



MORTGAGE BANKERS ASSOCIATION

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 Regarding Bureau Rules of Practice for Adjudication Proceedings (Docket No. CFPB-2018-0002)

Dear Ms. Jackson,

The Mortgage Bankers Association¹ appreciates the opportunity to comment on this Request for Information (RFI) from the Bureau of Consumer Financial Protection (BCFP). In addition to offering the comments below on Bureau Rules of Practice for Adjudication Proceedings, MBA would like to reiterate our belief in the need for a thorough reexamination of the Bureau's operations and practices after a half decade in operation. MBA released *CFPB 2.0: Advancing Consumer Protection* in September 2017 to outline key considerations for the Bureau as it begins to think about the next five years.² In brief, MBA recommended that:

- BCFP end “regulation by enforcement” by issuing guidance to facilitate compliance rather than relying on fact-specific enforcement actions to announce new regulatory interpretations.
- BCFP communicate clearly when and how it plans to offer compliance guidance and acknowledge that it is bound by the guidance it releases.
- BCFP provide more due process protections in its enforcement actions to ensure fairness and consistency.

These larger, thematic concerns run through all Bureau operations and therefore are a theme of all the RFIs that have been released to date. The RFI process can be a crucial starting point to gather the information necessary to determine how to best orient the BCFP's future direction to

¹ The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership; and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies and others in the mortgage-lending field. For additional information, visit MBA's website: www.mba.org.

² Available here: <https://www.mba.org/issues/cfpb-20-advancing-consumer-protection>

ensure it serves consumers and creates access to financial opportunity. MBA applauds this and the additional RFIs to the extent that they are the beginning of this important conversation.

The administrative adjudication process is an appropriate topic for the RFI initiative. As one of the avenues available to the Bureau to pursue enforcement actions, fairness in the administrative adjudication process is crucial to the Bureau's ability to successfully achieve its statutory purposes. The rules governing BCFP adjudications were designed to ensure that adjudication proceedings are conducted fairly and expeditiously.³ While the current adjudication process facilitates a speedy resolution, it does so by sacrificing important due process protections. Given the significant stakes and complex issues often involved in contested matters, this sacrifice is not appropriate. It's true that both speed and fairness are worthy objectives for administrative adjudications, however they are not of equal value. Fairness must be the primary objective.

This RFI offers a valuable opportunity to step back and recalibrate the balance between speed and fairness. In this spirit, MBA recommends that the Bureau provide respondents with the option of a judicial forum by adopting a removal mechanism. In addition, the Bureau should improve the administrative adjudication process for respondents who prefer an administrative proceeding. Until the Bureau can implement these changes, contested matters should be brought in federal court. The following specific comments provide further detail on these recommendations.

I. Adopt a Removal Mechanism

Under the Dodd-Frank Act, the BCFP has authority to pursue actions in federal court or through administrative adjudication.⁴ The Bureau has used each of the options in the past. Both forums serve the same basic purpose to interpret and apply the law. Importantly, the remedies available to the Bureau in federal court are also available in the administrative forum.⁵ Thus, from the perspective of the BCFP, there shouldn't be a preferred forum. This makes sense. A regulator shouldn't seek strategic advantage through forum shopping.⁶

³ See 12 CFR § 1081.101.

⁴ See 12 U.S.C. 5563.

⁵ *Id.*

⁶ History has shown that the Bureau will favor a particular forum when doing so benefits the Bureau. For example, the PHH matter was initiated in the administrative forum. It is safe to assume that the choice of forum was influenced by the Bureau's belief that administrative adjudications based on RESPA were not bound by the RESPA statute of limitations. Absent a statute of limitations, the Bureau imposed penalties much greater than those available in a judicial forum. The D.C. Circuit disagreed, indirectly confirming that due process requires the principle that the forum shouldn't matter to the Bureau. Specifically, the en banc court declined to adopt the BCFP's position that RESPA's three-year statute of limitations did not apply to actions brought in an administrative adjudication. The court held that enforcement actions under RESPA are subject to RESPA's three-year statute of limitations regardless of forum.

The same cannot be said for parties to an enforcement action. The current administrative adjudication process suffers from significant deficiencies including a lack of adjudicator independence, an unfair appeal process, severe restrictions on discovery, and various other procedural deficits. While these critiques are valid, there are at least some benefits to the administrative forum. For example, the strict timelines may result in a speedier resolution. Moreover, there may be cost savings associated with the quicker pace and general informality.

It follows that the administrative forum may be preferable for contested matters where the questions of law or fact are relatively straightforward or the alleged consumer harm and associated penalties are smaller. Parties to such matters may value the potential cost savings and speedy resolution offered by the administrative forum more than the procedural protections available in a judicial forum. On the other hand, situations where the stakes are high or the questions of law or fact are complex may be more appropriately resolved in a judicial forum. Parties to these matters may value the judicial forum's robust procedural protections and clear neutrality more than the administrative forum's cost-savings and speedy resolution.

In short, the most appropriate forum depends on the nature of the underlying matter and the party involved. It is necessarily a case-by-case determination. Given the challenge of attempting to define, for all possible parties, the types of enforcement actions that are best handled by either the judicial or administrative forum, the best approach is to leave the forum decision to the defendants who have the most to lose. This could be accomplished by providing parties to a BCFP administrative adjudication with the ability to remove the matter to an appropriate federal district court.

This suggestion is not novel. Similar proposals have been made with respect to Securities and Exchange Commission (SEC) administrative proceedings.⁷ The Due Process Restoration Act, introduced during 2015, provided certain parties to SEC administrative proceedings with the right to terminate the proceeding, after which the SEC could initiate a civil action.⁸ The Financial CHOICE Act, introduced by U.S. Representative Jeb Hensarling and approved by the full House Committee on Financial Services, included a nearly identical provision.⁹

The Bureau should create an automatic removal mechanism through rulemaking. A party who prefers a judicial forum should have the ability to require the Bureau to terminate the proceeding. Once a party requires the Bureau to terminate the proceeding, the Bureau would have the option to bring a civil action against the party in federal district court.¹⁰ The deadline for notifying the

⁷ Joseph A. Grundfest, Fair or Foul?: SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation, 85 Fordham L. Rev. 1143 (2016). Available at: <http://ir.lawnet.fordham.edu/flr/vol85/iss3/10>

⁸ H.R. 3798, 114th Cong. (2015)

⁹ H.R. 5983, 114th Cong. (2016)

¹⁰ The additional burden on the Bureau to initiate a civil action should be minimal as the notice of charges should be crafted in a manner which satisfies pleading requirements under the Federal Rules of Civil Procedure.

Bureau should be the same as the deadline for filing an answer to the notice of charges.¹¹ The rules should permit a party to file a petition requiring the Bureau to terminate the proceeding in lieu of an answer. The removal mechanism would add much needed fairness to the adjudication process.

II. Improve the Current Administrative Adjudication Process

In addition to adopting a removal mechanism, the Bureau should create a more equitable adjudication process. The following recommendations shed light on problematic aspects of the current adjudication process and offer appropriate solutions. Specifically, the Bureau should:

- (1) Adopt a transparent forum selection process;
- (2) Impose realistic filing deadlines and grant extensions for good cause shown;
- (3) Permit greater discovery tools;
- (4) Limit Bureau production to relevant materials;
- (5) Adopt the Federal Rules of Evidence; and
- (6) Allow filing of a motion to dismiss in lieu of an answer.

Forum Selection

The Bureau should establish a transparent forum selection process. Under current law, the Bureau has discretion on whether to adjudicate through an administrative proceeding or pursue an action in a judicial forum. Despite the significant consequences of the forum selection decision, including differences in adjudicator independence, appeal processes and procedural protections, it is unclear how the Bureau's forum selection decisions are made. Without a transparent process, it is impossible to assess whether the Bureau's choice of forum is based on a desire for an unfair 'home-court advantage.' This is particularly important given the Bureau's single director structure, an arrangement which lacks the greater perceived objectivity of the commission structure found at other agencies.

To address this concern, the Bureau should develop a transparent process for forum selection. The process should be based on objective criteria such as those adopted by the Securities and Exchange Commission.¹²

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

¹¹ Respondents must file an answer “within 14 days of service of the notice of charges.” See 12 CFR § 1081.201(a). Later in this letter MBA suggests that the Bureau adopt a 20-day deadline for filing an answer.

¹² Division of Enforcement Approach to Forum Selection in Contested Actions at <http://www.sec.gov/divisions/enforce/enforcement-approach-forum-selection-contested-actions.pdf>.

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

Filing Deadlines

The adjudication rules require that Bureau hearings “be conducted in a fair, impartial, expeditious, and orderly manner.”¹³ While each requirement is certainly desirable, they are not of equal importance. More than anything else, administrative adjudications must be fair. Unfortunately, as currently written, the rules appear to place undue weight on the requirement that hearings be conducted expeditiously.

In support of the requirement for an expeditious resolution, the rules set an ambitious 300-day time period (after service of the notice of charges) within which an adjudication must be resolved.¹⁴ This arbitrary time frame, in turn, requires all stages of the proceedings to be placed on an accelerated schedule, one MBA believes may compromise the fairness of the proceedings and the development of a complete administrative record. In particular, we note three shortcomings that appear to be driven by the 300-day timeframe currently set forth in the Adjudication Rules: (1) the time to file an answer; (2) the time to appeal an adverse decision; (3) the availability of extensions of time or other postponements or adjournments of proceedings.

The rules require a respondent to file an answer to the notice of charges “[w]ithin 14 days of service of the notice of charges.”¹⁵ As the Bureau recognizes, the answer is important as it helps focus and narrow the matters at issue. “An answer must specifically respond to each paragraph or allegation of fact contained in the notice of charges.”¹⁶ “Denials must fairly meet the substance of each allegation of fact denied.”¹⁷ Reviewing the notice of charges, investigating the factual and legal allegations, conferring with counsel to determine the appropriate response, and finally, drafting an answer *takes a considerable amount of time*; however, as stated above, the respondent has just 14 days from the service of the notice of charges to file an answer. The rules show no pity for the respondent who fails to file a timely answer. Failure to file a timely answer is deemed a waiver of the respondent’s right to contest the charges, authorization for the entry of a decision against the respondent, and a waiver of the respondent’s right to appeal.¹⁸

¹³ 12 CFR § 1081.302.

¹⁴ 12 CFR § 1081.400(a).

¹⁵ 12 CFR § 1081.201(a).

¹⁶ 12 CFR § 1081.201(b).

¹⁷ *Id.*

¹⁸ 12 CFR § 1081.201(d)(1).

The burden of complying with the 14-day deadline is compounded by the Bureau's affirmative disclosure process which further limits the useful time available for preparing an answer. While the respondent is allowed to inspect and copy certain non-privileged materials during the course of an investigation, the rules impose a seven day delay after service of the notice before the Bureau is required to make these documents available.¹⁹ As a result, during half of the time that the respondent has to draft an answer, the respondent will not have access to material evidence relied on by the Bureau in its decision to initiate an enforcement action. By comparison, the Bureau's 14-day deadline contrasts with the procedures of other federal banking agencies which allow 20 days for the filing of an answer.

The Bureau rules shorten another important time period, the time for filing a notice of appeal. Parties to an administrative hearing must file a notice of appeal within 10 days of service of the hearing officer's recommended decision.²⁰ This is 20 days less than the time allowed by the FTC.²¹

In addition to adopting shorter time periods than those of other federal financial regulators, the Bureau follows "a policy of strongly disfavoring granting such motions, except in circumstances where the moving party makes a strong showing that the denial of the motion would substantially prejudice its case."²² It is unclear why extensions should be disfavored. Other agencies, including the Office of the Comptroller of the Currency (OCC) and the Federal Trade Commission (FTC), have adopted rules whereby extensions are approved for good cause.²³ Moreover, experience has shown these agencies routinely grant extensions of time.

MBA urges the Bureau not to trade speed and efficiency for due process. The factual and legal issues determined in administrative adjudications are usually complex. The remedies sought can be significant monetarily, as well as to a party's reputation. Therefore, the Bureau should not seek to impose unrealistic filing deadlines, and like the federal financial regulators, should grant respondents at least 20 days to file an answer and 30 days to file a notice of an appeal. Further, extensions of time should be granted for good cause shown.

"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 ...

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

¹⁹ 12 CFR § 1081.206(d).

²⁰ 12 CFR § 1081.402(a)(1).

²¹ 16 CFR § 3.52(b)(2).

²² 12 CFR 1081.115(b).

²³ For OCC see 12 CFR § 109.13; for FTC see 16 CFR § 3.22(a).

Discovery Tools

Under the adjudication rules, there are no depositions (other than depositions of witnesses unavailable for the hearing) or third-party interrogatories, and subpoenas can only be issued by the hearing officer.²⁴ These limitations were justified based on the need for hearings to be conducted expeditiously.²⁵ Here too we believe the desire for a speedy resolution has unjustifiably supplanted the need for a fair process. Cumulatively, these rules put the respondent at a significant disadvantage to the Bureau. After all, the Bureau does not need discovery; before initiating a proceeding, it has the opportunity to gather all of the information it needs through examinations and investigative proceedings as well as through its broad powers to collect consumer complaints and to solicit information from covered persons.²⁶

In an effort to reassert necessary fairness into the process, we urge the Bureau to allow respondents to depose third parties who have direct knowledge of matters that are non-privileged, relevant, and material to the proceeding. Respondents should be provided with the ability to issue and enforce subpoenas for documents and testimony, and to serve third parties with interrogatories as necessary.²⁷ These changes will help ensure that a respondent has an adequate opportunity to marshal evidence in support of its defense.

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;

Bureau Document Production

The Bureau is required to produce “documents obtained by the Office of Enforcement prior to the institution of proceedings, from persons not employed by the Bureau, in connection with the investigation leading to the initiation of proceedings.”²⁸ The official commentary accompanying this rule clarifies its purpose by stating: “Section 1081.206 is intended to give respondents access to the *material facts* underlying enforcement counsel’s decision to recommend the commencement of enforcement proceedings.”²⁹ While ensuring that all parties have equal access to information is a commendable objective, experience shows that the rule’s affirmative discovery requirement has been abused.³⁰ One respondent estimated that the Bureau produced “26 GB of data [totaling] ... many hundreds of thousands of pages of documents.”³¹ The

²⁴ 12 CFR § 1081.209 (on depositions); 12 CFR § 1081.209 (on subpoenas).

²⁵ 77 FR 39073

²⁶ 12 U.S.C. § 1022.

²⁷ If adopted, a removal provision would allow parties to access these protections in a judicial forum.

²⁸ 12 C.F.R. § 1081.206

²⁹ 77 Fed. Reg. 39058, 39073 (June 29, 2012) (emphasis added)

³⁰ See PHH Corp., CFPB No. 2014-CFPB-0002 (February 18, 2014)

³¹ Id. at 2.

respondent speculated that the Bureau simply produced every document it received in response to the Bureau's broad investigative demands.³²

Flooding the respondent with "many hundreds of thousands of pages of documents" is clearly contrary to the disclosure rule's stated intent to provide the respondent with "the material facts." Given the compressed timeframes involved, it also conflicts with the overarching intent of the Bureau's adjudication framework to ensure hearings "be conducted in a fair, impartial, expeditious, and orderly manner."³³ To address this issue MBA asks that the Bureau amend Section 1081.206 in a manner which ensures production is limited to documents containing "the *material facts* underlying enforcement counsel's decision to recommend the commencement of enforcement proceedings."

"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"

Evidentiary Rules

The Federal Rules of Evidence do not apply in Bureau administrative proceedings. Instead, the administrative adjudication rules establish a more permissive approach to admissibility which allows the admission of evidence, such as hearsay, that would be inadmissible in Federal court.³⁴ Allowing hearsay evidence prevents a respondent from meaningfully challenging the offered evidence through cross-examination.

The admissibility of hearsay is no small matter given the importance of cross-examination to concepts of due process. The Supreme Court's ruling in *Goldberg v. Kelly* is instructive: "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."³⁵ To address this issue and instill more fairness into the administrative adjudication process, we ask that the Bureau adopt the Federal Rules of Evidence.

Motions to Dismiss

Under the adjudication rules, a respondent who files a motion to dismiss must also file an answer to the notice of charges.³⁶ This requirement contrasts with the Federal Rules of Civil Procedure which allow the filing of a motion to dismiss in lieu of an answer. Much like other aspects of the adjudication rules, this requirement is intended to "ensure that motions to dismiss do not delay the proceedings unnecessarily."³⁷ We believe that the most appropriate approach is that found in

³² *Id.* at 4.

³³ 12 CFR § 1081.302.

³⁴ 12 CFR § 1081.303(b)(3).

³⁵ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

³⁶ 12 CFR § 1081.212(a).

³⁷ 77 FR 39077.

the Federal Rules of Civil Procedure. The rules should be amended allow the filing of a motion to dismiss in lieu of an answer.

III. Commit to Bringing Contested Matters in Federal Court Until the Adjudication Process is Improved

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

Until the Bureau is able to adopt a removal mechanism and improve the adjudication process, it should refrain from bringing contested matters in the administrative forum. As previously described, the current administrative adjudication process puts parties at an unfair disadvantage. Absent a method to remove an administrative proceeding to a judicial forum, the respondent is forced to address Bureau charges in a materially unequitable setting. Implementing a policy in which contested matters of great consequence are addressed through a judicial forum is one way to correct this imbalance.

Inadequate independence

The administrative adjudication process is conducted by an administrative law judge (“ALJ” or “hearing officer”) from the Bureau’s Office of Administrative Adjudication. The Bureau both employs the ALJ³⁸³⁹ and serves as the opposing party in administrative hearings. This arrangement creates an appearance of partiality and increases the risk of actual bias.

Perhaps more concerning is the lack of independence in the actual adjudication. Under the rules, the ALJ – the primary decision maker – issues a “recommended decision.”⁴⁰ This decision is reviewed by the Director who may “issue a final decision and order adopting the recommended decision, or order further briefing regarding any portion of the recommended decision.”⁴¹ While the ALJ’s recommended decision can be appealed, appeals are heard by the BCFP Director.⁴²

To truly understand the lack of independence, the Director’s ability to hear appeals must be considered along with the Director’s other functions. The Director can initiate an investigation by issuing a Civil Investigative Demand. Disagreements that arise during the course of an investigation may be escalated to and resolved by the Director. Once an investigation has

³⁸ Prior to hiring a BCFP ALJ, the BCFP utilized ALJs from the Securities and Exchange Commission.

³⁹ The fact that the Bureau employs a single ALJ, rather than multiple ALJs such as are employed by the SEC, adds to the unfairness of the process. With just one ALJ there isn’t even an opportunity for a diversity of opinions at the ALJ level.

⁴⁰ 12 CFR § 1081.400(a).

⁴¹ 12 CFR § 1081.402(b).

⁴² 12 CFR § 1081.402(a).

concluded, the decision to file suit must be approved by the Director. In short, the Director is involved in every step of the process. In this way, the Director serves both in an adversarial role – by initiating and overseeing the enforcement action – and as jurist when deciding on an appeal from the ALJ’s decision.

This apparent conflict is only heightened by the fact that, to a large extent, the Director determines the rules controlling the adjudication as well as those governing the underlying conduct at issue. On appeal, the Director reviews the ALJ’s recommended decision de novo and may, upon “notice to all parties ... raise and determine any other matters that he or she deems material.”⁴³ The de novo standard of review applies to both findings of law and findings of fact. The Director has the ability to “affirm, adopt, reverse, modify, set aside, or remand for further proceedings the recommended decision.”⁴⁴ Thus, the Director can adopt findings that are consistent with his or her perspective, and ignore those which are not. As history has demonstrated, the Director can even *increase* the ALJ’s recommended penalty!⁴⁵

Under this arrangement, the Director’s decision is the only one that truly matters. Unlike other agencies with similar adjudicative authority, the BCFP is not governed by a bi-partisan commission. There is just a single individual, the Director, who has final authority over rulemaking, enforcement activities, and administrative adjudications.⁴⁶ This lack of independence is fundamentally unfair. As Alexander Hamilton wrote, “there is no liberty if the power of judging be not separated from the legislative and executive powers.”⁴⁷

Unfair appeal process

As previously described, a party has the option to appeal the hearing officer’s recommended decision to the Director. This initial appeal lacks even a pretense of independence. Given the Director’s extensive involvement in each step leading up to the appeal,⁴⁸ he or she is far from a neutral arbiter.

The ability of a party that disagrees with the Director’s decision to petition for judicial review under the Administrative Procedures Act does little to cure the unfairness of the appeal process. On appeal, the Director’s decision is given substantial deference by the reviewing federal court.

⁴³ 12 CFR § 1081.405(a).

⁴⁴ 12 CFR § 1081.405(c).

⁴⁵ See https://files.consumerfinance.gov/f/201506_cfpb_decision-by-director-cordray-redacted-226.pdf

⁴⁶ Federal District Court cases are heard by a panel of appellate judges, a recognition of value that is provided by diversity of opinion when considering contested legal questions. This dates back to the Judiciary Act of 1789’s creation of three circuits with requirements for the panel comprised of any two Supreme Court justices and one District Court justice from the Circuit.

⁴⁷ Alexander Hamilton, *Federalist* No. 78 (McLean Edition) (http://avalon.law.yale.edu/18th_century/fed78.asp).

⁴⁸ The Director: (i) makes certain decisions about the opening and direction of an investigation; (ii) makes the decision to file a lawsuit itself; (iii) approves substantive rules enforceable by the Bureau, rules which could potentially be at issue in an administrative proceeding; and (iv) approves the procedural rules governing the administrative proceeding.

Findings of fact are conclusive if supported by substantial evidence, a more deferential standard than the standard applied to findings of fact by lower courts.⁴⁹ Findings of law will likely be subject to a more deferential standard of review, under either the *Chevron*, *Auer* or *Mead-Skidmore* doctrines, than the standard applied to a lower court's decision.⁵⁰

Inadequate procedural protections

The administrative adjudication process lacks adequate procedural protections. One of the most fundamental concepts underlying the principle of due process is that procedural protections must be commensurate with the stakes of the government action.⁵¹ The Bureau's adjudication rules fall well short of that standard.

As previously described, the Bureau has the ability to impose a wide variety of penalties through an administrative adjudication.⁵² In fact, the remedies available to the Bureau in the administrative forum do not meaningfully differ from those available in a civil action. While the penalties that may be imposed are nearly identical, there are significant procedural differences. A party to an administrative adjudication must contend with restrictions on discovery tools, a compressed timeframe, the admissibility of hearsay, the absence of a truly independent hearing, and a wholly inadequate appeals process. In aggregate, these differences place the respondent at a serious disadvantage.

ALJ Appointment

A recent Federal appellate court decision has called into question the constitutionality of BCFP's ALJ appointment process. The case at issue, *Bandimere v. S.E.C.*, relates to the appointment of an SEC ALJ.⁵³ A similar analysis would likely apply to the current Bureau ALJ appointment process. While Federal circuits are split on the issue - with the Tenth Circuit finding the appointment unconstitutional - the uncertainty remains a concern. This development would

⁴⁹ *Dickinson v. Zurko*, 527 U.S. 150, 153 (1999) ("Traditionally, this court/court standard of review has been considered somewhat stricter (i.e., allowing somewhat closer judicial review) than the APA's court/agency standards.")

⁵⁰ Philip Hamburger, "Chevron Bias," 84 G.W. L.Rev. 1187, (2015).

⁵¹ See *Mathews v. Eldridge*, 424 U.S. 319 (1976); See also *Lucia v. SEC*, 832 F.3d 277 (D.C. Cir. 2016). In *Lucia*, the court found the SEC's use of ALJs constitutional because the ALJs did not issue final decisions. This case has been appealed to the Supreme Court. Oral arguments on the ALJ appointment issue are scheduled for April 23, 2018.

⁵² The Bureau may "grant any appropriate legal or equitable relief" including "without limitation rescission or reformation of contracts; refund of moneys or return of real property; restitution; disgorgement or compensation for unjust enrichment; payment of damages or other monetary relief; public notification regarding the violation, including the costs of notification; limits on the activities or functions of the person; and civil money penalties." 12 U.S.C. 5565(a).

⁵³ *Bandimere v. S.E.C.*, 844 F.3d 1168 (2016).

require a change to the manner in which Bureau ALJs are appointed and potentially call into question the validity of past ALJ adjudications.⁵⁴

ALJ Expertise

One of the common justifications for the use of ALJs is their subject matter expertise. For example, the SEC considers ALJ securities law expertise as a factor weighing in favor of using an administrative forum.⁵⁵ While this argument may make sense for matters involving federal securities laws, it is less persuasive when applied to matters involving federal consumer financial protection laws. Unlike federal securities laws, many of the federal consumer financial protection laws within the BCFP's jurisdiction, including the Real Estate Settlement Procedures Act and the Truth in Lending Act, have historically been interpreted by federal courts. There's no indication that courts are unable or ill-suited to handle cases based on federal consumer financial protection law.

A policy whereby contested matters are pursued in Federal court would eliminate many of the concerns associated with the current process. Cases would be decided by an independent adjudicator. A Federal court would provide a neutral venue, along with long-standing procedural rules. Appeals would be governed by similarly established guidelines. Finally, given the ongoing constitutional questions surrounding the ALJ appointment process, the rulings of a Federal court would be of more certain validity than those issued by Bureau ALJs.

IV. Conclusion

The BCFP's authority to conduct administrative adjudications is one of the Bureau's most important authorities. The consequences of an adverse adjudication can be severe, resulting in potentially ruinous penalties and irreparable reputational harm to regulated entities. Given these consequences, MBA urges BCFP to redouble its efforts to create a fair and just forum for parties to administrative adjudications. By acting as an adjudicator, thereby filling a role typically reserved for the courts, the Bureau must make every effort to ensure adjudication proceedings are impartial and, to the extent possible, that they have the appearance of impartiality. This is particularly important given that unlike a court, the BCFP Director fills many roles including those of prosecutor by initiating the proceeding and appellate jurist by determining its ultimate outcome.

⁵⁴ While the issue of unconstitutional appointments may be a relatively simple problem for the Bureau to correct, it remains a valid area of uncertainty.

⁵⁵ Division of Enforcement Approach to Forum Selection in Contested Actions, available at <http://www.sec.gov/divisions/enforce/enforcement-approach-forum-selection-contested-actions.pdf>.

The Bureau can add much needed fairness to this process by adopting an automatic removal mechanism. In addition to ceding forum selection to respondents, the Bureau should reform problematic aspects of the administrative adjudication process. Taking steps such as creating more flexible timing requirements, broadening discovery tools, and implementing a transparent forum selection process will help ensure BCFP administrative adjudications do not “result in undue burdens, impacts, or costs on the parties subject to these proceedings.”⁵⁶ Until these improvements are made, the Bureau should commit to bringing contested matters in federal court.

MBA appreciates the opportunity to contribute to the discussion on this important matter and applauds the Bureau’s willingness to consider the above recommendations on how to improve the administrative adjudication process. Please contact Justin Wiseman, Associate Vice President and Managing Regulatory Counsel, at (202) 557-2854 or jwiseman@mba.org with any questions about this comment.

Sincerely,

A handwritten signature in black ink, appearing to read "D.H. Stevens". The signature is fluid and cursive, with a large initial "D" and "H" followed by a smaller "S" and "tevens".

David H. Stevens, CMB
President and Chief Executive Officer
Mortgage Bankers Association

⁵⁶ Request for Information Regarding Bureau Rules of Practice for Adjudication Proceedings, CFPB-2018-0002