

CFPB PROCEDURES FOR INVESTIGATION AND ADJUDICATION

I. An Investigation Is Initiated

In special circumstances, such as a wave of similar customer complaints, the CFPB could launch an investigation without warning. More commonly, though, investigations will arise from the Bureau's examinations which are scheduled and conducted by the Office of Supervision.¹ Supervision takes different forms for different entities:

- For very large banks, their affiliates, and their service providers, monitoring by the CFPB is continuous and cyclical.²
- Banks with less than \$10 billion in total assets are not supervised by the Bureau, but by the FDIC, which could make a referral to the Bureau leading to an investigation.³
- Examinations of other entities are scheduled using the results of statistical analyses by the Bureau's Nonbank Supervision Risk Analytics and Monitoring Team.⁴

The supervisory priorities of the Bureau are governed by its mandate to reduce risk to consumers, while maintaining emphases on measurable data and consistency of response.⁵

At the conclusion of an examination, prudential regulators are provided with preliminary results and given an opportunity to comment; state regulators may be included as well.⁶ An examination culminates with the assignment of a Compliance Rating and the issuance of a Final Report. The examiner explains unfavorable results in a meeting with the entity's Board of Directors or Principals.⁷ At the Bureau, meanwhile, the Office of Supervision reports to the Director and his or her staff. On review by director-level officials at the CFPB, an unfavorable report may give rise to an investigation by the Office of Enforcement. The Bureau explains in general terms: "Whether... formal enforcement action is necessary will depend on the type of problem(s) found and the severity of harm to consumers."⁸

¹ The examination process is described in detail in the Bureau's October 2011 Supervision and Examination Manual (Manual") available at <http://www.consumerfinance.gov/guidance/supervision/manual/>

² See Manual at 13. "With respect to large depository institutions and their affiliates, CFPB will share draft examination reports and consult with prudential regulators regarding supervisory action." Manual at 6.

³ The CFPB Office of Supervision will work alongside the prudential regulators, and in dealing with smaller banks may "include its examiners on a sampling basis" in the FDIC's supervisory activities. Manual at 1 n. 2.

⁴ "This team will acquire and analyze qualitative and quantitative information and data pertaining to consumer financial product and service markets to determine what industries and institutions pose the greatest risk to consumers.... [It] will provide a risk ranking of entities to program teams for use in scheduling examinations." Manual at 10.

⁵ *Id.* at 3.

⁶ *Id.* at 11-12.

⁷ *Id.* at 12.

⁸ *Id.* at 6.

Only an Assistant Director or Deputy Assistant Director of the Office of Enforcement (hereinafter “director-level officials”) can initiate an investigation. Rule 1080.4. The Rules affirm that the CFPB Office of Enforcement, like the Office of Supervision, does not act on behalf of any complaining person. It focuses on the public interest: it “will not initiate an investigation or take other enforcement action when the alleged violation is merely a matter of private controversy and does not tend to affect adversely the public interest.” Rule 1080.3.

Outside the examination context, the Bureau’s priorities can be discerned from its proactive requests for information from banks and from the public. For example, in February, 2012, the Bureau requested input about bank overdraft charges, reflecting its intention to build on the standards established by the FDIC⁹ and in recently developing state case law.¹⁰ In May, 2012, the Bureau issued a request for input about practices in the marketing and service of reloadable prepaid cards.¹¹ The request was announced by Director Richard Cordray, and his remarks prominently featured the observation that such cards are often used by “the most vulnerable among us.”¹²

Both these initiatives reveal a special interest in low-income consumers. That emphasis accords with the Bureau’s unique obligation to develop and enforce rules against “abusive” practices. Unlike “unfair” and “deceptive” practices, which are policed by the prudential regulators and the FTC, “abusive” practices are defined statutorily with reference to the tendencies of specific customer groups. Hence the Bureau is the sole regulatory body tasked with identifying marketing practices that may not rise to the level of deception, but unreasonably take advantage of certain customers’ insensitivity to excessive risk. The Bureau can be expected to take particular interest if marketing seems to target a consumer who is at high risk of (a) failing to understand the material risks of a product; (b) being unable to protect his or her interests, in light of diminished resources or time; or (c) relying – reasonably, but more than is typical – on a service provider to act in his or her interests.¹³

The guidelines for “transaction testing” during examinations place emphasis on these elements as well, suggesting, for example, that examiners determine whether “A product is targeted to particular populations,

⁹ See FDIC Financial Institution Letter FIL-81-2010 (Nov. 24, 2010), available at <http://www.fdic.gov/news/news/financial/2010/fil10081.pdf>.

¹⁰ *E.g.*, *Gutierrez v. Wells Fargo Bank, N.A.*, 730 F. Supp. 2d 1080, 1140 (N.D. Cal. 2010) (ordering \$203 million in restitution under California deceptive practices law for bank customers who paid multiple overdraft fees due to bank’s manipulation of batch-processing order); see also *Swift v. BancorpSouth Bank*, no. 09-md-02036-JLK, doc. no. 2673) (S.D.Fla. May 4, 2012) (certifying class of customers injured in same fashion for action under the Arkansas Deceptive Trade Practice Act).

¹¹ See http://files.consumerfinance.gov/f/201205_cfpb_GPRcards_ANPR.pdf; see also *id.* at 8 (“Some GPR cards include a feature that claims to offer consumers the opportunity to improve or build credit. ... The Bureau seeks public input and data concerning the efficacy of credit reporting features on GPR cards.”)

¹² <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-considers-rules-on-prepaid-cards/>

¹³ See 12 U.S.C. § 5531 (d) (defining “abusive” practices under the Dodd-Frank Act). These enforcement priorities are not novel, and neither is the term “abusive” to define the problem. See FDIC Letter FIL-20-2004, “Unfair or Deceptive Acts or Practices by State-Chartered Banks” (Mar. 11, 2004), available at <http://www.fdic.gov/news/news/financial/2004/fil2604a.html> (highlighting, among the risks involved with unfair and deceptive practices, the problem of “abusive practices,” and, in particular, “[t]he need for clear and accurate disclosures that are sensitive to the sophistication of the target audience... [especially] the elderly, the financially vulnerable, and customers who are not financially sophisticated”).

without appropriate tailoring of marketing, disclosures, and other materials designed to ensure understanding by customers.”¹⁴

In light of the February request for information on overdraft practices, one hypothetical scenario may provide a framework for application of the new rules.

Ninth America Southwest Bank (NASB) offers no-frills savings accounts with no checking and virtually no fees, for customers who do most of their banking through ATM machines. Through direct mail, NASB occasionally offers these accountholders “convenience checks,” which allow them to write checks on their accounts for a fee of \$1.50. The mailing includes a promotional items explaining terms, with a more detailed explanation on the reverse.

The convenience checks allow customers to overdraw their accounts up to a certain dollar maximum. Signing a check constitutes agreement and an ‘opt-in’ to overdraft protection (in compliance with “Regulation E”). If a check exceeds the account balance, the bank honors the check by extending an interest-free 30-day advance, to be recouped with an offset of the accountholder’s next large deposit.

The overdraft triggers a “convenience fee” for 11% of the check total.

NASB sends the convenience checks in promotional mailings to customers with accounts showing regular monthly or biweekly deposits. It sends such mailings more often to customers who carry balances below \$2000, reasoning that they are more likely to benefit from the overdraft-protection service.

An examination procedure might evaluate the functioning of the bank’s compliance department in the rollout of this product, but it also could evaluate the extent the product “materially increase[s] the risk of consumers being treated in an unfair, deceptive, or abusive manner.”¹⁵ The convenience checks in this hypothetical might lead an examiner to flag the following risk factors in the downloadable Risk Assessment Template:

- The profitability of a product is dependent upon penalty fees
- Pricing structure and other features and terms are combined in a manner that is likely to make the total costs of the product difficult for consumers to understand.
- The product is targeted to students, young adults, low-income consumers or consumers on limited fixed incomes, consumers with limited experience with financial products or services, consumers in or who have recently experienced financial distress.

¹⁴ Manual at UDAAP 4.

¹⁵ Manual at UDAAP 1.

- Complex products are marketed to consumers not likely to benefit from them or who may likely be harmed by them.¹⁶

The examination process may or may not put these concerns to rest, but an additional element of the hypothetical can create additional problems.

In response to California litigation in which batch processing of the day's transactions in high-to-low order created an unfairly large number of overdraft fees, NASB has recently switched all its batch processing to a low-to-high order. This means that transactions are posted with the smallest dollar amounts first, and larger amounts later, regardless of when they happened in the course of the day. Since the convenience checks charge overdraft fees in proportion to the size of the check that overdraws the account (not in proportion to the amount of the overdraft), this ordering has the effect of maximizing customer fees for the overdraft service.

The coincidence of the convenience-check rollout and the batch-processing policy change could concern prudential regulators and CFPB directors. Moreover, in response to the February 2012 request for input, several dozen complaints along these lines could have been filed:

Until February, when I received NASB's convenience-check offer, I had always paid my rent in cash. My \$1000 February rent convenience check was been deposited at noon on March 1, but posted at midnight after an ATM withdrawal of \$60 that I incurred later in the day. The two transactions together overdraw my account by \$20 – but the overdraft fee was \$110, 11% of the check's face value. I thought that if I overdraw the account the penalty would have just been 11% of \$20! Or at most 11% of \$60. This is a scam.

Under such a scenario, or for other reasons, a Deputy Assistant Director could contact the Enforcement Division to initiate an investigation.

Once an investigation has been triggered, the process that follows is governed by the newly finalized rules in 12 CFR Part 1080. The CFPB's rules for investigations and adjudications are modeled on procedural regimes used by prudential regulators¹⁷ pursuant to FIRREA (56 FR 38024), by the SEC (17 CFR part 201), and by the FTC (16 CFR part 3). Many elements of those procedures are adopted unchanged, so precedents from those bodies can be useful in predicting how events will unfold.

II. Factfinding: Civil Investigative Demands

CFPB investigators' primary tool is the Civil Investigative Demand for documents, testimony, or other evidence. They may be issued to an entity under investigation or to third parties. The authority to issue CID's resides solely in the Director, Assistant Directors, and Deputy Assistant Directors. Rule 1080.6(a). CID's can be enforced in federal court. Rule 1080.10(b).

¹⁶ Manual at Risk Assessment 2-6.

¹⁷ The Federal Reserve Board of Governors, the FDIC, the National Credit Union Association, and the Office of the Comptroller of the Currency.

Civil Investigative Demand

Any CID will inform its recipient¹⁸ of the nature of the alleged conduct being investigated, and the law that that conduct may have violated. Rule 1080.5. This statutory requirement contrasts with the SEC practice of serving and interviewing persons without revealing whether they are a target of an investigation, or merely a witness. It has benefits for witnesses but can result in unwanted exposure for the entity under investigation. “Bureau investigations generally are non-public, [but] Bureau investigators may disclose the existence of an investigation to potential witnesses or third parties to the extent necessary to advance the investigation.” Rule 1080.14(b).

6(c) Meeting on CID Compliance (within 10 days)

Unless a Director-level official decides otherwise, the recipient of the CID, whether part of the entity being investigated or a third party, must meet with investigators to discuss compliance within ten calendar days after the CID is received. Rule 1080.6(c). The meeting may be in person or by phone. Those attending the meeting must include people with knowledge of the recipient’s information systems, including an appropriate IT officer for discussion of electronic discovery. Arrangements for compliance may include extensions of time or a rolling document production schedule. Rule 1080.6(d). The CID will include a deadline for compliance, which can be discussed at the 6(c) meeting.

Petition Objecting to CID (within 10 days)

Once it has participated in the meeting “meaningfully” and registered any objections, the CID recipient is permitted to file those objections in a petition. Rule 1080.6(e). Objections not raised in the 6(c) meeting cannot be raised in the petition. Rule 1080.6(c)(3). The petition must include a recital describing the recipient’s efforts to resolve disputed disclosure issues, including a description of the 6(c) meeting and of any disputes resolved there. Rule 1080.6(e)(1). Unless a stricter deadline is set in the CID, this petition to modify or set aside the CID must be filed within twenty calendar days after the demand is received. The attorney must sign objections, and supporting documentation must be attached. “Requests for extensions of time are disfavored.” Rule 1080.6(e)(2).

Such a petition stops the clock on the production deadline set in the CID, but only for the elements of the demand to which objections have been raised. Rule 1080.6(f). The production deadline is unchanged for other elements of the CID.

Claims of privilege may not serve as the basis for a petition to modify the order; instead, the CID recipient must produce all responsive unprivileged documents along with a privilege log. Rule 1080.8(b) and (a). Inadvertent and intentional waivers of privilege are handled just as under the Federal Rules of Civil Procedure.

¹⁸ In one place, the Rules refer to “service” of the demand, Rule 1080.6(e), but technically correct service of process does not seem to be required.

In response to a petition challenging a CID, Bureau investigators may file their own memo with the CFPB Director. Rule 1080.6(e)(3). The party that has objected to the CID has no opportunity to read or respond to this document. See commentary, CPFEB-2011-0007 at 14-15.

The Director faces no deadline in ruling on the petition.

Some CIDs require oral testimony. A properly filed petition objecting to any part of such a CID can be filed with the hearing officer, but “no arguments in support thereof will be allowed at the hearing.” Rule 1080.9(b)(4). Hence, even if raised in a duly filed petition, objections not related to a constitutional privilege cannot prevent an investigator from requiring testimony on those topics. If the petition is granted, relief will have to be retroactive.

Director-level officials can grant extensions of CID deadlines. Rule 1080.6(d).

Deadline for Production (set by the CID, extended at Bureau’s discretion)

- *Production of Documents and Tangible Things*

Under Rule 1080.6(a)(1), the CID must specify documents as a class “with such definiteness and certainty as to permit such material to be fairly identified,” and provide a deadline for their production. When documents or things are produced, there must also be a sworn certification that nothing has been withheld, from someone with “knowledge of the facts and circumstances” of the production process.

- *Interrogatories*

Under 1080.6(a)(3), reports and interrogatory answers demanded in a CID must be provided in writing and under oath, with a sworn certification of completeness.

- *Oral Testimony*

A CID may order a hearing for the purpose of sworn oral testimony from any person. Typically, the entity under investigation is not present or represented at this hearing. “Bureau investigators shall exclude” from the hearing room any party except the testifying witness (with counsel), unless the witness consents and the investigator conducting the hearing exercises his or her own discretion to allow someone else to attend. Rule 1080.7(c).

“The Director has the nondelegable authority to request approval from the Attorney General of the United States for the issuance of an order requiring a witness to testify [...] and granting immunity under 18 U.S.C. 6004.” Rule 1080.12.

At the hearing, a witness is allowed to consult with counsel about a question only to consider a claim of privilege. Except to assert privilege, counsel may not object to a question, and the witness may not refuse to answer. Rules 1080.9(b)(1)-(2). At the conclusion of testimony, the officer has

discretion to grant a request from the witness's attorney that the witness be allowed to clarify some aspect of the testimony. Rule 1080.9(b)(4).

Afterward, the witness is allotted thirty days to review and certify the accuracy of the transcript. Rule 1080.9(a). After the witness reviews and corrects the transcript or waives the opportunity to do so, it is "promptly" sent to the entity. Rule 1080.7(c).

The investigation concludes behind closed doors, but the respondent entity then has an opportunity to make its case before charges are brought.

III. The Entity Is Notified of Impending Charges, and May Respond with Legal Arguments

Early Warning Notice

If the investigation provides a basis for further enforcement action, the Bureau typically contacts the respondent by telephone and with a follow-up letter known as an Early Warning Notice. See CFPB Bulletin 2011-04. This notice is not required by the rules, and may be forgone "when the Office of Enforcement needs to act quickly." *Id.* The practice of advance notice is modeled on the SEC's "Wells Notice," and presumably will lead to similar practices and requirements. As in the SEC context, for example, this notification of forthcoming civil charges will probably not trigger a disclosure requirement under securities laws for publicly held companies.¹⁹

Early Warning Notice Submission in response (within fourteen days)

The Notice includes an invitation for the respondent to make an argument that enforcement action should not be taken, as a matter of law or policy. This statement, called the "Early Warning Notice submission," is due fourteen days after the initial phone notification of potential enforcement action. Supporting facts should be attached in affidavits based on firsthand knowledge, but the document should not center on disputed facts. It should focus on legal and policy reasons the Bureau should forbear from further action. If enforcement action proceeds, this document will accompany the Office of Enforcement's referral of the matter to the adjudicatory body.

Advocacy in the Early Warning Notice submission should be legal and policy-oriented, focusing on consumer risk rather than the rights or intentions of the respondent.

¹⁹ Cf. *Richman v. Goldman Sachs Grp.*, No. 10-civ-3461, 2012 WL 2362539, at *7-8 (S.D.N.Y. June 21, 2012) (holding that because the enforcement staff's recommendation of charges might not "mature" into litigation, a publicly-held entity's receipt of a Wells Notice does *not* create a duty to reveal the fact of a "pending legal proceeding ... known to be contemplated by governmental authorities" under Securities Regulation S-K, Item 103); see also *id.* at *7 (noting that failure to report the Notice to FINRA violated FINRA Rule 2010, but created no private cause of action under §10(b) of the Exchange Act).

IV. Civil Charges Are Brought

If the arguments in the Early Warning Notice submission are unavailing, the Office of Enforcement can bring an action in court, refer the matter to another agency, or refer it to the CFPB's own Office of Administrative Adjudication. Rules 1052-54; 1080.11. In the latter scenario, described below, the new rules of CFR Chapter X, Part 1081 will govern. Other regulatory regimes may become involved, whether through CFPB collaboration²⁰ or collaterally.²¹

If the entity under investigation communicates proactively with the CFPB before charges are brought, the terms of a settlement may be established even before the charges are brought. Such negotiations may not be used to bring an investigation to a premature close, but they can foreshorten the adjudication process to a single event. If the respondent agrees to a settlement before charges are filed, a proceeding may be commenced by filing a stipulation and a consent order concluding that same proceeding. Rule 1081.200(d).

Notice of Charges

The Office of Administrative Adjudication serves a notice of charges on the respondent entity using overnight delivery or (with time limits tolled for two extra days, Rule 1081.114(c)(1)) registered mail. Subsequent filings can be made by e-mail. Service is effective when the item is sent. Time limits are then calculated by counting every calendar day after the day of service, then extending time through a weekend if necessary. Rule 1081.114(a). The Director and the hearing officer can grant extensions of time limits, but "should adhere to a policy of strongly disfavoring" them. Rule 1081.115(b).

Publication of Charges (ten days later)

The fact that charges have been filed can be published overtly on the Bureau's website and in the Federal Register ten days from the notice of charges, unless the respondent files a motion for a protective order during that time. Rule 1081.200(c); see *also* below on protective orders under Rule 1081.119.

Answer to the Notice of Charges (within fourteen days)

An answer to the notice of charges is due fourteen days from the day of service of process. Rule 1081.201(a).²² It must contain denials of all allegations the respondent does not wish to concede, and any affirmative defenses the respondent intends to raise. Rule 1081.201(b). The answer must be accompanied by a statement of financial interest. Rule 1081.201(e).

²⁰ <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-considers-rules-on-prepaid-cards/>

²¹ For example, the filing of charges almost certainly will trigger SEC disclosure obligations for publicly held companies, under Section 13 of the Exchange Act, Regulation S-K Item 103 (requiring disclosure of any "pending legal proceeding ... known to be contemplated by governmental authorities"); and under the supplemental rule at 17 C.F.R. § 240.12b-20 (requiring supplemental reports to render previous "required statements... not misleading"). *Cf., e.g., United States v. Yeaman*, 987 F.Supp. 373, 381 (E.D.Pa. 1997) (SEC investigation context).

²² A motion to dismiss does not alter the requirement to meet this deadline for an answer. Rule 1081.212(a).

The hearing officer faces a deadline of his or her own: a decision recommending action to the Director is expected “no later than 300 days” after the filing of the notice of charges. Rule 1081.400(a). This deadline is not altered by any extensions granted to parties for intermediate time limits. Rule 1081.115(d). The Director can extend this deadline upon request of the hearing officer, but only if a request is filed by thirty days before the deadline. Rule 1081.400(b).

V. The Bureau Provides Evidence to the Respondent, and Confidentiality Is Addressed

Unlike the investigative process, the administrative adjudication process requires transparency. This means that the Bureau may not covertly steer the officer toward a desired result: “all direction by the Bureau to the hearing officer concerning any adjudication proceedings shall appear in and be made part of the record.” Rule 1081.105(b); see also Rule 1081.110(e) (forbidding investigative personnel from participating in the adjudication process, except as witnesses or prosecuting counsel). It also means that the respondent is entitled to virtually all factual material on which the CFPB based its decision to press charges.

Information Accessible to the Respondent

CFPB Disclosure of Documents (within seven days of the Notice of Charges)

In providing factual evidence to the respondent entity, the CFPB has adopted the SEC’s “affirmative disclosure approach.” See 17 CFR 201.230. Within seven days of the notice of charges, the Office of Administrative Adjudication makes available to the respondent for copying virtually all the factual material the Bureau has compiled, including (with few exceptions) all consumer complaints, transcripts, and documents provided by third parties to the investigation. Rules 1081.206(a)(1) and (f). In addition to factual materials, final reports from other offices of the Bureau must be made available to the respondent if the Enforcement Office intends to introduce them in the proceeding; and all CID’s must be made available. Rule 1081.206(a)(2)(ii) and (i).

On the other hand, documents created by Bureau staff during routine examination proceedings, during an investigation, or during the litigation itself are *not* made available unless the Bureau intends to introduce them in the proceeding. Rule 1081.206(b)(1)(ii). Additional safeguards protect confidential informants²³ and sister agencies who provided material under a confidentiality agreement; moreover, the officer can block access to documents he or she finds irrelevant, or “otherwise, for good cause,” not to be shared with the respondent. Rule 1081.206(b)(i), (iii)-(vi).

Notwithstanding those shields, the Bureau is required to produce “material exculpatory evidence” of any kind. Rule 1081.206(b)(2).

²³ Information from a confidential source, sometimes including the source’s identity, will be provided “to the extent the Bureau plans to call a source as a witness,” or rely upon information provided by that source.

The hearing officer is empowered to require the CFPB Enforcement Office to produce a “list of withheld documents,” analogous to a privilege log. The officer can then require production of documents on that list – but no provision grants the respondent a right to see the list or advocate for access to any document. Rule 1081.206(c). During routine examinations of large banks, Bureau personnel produce and file a wide array of “workpapers” – completed checklists and observations based on downloadable templates, spreadsheets, documentation of staff and management interviews, meeting agendas and minutes, and documentation of the examiner’s compliance research and reference work. Manual at 13. Under the Bureau’s analogy to the work-product doctrine, such workpapers created by Bureau staff are not discoverable, although the respondent can, presumably, attempt to assert waiver and have the hearing officer subpoena them. See Rule 1081.206(a)(3).

Documents can be photocopied at the respondent’s expense at the Bureau’s own office; alternatively, at its discretion, the Bureau may allow removal of documents into the respondent’s safekeeping, or electronic access. Rule 1081.206(e)-(f).

Information Accessible to the Public

Although it allows for easy access to factual evidence, the transparency principle in adjudications also means that the respondent is exposed to negative publicity: “all papers filed in connection with an adjudication proceeding are presumed to be open to the public.” Rule 1080.111(c). Confidential treatment of documents can be authorized by the Director, the hearing officer, or a federal court. Otherwise, a party can file a motion for a protective order. While such a motion is pending, the documents in question are kept nonpublic. Rule 108.119(e).

Non-parties may also file motions for a protective order, and must be given a ten-day warning to afford them the opportunity to do so before the disclosure of any information obtained from them that is subject to a claim of confidentiality. Rule 1081.119(a).²⁴ Respondent filings that include potentially confidential information from third parties must include a certification that such a warning was duly provided.

A proposed protective order should accompany a party’s motion. The order can be designed to shield information from the parties to the case, or merely from the public at large. Rule 1081.119(b). The motion itself will not be confidential, and therefore should describe the information at issue only in general terms. Rule 1081.112(b). Once the motion is filed, the hearing officer can request more information in support of the motion; a party has five days to produce that support. Rule 1081.119(d).

Motion for Protective Order as to Confidential or Injurious Materials

²⁴ Along with such a motion, the intervenor must file its own statement of financial interest. Rule 1081.201(e).

Protective orders are granted in an adjudication for any of four reasons: (1) all the relevant parties stipulate to them; (2) public disclosure is prohibited by law; (3) “clearly defined, serious injury” would otherwise result; or (4) the material “constitutes sensitive personal information.” Rule 1081.119(c). This last category is narrowly defined to include personal identification numbers (including account numbers and full dates of birth) and individually identifiable health information. Rule 1081.112(e). Hence, confidentiality will often hinge upon category #3, and on whether the respondent can clearly define the “serious injury” threatened by the exposure of certain documents.

Preservation of Privilege for Materials Provided to the Bureau

The CFPB maintains that respondent entities and CID recipients may provide information to the Bureau without waiving any associated privilege. Other regulatory bodies have a statutory basis for such preservation of privilege, and privileged documents they might in turn supply to other agencies cannot be used against the respondent entity. But Congress has not granted the CFPB such a basis, and the fallback argument – that privilege is preserved because disclosure is not “voluntary” – has been abandoned by the Bureau in recent months. There is no ambiguity in the Bureau’s position about the preservation of privilege, but it is not clear that a court will enforce it as against an opponent in later litigation.

VI. Pre-hearing Logistics, Discovery, and Motion Practice

Once initial disclosures and protections are complete, the case takes on a litigation posture, with the Bureau’s Enforcement Office serving as one of the parties. “As early as practicable,” lawyers for the parties must meet to discuss their respective positions and consider settlement. Rule 1081.203(a). They should also prepare for a pretrial scheduling conference with the hearing officer.

The Scheduling Conference (within 20 days of notice of charges)

The scheduling conference takes place within twenty days of service of the notice of charges, unless postponed by assent of all parties. Rule 1081.203(b). The agenda includes scheduling the hearing, clarification of the issues in the case, settlement, discovery procedures, and the parties’ intentions as to witnesses, experts, and potential summary disposition motions.

Subsequent meetings to discuss the same issues may be convened by the hearing officer. Rule 1081.214.

The Adjudication Rules (unlike the Rules for Investigations) encourage the parties to reach a settlement.²⁵ A settlement offer in writing can be extended at any time by the respondent, and will be forwarded to the Director on request, along with a recommendation by the Office of Enforcement. The offer must provide for a waiver of the usual division of responsibilities with the Bureau, so that the Director can communicate *ex*

²⁵ Rule 1081.120; *cf.* 17 CFR 201.240 (similar rules for the SEC).

parte about the merits of the offer with enforcement personnel. If accepted, the offer can then be reduced to stipulations and a consent order. Rule 1081.120(d).

VII. Motion Practice

Dispositive motions – motions to dismiss or for summary disposition – are governed by the same standards as in the Federal Rules of Civil Procedure. A brief in support of such a motion may not exceed thirty-five pages. Rule 1801.212(e). A response, also limited to thirty-five pages, is then due within twenty days. Rule 1801.212(f). In turn, a reply to a response, confined to ten pages, is then due five days later. *Id.* The hearing officer is then required to rule, whether or not the officer opts to hold oral argument, within thirty days. Rule 1801.212(h).

Non-dispositive motions are provided for in the rules as well. Failure to oppose a non-dispositive motion is deemed consent to its proposed order. Rule 1081.25(d)(3). Response briefs are due ten days after a brief is filed, with reply briefs due three days after the filing of the response brief. Rule 1081.205(d). As mentioned below, response briefs to a motion to quash a subpoena are an exception: they are due within five days, and no reply is allowed. Rule 1081.209(f)(1).

Interlocutory review of the hearing officer's decisions is governed by Rule 1081.211; it hinges on whether subsequent review of the decision would be an inadequate remedy for an error.

VIII. Further Discovery Is Conducted by the Respondent

In addition to accessing all the documents the Bureau has already obtained – although none of its internal deliberations – the respondent entity may request new subpoenas to be issued by the hearing officer. Rule 1081.208. The respondent may not issue or enforce such subpoenas; they must issue from the hearing officer. No depositions or interrogatories may be obtained from third parties, except in the case of witnesses who will be unavailable for the hearing. In other words, a subpoena to a third party normally may compel only document production or in-person testimony at the hearing itself. This rule is intended to prevent the use of depositions to delay resolution of the case.

In general, then, sworn testimony (besides that gathered during the investigation without the respondent present) occurs only at the hearing. The only exception to this rule allows for depositions of third parties who are unavailable for the hearing under the standards of Rule 1081.209(a)(1). On receiving a request for such a subpoena, the hearing officer may call for a showing that the testimony will be relevant and reasonable in scope, and will give other parties the opportunity to stipulate to the testimony to obviate the need for the deposition. Rule 1081.209(a)(3).

Parties receiving subpoenas from the hearing officer may move for them to be quashed or modified. Rules 1081.208(h), 1081.209(f). Before doing so, they must meet and confer with the party requesting the subpoena; the motion must certify that they have done so. Rule 1081.205(f). Such motions must be filed within ten days of service of the subpoena. A response is due from the party requesting the subpoena only

five days later. Rule 1081.209(f)(1). No reply to the response is allowed. Neither brief may exceed fifteen pages. Rule 1081.205(e).

Expert discovery is conducted in advance of the hearing under Rule 1081.210. The initial schedule for expert disclosures and depositions is set at the scheduling conference. Rule 1081.203(b)(8). When the expert reports have been filed, depositions of the experts may be conducted in the following 21 days. A rebuttal expert report may then be filed within the 28 days after the expert report is filed. (If a rebuttal report goes beyond the scope of the report it is rebutting, a motion to strike or file a surrebuttal may be filed within five additional days of the rebuttal deadline.) Communications with experts and potential experts, and draft expert reports, are privileged; facts and assumptions provided to the experts by counsel are not. Rule 1081.201(e).

IX. Preliminaries to the Hearing

Submission of Prehearing Statement (ten days before hearing)

A prehearing statement is due ten days before the hearing. It should include

(1) an outline or narrative summary of [the party's] case or defense, and the legal theories upon which it will rely; (2) A final list of witnesses to be called to testify at the hearing, including the name and address of each witness and a short summary of the expected testimony of each witness; (3) Any prior sworn statements that a party intends to admit into evidence pursuant to §1081.303(h); (4) A list of the exhibits to be introduced at the hearing along with a copy of each exhibit; and (5) Any stipulations of fact or liability.

If a party is presenting expert testimony, all of the expert's credentials must also be filed at this time, if not filed previously. Rule 1081.210.

The hearing officer may convene meetings to discuss the logistics of the hearing itself. Rule 1081.214.

X. The Hearing

The burden of proof on the ultimate issues of the case rests on the Bureau and its "enforcement counsel," who functions like the prosecutor in a criminal trial. Unlike in a criminal trial, though, the rules of evidence are relaxed to the fullest extent allowable under the Administrative Procedures Act. Evidence must be excluded only if it is privileged, irrelevant, unreliable, dilatory, or cumulative, or creates inordinate danger of unfair prejudice or confusion. Rule 1081.303(a). "Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection." Rule 1081.303(e)(3).

If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice of charges or answer, the hearing officer may admit the evidence [absent a showing of] unfair prejudice.... The hearing officer may grant a continuance to enable the objecting party to meet such evidence. Rule 1081.202(b).

In addition to sworn statements from witnesses determined to be unavailable, other sworn statements can be proffered and will be admitted at the discretion of the hearing officer. Such evidence is disfavored, but stipulations by both parties will usually make them admissible. Rule 1081.303(h).

Any document prepared by a prudential regulator, including the CFPB, or by a State regulatory agency is presumptively admissible either with or without a sponsoring witness. Rule 1081.303(d)(2).

Production and correction of the hearing record is governed by Rule 1081.304.

XI. Motion Practice after the Hearing; Decision; and Appeals

Parties' Briefs and Proposed Orders (30 days after hearing)

Once the record of the hearing is filed, each party is served with notice and then has thirty days to file proposed findings of fact, proposed conclusions of law, and a proposed order. Rule 1081.305(a). There is no apparent page limit for these briefs.

Parties' Responsive Briefs (fifteen days later)

There is no apparent page limit for the briefs in response due fifteen days later (which must, however, be confined to the arguments of the other party's brief). Rule 1081.305(b).

Hearing Officer's Recommendation (30 days later)

Unless the 300-day deadline is sooner, the filing of the last responsive brief establishes a deadline 30 days later for the hearing officer's decision recommending action to the Director. Remedies in case of an adverse decision may include restitution, disgorgement, damages, public notification about the violation, injunctions, and civil forfeitures. See CFPB Supervision Manual at 6.

Notice of Appeal to the Director (ten days later)

A party has ten days to file a notice of appeal, allowing it to make an argument on a specified issue to the Director, requesting that he or she override the hearing officer's recommendation. Rule 1081.402(a)(1). Such an appeal is required in order to exhaust administrative remedies before bringing a matter to federal district court. Rule 1081.402(c).

Brief on Appeal to the Director (thirty days later)

Before thirty days from the service of the recommendation, the party must file its brief (no more than thirty pages) with the Director.

Response Brief of Appellee (thirty days later)

Reply Brief of Appellant (seven days later)

Responsive briefs, also no more than thirty pages, are due thirty days later, and the appellant then has seven days to reply with a brief of no more than fifteen pages. Oral argument should be requested on the first page of initial briefs. The Director has the option to issue an order setting a date for oral argument. Rule 1081.404(a). Further briefing may be called for. Rule 1081.405(a).

Decision by the Director (ninety days later)

After the deadline for reply briefs, the Director has ninety days to issue a decision, which is served on the parties and published on the CFPB's website. Rule 1081.405(d)-(e).

Motion for Reconsideration (fourteen days later)

Within 14 days, a party may move for reconsideration only in light of "new questions raised by the final decision or final order." 1081.406.

Effective Date of Decision (thirty days after Decision)

The decision becomes effective thirty days after it is served, unless during that time a party files a motion for stay and the stay is granted in the discretion of the Director. Neither the filing of such a motion nor the initiation of proceedings to seek judicial review operates as a stay of the order. Rule 1081.407.

XII. Judicial Review

Per 5 U.S.C. §703 judicial review can be sought in a "court of competent jurisdiction" which will generally be the District Court unless a cease-and-desist order is being contested, in which case it will be a United States Court of Appeals, per 12 U.S.C. §5563(b)(4).

Judicial review will be governed by the Administrative Procedures Act, 5 U.S.C. §706(2) which allows the decision to be set aside if it was made, for example, "without observance of procedure required by law," or if it is "unsupported by substantial evidence[.]"

In lieu or in addition to challenging the CFPB's adjudication, the appeal can challenge the CFPB's regulation under the same statute, generally as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

If the respondent seeks judicial review of the Director's decision, it can also ask the Director to stay his or her final order pending that review.[]

CFPB Investigation & Adjudication Timeline¹

Investigation by the Office of Enforcement

CID-0	Receipt of a Civil Investigative Demand by Witness or Respondent Entity
Day CID-10	§ 6(c) Meeting with Enforcement Staff about CID Compliance
Day CID-20 or before	Petition Objecting to CID <ul style="list-style-type: none">Limited to arguments raised in 6(c) meeting
As specified	Production of Evidence in Compliance with CID <ul style="list-style-type: none">deadline set in the CID; tolled as to matters contested in Petition; extended at Bureau discretion

* * *

Day T-0 CID	Recipient's Oral Testimony before Hearing Officer and Production of Transcript <ul style="list-style-type: none">The respondent is not represented; no objections by witness's counsel except to claim privilege.
Day T-30	Transcript Review and Certification by Witness
No later than Day T-31	Transcript Sent to Respondent Entity

Adjudication by the Office of Administrative Adjudication, under a hearing officer:

Day W-0	Early Warning Notice of Charges Recommended to Director
Day W-14	Early Warning Notice Submission in response

* * *

Day 0	Notice of Charges
"As early as practicable"	Meeting with Enforcement Officer to Discuss Parties' Positions

¹ Some deadlines are measured from an intervening action by the opposing party; these are labeled "Day x or before."
SKYLIGHT OFFICE TOWER
1660 WEST 2ND STREET, SUITE 1100
CLEVELAND, OHIO 44113-1448

Day 7 CFPB Disclosure of Materials Obtained Pursuant to CID's
Day 10 Motion for Protective Order as to Injurious or Confidential Materials
Day 10 Publication of Charges (*if no motion for protective order is pending*)
Day 14 Respondent's Answer to the Notice of Charges
Day 20 Scheduling Conference

* * *

Day E-0 Filing of Expert Reports
Day E-21 Expert Depositions complete
Day E-28 Filing of Expert Rebuttal Reports
Day E-33 or before Motion to Strike Expert Assertions or for Leave to File Surrebuttal

* * *

Day Q-0 Request for Hearing-Officer Subpoena and 'Prompt' Issuance on Authorization
• No depositions or interrogatories, except for witnesses found to be unavailable for the hearing
Before motion to quash Meeting between Recipient of Subpoena and Party Requesting Subpoena
Day Q-10 Motion to Quash Subpoena (*15 pages*)
Day Q-15 or before Response to Motion to Quash (*15 pages; No reply allowed*)
No sooner than Q-14 Deposition of Witness Unavailable for Hearing

* * *

Day D-0 Motion for Dismissal or Summary Disposition (*35 pages; Does Not Toll Deadlines*)
Day D-20 Response to Dispositive Motion (*35 pages*)
Day D-25 or before Reply in Support of Dispositive Motion (*10 pages*)

Day D-30 or before Ruling on Dispositive Motion

* * *

Day L-0 Motion in Limine or Other Non-Dispositive Motion

Day L-10 Response to Motion in Limine

Day L-13 or before Reply in Support of Motion in Limine

* * *

Day A-0 Any Ruling by the Hearing Officer

Day A-5 Motion to Certify Ruling for Interlocutory Appeal to the Director

Day A-8 or before Opposition Response to Motion to Certify Ruling for Interlocutory Appeal

Day A-11 or before Decision on Certification for Interlocutory Appeal

* * *

Day H-0 Submission of Prehearing Statement

Day H-10 Hearing

Day H-40 Parties' Briefs and Proposed Orders

Day H-55 Parties' Responsive Briefs (*each limited to arguments in opposing brief*)

no later than
Day H-85
or Day 300 Hearing Officer's Recommendation

no later than
Day H-95
or Day 310 Notice of Appeal to the Director
● Appeal required to exhaust administrative remedies

no later than
Day H-120 or
Day 330 Brief on Appeal to the Director (*30 pages*)

no later than Response Brief of Appellee (*30 pages*)

Day H-150 or
Day 360

no later than
Day H-157
or Day 367

Reply Brief of Appellant (15 pages)

At Director's
discretion

Oral Argument on Appeal

90 days after reply
deadline, no later than
Day H-247
or Day 457)

Decision by the Director

No later than
Day H-261
or Day 471

Motion for Reconsideration

- "New questions" only

30 days after Decision,
no later than
Day H-277
or Day 487

Effective Date of Decision in the absence of a stay

Judicial Review:

- Per 5 U.S.C. §703 judicial review can be sought in a "court of competent jurisdiction"
 - Generally be the District Court
 - For cease-and-desist orders, the case will be before a United States Court of Appeals. 12 U.S.C. §5563(b)(4).
- Judicial review governed by the Administrative Procedures Act, 5 U.S.C. §706(2)
 - Allows the decision to be set aside if, among other reasons, it was made "without observance of procedure required by law," or if it is "unsupported by substantial evidence[.]"
- An appeal can challenge:
 - The CFPB's adjudication,
 - The CFPB's regulation, generally as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."
- If judicial review of the Director's decision is sought, an appellant can ask the Director to stay the final order pending that review