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HOW TO NAVIGATE A CFPB ADMINISTRATIVE PROCEEDING

Recent heightened enforcement activity and statements by the CFPB director raise the possibility that the Bureau will exercise its long-neglected authority to bring contested litigation in its administrative forum. In this article, the author, a former Deputy General Counsel at the Bureau, describes administrative enforcement proceedings under the Bureau's rules. He lays out in detail the steps in the proceeding: from the authority to conduct proceedings, to the rules on pleadings, discovery, and motion practice. He then turns to the hearing and recommended decision. He closes with the Director's decision and review in the courts of appeal.

By John R. Coleman *

After a slow start, Consumer Financial Protection Bureau ("CFPB" or "Bureau") Director Rohit Chopra's enforcement program appears to be gaining steam. The CFPB has aggressively enforced federal consumer financial law during its short history, with an average of more than 30 public enforcement actions per calendar year through 2020.[1] Given his reputation as an advocate of vigorous law enforcement, it was surprising that the CFPB brought only five enforcement actions in Chopra's first six months at the helm.[2]

It now appears that this slow start may have reflected a change in enforcement priorities, not a reluctance to exercise the CFPB's enforcement authority. In recent congressional testimony, Chopra signaled that, under his leadership, the CFPB would be shifting its enforcement focus away from smaller entities and towards larger entities.[3] He also signaled that the CFPB would be less likely to settle matters, predicting that its approach "may lead to more litigation."[4] Consistent with these statements, the CFPB brought four enforcement actions during Chopra's seventh month at the helm, three of which were against large, publicly traded financial services providers, and two of which are contested.[5]

The prospect of more litigated enforcement actions raises the possibility that the CFPB will exercise its long-neglected authority to bring contested litigation in its administrative forum.[6] Although it has been over five years since the CFPB brought a contested enforcement

[1] *See,* e.g., Enforcement by the Numbers | CFPB (consumerfinance.gov).

[2] Enforcement Actions | CFPB (consumerfinance.gov) (listing five public enforcement actions between October 12, 2021 and April 11, 2022).

[3] Prepared Statement of Director Rohit Chopra before the House Committee on Financial Services | CFPB (consumerfinance.gov).

[4] *Id*.

[5] Enforcement Actions | CFPB (consumerfinance.gov) (listing four public enforcement actions between April 12, 2022 and May 12, 2022).

[6] *See* 12 U.S.C. § 5563.

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action in its administrative forum,[7] those companies contemplating litigation against the Bureau's Office of Enforcement should not assume that they will be doing so in federal court. As a Commissioner on the Federal Trade Commission, Chopra touted the advantages of administrative proceedings, including the ability to bring "specialized knowledge" and a "unique vantage point" to address "emerging challenges," including the use of "dark patterns" and "algorithmic decisionmaking."[8] A few months ago, the CFPB quietly amended its procedural rules that govern these proceedings,[9] and Chopra's recent congressional testimony suggests that, while the CFPB will continue to bring the majority of its contested litigation in federal court, it may also bring contested administrative proceedings.[10]

In light of these indications of a renewed interest in contested administrative adjudication, companies or individuals anticipating that they may become the subject of a CFPB enforcement action should carefully consider the unique aspects of CFPB administrative proceedings and how the possibility of administrative litigation affects their litigation risk calculus. To aid in that endeavor, this article walks through the major players in CFPB administrative proceedings, the key phases, and the important strategic decisions that will be presented throughout.

CFPB ADMINISTRATIVE PROCEEDINGS: THE HOME COURT

Congress authorized the CFPB to enforce federal consumer financial law in one of two ways: by filing a civil action in a U.S. district court or a state court of competent jurisdiction[11] or by bringing a formal administrative proceeding as prescribed by the Administrative Procedure Act (APA).[12] With respect to the latter category, the CFPB is authorized to bring cease-and-desist proceedings against any "covered person or service provider" subject to its enforcement authority, and impose broad remedies — including civil money penalties, restitution, and injunctive relief — if it finds a violation of federal consumer financial law.[13] These proceedings must conform to the authorizing provision of the Consumer Financial Protection Act ("CFPA"),[14] the provisions of the APA that govern formal administrative proceedings,[15] and the U.S. Constitution, including the Due Process clause of the Fifth Amendment.[16] In addition, pursuant to express

[7] CFPB Sues Five Arizona Title Lenders for Failing to Disclose Loan Annual Percentage Rate to Consumers | CFPB (consumerfinance.gov).

[8] Prepared Remarks of Commissioner Rohit Chopra Truth in Advertising Event on the FTC's Remedial Authority - January 11, 2021. The specific issues cited by Director Chopra are current priorities of the CFPB. *See,* e.g., The CFPB's 2021 Fair Lending Annual Report to Congress | CFPB (consumerfinance.gov) ("[T]he CFPB will be sharpening its focus on digital redlining and algorithmic bias."); Director Chopra's Prepared Remarks on the Repeat Offender Lawsuit Against TransUnion and John Danaher | CFPB (consumerfinance.gov) ("Dark patterns have festered online, and the CFPB will be working with the Federal Trade Commission, the Department of Justice, state attorneys general, and our international partners to combat this digital misconduct.").

[9] Rules of Practice for Adjudication Proceedings, 87 Fed. Reg. 10028 (Feb. 22, 2022).

[10] Consumers First: Semi-Annual Report of the CFPB: Hearing before the House Financial Services Committee, 117th Cong. (2022).

[11] 12 U.S.C. § 5564(a).

[12] 12 U.S.C. § 5563.

[13] 12 U.S.C. §§ 5563(b), 5565. This authority is modeled on the similar authority of the federal banking agencies. 12 U.S.C. § 1818.

[14] 12 U.S.C. § 5563.

[15] 5 U.S.C. §§ 551 et seq.

[16] 5 U.S.C. § 706(2). In a decision issued after submission of this article, a divided panel of the U.S. Court of Appeals for the Fifth Circuit held that an administrative proceeding brought by the Securities and Exchange Commission violated the respondent's Seventh Amendment right to a jury trial, and that delegation to the SEC of the "unfettered discretion" to choose between an administrative forum and district court when enforcing the law violated the non-delegation doctrine. *Jarkesy v. SEC,* No. 20-61007, 2022 WL 1563613 (5th Cir. May 18, 2022). The decision may be subject to further review; if upheld it would call into question the constitutionality of the CFPB's authority to bring enforcement proceedings in its administrative forum, as the CFPB also possesses "unfettered authority" to

delegation of rulemaking authority,[17] the CFPB has promulgated "Rules of Practice for Adjudication Proceedings,"[18] which bind the participants in any proceeding, including the CFPB.[19]

Congress also authorized the CFPB to issue a temporary cease-and-desist order — akin to a preliminary injunction issued by a court — to, among other things, protect the "interests of consumer" while the underlying cease-and-desist proceeding is adjudicated.[20] Such temporary orders are subject to immediate review in district court and expire automatically upon completion of the underlying cease-and-desist proceeding.[21]

The CFPB has litigated only two cease-and-desist proceedings all the way through to a final decision. In both cases, the administrative law judge ("ALJ") found for the Bureau, the decision was appealed to the Director, and the Director affirmed the Bureau's position. The first final decision, finding that PHH Corporation and its affiliates had violated the Real Estate Settlement Procedures Act, was reversed by the D.C. Circuit and dismissed by the Bureau upon remand.[22] The second, finding that payday lender Integrity Advance and its Chief Executive Officer had violated federal consumer financial laws, is on review before the U.S. Court of Appeals for the Tenth Circuit.[23] The Bureau has never issued a temporary cease-and-desist order.[24]

THE PLAYERS, THE REFEREE, AND THE PLAYER/REFEREE

The Key Participants. Like any contested legal proceeding, the participants in a CFPB administrative proceeding consist of adversarial parties (represented by counsel) and adjudicators. The key feature of administrative adjudication that distinguishes it from litigation in federal court is that the agency both prosecutes and decides the matter (subject to review in the courts of appeal). For the most part, at least different individuals within the agency play these roles. The Bureau as prosecutor is represented by "enforcement counsel,"[25] who will often be the same lawyers that conducted the investigation and pushed the matter through the agency's internal process. The party or parties accused of violating the law are called "respondents," and their lawyers are generally referred to as "respondents' counsel."[26]

The Bureau as adjudicator will be represented, at least in part, by an ALJ, who regulates the course of the proceeding, rules on motions, presides over the hearing, and makes a recommended decision after the conclusion of the hearing.[27] The Rules of Practice refer to these individuals as "hearing officers," but they must be actual ALJs appointed pursuant to section 3105 of Title 5 of the United States Code,[28] and afforded certain protections

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choose its forum. The court also held that statutory removal protections applicable to ALJs, when combined with removal protections assumed to apply to SEC commissioners, violated Article II's Take Care clause. *Id.* This holding is likely to be distinguishable in the case of the CFPB, as its Director is removable at will. *Seila Law LLC v. CFPB*, 140 S.Ct. 2183 (2020).

[17] 12 U.S.C. § 5563(e).

[18] 12 CFR pt. 1081.

[19] 5 U.S.C. § 706(2)(D); *see also* 7 West's Fed. Admin. Prac. § 7519 ("Especially where individual rights are affected, courts insist that the agency follow their own rules of practice and procedure.").

[20] 12 U.S.C. § 5563(c)(1).

[21] 12 U.S.C. § 5563(c)(2), (4).

[22] *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016), vacated in part and reinstated in part, 881 F.3d 75 (D.C. Cir. 2018) (en banc); *see also* Order Dismissing the Notice of Charges, *In re PHH Corp.*, 2014-CFPB-0002 (CFPB June 7, 2018).

[23] Decision of the Director, *In re Integrity Advance, LLC et al.*, 2015-CFPB-0029, at 17 (Jan. 11, 2021), petition for review pending, *Integrity Advance, LLC et al. v. CFPB*, No. 21-9521 (10th Cir.).

[24] *See generally* Docket of the Office of Administrative Adjudication | CFPB (consumerfinance.gov).

[25] 12 CFR 1081.103.

[26] 12 CFR 1081.107(a); *see also* 5 U.S.C. § 555(b) (guaranteeing a right to counsel in administrative proceedings). Respondent's counsel must be a member in good standing of a state bar and is subject to sanctions or even disbarment from appearing before the Bureau for misconduct. 12 CFR 1081.107(b), (c).

[27] *See generally* 5 USC § 556(c); 12 CFR 1081.104.

[28] 5 U.S.C. § 556(b)(3) ("There shall preside at the taking of evidence . . . one or more administrative law judges appointed under section 3105 of this title."); *see also* Admin. Conf. of the U.S., Recommendation 2019-2, *Agency Recruitment and Selection of Administrative Law Judges*, 84

designed to ensure their independence from the agency and its other employees.[29] Indeed, the CFPB's own website states that "[a]dministrative law judges have complete judicial independence from the Bureau."[30]

As noted, the CFPB has brought only two administrative proceedings that have resulted in a final, appealable decision. The first, *In re PHH Corp.*, was overseen by an administrative law judge on loan from the Securities and Exchange Commission.[31] The second, *In re Integrity Advance*, was initially overseen by an ALJ on loan from the U.S. Coast Guard, and ultimately by the Bureau's own ALJ.[32] The Bureau's website does not disclose whether the Bureau currently employs an ALJ.

While the relatively independent ALJ will generally preside over the hearing and issue a recommended decision, the ultimate decisionmaker in any CFPB administrative proceeding is the Director. Indeed, at least in theory, the Director could preside over the entire hearing, obviating the need for an ALJ.[33] Given the other demands on the Director's time, this is likely impractical, even for the most energetic of Directors. As a result, CFPB Directors' involvement in administrative proceedings historically has been limited to reviewing ALJs' recommended decisions and issuing final decisions, and related orders.[34] This may change. Recent amendments to the Rules of Practice provide the Director with greater opportunities to participate in CFPB administrative proceedings prior to the issuance of a recommended decision, including through ruling on dispositive motions.[35]

Due Process and the Separation of Functions. The combination of prosecutorial and adjudicative responsibilities in a single individual raises important fairness and due process considerations. Indeed, the drafters of the APA understood that allowing the same people "to serve both as prosecutors and judges . . . undermines judicial fairness [and] weakens public confidence in that fairness."[36] To address this concern, they prohibited any "employee or agent engaged in the performance of investigative or prosecuting functions for an agency" with respect to a matter or factually similar matter to "participate or advise" agency decision makers in adjudicating that matter "except as witness or counsel in public proceedings."[37]

But this general prohibition is subject to an important exception: it does not apply "to the agency or a member or members of the body comprising the agency."[38] For agencies — like the CFPB — headed by a single individual, this means that the APA permits that individual to both make the decision to prosecute the

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Fed. Reg. 38930 (Aug. 8, 2019) (discussing agencies' greater latitude in selecting ALJs).

[29] 5 U.S.C. § 554(d); 12 CFR 1081.105(b) ("Hearing officers will not be subject to the supervision or direction of, or responsible to, any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for the Bureau, and all direction by the Bureau to the hearing officer concerning any adjudication proceedings must appear in and be made part of the record."); *Mahoney v. Donovan*, 721 F.3d 633, 634 (D.C. Cir. 2013) (describing provisions designed to ensure independence of ALJs); *Butz v. Economou*, 438 U.S. 478, 513 (1978) ("[T]he process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency."); *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2060 (2018) (Breyer, J., concurring in the judgment in part and dissenting in part) ("The substantial independence that the Administrative Procedure Act's removal protections provide to administrative law judges is a central part of the Act's overall scheme.") (citing *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 130 (1953); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 46 (1950)).

[30] Administrative Adjudication Proceedings | CFPB (consumerfinance.gov) (last visited April 22, 2022).

[31] *PHH Corp. v. CFPB*, 839 F.3d 1, 55 (D.C. Cir. 2016) (Randolph, J., concurring), vacated in part and reinstated in part, 881 F.3d 75 (D.C. Cir. 2018) (en banc).

[32] Decision of the Director, *In re Integrity Advance, LLC et al.*, 2015-CFPB-0029 (Jan. 11, 2021).

[33] 5 U.S.C. § 556(b)(1) (authorizing the "agency" to preside at the hearing); 12 CFR 1081.103 (defining "hearing officer" as "any person duly authorized to preside at a hearing."); 12 CFR 1081.211(a) ("The Director may, at any time, direct that any matter be submitted to the Director for review.").

[34] 12 CFR 1081.405; Decision of the Director, *In re Integrity Advance, LLC et al.*, 2015-CFPB-0029 (Jan. 11, 2021); *see generally* PHH Corporation, PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation | CFPB (consumerfinance.gov).

[35] 87 Fed. Reg. 10028, 10032 (Feb. 22, 2022) (discussing 12 CFR 1081.213(a)).

[36] S. Rep. No. 79-752 (1945), at 189 (quoting the 1937 Report of the President's Committee on Administrative Management).

[37] 5 U.S.C. § 554(d); 12 CFR 1081.110(e).

[38] 5 U.S.C. § 554(d).

case and adjudicate respondents' liability. This exception to the general rule requiring the separation of prosecuting and adjudicative functions was regarded as a necessary concession "to the very nature of administrative agencies," but the drafters of the APA cautioned that "this exemption is not to be taken as meaning that the top authority must reserve to itself both prosecuting and deciding functions."[39] Rather, the agency "should confine itself to determining policy and should delegate the actual supervision of investigations and initiation of cases to responsible subordinate officers."[40]

The fundamental fairness concerns with the commingling of prosecuting and adjudicative functions that motivated these statements nearly 80 years ago have persisted.[41] But while the Supreme Court has acknowledged that such comingling raises due process concerns, it has declined to adopt a categorical rule prohibiting the head of an agency participating in both the investigation and adjudication of a matter.[42] Rather, one alleging a deprivation of due process on these grounds must demonstrate, based on "special facts and circumstances present in" that particular matter, "that the risk of unfairness is intolerably high."[43] In this respect, it is noteworthy that the U.S. Court of Appeals for the Ninth Circuit has rejected a due process challenge to a cease-and-desist proceeding — similar to those brought by the CFPB — brought by the since-abolished Office of Thrift Supervision ("OTS"), in part, on the ground that the OTS Director's participation in the commencement of the proceedings was "minimal" and because the respondent was "entitled to a hearing before an ALJ before it reaches the Director for review."[44] Respondents in CFPB administrative proceedings should consider whether "special facts and circumstances," including a diminished role for the ALJ, could provide a basis for a due process challenge to the proceeding.

THE FIRST QUARTER: PLEADINGS, THE DATA DUMP, AND THE SCHEDULING CONFERENCE

The first month of any CFPB administrative proceeding is perhaps the most critical phase, as respondents will be required to make several important strategic decisions that will govern the course of the proceedings.

The Answer. The formal process starts when the Office of Enforcement files a "notice of charges," akin to a complaint filed in U.S. district court, that sets forth the legal authority for the proceedings and for the Bureau's jurisdiction, and a statement of the matters of fact and law showing that the Bureau is entitled to relief.[45] Respondents have only two weeks to file an answer that both responds to all the factual allegations of the notice of charges and sets forth any affirmative defense or other ground of avoidance.[46] The Rules of Practice state that the failure to include an affirmative defense or other avoidance, such as a statute of limitations defense or a defense of res judicata, will be deemed a waiver.[47] Although there may be arguments for contesting alleged waivers, the courts do generally enforce agency rules requiring issue exhaustion.[48] It is therefore prudent to raise any affirmative defense or grounds for avoidance in the answer. If the ground for the defense is inadvertently not included or becomes apparent only after the answer has been filed, respondents should seek enforcement counsel's consent or the ALJ's leave to file an amended answer as soon as possible.[49] Given the short timeframe and the risk of waiver, respondents who expect litigation should begin thinking through potential affirmative defenses, to the extent possible, well in advance of the filing of the notice of charges.

[39] S. Rep. No. 79-752 (1945), at 204.

[40] *Id.*

[41] Consumers First: Semi-Annual Report of the CFPB: Hearing before the House Financial Services Committee, 117th Cong. (2022) (question of Rep. Davidson).

[42] *Withrow v. Larkin*, 421 U.S. 35, 47-52 (1975) (citing *FTC v. Cement Instit.*, 333 U.S. 683 (1948)).

[43] *Id.* at 58.

[44] *Simpson v. Off. of Thrift Supervision*, 29 F.3d 1418, 1424 (9th Cir. 1994).

[45] 12 CFR 1081.200(a); *see also* Notice of Charges, *In re PHH Corp.*, 2014-CFPB-0002 (CFPB Jan. 29, 2014); Notice of Charges, In re Integrity Advance, LLC, 2015-CFPB-0029 (CFPB Nov. 18, 2015).

[46] 12 CFR 1081.201(a), (b).

[47] 12 CFR 1081.201(b).

[48] *Sims v. Apfel*, 530 U.S. 103, 108 (2000) (noting that "it is common for an agency's regulations to require issue exhaustion in administrative appeals" and that "when regulations do so, courts reviewing agency action regularly ensure against the bypassing of that requirement by refusing to consider unexhausted issues."); *see generally* Issue Exhaustion, 4 Admin. L. & Prac. § 12:22 (3d ed.).

[49] 12 CFR 1081.202.

Another important early consideration is whether to file a motion to dismiss.[50] In this respect, it is important to note that, unlike in federal district court, such motions do not stay the filing of an answer, and therefore should be filed in addition to, and not in lieu of, an answer.[51] In addition, when considering whether to file a motion to dismiss, respondents should consider not just the strength of their arguments, but also the best procedural context to present those arguments. The recent amendments to the Rules of Practice provide that motions to dismiss go to the Director who will either decide the motion himself or refer it the ALJ.[52] The Bureau believes this new procedure is likely to "improve the quality of decision-making and expedite the proceeding,"[53] which suggests a presumption that the Director will rule on these motions in order to avoid the need for two orders (one from the ALJ and one, ultimately, from the Director) on the same legal issues. Under the Bureau's internal procedures, the Director would have recently authorized the filing of the very same notice of charges that any motion to dismiss would now attack as legally insufficient.[54] If the motion is denied by the Director, the adjudication will proceed, but the Director's decision on the legal issues will likely be regarded as "law of the case" for the ALJ, and effectively eliminate the possibility that the ALJ will adopt a different analysis of the legal issues. Of course, the Director will ultimately decide all legal issues presented in the matter, either in response to a motion for summary disposition (akin to a motion for summary judgment) filed by either party,[55] or upon review of an ALJ's recommended decision.[56] But, respondents should consider, to the extent it is subject to their control, whether there are advantages to presenting legal disputes in the context of a more complete factual record and to the ALJ in the first instance.

The Data Dump. Under the Rules of Practice, on the same day that respondents are required to file their answer, enforcement counsel is directed to provide to respondents an "affirmative disclosure" of evidence the Office of Enforcement has collected during its investigation.[57] This "data dump" will include all civil investigative demands ("CIDs") or written requests for information, documents or testimony provided in response to these CIDs or requests, and any final examination reports prepared by any other office of the Bureau, if the Bureau intends to rely on such reports during the hearing.[58] Certain documents, including privileged documents, those obtained from another government entity on condition that they be kept confidential, documents reflecting settlement negotiations with non-parties, and documents that identify confidential sources, need not be disclosed, provided that if the document contains material exculpatory information, it must be produced.[59] The ALJ can require enforcement counsel to provide a log of any withheld documents so that respondents' counsel can challenge their withholding.[60]

Depending on the nature of the investigation leading up to notice of charges, respondents may be familiar with much of this evidence, as they may have produced it to the Bureau in response to a CID or other written request. Respondents should have established, based on this known factual record and, if applicable, through their participation in the Notice and Opportunity to Respond and Advise ("NORA") process,[61] both their affirmative defenses and a preliminary litigation strategy. Once Respondents receive the affirmative disclosure, they should immediately assess the scope of new evidence and determine whether it provides new bases for affirmative defenses (which may warrant an amended pleading) or warrants reconsideration of the litigation strategy.

The Scheduling Conference. In addition to filing the answer, respondents must also spend the first two weeks of the proceeding preparing for the scheduling

[50] 12 CFR 1081.212(b).

[51] *See* 12 CFR 1081.212(a) ("The filing of any such motion does not obviate a party's obligation to file an answer or take any other action required by this part or by an order of the hearing officer, unless expressly so provided by the hearing officer.").

[52] 12 CFR 1081.213(a).

[53] 87 Fed. Reg. 10028, 10032 (Feb. 22, 2022) (discussing 12 CFR 1081.213(a)).

[54] CFPB, Life Cycle of an Enforcement Action ("When warranted by the investigation, Enforcement may seek authority from the Director to take a public enforcement action. . . . If the Director authorizes a public enforcement action, we may bring the action in state or federal court, or institute an administrative adjudication proceeding.").

[55] 12 CFR 1081.212(c).

[56] 12 CFR 1081.405.

[57] 12 CFR 1081.206(a), (d).

[58] 12 CFR 1081.206(a).

[59] 12 CFR 1081.206(b).

[60] 12 CFR 1081.206(c).

[61] *See* Life Cycle of an Enforcement Action | CFPB (consumerfinance.gov) (describing the NORA process).

conference, which the Rules of Practice state will occur only a week after the answer is filed (unless the parties and the ALJ agree to another date), and which presents many key strategic decisions about how to litigate the proceeding.[62] In substance, however, the timing of these decisions is even earlier. The Rules of Practice require the parties to confer prior to the scheduling conference on all of the issues to be discussed and decided at the conference,[63] and to exchange a "scheduling conference disclosure" setting forth (1) a factual summary of the case; (2) a summary of all factual and legal issues in dispute; (3) a summary of all factual and legal bases supporting each defense; (4) contact information for each proposed witness and a summary of the witness's anticipated testimony; and (5) "identification of each document or other exhibit, including summaries of other evidence, along with a copy of each document or exhibit identified unless the document or exhibit has already been produced to the other party."[64] Unless the applicable deadlines are extended, these disclosures are required on the day the answer is due and the day enforcement counsel "commences" its affirmative disclosure described above. In recognition of the fact that the parties, and in particular the respondents, may not have all of the information necessary to complete the disclosure,[65] the Rules of Practice impose a duty to supplement the disclosures and also provide that a party's failure to include information in a disclosure will not require rehearing unless the other party can demonstrate prejudice.[66]

CFPB administrative proceedings are supposed to be conducted "fairly" but also "expeditiously."[67] These two goals can be in tension if the Bureau decides to file factually complex cases in its administrative forum, and respondents may have to decide whether to forego fact discovery or motions practice in order to expedite the proceeding. Indeed, perhaps the most critical decision for respondents at the scheduling conference will be whether to exercise their statutory right to a hearing within 30 to 60 days.[68] This decision will significantly affect the ability to engage in motions practice, and to seek and obtain additional discovery from the Bureau or third parties. For example, while the recent amendments to the Rules of Practice allow respondents a broader right to seek deposition testimony, that right is explicitly conditioned on their willingness to waive the right to a hearing within 60 days.[69] Even if respondents waive their right to a hearing in 30 to 60 days, the ALJ is presumptively bound by a requirement that the entire proceeding before the ALJ — including discovery, motions practice, expert discovery (if any), the hearing, post-hearing briefing, and the issuance of a recommended decision — be complete within 360 days of the filing of the notice of charges (unless the Director, upon request of the ALJ, agrees to extend that time).[70]

In addition to the timing of the hearing, the parties are required to discuss any anticipated amendments to the pleadings, the possibility of settlement or simplification of any of the issues, anticipated discovery (including expert discovery), and dispositive motions practice.[71] Within a week of the conference, the ALJ will issue a scheduling order setting forth the date of the hearing and other procedural determinations.[72] The ALJ may amend deadlines set forth in the scheduling order for "good cause shown,"[73] but the ALJ may be less willing to grant an extension if doing so would effectively require the ALJ to seek an extension on the 360 day deadline from the Director.

THE SECOND QUARTER: DISCOVERY, SUMMARY DISPOSITION, THE HEARING, AND THE RECOMMENDED DECISION

Discovery. As discussed, respondents should be assessing the strength of their factual position well before the notice of charges is filed and should reassess their position once they have received the "data dump." If further factual development would be helpful, the

[62] 12 CFR 1081.203(e).

[63] 12 CFR 1081.203(a).

[64] 12 CFR 1081.203(b).

[65] 12 CFR 1081.203(c).

[66] 12 CFR 1081.203(d).

[67] 12 CFR 1081.101.

[68] 12 U.S.C. § 5563(b)(1)(B) (requiring the "hearing to be held not earlier than 30 days nor later than 60 days after the date of service of [the notice of charges], unless an earlier or a later

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date is set by the Bureau, at the request of any party so served."); 12 CFR 1081.203(e)(1).

[69] 12 CFR 1081.208(*l*) ("A respondent's request for issuance of a subpoena constitutes a request that the hearing not be held until after a reasonable period, determined by the hearing officer, for the completion of discovery.").

[70] 12 CFR 1081.400(a).

[71] 12 CFR 1081.203(e).

[72] 12 CFR 1081.203(g).

[73] 12 CFR 1081.115.

Rules of Practice allow respondents to utilize many of the traditional tools of civil discovery, albeit subject to different procedural requirements and limitations. For example, the Rules of Practice permit respondents to seek further documents, either from enforcement counsel or third parties, but they cannot do so directly.[74] Rather, the ALJ must issue a subpoena, and only after determining that is not "unreasonable, oppressive, excessive in scope, or unduly burdensome."[75] Further, recipients of subpoenas may move the ALJ to quash the subpoena, and if a third party recipient refuses to comply with any subpoena or an order of the ALJ denying a motion to quash and enforcing the subpoena, the Bureau's General Counsel, and not respondents, is tasked with seeking enforcement of the subpoena in court.[76] This convoluted procedure is likely required by the text of the CFPA,[77] but it could make obtaining document discovery more challenging and time consuming than in civil litigation.

Respondents may also seek deposition testimony, a right the recent amendments to the Rules of Practice broadened beyond those witnesses who will be unable to attend the hearing.[78] Now, respondents have a presumptive right to seek deposition testimony from three to five witnesses (not counting those witnesses with material testimony who likely will not be available for the hearing), depending on whether there is a single respondent or multiple respondents, and may seek permission from the ALJ to seek up to two additional depositions.[79] According to the Bureau, these amendments are "intended to provide parties with further opportunities to develop arguments and defenses through deposition discovery, which may narrow the facts and issues to be explored during the hearing."[80] But the rule limits parties to seeking discovery deposition testimony to certain witnesses: those identified in the initial disclosures, fact witnesses, expert witnesses, and document custodians.[81] Although the preamble to the recent amendments discourages attempts to depose Bureau staff, such requests are not explicitly prohibited.[82] As with document discovery, subpoenas for deposition testimony are issued by the ALJ and enforced, if necessary, by the General Counsel.[83]

Finally, the Rules of Practice provide for the exchange of any expert reports, including rebuttal reports, and (as noted) deposition of experts.[84] Parties cannot present expert testimony at the hearing unless they provide the expert's report, and are limited to presenting the testimony of five experts at the hearing.[85] The ALJ is authorized to dispense with expert discovery "in appropriate cases."[86]

As a practical matter, respondents in CFPB administrative proceedings are likely to have, at least relative to civil litigation, fewer opportunities and less time to develop favorable facts. Those anticipating a CFPB enforcement proceeding should think strategically about the areas of the factual record that are most important to develop, prioritize those areas when exercising rights to discover under the Rules of Practice, and consider other potential sources of useful factual information, including (for example) Freedom of Information Act requests.[87] In addition, respondents litigating a proceeding should establish a clear record of requests to obtain needed discovery, even if such requests are likely to be denied, in order to support possible claims of procedural unfairness during judicial review.

Motions for Summary Disposition. The Rules of Practice allow either party to move for summary disposition on the ground that "there is no genuine issue as to any material fact" and the moving party is entitled to a decision in their favor "as a matter of law."[88] As with motions to dismiss, the Director may choose to decide the motion or refer it to the ALJ for decision.[89] A respondent's filing of a dispositive motion, including a motion for summary disposition, is deemed to be a request that the hearing not be held until after the motion is resolved, which the ALJ can choose to grant or deny.[90]

[74] *Compare* 12 CFR 1081.208(i) *with* Fed. R. Civ. P. 34, 45.

[75] 12 CFR 1081.208(c), (d).

[76] 12 CFR 1081.208(k).

[77] 12 U.S.C. § 5562(b).

[78] 87 Fed. Reg. at 10030 (amending 12 CFR 1081.209).

[79] 12 CFR 1081.209(a), (c).

[80] 87 Fed. Reg. at 10030.

[81] 12 CFR 1081.209(e)(1).

[82] 87 Fed. Reg. at 10031.

[83] 12 CFR 1081.208.

[84] 12 CFR 1081.210.

[85] 12 CFR 1081.210(b).

[86] 12 CFR 1081.210(e).

[87] 5 U.S.C. § 552.

[88] 12 CFR 1081.212.

[89] 12 CFR 1081.213.

[90] 12 CFR 1081.212(g).

As with motions to dismiss, respondents contemplating motions for summary disposition should consider whether there are advantages to having the ALJ decide legal issues in the first instance through a recommended decision issued after the hearing. Of course, the choice is not entirely up to respondents; enforcement counsel may also choose to file a motion for summary disposition in appropriate cases.

The Hearing and the Recommended Decision. Issues not resolved through dispositive motions practice will be tried at a presumptively public hearing,[91] presided over by the ALJ.[92] In advance of the hearing, the ALJ may hold a prehearing conference to "aid in an orderly disposition of the proceeding,"[93] and the parties will be required to exchange prehearing submissions, including prehearing statements, witness lists, any prior sworn statements the party intends to submit, exhibit lists, any stipulations of fact or liability, and, to the extent the party is calling an expert witness, certain additional disclosures about the expert.[94]

The ALJ may determine how the hearing will proceed, but the Rules presume that enforcement counsel, as the party with the ultimate burden of proof, will present its case in chief first.[95] The parties may introduce witness testimony (including via electronic means for good cause), documentary evidence, and in certain limited situations prior sworn testimony (e.g., if the witness is unable to testify at the hearing for good reason).[96]

At the conclusion of the hearing and the closing of the record, the parties have four weeks to file, concurrently, proposed findings of fact and conclusions of law.[97] Responsive briefs are due two weeks later.[98] The ALJ is required to file the recommended decision within 90 days of the filing of the responsive briefs,[99] although this deadline may be extended by the Director upon request of the ALJ.[100] The recommended decision must include findings of fact, conclusions of law, and an order setting forth a remedy for any violations of law, or denying any such remedy.[101]

Although the ALJ's recommended decision is subject to review by the Director and is not formally the decision that will be reviewed by any court of appeals, it is an important part of the record on review as it can often provide the courts with a detailed resolution of the factual and legal issues by the individual that actually presided over the taking of evidence, and — given the protections for ALJ independence that still exist — may be perceived as a more detached decision than the one formally under review.[102]

THE THIRD QUARTER: THE FINAL DECISION OF THE DIRECTOR

Either respondents or enforcement counsel may ask the Director to review the ALJ's recommended decision, and the Director may independently decide to review any aspect of the recommended decision.[103] In this respect, respondents should ask the Director to review any aspect of the recommended decision for which they may later seek judicial review. Even if they are doubtful that the Director will rule in their favor, "a perfected appeal to the Director of [a recommended decision] is a

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[91] 12 CFR 1081.300.

[92] 12 CFR 1081.303(g)(4).

[93] 12 CFR 1081.214.

[94] 12 CFR 1081.215.

[95] 12 CFR 1081.302; 1081.303(a).

[96] 12 CFR 1081.303(g), (h).

[97] 12 CFR 1081.305(a), (c).

[98] 12 CFR 1081.305(b).

[99] 12 CFR 1081.400(a). Note that the recent amendments to the Rules changed references to the "recommended decision" to "preliminary findings and conclusions," supposedly because

footnote continued from previous column…

the later term is "more descriptive of this component of an adjudication proceeding." 87 Fed. Reg. at 10033. This is arguable, as the recommended decision could well become the final decision or be adopted in large part. 12 CFR 1081.402(b). In any event, the Bureau acknowledges that the "preliminary findings and conclusions" remain a "recommended decision" for purposes of the APA. 87 Fed. Reg. at 10033.

[100] 12 CFR 1081.400(b).

[101] 12 CFR 1081.400(c).

[102] *See*, e.g., Daniel B. Listwa, Lydia K. Fuller, *Constraint Through Independence*, 129 Yale L.J. 548, 553 (2019) ("ALJs generate the initial administrative record, often providing the key evidence upon which the courts rely in identifying red flags in the agency's conclusions. Courts and ALJs are thus engaged in a form of cooperative review, constraining agency fact-finding from both the top and the bottom. Absent an independent ALJ, the agency would be free to develop the administrative record in a way that would prevent the appearance of red flags, essentially nullifying effective judicial review.").

[103] 12 CFR 1081.402(a), (b).

perquisite to the seeking of judicial review" of any final decision that adopts the recommended decision, in whole or in part.[104]

Assuming the Director does review the recommended decision, either upon a party's request or *sua sponte*,[105] the parties will file briefs on the issues under review,[106] and the Director will likely hold an oral argument.[107] The Director's final decision, which may "affirm, adopt, reverse, modify, set aside, or remand for further proceedings" the recommended decision, is required to be filed within 90 days of the close of briefing before the Director.[108]

The Rules of Practice give either party a right to seek reconsideration of the final decision, though only on "new questions raised by the decision or order and upon which [the party] had no opportunity to argue, in writing or orally, before the Director."[109] Importantly, seeking reconsideration does not automatically stay any relevant time period, including the 30-day period for seeking judicial review.[110]

The Director's order will become effective within 30 days of when it is served on the parties, unless stayed by the Director or by the court of appeals upon motion by the respondent (called the "petitioner" in the court of appeals).[111] The Bureau may stay, terminate, or modify the final decision at any point, provided that if respondent seeks judicial review, the Bureau must obtain that court's permission to modify its order at any point after it has filed the record for review.[112]

THE FOURTH QUARTER: REVIEW IN THE COURTS OF APPEAL

Any respondent may seek judicial review of a final decision issued by the Director by filing a petition for review in the U.S. Court of Appeals for the D.C. Circuit or the court of appeals of the United States for the circuit in which the respondent(s) principal place of business is located.[113] The Bureau must then file the record within 30 days, after which the court will proceed to review the matter as set forth in the Federal Rules of Appellate Procedure.[114]

The choice of forum for judicial review is an important strategic decision, which respondents should consider long before any final, appealable decision of the CFPB. Respondents should be raising and framing arguments during the administrative proceeding in a manner that will take advantage of favorable circuit precedent (or avoid unfavorable precedent) on both substantive and procedural issues. Respondents should also consider the composition of the respective courts of appeal and any prior rulings that, even if not strictly on point, indicate potential judicial skepticism of CFPB or other agency adjudications.

In addition to the forum, respondents should also be cognizant of the applicable standard of review. Factual findings are subject to review under the deferential "substantial evidence" standard.[115] The "substantial evidence" standard is a "term of art" that asks whether the administrative record "contains 'sufficien[t] evidence' to support the agency's factual determinations."[116] In effect, an agency factual determination will be upheld if a "reasonable mind" would view the evidence "as adequate to support a conclusion."[117] Credibility determinations, particularly those of the ALJ, are afforded even greater deference, and will be upheld unless "hopelessly incredible, self-contradictory, or patently unsupportable."[118] Note,

[104] 12 CFR 1081.402(c).

[105] If neither party seeks review, the Director may decide to simply adopt the recommended decision as the decision of the CFPB. 12 CFR 1081.402(b).

[106] 12 CFR 1081.403.

[107] 12 CFR 1081.404.

[108] 12 CFR 1081.405; *see also* 12 U.S.C. § 5563(b)(3) (requiring an order to be submitted within 90 days of when the Bureau has notified the parties that the case has been submitted to the Bureau for final decision).

[109] 12 CFR 1081.406.

[110] *See* 12 CFR 1081.406(c); 12 USC § 5563(b)(4).

[111] 12 CFR 1081.407(a), (e). Fed. R. App. P. 18.

[112] 12 U.S.C. § 5563(b)(3).

[113] 12 U.S.C. § 5563(b)(4).

[114] *Id.*; *see also* Fed. R. App. P. 15-20.

[115] 5 U.S.C. § 706(2)(E).

[116] *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[117] *Id.*

[118] *Raymond Interior Sys., Inc. v. N.L.R.B.*, 812 F.3d 168, 178 (D.C. Cir. 2016) (citations omitted).

however, that courts may be less deferential to factual determinations, including especially credibility determinations, adopted by the Bureau that are contrary to those of the ALJ.[119] Further, a ruling granting a motion for summary disposition — that is, a finding that no genuine factual dispute exists — is reviewed *de novo*.[120]

The Bureau's legal conclusions — at least with respect to federal consumer financial law — will be subject to review under the *Chevron* framework, under which an agency's resolution of genuine statutory ambiguity will be upheld if reasonable.[121] In this respect, it is noteworthy that, although the courts have declined to afford *Chevron* deference to the Federal banking agencies' interpretation of statutes that are jointly administered,[122] Congress has made clear that the courts should not use similar logic to deny deference to the CFPB.[123] Both the legitimacy of *Chevron* and the actual impact of the *Chevron* doctrine on judicial review is a source of perennial debate, and courts may conduct especially searching reviews of agency interpretations adopted in an administrative proceeding that plow new ground.[124] But, if nothing else, the doctrine will likely require respondents to frame their arguments in its terms, i.e., that the CFPB's interpretation of federal consumer financial law is not reasonable. Of course, the courts will not defer to the CFPB's interpretation of the Constitution or other laws that it does not administer, and respondents should consider whether such arguments provide a basis for overturning any adverse decision.

Finally, courts will uphold the CFPB's choice of remedy so long as it is not an "arbitrary or capricious" or otherwise an "abuse of discretion."[125] Under this standard, courts will not overturn the CFPB's "choice of sanctions unless they are either unwarranted in law or without justification in fact."[126] In this respect, the CFPB's Director has suggested that the agency will pursue novel "structural" remedies,[127] which, if adopted in an administrative proceeding, might well test the boundaries of this otherwise deferential standard of review.

CONCLUSION

Although the CFPB may continue to bring many of its contested enforcement actions in federal district court, it has clearly indicated an intention to use its administrative forum, after avoiding it entirely for many years. Of course, the CFPB is not required to disclose, in advance of bringing an enforcement action, which forum it may choose. As a result, any "covered person or service provider" facing a potential enforcement action must consider how it would defend that action — from filing through judicial review — in the CFPB's home court. ■

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[119] *See,* e.g., *Aggregate Indus. v. N.L.R.B.*, 824 F.3d 1095, 1100 (D.C. Cir. 2016) ("We defer to the Board's conclusions if they are supported by substantial evidence, but when the Board reverses an ALJ on factual matters, we examine the disagreement with a gimlet eye.") (citing *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 494 (1951) ("[O]n matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown.")); *see generally* Daniel B. Listwa, Lydia K. Fuller, *Constraint Through Independence*, 129 Yale L.J. 548, 584 (2019).

[120] *Blanton v. Office of the Comptroller of the Currency*, 909 F.3d 1162, 1171 (D.C. Cir. 2018).

[121] *See PHH*, 839 F.3d at 43; *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 297 (2013) ("No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority.").

[122] *See,* e.g., *Grant Thornton, LLP v. Office of the Comptroller of the Currency*, 514 F.3d 1328, 1331 (D.C. Cir. 2008).

[123] 12 U.S.C. § 5512(b)(4)(B) ("Notwithstanding any power granted to any Federal agency or to the Council under this title, and subject to [12 U.S.C. § 5581(b)(5)(E)], the deference that a court affords to the Bureau with respect to a determination by the Bureau regarding the meaning or interpretation of any provision of a federal consumer financial law shall be applied as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such federal consumer financial law.").

[124] *See,* e.g., *In re PHH*, 839 F.3d at 43.

[125] 5 U.S.C. 706(2)(A); *Kim v. Off. of Thrift Supervision*, 40 F.3d 1050, 1052-53 (9th Cir. 1994).

[126] *Pharaon v. Bd. of Governors of the Fed. Reserve Sys*., 135 F.3d 148, 155 (D.C. Cir.1998); *see also Dodge v. Comptroller of Currency*, 744 F.3d 148, 161 (D.C. Cir. 2014) ("The court will not overturn a civil monetary penalty unless it is either 'unwarranted in law or . . . without justification in fact.'").

[127] "Reining in Repeat Offenders": 2022 Distinguished Lecture on Regulation, University of Pennsylvania Law School | CFPB (consumerfinance.gov).

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