

Client Alert

February 2, 2018

CFPB Starts Review of Administrative Adjudications

By Oliver I. Ireland, Steven M. Kaufmann, and Donald C. Lampe

In a recent [client alert](#), we reported that the Consumer Financial Protection Bureau (CFPB or “Bureau”) announced that it would issue a series of Requests for Information (RFIs) to “ensure the Bureau is fulfilling its proper and appropriate functions to best protect consumers.” The CFPB said the RFIs will seek public comment on enforcement, supervision, rulemaking, market monitoring, and education activities, with the goal of providing “an opportunity for the public to submit feedback and suggest ways to improve outcomes for both consumers and covered entities.”

The Bureau [published its first RFI](#) on January 26, 2018, relating to civil investigative demands. The CFPB issued its second RFI on January 31, 2018; this one dealing with administrative adjudications. In the associated [press release](#), the Bureau explained that it “is seeking to better understand the benefits and impacts of its use of administrative adjudications, and how its existing process may be improved.” The Bureau also announced that it will issue a third RFI next week focusing on the Bureau’s enforcement processes.

Administrative adjudication proceedings are formal adversarial proceedings that follow certain truncated procedures as compared to federal court litigation. The most common use of the administrative adjudication procedure is to formalize and memorialize stipulation and consent orders that the CFPB negotiates with potential defendants before an action is formally filed. Administrative adjudications that are not settled prior to the involvement of an administrative law judge are subject to a formal proceeding conducted by an administrative law judge, who issues only a recommended decision to the CFPB director, who then issues a final decision, either adopting or modifying the administrative law judge’s recommended decision. The CFPB has conducted eight formal administrative adjudication proceedings that were not immediately resolved by the issuance of a consent order. Only one proceeding resulted in a decision of the director, and that matter, *In re PHH Corporation*, was appealed and the subject of highly publicized litigation which resulted in an [en banc D.C. Circuit opinion](#), issued on January 31, 2018. One proceeding is pending (*In re Integrity Advance, LLC and James R. Carnes*), and the six other proceedings settled during the course of the formal adjudication proceeding.

The CFPB seeks comments on its administrative adjudication rules, entitled “Rules of Practice for Adjudication Proceedings” (“Rules”), codified at 12 CFR Part 1081, from interested entities and individuals, including covered persons, those involved in proceedings before the Bureau or other agencies, members of the bar, consumer advocates, associations, and academics. The Bureau acknowledged that its Rules and proceedings could be unduly burdensome and stated that “[t]he Bureau is especially 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 updated, streamlined, or revised to better achieve the Bureau’s statutory objectives; to minimize burdens, impacts, or costs on parties subject to these proceedings; to align the Bureau’s administrative adjudication Rules more closely with those of other agencies; and to better provide fair and efficient process to individuals and entities involved in the adjudication process, including ensuring that they have a full and fair opportunity to present evidence and arguments relevant to the proceeding.”

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The RFI seeks comments about the pros and cons of the administrative adjudication process and whether federal litigation would be preferable; potential modifications to the Rules; the Rules' protection of the rights of third parties; the notice of charges provisions of the Rules; the pace and deadlines of the Rules requiring expeditious resolution; and other procedural issues that may affect fairness or the ability of a respondent to effectively participate. Given the highly scrutinized nature of the *PHH* matter, the only CFPB administrative adjudication to proceed through resolution, it will likely provide much fodder for submissions to, and deliberation by, the Bureau.

Separately, going forward, the Bureau will also need to conform to whatever standard the U.S. Supreme Court articulates is required for the appointment of administrative law judges when the Court considers the matter in *Lucia v. SEC* later this year.

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