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February 5, 2018

To: Clients and Friends

From: David F. Dulock

Subject: CFPB Request for Comments on the CFPB's Rules of Practice for Adjudication Proceedings

In the February 5, 2018, issue of the *Federal Register* (83 FR 5055, [click here](#)), the Consumer Financial Protection Bureau (CFPB) published a request for information (RFI) seeking comments and information to assist it in considering whether and how to amend the CFPB's Rules of Practice for Adjudication Proceedings, including its administrative adjudication processes, while continuing to achieve its statutory purposes and objectives.

The following is a redaction of the above RFI published by the CFPB in the *Federal Register*. The redacted text contains the essential information needed to submit the requested information and comments.

You may submit information and other comments, identified by Docket No. CFPB-2018-0002, by any of the following methods:

- *Electronic:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email:* FederalRegisterComments@cfpb.gov. Include Docket No. CFPB-2018-0002 in the subject line of the message.
- *Mail:* Monica Jackson, Office of the Executive Secretary, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552.
- *Hand Delivery/Courier:* Monica Jackson Office of the Executive Secretary, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552.

Comments must be received by April 6, 2018, and must include the document title and docket number.

The Consumer Financial Protection Act of 2010 (Act) required the CFPB to prescribe rules establishing such procedures as may be necessary to carry out hearings and adjudications. These rules are codified in the Code of Federal Regulations, 12 CFR §§1081.100 – 1081.502 titled “Rules of Practice for Adjudication Proceedings” (Rules). The Rules pertain to the general conduct of administrative adjudication proceedings, the initiation of such proceedings and prehearing rules, hearings, decisions and appeals, and temporary cease-and-desist proceedings.

The CFPB is interested in receiving suggestions for whether it should be availing itself of the administrative adjudication process, and if so how its processes and Rules could be amended to better achieve the CFPB's statutory objectives; to minimize burdens, impacts, or costs on parties subject to these proceedings; to align the Rules more closely with those of other agencies; and to better provide fair and efficient process to persons involved in the adjudication process, including ensuring that they have a full and fair opportunity to present evidence and arguments relevant to the proceeding.

To more effectively evaluate suggestions, the CFPB requests that, where possible, the comments include:

- Specific discussion of the positive and negative aspects of the CFPB's administrative

adjudication processes, including whether a policy of proceeding in Federal court in all instances would be preferable;

- Specific suggestions regarding any potential updates or modifications to the CFPB's administrative adjudication processes, including the Rules, consistent with the CFPB's statutory purposes and objectives, and including, in as much detail as possible, the potential update or modification, supporting data or other information on impacts and costs, or information concerning alignment with the processes of other agencies; and
- Specific identification of any aspects of the CFPB's administrative adjudication processes, including the Rules, that should not be modified, consistent with the CFPB's statutory purposes and objectives, and including, in as much detail as possible, supporting data or other information on impacts and costs, information related to consumer and public benefit resulting from these processes, or information concerning alignment with the processes of other agencies.

The following list represents the CFPB's preliminary attempt to identify elements of its administrative adjudication process on which it should immediately focus. This non-exhaustive list is to assist those making comments and is not intended to restrict the issues that may be addressed, as the CFPB is seeking feedback on all aspects of its administrative adjudication process. In their comments, the CFPB requests that commenters identify with specificity the CFPB regulations or practices at issue, providing legal citations where appropriate and available.

1. Whether, as a matter of policy, the CFPB should pursue contested matters only in Federal court rather than through the administrative adjudication process;
2. The Rules' protection of the rights and interests of third parties;
3. Rule 1081.200(b)'s requirements for the contents of the CFPB's notice of charges;
4. The policy expressed in Rule 1081.101 for administrative adjudication proceedings to be conducted expeditiously, including:
 - a. Rule 1081.201(a)'s requirement that respondents file an answer to a notice of charges within 14 days;
 - b. Rule 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;
 - c. Rule 1081.212(h)'s requirement that the hearing officer decide any motion for summary disposition within 30 days; and
 - 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;
5. Rule 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;
6. Rule 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;
7. Rule 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;
8. Rule 1081.210(b)'s limitation on the number of expert witnesses any party may call at a hearing, absent "extraordinary circumstances";
9. Rule 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;

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

11. Rule 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 Rule 1081.303(b)(3) should comply with the requirements of Federal Rule of Evidence 804(b)(1);

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

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).

To assist you in submitting information and/or comments for this RFI [click here](#) for the Rules.

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