Comments of Legal Academics and Former Consumer Protection Public Enforcement Attorneys
Docket No. OMB-2019-0006

March 13, 2020

Russell T. Vought
Acting Director
Office of Management and Budget
Washington, D. C.

Dear Mr. Vought:

Please see the submission below in response to the Office of Management and Budget's Docket No. OMB-2019-0006, the Notice of Proposed Rulemaking (NPRM) regarding "Improving and/or reforming regulatory enforcement and adjudication."

We are legal academics who research and teach about consumer protection law, public enforcement of civil law, administrative law and related topics. Each of us also has extensive past experience in public enforcement of consumer protection laws. Our academic affiliation and former position in public enforcement is listed below. We appreciate the opportunity to submit these comments in our individual capacities for your consideration.

The first listed signatory is the "contact for questions or other follow-up on your response if desired," as stated in the NPRM.

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SUMMARY

Our brief comment is directed to our area of expertise, which is the public enforcement of consumer protection law. Accordingly, we focus on administrative adjudications by the Consumer financial Protection Bureau (CFPB) and Federal Trade Commission (FTC). We make the following three observations about the NPRM as it pertains to the adjudications of these agencies:

- The available data on administrative adjudications by the CFPB and FTC suggest infrequent use of administrative proceedings to resolve contested issues in enforcement actions.

- The NPRM seeks information wholly on topics that would favor the interests of defendants in administrative adjudications. It lacks even a semblance of balance, or any expression of concern for the rights of consumers in public enforcement administrative adjudications.

- Current administrative adjudicative proceedings by the CFPB and FTC contain extensive procedural protections sufficient to allay legitimate due process concerns of enforcement defendants.

I. PUBLIC ENFORCEMENT OF CONSUMER PROTECTION LAWS RARELY RESULTS IN RESOLUTION OF CONTESTED ISSUES THROUGH ADMINISTRATIVE ADJUDICATIONS

As OMB is no doubt aware, the range of administrative adjudications is vast. *See* Joint Project of the Administrative Conference of the United States and Stanford University, Adjudication Research, available at: https://acus.law.stanford.edu/ (cataloging the "wide variety of agency adjudicatory schemes across the federal government and their related rules of practice and case management techniques."); Christopher J. Walker and Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 Cal. L. Rev. 141 (2019) (describing a "new world of formal adjudication outside of the APA is procedurally and substantively diverse").

Our focus here is to comment on the use of adjudicative proceedings by the FTC and CFPB to pursue alleged violations of federal unfair and deceptive acts and practices law (UDAP)[1] and other consumer protection statutes and regulations. The FTC and the CFPB both have the authority to pursue enforcement actions as either administrative adjudications or through judicial proceedings initiated in federal district court. *See* 15 U.S.C. § 45 (FTC administrative enforcement authority); 15 U.S.C. § 53 (FTC judicial enforcement authority); 12 U.S.C. § 5563 (CFPB administrative enforcement authority); 12 U.S.C. § 5564 (CFPB judicial enforcement authority). Studies of FTC and CFPB enforcement actions suggest that both agencies consistently use judicial enforcement to resolve the overwhelmingly majority of enforcement

[1] We use the abbreviation "UDAP" to mean either Unfair or Deceptive Acts or Practices, the law enforced by the FTC, or any other federal or state variant of that law, including the CFPB's additional authority over "abusive" conduct.

actions that raise factual and legal disputes that could not be settled between the agency and the enforcement defendant prior to filing of the action.

In a comprehensive study of CFPB enforcement, Christopher Peterson examined every enforcement action taken by the CFPB from its inceptions through 2015. *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 Tulane L. Rev. 1057 (2016). Peterson's study included an analysis of cases brought by the CFPB in judicial versus administrative fora. Peterson found that the CFPB slightly favored bringing matters in an administrative forum, with 67 (55%) of enforcement actions were administrative filing, compared to 55 (45%) of filings in federal district court. Yet contested cases were almost always brought as judicial actions. Peterson found that 29 of the 122 enforcement actions brought by the CFPB were contested. Of these 29 contested matters, 26 were filed in district court and 3 were administrative proceedings. *Id.* at § 1081. Peterson concluded that:

> The CFPB has frequently used administrative enforcement actions to conclude matters in which the defendant has agreed to a settlement. But the Bureau has only very rarely used administrative adjudication in contested cases. Out of 122 public enforcement cases, the Bureau has brought only 3 relatively small administrative enforcement actions that defendants contested after the Bureau filed notices of charges. Although the Bureau's administrative enforcement procedures are likely faster and less resource-intensive than pursuing disputed cases in federal court, the agency has refrained from attempting to exploit either a real or perceived "home court" advantage.

Id. at 1094. That trend has continued. To date, the CFPB has filed approximately 236 enforcement actions. Only the three actions mentioned in Peterson's article (approximately 1% of the total actions) have been administrative adjudication proceedings where the respondents actively contested the action by filing motions on the merits or seeking discovery. Further, only two of those actions proceeded to a full hearing. PHH Corp., CFPB No. 2014-CFPB-0002 docket *available at https://www.consumerfinance.gov/administrative-adjudication-proceedings/administrative-adjudication-docket/phh-corporation/*; Integrity Advance, LLC, CFPB No. 2015-CFPB-0029 docket *available at https://www.consumerfinance.gov/administrative-adjudication-proceedings/administrative-adjudication-docket/integrity-advance/*. In the remaining action, the parties settled the matter before there was a full hearing on the merits. 3D Resorts-Bluegrass, LLC, CFPB No. 2013-CFPB-0002 docket *available at* https://www.consumerfinance.gov/administrative-adjudication-proceedings/administrative-adjudication-docket/3d-resorts-bluegrass/.

Prentiss Cox, Amy Widman & Mark Totten reached an almost identical conclusion as to FTC enforcement in their study of all public enforcement actions asserting violations of UDAP law resolved during calendar year 2014. *Strategies of Public UDAP Enforcement*, 55 Harv. J. Leg. 37 (2018). These authors examined 94 FTC enforcement actions completed that year and divided FTC cases into two distinct types of cases. Type A cases were "against a single, often large, corporation for which the sole remedy was an administrative order designed to restrain the specific conduct at issue." *Id.* at 80. Type B cases were almost always filed in a judicial forum and "targeted widespread fraud, often by a large number of smaller entity defendants and related

individuals." Consistent with the Peterson finding on the use of administrative adjudications in non-contested actions brought by the CFPB, the authors of this study described the differences between these two case types as follows:

> Type B cases required litigation in federal court. Of the thirty-four Type B cases, twenty-three (67.6%) were in litigation for more than 180 days. The median time from filing to resolution was 395 days in Type B cases. All but one Type B case was filed and resolved in federal court. Type A cases were exactly the opposite. All but one Type A case was settled prior to filing, and all but two were administrative actions before the FTC.

Id. at 82.

The use of administrative adjudications for non-contested issues appears to allow for an efficient formalization of pre-complaint settlements. The data suggest the largest defendants are more likely to agree to such settlements and thus the defendants most likely to have the resources to defend also are the most likely to prefer the use of the administrative proceeding to create a formal settlement order.

Thus, there is no evidence supporting any claim that the administrative fora are being used regularly to resolve contested disputes, and as demonstrated *infra* in Section III, the procedures in administrative proceedings adequately allay any legitimate due process concerns in those rare instances in which the fora are used to resolve contested matters.

II. ANY REFORM OF ADMINISTRATIVE ADJUDICATIVE PROCEDURES SHOULD REFLECT THE CONCERNS OF CONSUMERS IN ADDITION TO THE INTERESTS OF ENFORCEMENT DEFENDANTS

As is noted *infra* in Section III, the current procedures governing administrative adjudication proceedings carefully balance the rights of enforcement defendants with the governmental imperative to protect consumers and hold wrongdoers accountable. As Peterson found, through 2015 alone, defendants in CFPB actions caused more than $11.2 billion in harm to consumers, and the CFPB provided consumers with more than $7.7 billion of relief for that harm through non-contested administrative adjudication proceedings. *Empirical Review*, *supra*, at § 1081. We note that the questions posed in the NPRM seek to upset that careful balance and fail completely to recognize the important rights of consumers to be free from these defendants' unlawful practices and to receive relief for the harm caused by those illegal practices. Almost every set of questions asked in the NPRM framed the inquiry as a matter of increasing the rights of enforcement defendants to shape the proceeding or constraining the authority of public enforcers.

For example, the first four set of questions in the NPRM include the following inquiries: "Should investigated parties have an opportunity to require an agency to 'show cause' to continue an investigation?"; "When do multiple agencies investigate the same (or related) conduct and then force Americans to contest liability in different proceedings across multiple agencies?"; "Would applying the principle of res judicata in the regulatory context reduce duplicative proceedings?";

and "…need an American prove innocence in regulatory proceeding(s)? What reform(s) would ensure an American never has to prove the absence of liability?" The NPRM continues in this vein throughout, including seeking comment on "When do regulatory investigations and/or adjudications coerce Americans into resolutions/settlements?" and "Are agencies and agency staff accountable to the public in the context of enforcement and adjudications?"

These questions and other similar requests for input are legitimate subjects of inquiry. Yet they all seek information on only one side of the process. They all ask for input on the types of information that enforcement defendants would want to provide to create procedures that would burden or limit public enforcers in presenting an enforcement case in the administrative forum.

We encourage the OMB to expand its evaluation of administrative adjudications before considering the promulgation of rules that reshape federal administrative proceedings. For example, we encourage the OMB to seek information on topics such as the following:

- When public enforcers prosecute alleged violations of laws designed to protect Americans from marketplace fraud and abuse, are enforcement defendants more likely to produce documents and information needed to evaluate the existence and extent of a violation efficiently and fully when the adjudication occurs in administrative or judicial fora? Does it matter whether the public enforcer has used pre-complaint investigative authority mechanisms as opposed to seeking records or testimony during the enforcement proceeding?

- Are consumers, investors, employees or other Americans more likely to obtain compensation for loss or harm when the public enforcer uses administrative adjudication or uses judicial adjudication? Are administrative law judges and federal district court judges equally likely to understand when an order of public compensation is appropriate and how to effectively and efficiently structure such an order?

- How do orders for conduct regulation issued following a finding that an enforcement defendant has violated laws designed to protect Americans from marketplace fraud and abuse differ in administrative adjudications? Is there any evidence that enforcement defendants, or other companies or individuals in the industry, are more or less likely to continue violating federal law following an order for conduct regulation issued in an administrative adjudication?

- Are records of proceedings in public enforcement actions more or less likely to be efficiently and readily available for public review when an action is conducted in an administrative versus judicial proceeding?

- Are the fines in administrative proceeding substantially different than the fines assessed in judicial proceedings? If so, are the fines in administrative adjudications sufficient to deter the defendant and others in the industry from repeated conduct that violates federal law?

These and countless similar questions ask about the experience of administrative adjudications from the point of view of those sought to be protected by the laws alleged to have been violated

in the enforcement action. The NPRM repeatedly uses the descriptor "Americans" to mean the defendants in public enforcement actions. In public enforcement actions, a much larger number of Americans are those hurt by violations of laws for which the FTC and the CFPB are uniquely capable of enforcing. Information on various reform options for administrative adjudications should include consideration of the interests of these Americans.

III. CURRENT ADMINISTRATIVE PROCEEDINGS ENFORCING CONSUMER LAW VIOLATIONS DO NOT PRESENT LEGITIMATE DUE PROCESS CONCERNS

CFPB administrative adjudication proceedings have numerous safeguards to ensure respondents receive a fair and expeditious hearing. 12 C.F.R. § 1081.101; *see also id.* § 1081.302 (requiring that hearings be conducted in a "fair, impartial, expeditious, and orderly manner"). First, as in federal court, respondents are entitled to counsel, and their counsel does not have to be a member of any particular bar. *Id.* § 1081.107(a)(1) (requiring only that counsel be a member in good standing of the highest court of any State who has not been debarred or suspended from practice in front of the CFPB); *cf.* 17 C.F.R. § 201.102 (same for SEC). Enforcement counsel also bears the burden of persuasion on the ultimate claims in CFPB adjudication proceedings. 12 C.F.R. § 1081.303(a); *see also* 16 C.F.R. § 3.43(a) (same with FTC). Filings generally must be signed subject to requirements very similar to those in Federal Rule of Civil Procedure 11. *Compare* 12 C.F.R. § 1081.108(b)(1) *with* Fed. R. Civ. P. 11 (FRCP).

Respondents have the right to develop their cases as in federal court: respondents may subpoena witnesses and documents, 12 C.F.R. § 1081.208; they are entitled to reports by any experts to be called by the CFPB, *id.* § 1081.210; and they may move for the production of statements by witnesses, similar to the requirements of the Jencks Act, 18 U.S.C. 3500, *id.* § 1081.207. *See also* 16 C.F.R. § 3.41(c) (requiring that parties in adjudication proceedings under the Federal Trade Commission "[e]very party . . . shall have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing"); *id.* § 3.31(a) ("Parties [in FTC proceedings] may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; production of documents or things for inspection and other purposes; and requests for admission."); *id.* § 3.31A(a) (expert discovery in FTC proceedings); *cf.* 17 C.F.R. § 201.232(a) (providing for subpoenas for witnesses and documents in SEC hearings). In fact, enforcement counsel in adjudication proceedings affirmatively must disclose more documents than would be required as initial disclosures under the Federal Rules of Civil Procedure. Compare 12 C.F.R. § 1081.206 (requiring production of all documents acquired from other parties as part of the investigation, including transcripts of all depositions, subject to limited, express exceptions like privilege that must be logged), 16 C.F.R. § 3.31(b) (FTC mandatory initial disclosures) *with* FRCP 26(a)(1)(A) (requiring production only of documents that a party may use to support its claims or defenses). Finally, if respondents believe that the facts as pleaded do not state a claim, they may move to dismiss the notice of charges, or they may move for summary disposition if they believe that enforcement counsel has failed to produce facts

demonstrating a violation. 12 C.F.R. § 1081.212; *see also* 16 C.F.R. § 3.24(a)(1) (allowing motions for summary decisions in FTC proceedings); *id.* § 3.22(a) (motions to dismiss in FTC proceedings). In these ways, respondents can end proceedings without the cost and burden of a hearing.

Given these requirements and safeguards, agencies should not be required to guess what evidence respondent believes will be favorable and produce that material. Indeed, such a requirement flies in the face of the adversarial system in the United States and is not required in federal civil courts. In CFPB adjudication proceedings, respondents receive documents and information acquired during the investigation, and respondents can seek additional information if they feel it is necessary. Nothing more should be required.

Nor are any changes related to the admissibility of hearsay necessary. Evidence in a CFPB adjudication proceeding must be "relevant, material, and reliable." 12 C.F.R. § 1081.303(b)(1); *see also* 16 C.F.R. § 3.43(b) ("Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded."). Weighing the reliability, materiality, and relevance of evidence is well within the Respondents may object to admission of evidence similar to actions under the Federal Rules of Evidence, see 12 C.F.R. § 1081.303(e), and evidence may be excluded if its probative value is substantially outweighed by its prejudicial effects, similar to exclusions under Federal Rules of Evidence 403, *compare id.* § 1081.303(b)(2), 16 C.F.R. § 3.43(b) (FTC), *with* Fed. R. Evid. 403. Hearsay may be admitted only to the extent the hearing officer determines "it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair." *Id.* § 1081.303(b)(3); *see also* 16 C.F.R. § 3.43(b) (same for FTC). The Federal Rules of Evidence also contain similar exceptions that allow the introduction of evidence that otherwise would be hearsay. *See* Fed. R. Evid. 803, 804, 807. Furthermore, in enforcement adjudication proceedings, the documents in question often come from the respondents themselves. To the extent they claim any hearsay issues with their own documents, as happened during the Integrity Advance administrative adjudication proceeding, they simply can offer authenticated versions, as the hearing officer in that proceeding ruled. *See* Hearing Tr. I at 171-72, Integrity Advance, LLC, CFPB No. 2015-CFPB-0029 docket #172 *available at https://www.consumerfinance.gov/administrative-adjudication-proceedings/administrative-adjudication-docket/integrity-advance/*.

Similarly, CFPB administrative adjudication proceedings have safeguards to ensure the independence and transparency of any decisions. In CFPB adjudication proceedings, the hearing officer cannot be subject to the supervision or direction of persons who investigate or prosecute consumer law violations. 12 C.F.R. § 1081.105(b); 16 C.F.R. § 3.43(f) (same for FTC). Hearing officers must withdraw if they deem themselves disqualified, and if respondents have concerns regarding the impartiality of a hearing officer, they can move to disqualify the officer. 12 C.F.R. § 1081.105(c)(1),(2); 16 C.F.R. § 3.43(g)(1),(2) (same for FTC). Similarly, any employees who advise the Director as to the outcome of the proceeding (so-called decisional employees) cannot have "engaged in an investigative or prosecutorial role in a proceeding." *Id.* § 1081.103, § 1081.405(b). Any direction to a hearing officer concerning an adjudicatory proceeding must be part of the record—in other words, there cannot be ex parte contact with the hearing officer

regarding the proceeding. *Id.* § 1081.105(b). Finally, the hearing itself must be conducted in accordance with the requirements of the Administrative Procedures Act. 12 U.S.C. § 5563(a).

In addition to the safeguards during the hearing itself, respondents have access to multiple levels of review, including by federal courts of appeal. The hearing officer only makes a recommended decision. 12 C.F.R. § 1081.400. Parties may appeal a recommended decision by the hearing officer to the director, *id.* § 1081.402, and even absent an appeal, the director must review the recommended decision and either adopt it or order further briefing on some of the issues. *Id.*; *see also* 16 C.F.R. § 3.52(b) (respondent in FTC adjudication proceeding may file an appeal of the initial decision by an administrative law judge). In the only two administrative adjudicatory proceedings wherein a hearing was conducted, the Director ordered additional briefing and argument on numerous issues rather than adopting the recommended decision. *See* PHH Corp., CFPB No. 2014-CFPB-0002 docket *available at https://www.consumerfinance.gov/administrative-adjudication-proceedings/administrative-adjudication-docket/phh-corporation/*; Integrity Advance, LLC, CFPB No. 2015-CFPB-0029 docket *available at https://www.consumerfinance.gov/administrative-adjudication-proceedings/administrative-adjudication-docket/integrity-advance/*. Respondents may appeal any final decision by the Director to the United States Courts of Appeal. 5 U.S.C. § 706; 12 U.S.C. § 5563(b)(4); *see also* 12 U.S.C. § 5563(c)(2) (allowing appeal of any temporary cease and desist orders to federal district courts); 15 U.S.C. § 45(c) (allowing appeal of FTC orders to United States courts of appeal); *cf. also, e.g.*, *id.* § 77i(a) (allowing appeal of Securities and Exchange Commission orders to United States courts of appeal); 17 C.F.R. § 201.75 (allowing review by SEC of fee applications); *id.* § 201.58 (allowing judicial review of same); 5 U.S.C. § 504(c)(2) (same). Reforms regarding the independence of the adjudicators are not necessary in this context.