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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1081

[Docket No. CFPB–2022–0009]

RIN 3170-AB08

Rules of Practice for Adjudication Proceedings

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule.

SUMMARY: The Rules of Practice for Adjudication Proceedings (Rules of Practice) govern adjudication proceedings conducted by the Consumer Financial Protection Bureau (Bureau). The Bureau issued a procedural rule to update the Rules of Practice (Updated Rules of Practice). The Updated Rules of Practice expanded the opportunities for parties in adjudication proceedings to conduct depositions. They also made amendments concerning timing and deadlines, the content of answers, the scheduling conference, bifurcation of proceedings, the process for deciding dispositive motions, and requirements for issue exhaustion, as well as other technical changes. The Bureau sought to provide the parties with earlier access to relevant information and also foster greater procedural flexibility, which the Bureau expected would ultimately contribute to more effective and efficient proceedings. The Bureau invited the public to submit comments on the Updated Rules of Practice. After considering the comments, the Bureau has decided to retain the amendments.

DATES: This rule is effective on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Kevin E. Friedl or Christopher Shelton,

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SUPPLEMENTARY INFORMATION:

I. Background

The Consumer Financial Protection Act of 2010 (CFPA) establishes the Bureau as an independent bureau in the Federal Reserve System and assigns the Bureau a range of rulemaking, enforcement, supervision, and other authorities.[1] The Bureau's enforcement powers under the CFPA include section 1053, which authorizes the Bureau to conduct adjudication proceedings.[2] The Bureau finalized the original version of the Rules of Practice, which govern adjudication proceedings, in 2012 (2012 Rule).[3] The Bureau later finalized certain amendments, which addressed the issuance of temporary cease-and-desist orders, in 2014 (2014 Rule).[4]

II. Overview of the Updated Rules of Practice and Comments Received

The Bureau issued the Updated Rules of Practice in February 2022.[5] The Updated Rules of Practice were exempt from the notice-and-comment requirements of the Administrative Procedure Act, because they were a rule of agency organization, procedure, and practice.[6] Consequently, they were effective upon publication (although no adjudication proceedings have occurred under the Updated Rules of Practice). The Bureau invited the public to submit comments.

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[1] Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376, 1955-2113 (2010).

[2] 12 U.S.C. 5563; *see also* section 1052(b), 12 U.S.C. 5562(b) (addressing subpoenas).

[3] 77 FR 39057 (June 29, 2012); *see also* 76 FR 45337 (July 28, 2011) (interim final rule).

[4] 79 FR 34622 (June 18, 2014); *see also* 78 FR 59163 (Sept. 26, 2013) (interim final rule).

[5] 87 FR 10028 (Feb. 22, 2022).

[6] 5 U.S.C. 553(b).

The Bureau received four comments. These came from a group of trade associations, a consumer advocacy organization, a bank holding company, and a legal foundation.[7] The group of trade associations noted that administrative adjudication can play an important and valuable role in an effective regulatory system by providing an efficient, and equally fair, alternative to civil litigation. However, the trade associations opposed the changes regarding the content of answers, bifurcation of proceedings, rulings on dispositive motions, and issue exhaustion. By contrast, the consumer advocacy organization supported the rule, stating that it simultaneously strengthens the ability of the agency to protect consumers and the rights of respondents subject to agency action. The bank holding company expressed support for the trade associations' comment. Finally, the legal foundation opposed the issue-exhaustion provision.

After carefully considering these comments, the Bureau has decided to retain the amendments made in the Updated Rules of Practice. The Bureau addresses the comments in more detail below.

III. Legal Authority

Section 1053(e) of the CFPA provides that the Bureau "shall prescribe rules establishing such procedures as may be necessary to carry out" section 1053.[8] Additionally, section 1022(b)(1) provides, in relevant part, that the Bureau's Director "may prescribe rules . . . as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and

[7] The Bureau also received other communications on the docket that did not relate to the topic of adjudication proceedings.

[8] 12 U.S.C. 5563(e). As courts have recognized, the term "necessary" is "a 'chameleon-like' word" whose meaning can vary based on context; in the context of section 1053(e), the Bureau interprets "'necessary' to mean 'useful,' 'convenient' or 'appropriate' rather than 'required' or 'indispensable.'" *Prometheus Radio Project* v. *FCC*, 373 F.3d 372, 391-94 (3d Cir. 2004). Section 1053 sets out the fundamental features of Bureau adjudications, but it leaves many details open that can only be addressed through more specific Bureau procedures. In turn, those Bureau procedures could not be effective, or fair to the parties, if they were limited to only the most rudimentary steps that would be indispensable to holding a skeletal proceeding. Instead, the Bureau believes that Congress gave the Bureau room to adopt procedures that are useful in carrying out section 1053.

objectives of the Federal consumer financial laws, and to prevent evasions thereof."[9] The Bureau issues this rule based on its authority under section 1053(e) and section 1022(b)(1).

IV. Section-by-Section Analysis

1081.114(a) Construction of time limits.

12 CFR 1081.114(a) (Rule 114(a)) governs the computation of any time limit that is prescribed by Rules of Practice, by order of the Director or the hearing officer, or by any applicable statute. The Updated Rules of Practice amended Rule 114(a) for the purpose of simplifying and clarifying it, based on similar amendments made to Federal Rule of Civil Procedure 6(a) in 2009.

As amended by the Updated Rules of Practice, Rule 114(a) provides for time periods to be computed in the following manner. First, exclude the day of the event that triggers the period. Second, count every day, including intermediate Saturdays, Sundays, and Federal holidays. Third, include the last day of the period unless it is a Saturday, Sunday, or Federal holiday as set forth in 5 U.S.C. 6103(a). When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday.

The Updated Rules of Practice also made adjustments to various specific deadlines in the Rules of Practice, to roughly compensate for the update in computation method. For example, a 10-day period under the previous computation method would most frequently correspond to a 14-day period under the updated computation method, so 10-day periods were generally changed to 14 days.

No comments opposed the amendments to Rule 114(a), and the Bureau is retaining them.

[9] 12 U.S.C. 5512(b)(1).

1081.115(b) Considerations in determining whether to extend time limits or grant postponements, adjournments and extensions.

12 CFR 1081.115(b) (Rule 115(b)) concerns motions for extensions of time. Under the 2012 Rule, the provision stated that the Director or the hearing officer should adhere to a policy of strongly disfavoring granting motions for extensions of time, except in circumstances where the moving party makes a strong showing that the denial of the motion would substantially prejudice its case. It then listed factors that the Director or hearing officer will consider.

The Updated Rules of Practice simplified the provision, to state only that such motions are generally disfavored, while retaining the same list of factors that the Director or hearing officer will consider. The preamble explained that the Bureau continues to believe that extensions of time should generally be disfavored, but it believes that relatively more flexibility than the previous language provided may be appropriate.

No comments opposed the amendment to Rule 115(b), and the Bureau is retaining it.

1081.201(b) Content of answer.

12 CFR 1081.201(b) (Rule 201(b)) requires a respondent to file an answer containing, among other things, any affirmative defense.

The Updated Rules of Practice amended Rule 201(b) to make clear that the answer must include any avoidance, including those that may not be considered "affirmative defenses." As the Securities and Exchange Commission (SEC) explained when it adopted a similar amendment to its rules of practice, timely assertion of such theories should help focus the use of prehearing discovery, foster early identification of key issues and, as a result, make the discovery process more effective and efficient.[10]

[10] 81 FR 50211, 50219-20 (July 29, 2016).

The comment by a group of trade associations opposed the amendment to Rule 201(b). The comment stated that the amendment would reduce protections for respondent companies in a way that will lead to a denial of due process. However, the comment did not articulate why a duty to include avoidances in the answer would be a denial of due process. The Bureau considers the amendment to Rule 201(b) to be a reasonable requirement that promotes early identification of issues, and the Bureau notes that the answer can later be amended in appropriate circumstances under 12 CFR 1081.202(a) (Rule 202(a)). The Bureau is retaining the amendment to Rule 201(b).

1081.203 Scheduling conference.

12 CFR 1081.203 (Rule 203) requires a scheduling conference with all parties and the hearing officer for the purpose of scheduling the course and conduct of the proceeding. Before that scheduling conference, Rule 203 requires the parties to meet to discuss the nature and basis of their claims and defenses, the possibilities for settlement, as well as the matters that will be discussed with the hearing officer at the scheduling conference. The Updated Rules of Practice made certain changes to the details of Rule 203, including renumbering its provisions. This discussion cites the provisions as renumbered.

First, the Updated Rules of Practice amended Rule 203(b) to require that the parties exchange a scheduling conference disclosure after that initial meeting, but before the scheduling conference. That disclosure must include a factual summary of the case, a summary of all factual and legal issues in dispute, and a summary of all factual and legal bases supporting each defense. The disclosure must also include information about the evidence that the party may present at the hearing, other than solely for impeachment, including (i) the contact information

for anticipated witnesses, as well as a summary of the witness's anticipated testimony; and (ii) the identification of documents or other exhibits.

The Updated Rules of Practice also made certain amendments to Rules 203(c), (d), and (e). Amended Rule 203(c) provides that a party must supplement or correct the scheduling conference disclosure in a timely manner if the party acquires other information that it intends to rely upon at a hearing. Amended Rule 203(d) provides a harmless-error rule for failures to disclose in scheduling conference disclosures. Finally, the Updated Rules of Practice made certain minor clarifications to Rule 203(e), which governs the scheduling conference itself.

As the preamble to the Updated Rules of Practice stated, these amendments to Rule 203 are intended to foster early identification of key issues and, as a result, make the adjudication process, including any discovery process, more effective and efficient. They are also intended to, early in the process, determine whether the parties intend to seek the issuance of subpoenas or file dispositive motions so that, with input from the parties, the hearing officer can set an appropriate hearing date, taking into account the time necessary to complete the discovery or decide the anticipated dispositive motions.

The preamble to the Updated Rules of Practice recognized that, in most cases, the deadline for making the scheduling conference disclosure will also be the date the Office of Enforcement must commence making documents available to the respondent under 12 CFR 1081.206 (Rule 206). The preamble reiterated a statement from the preamble to the 2012 Rule, which was that the Bureau expects that the Office of Enforcement will make the material available as soon as possible in every case.[11] And even in cases where the Office of Enforcement cannot make those documents available within that time, a respondent may request

[11] 77 FR 39057, 39072 (June 29, 2012).

a later hearing date and can move the hearing officer to alter the dates for either the scheduling conference or the scheduling conference disclosure.

No comments opposed the amendments to Rule 203, and the Bureau is retaining them.

1081.204(c) Bifurcation.

The Updated Rules of Practice added a new 12 CFR 1081.204(c) (Rule 204(c)) to address bifurcation of proceedings. It provides that the Director may order that the proceeding be divided into two or more stages, if the Director determines that it would promote efficiency in the proceeding or for other good cause. For example, the Director may order that the proceeding have two stages, so that at the conclusion of the first stage the Director issues a decision on whether there have been violations of law and at the conclusion of the second stage the Director issues a final decision and order, including with respect to any remedies. The Director may make an order under Rule 204(c) either on the motion of a party or on the Director's own motion after inviting submissions by the parties. The Director may include, in that order or in later orders, modifications to the procedures in the Rules of Practice in order to effectuate an efficient division into stages, or the Director may assign such authority to the hearing officer.[12]

The preamble to the Updated Rules of Practice noted that bifurcation is a standard case-management tool available to Federal district courts. It explained that Rule 204(c) will provide the Bureau with the flexibility to use bifurcation in adjudication proceedings, if warranted by particular cases, and to tailor its procedures to the circumstances of those bifurcated cases.

The comment by a consumer advocacy organization supported Rule 204(c). According to the organization's comment, separating the determination of whether there has been a

[12] The new provision also clarifies that only the decision and order of the Director after the final stage, and not a decision of the Director after an earlier stage, will be a final decision and order for purposes of specified provisions of the Rules of Practice and section 1053(b) of the CFPA.

violation of law from the issue of remedies would help promote the development of legal precedent and also save resources by the Bureau and respondents.

The comment by a group of trade associations opposed Rule 204(c). This comment argued that assigning too much authority to the Director risked depriving respondents of due process, because, in the commenters' view, the Director is insufficiently impartial. However, it is unclear why the decision to bifurcate a proceeding is any different from the many other decisions that the Director makes in an adjudication. The Director can and will adjudicate matters fairly, whether in bifurcated or non-bifurcated proceedings. As courts have consistently held, heads of executive agencies can perform adjudicative functions, and such adjudications provide due process of law. Accordingly, the Bureau is retaining Rule 204(c).

1081.206 Availability of documents for inspection and copying.

12 CFR 1081.206 (Rule 206) provides that the Bureau's Office of Enforcement will make certain documents available for inspection and copying. The Updated Rules of Practice amended Rule 206 to clarify certain categories of documents that may be withheld or information that may be redacted, as well as to make clear that the Office of Enforcement may produce those documents in an electronic format rather than making the documents available for physical inspection and copying.

As the preamble to the Updated Rules of Practice explained, the clarifying amendments regarding documents that may be withheld or information that may be redacted are based on amendments the SEC recently made to its rules of practice. Amended Rule 206(b)(1)(iv) makes clear that the Office of Enforcement need not produce a document that reflects only settlement negotiations between the Office of Enforcement and a person or entity who is not a current respondent in the proceeding. As the SEC explained when it amended its rules of practice, this

amendment is consistent with the important public policy interest in candid settlement negotiations, will help to preserve the confidentiality of settlement discussions, and help safeguard the privacy of potential respondents with whom the Office of Enforcement has negotiated.[13] Amended Rule 206 also permits the Office of Enforcement to redact from the documents it produces information it is not obligated to produce (Rule 206(b)(2)(i)) and sensitive personal information about persons other than the respondent (Rule 206(b)(2)(ii)). These amendments also track the SEC's recent amendments to its rules of practice and are designed to provide further protections for sensitive personal information and to permit the redaction of information that is not required to be produced in the first place.

The Updated Rules of Practice also amended Rule 206(d) to change the date by which the Office of Enforcement must commence making documents available to the respondent, changing that date from seven days after service of the notice of charges to fourteen. This clarification harmonizes these timing provisions with 12 CFR 1081.119 (Rule 119), which protects the rights of third parties who have produced documents under a claim of confidentiality. The previous Rule 119 required a party to give a third party notice at least ten days prior to the disclosure of information obtained from that third party subject to a claim of confidentiality. Under the previous Rules of Practice, that meant that the Office of Enforcement had to provide notice to third parties *before* it commenced the adjudication proceeding because the Office of Enforcement had to give those third parties at least ten days' notice before producing the documents and the Office of Enforcement had to commence making documents available seven days after filing. The Updated Rules of Practice amended Rule 119 to require parties to notify the third parties at least seven days prior to the disclosure of information the third party produced

[13] 81 FR 50211, 50222 (July 29, 2016).

under a claim of confidentiality. Together, Rules 119 and 206 now require the Office of Enforcement to commence making documents available fourteen days after service of the notice of charges and to notify third parties who produced documents subject to that disclosure requirement under a claim of confidentiality at least seven days before producing those documents.

Under the 2012 Rule, Rule 206(e) provided that the Office of Enforcement must make the documents available for inspection and copying at the Bureau's office where they are ordinarily maintained. The preamble to the 2012 Rule explained that the Bureau anticipated providing electronic copies of documents to respondents in most cases.[14] Subsequently, the Updated Rules of Practice amended Rule 206(e) to recognize this practice and expressly provide that the Office of Enforcement may produce those documents in an electronic format rather than making the documents available for inspection and copying. Under the amended Rule 206(e), the Office of Enforcement retains the discretion to make documents available for inspection and copying.

No comments opposed the amendments to Rule 206, and the Bureau is retaining them.

1081.208 Subpoenas and 1081.209 Depositions.

The Updated Rules of Practice made certain interrelated changes to 12 CFR 1081.208 and 1081.209 (Rules 208 and 209).

Under the 2012 Rule, Rule 209 permitted parties to take depositions only if the witness was unable to attend or testify at a hearing. As the Bureau noted in the preamble to the 2012 Rule, the Bureau's Rules of Practice were modeled in part on the approach that the SEC took in

[14] 77 FR 39057, 39070 (June 29, 2012).

its rules of practice.[15] Since that time, the SEC has amended its rules of practice to permit discovery depositions.[16]

The Updated Rules of Practice amended Rule 209 to permit discovery depositions—either by oral examination or written questions—in addition to depositions of unavailable witnesses. If a proceeding involves a single respondent, amended Rule 209(a)(1) allows the respondent and the Office of Enforcement to each depose up to three persons (i.e., up to three depositions per side). If a proceeding involves multiple respondents, amended Rule 209(a)(2) allows respondents to collectively depose up to five persons and the Office of Enforcement to depose up to five persons (i.e., up to five depositions per side). This approach is consistent with the approach the SEC adopted when it amended its rules of practice to allow depositions.[17] Under Rule 209(a)(3), a party may also move to take additional depositions, though that motion must be filed no later than 28 days prior to the hearing date. Amended Rule 209(a)(3) also sets forth the procedure for requesting to taking additional depositions.

The preamble to the Updated Rules of Practice explained that the above amendments to Rule 209 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. Allowing depositions should facilitate the development of the case during the prehearing stage, which may result in more focused prehearing preparations, with issues distilled for the hearing and post-hearing briefing.

Under amended Rules 208(a) and 209(a), a party must request that the hearing officer issue a subpoena for the deposition. If the subpoena is issued, under amended Rule 209(d) the

[15] 77 FR 39057, 39058 (June 29, 2012).

[16] 81 FR 50211 (July 29, 2016).

[17] *Id.* at 50216.

party must also serve written notice of the deposition. New Rule 208(e) governs the standard for issuance of subpoenas seeking depositions upon oral examination. Under Rule 208(e), the hearing officer will promptly issue any subpoena requiring the attendance and testimony of witnesses at a deposition only if the subpoena complies with Rule 209 and if the proposed deponent: (i) is a witness identified in the other party's scheduling conference disclosure now required under revised Rule 203(b); (ii) a fact witness;[18] (iii) is a designated expert witness under 12 CFR 1081.210(b) (Rule 210(b)); or (iv) a document custodian.[19] The preamble to the Updated Rules of Practice explained that fact witnesses, expert witnesses, and document custodians, whose knowledge of relevant facts does not arise from the Bureau's investigation, the Bureau's examination, or the proceeding, are the individuals most likely to have information relevant to the issues to be decided. Because the Bureau will also disclose to respondents the documents described in Rule 206 as well as witness statements upon request under 12 CFR 1081.207 (Rule 207), deposing Bureau staff whose only knowledge of relevant facts arose from the investigation, examination, or proceeding is unlikely to shed light on the events underlying the proceeding and will likely lead to impermissible inquiries into the mental processes and strategies of Bureau attorneys or staff under their direction. Not only does this implicate privileges or the work-product doctrine, but deposition of Bureau staff in this manner can be

[18] Under amended Rule 208(e), this type of proposed deponent must have witnessed or participated in any event, transaction, occurrence, act, or omission that forms the basis for any claim asserted by the Office of Enforcement, any defense, or anything else required to be included in an answer pursuant to Rule 201(b), by any respondent in the proceeding (this excludes a proposed deponent whose only knowledge of these matters arises from the Bureau's investigation, the Bureau's examination, or the proceeding).

[19] This excludes Bureau officers or personnel who have custody of documents or data that was produced from the Office of Enforcement to the respondent. In most circumstances, the Bureau officers or personnel were not the original custodian of the documents. Where the Bureau was the original custodian of the document—for example, a report of examination under 12 CFR 1081.303(d)(2) (Rule 303(d)(2))—there is no need to depose a document custodian as that report is admissible without a sponsoring witness.

burdensome and disruptive because it embroils the parties in controversies over the scope of those protections.

The Updated Rules of Practice also amended Rule 208(e)(2) to provide a process for the hearing officer to request more information about the relevance or scope of the testimony sought and to refuse to issue the subpoena or issue it only upon conditions. The preamble to the Updated Rules of Practice explained that this provision is intended to foster use of depositions where appropriate and encourage meaningful discovery, within the limits of the number of depositions provided per side. The provision should encourage parties to focus any requested depositions on those persons most likely to yield relevant information and thereby make efficient use of time during the prehearing stage.

Under the 2012 Rule, Rule 208(a) permitted parties to request issuance of subpoenas requiring the attendance and testimony of witnesses at the designated time and place of the hearing, for the production of documentary or other tangible evidence, or for the deposition of a witness who will be unavailable for the hearing. Rule 210 also permitted the deposition of expert witnesses. The Updated Rules of Practice kept these provisions, making conforming amendments to account for the new provision permitting discovery depositions. A subpoena seeking the deposition of a witness who will be unavailable for the hearing does not count against the number of depositions permitted under Rule 209(a).

As the preamble to the Updated Rules of Practice explained, the above amendments expand the available legitimate mechanisms respondents may use to conduct discovery, providing respondents a clearer understanding of the bases of the Bureau's factual contentions while reducing the costs and burdens of hearings on all parties. Additionally, the grounds for a hearing officer denying a request to issue a subpoena under Rule 208(e)—that it is

"unreasonable, oppressive, excessive in scope, or unduly burdensome"—are consistent with well-established judicial standards, and hearing officers will, in their consideration of requests for subpoenas, act diligently and in good faith to implement the standards for refusing or modifying deposition subpoenas set forth under the amended rule. These combined changes are overall less burdensome yet are equally effective in the resolution of the case on the merits.

Amended Rule 209 also includes additional procedures governing the taking of depositions. For example, once a subpoena for a deposition is issued, the party seeking the deposition must serve written notice of the deposition pursuant to Rule 209(d). That notice must include several things, including the time and place of the deposition, the identity of the deponent, and the method for recording the deposition. The preamble to the Updated Rules of Practice explained that these procedural provisions track the SEC's recent amendments to its rules of practice.[20] They govern the process for seeking depositions by written questions and the taking of all depositions, including setting forth the deposition officer's duties, the process for stating objections, motions to terminate or limit the deposition, and the process for finalizing a transcript.

Finally, the Updated Rules of Practice added a new Rule 208(l), which addresses the relationship of subpoenas to the scheduling of the hearing. In the 2012 Rule, one reason why the Bureau did not—as a general matter—permit discovery depositions was because the additional time required for depositions before the hearing could be in tension with the statutory timetable for hearings under section 1053(b) of the CFPA.[21] As the preamble to the 2012 Rule noted, prehearing depositions would present extreme scheduling difficulties in those cases in which

[20] 81 FR 50211, 50215-17 (July 29, 2016).

[21] 12 U.S.C. 5563(b).

respondents did not request hearing dates outside the default timeframe under section 1053(b), which provides for the hearing to be held 30 to 60 days after service of the notice of charges, unless an earlier or a later date is set by the Bureau, at the request of any party so served.[22] The new Rule 208(l) addresses this scheduling obstacle to depositions and other discovery, by specifying that 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.[23] This is because a request for discovery reasonably entails a delay for the discovery process to be completed.

The preamble to the Updated Rules of Practice explained that, given this resolution of the 2012 Rule's scheduling concern, the Bureau believes that the benefits of discovery depositions under the amended Rule 209, as described earlier, outweigh other concerns expressed in the preamble to the 2012 Rule about the time, expense, and risk of collateral disputes arising from depositions.[24]

The comment that the Bureau received from a consumer advocacy organization supported the amendments to Rules 208 and 209. The consumer advocacy organization stated that discovery depositions would allow respondents to further develop their cases, which should lead to a more informed and deliberative process. It also stated that the amendments should prevent disruption from surprise witnesses. No comments opposed the amendments to Rules 208 and 209, and the Bureau is retaining them.

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[22] 77 FR 39057, 39076 (June 29, 2012).

[23] Rule 208(l) goes on to specify that the hearing officer will decide whether to grant such a request. If the request is granted, the hearing officer will set a deadline for the completion of discovery and schedule the specific date of the hearing, in consultation with the parties. Rule 208(l) does not apply to a subpoena for the attendance and testimony of a witness at the hearing or a subpoena to depose a witness unavailable for the hearing.

[24] 77 FR 39057, 39076 (June 29, 2012).

1081.211 Interlocutory review.

12 CFR 1081.211 (Rule 211) governs interlocutory review by the Director. Under the 2012 Rule, the provision included language stating that interlocutory review is disfavored, and that the Director will grant a petition to review a hearing officer's ruling or order prior to the Director's consideration of a recommended decision only in extraordinary circumstances. The Updated Rules of Practice simplified this language to state only that interlocutory review is generally disfavored. The preamble explained that, although interlocutory review remains disfavored, the Bureau believes that there can be situations where interlocutory review can contribute to the efficiency of proceedings short of extraordinary circumstances.

No comments opposed the amendment to Rule 211, and the Bureau is retaining it.

1081.212 Dispositive motions.

The Updated Rules of Practice relocated the previous 12 CFR 1081.212(g) and (h) (Rule 212(g) and (h)), which addressed oral argument and decisions on dispositive motions, respectively, to form part of 12 CFR 1081.213 (Rule 213). Rule 213 is discussed in the next section of this section-by-section analysis.

Additionally, the Updated Rules of Practice added new Rule 212(g) to address the relationship of dispositive motions to the scheduling of the hearing. It is codified as Rule 212(g) but unrelated to the previous Rule 212(g). It is analogous to Rule 208(l), discussed above. It specifies that a respondent's filing of a dispositive motion constitutes a request that the hearing not be held until after the motion is resolved.[25] This is because the filing of a dispositive motion, whose purpose is to avoid or limit the need for a hearing, reasonably entails a delay of that

[25] Rule 212(g) goes on to state that the hearing officer will decide whether to grant such a request. If the request is granted, the hearing officer will schedule the specific date of the hearing, in consultation with the parties.

hearing so that the motion can be resolved.

No comments opposed the amendments to Rule 212, and the Bureau is retaining them.

1081.213 Rulings on dispositive motions.

The Updated Rules of Practice amended Rule 213 to adopt a new procedure for rulings on dispositive motions, based on a procedure used by the Federal Trade Commission (FTC). The Bureau also made related technical changes for clarity.

Under the 2012 Rule, the Director could, "at any time, direct that any matter be submitted to him or her for review."[26] However, prior to the Updated Rules of Practice, there was no specific procedure for the Director to exercise this discretion in the context of dispositive motions.

As amended by the Updated Rules of Practice, Rule 213(a) provides that the Director will either rule on a dispositive motion, refer the motion to the hearing officer, or rule on the motion in part and refer it in part. This is based on a similar process under the FTC's rules of practice.[27] The preamble to the Updated Rules of Practice noted that Bureau agrees with the reasoning of the FTC when it adopted this process a decade ago. The FTC explained that the head of the agency has authority and expertise to rule initially on dispositive motions, and doing so can improve the quality of decision-making and expedite the proceeding.[28] As the FTC further noted, an erroneous decision by an administrative law judge on a dispositive motion may lead to unnecessary briefing, hearing, and reversal, resulting in substantial costs and delay to the

[26] 12 CFR 1081.211(a).

[27] 16 CFR 3.22(a). This FTC provision does not specifically discuss a situation where the agency head rules on the motion in part and refers it in part. The Bureau has included language in Rule 213(a) to specifically discuss this situation.

[28] 74 FR 1803, 1809-10 (Jan. 13, 2009).

litigants.[29] The preamble to the Updated Rules of Practice explained that adopting this process will give the Director the flexibility to decide whether a given dispositive motion would be most efficiently addressed by the hearing officer, with ultimate review by the Director, or simply by the Director.

Rule 213(b) was amended to provide that, if the Director rules on the motion, the Director must do so within 42 days following the expiration of the time for filing all responses and replies, unless there is good cause to extend the deadline. If the Director refers the motion to the hearing officer, the Director may set a deadline for the hearing officer to rule. This was based on the parallel timing requirements under the FTC's rules of practice.[30] Under the 2012 Rule, Rule 212(h) provided a 30-day timeframe for the hearing officer to decide dispositive motions, subject to extension.[31] But the preamble to the Updated Rules of Practice stated that the FTC's somewhat more flexible approach to timing is warranted, given that the Director must first decide whether or not to refer the motion to the hearing officer and also has other responsibilities as the head of the agency. The preamble stated that that the overall efficiency gains to adjudication proceedings from the new process, as discussed above, should generally compensate for any delays associated with a more flexible deadline.

Rule 213(c) was amended to provide that, at the request of any party or on the Director or hearing officer's own motion, the Director or hearing officer (as applicable) may hear oral argument on a dispositive motion. The amended Rule 213(c) was identical to the previous Rule 212(g), except that it was updated to reflect the fact that the Director would be the appropriate

[29] *Id.* at 1809-10.

[30] 16 CFR 3.22(a). This FTC provision includes an interval of 45 days, but the Updated Rules of Practice generally adopted time intervals in increments of seven days.

[31] *See* 12 CFR 1081.115 (change of time limits).

official to hear oral argument, if any, to the extent the Director is deciding the motion.

Finally, Rule 213(d) was amended to describe the types of rulings that the Director or hearing officer may make on a dispositive motion. It consolidated language from the previous Rules 212(h) and 213, with updates to reflect the fact that the Director may be the official who decides the motion, as well as other technical changes for clarity.

The comment by a group of trade associations opposed the amendments to Rule 213. This comment argued that having the Director decide dispositive motions is inconsistent with due process. It asserted that the Director is not impartial, since the Director would have previously authorized the Office of Enforcement to file the notice of charges. The comment further argued that Directors can change depending on the administration, so vesting authority in the Director would lead to instability in legal doctrine.

The Bureau disagrees. The Director can and will act fairly in performing his or her adjudicative functions. The Director's ability to do so is unaffected by whether he or she decides that a dispositive motion would be most efficiently addressed by the hearing officer, with ultimate review by the Director, or simply by the Director. Also, as noted, it was already the case under the 2012 Rule that the Director could, "at any time, direct that any matter be submitted to him or her for review." The adoption of a specific process for review of dispositive motions does not substantively change the Director's adjudicative role. In sum, Rule 213 is entirely consistent with due process principles.

The Bureau also disagrees with the suggestion that the changes to Rule 213 will lead to instability in legal doctrine. Commenters' observation that leadership of the agency will change over time, including as presidential administrations change, is true regardless of whether the Director or the hearing officer reviews a dispositive motion in the first instance. It is also true of

many other agencies that use adjudication proceedings, including both single-head and multimember agencies.

Accordingly, the Bureau is retaining the amendments to Rule 213.

1081.400(a) Time period for filing preliminary findings and conclusions.

12 CFR 1081.400(a) (Rule 400(a)) sets the deadline for the hearing officer to file preliminary findings and conclusions. Under the 2012 Rule, subject to possible extensions, the hearing officer was required to file a recommended decision (now known as "preliminary findings and conclusions") no later than 90 days after the deadline for filing post-hearing responsive briefs pursuant to 12 CFR 1081.305(b) (Rule 305(b)) and in no event later than 300 days after filing of the notice of charges. The Updated Rules of Practice extended the latter, 300-day interval to 360 days, in light of the amendments to Rule 209 that expanded the opportunities for depositions. The Updated Rules of Practice also changed terminology from "recommended decision" to "preliminary findings and conclusions" throughout the Rules of Practice, as discussed later in this section-by-section analysis.

The comment by a consumer advocacy organization supported the extension of the 300-day deadline to 360 days. It noted that the extension would benefit respondents by giving them more time to develop their cases and would provide for a more informed and deliberative agency process. Other commenters did not address the amendments to Rule 400(a), and the Bureau is retaining them.

1081.408 Issue exhaustion.

The Updated Rules of Practice added a new 12 CFR 1081.408 (Rule 408), which addresses issue exhaustion.

As the Supreme Court has explained: "Administrative review schemes commonly require parties to give the agency an opportunity to address an issue before seeking judicial review of that question."[32] These requirements can be "creatures of statute or regulation" or else are "judicially created."[33] It is "common for an agency's regulations to require issue exhaustion in administrative appeals. And when regulations do so, courts reviewing agency action regularly ensure against the bypassing of that requirement by refusing to consider unexhausted issues."[34] Consistent with the Court's case law, the Administrative Conference of the United States has recommended that agencies address issue exhaustion requirements in their regulations.[35]

The Updated Rules of Practice adopted Rule 408, which is an express regulation on issue exhaustion. Section 1053 of the CFPA contemplates that the Bureau will conduct a proceeding to decide whether to issue a final order, and then parties may petition courts to review the Bureau's decision, based on the record that was before the Bureau.[36] But if parties do not adequately present their arguments to the Bureau, it frustrates this statutory scheme. Accordingly, having procedures to address issue exhaustion in adjudication proceedings is important to carry out section 1053.[37] Additionally, having express procedures on this subject

[32] *Carr* v. *Saul*, 141 S. Ct. 1352, 1358 (2021).

[33] *Id.*

[34] *Sims* v. *Apfel*, 530 U.S. 103, 108 (2000) (internal citation omitted).

[35] 86 FR 6612, 6619 (Jan. 22, 2021) (recommendation 2.k).

[36] *See generally* section 1053(b), 12 U.S.C. 5563(b).

[37] Section 1053(e), 12 U.S.C. 5563(e). The issue exhaustion provision is also independently authorized by section 1022(b)(1), 12 U.S.C. 5512(b)(1), based on either of two grounds. First, establishing orderly rules for issue exhaustion is appropriate to enable the Bureau to "administer and carry out the purposes and objectives of" section 1053, for the reasons discussed above and below. *Id.* Second, these issue-exhaustion rules "prevent evasions" of section 1053 and the Rules of Practice by some parties, who otherwise may not adequately present their arguments to the Bureau. *Id.*; *see Woodford* v. *Ngo*, 548 U.S. 81, 90 (2006) (explaining that "exhaustion requirements are designed to deal with parties who do not want to exhaust").

should benefit both the Bureau and the parties, by avoiding any potential confusion about how parties must raise arguments in adjudication proceedings.

Rule 408(a) defines the new Rule 408's scope. It applies to any argument to support a party's case or defense, including any argument that could be a basis for setting aside Bureau action under 5 U.S.C. 706 or any other source of law. This broad scope ensures that the Bureau has the opportunity to consider any issue affecting its proceedings.

Rule 408(b) provides, first, that a party must raise an argument before the hearing officer, or else it is not preserved for later consideration by the Director. Second, a party must raise an argument before the Director, or else it is not preserved for later consideration by a court. This is consistent with the roles of the hearing officer and Director.[38]

Rule 408(c) provides that an argument must be raised in a manner that complies with the Rules of Practice and that provides a fair opportunity to consider the argument.

Finally, Rule 408(d) clarifies that the Director has discretion to consider an unpreserved argument, including by considering it in the alternative. It also clarifies that, if the Director considers an unpreserved argument in the alternative, the argument remains unpreserved. Because issue exhaustion requirements serve to protect the agency's processes, it is appropriate for the head of the agency to retain discretion to waive those issue exhaustion requirements in appropriate cases.[39] If a party believes that there is good cause for the issue exhaustion

[38] The Bureau notes that in cases where Rule 408(b) interacts with the Bureau's revisions to Rule 213, it yields a common-sense result. If the Director rules on a dispositive motion under Rule 213 rather than referring it to the hearing officer, then the first sentence of Rule 408(b)—which normally requires parties to raise arguments before the hearing officer in the first instance—would be inapplicable to the Director's consideration of the motion. This is because the Director's ruling on the motion would not be "later" consideration by the Director after the hearing officer. On the other hand, the second sentence of Rule 408(b) would be applicable, and arguments not properly raised before the Director in briefing on the motion would not be preserved for later consideration by a court.

[39] *See, e.g., Am. Farm Lines* v. *Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) (It "is always within the discretion of . . . an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.").

requirements to not be applied in a particular context, the proper course is to timely request that the Director exercise this discretion. The Director may also do so on the Director's own initiative. On the other hand, if the Director merely considers an unpreserved argument in the alternative, that should not be construed as a waiver by the Director of the party's failure to appropriately raise the argument.

Comments by the group of trade associations and by the legal foundation opposed Rule 408. The trade associations stated that the provision would reduce access to Federal courts. The legal foundation argued that Rule 408 should not cover "structural" constitutional claims. According to the legal foundation, Rule 408 strips courts of the power to police the separation of powers and denies respondents any forum to litigate structural constitutional claims.[40]

However, Rule 408 does not foreclose respondents from raising any claim in Federal court, including constitutional claims. Like any issue-exhaustion regulation, it merely requires them to give the agency a fair opportunity to address the issue first, before invoking it to attack the agency's decision after the fact. For these reasons and the reasons explained in the Updated Rules of Practice, the Bureau is retaining Rule 408.

Global technical amendments.

In addition to the specific changes outlined above, the Updated Rules of Practice made certain technical amendments throughout the Rules of Practice.

[40] The legal foundation's comment also cites *Carr v. Saul*, 141 S. Ct. 1352 (2021), a case where the Supreme Court held that social security claimants were not required to exhaust Appointments Clause claims before Social Security Administration ALJs. The comment argues that this means that issue exhaustion does not apply to structural constitutional claims. However, this reflects a misreading of *Carr*. The Court emphasized that it was addressing a situation where "statutes and regulations are silent," and so the question presented in *Carr* was whether the Court should "impose a *judicially created* issue-exhaustion requirement." *Id.* at 1358 (emphasis added). Even in that context, the Court relied on several factors "taken together," only one of which related to the constitutional nature of the claims. *See id.* at 1358-62. *Carr* does not stand for the proposition that an issue-exhaustion regulation cannot address constitutional claims.

First, the Updated Rules of Practice retitled the hearing officer's "recommended decision" as "preliminary findings and conclusions." The preamble explained that the new title is more descriptive of this component of an adjudication proceeding. The preamble also emphasized that this is a terminological change, and preliminary findings and conclusions remain a recommended decision for purposes of the Administrative Procedure Act.

Second, the Updated Rules of Practice made changes to ensure that the language of the Rules of Practice is gender inclusive.

Third, consistent with the current Federal Rules of Civil Procedure, the Updated Rules of Practice replaced used of the term "shall" with the terms "must," "may," "will," or "should," depending on the context, because the term "shall" can sometimes be ambiguous.[41]

Fourth, the Updated Rules of Practice replaced certain uses of the term "the Bureau" with either "the Director," "the Office of Administrative Adjudication," or "the Office of Enforcement," in order to avoid ambiguity about which Bureau organ is being referenced.

Fifth, as discussed in the section-by-section analysis for Rule 114(a), the Updated Rules of Practice adjusted various time periods in the Rules of Practice.

Finally, the Updated Rules of Practice made technical changes to requirements in 12 CFR 1081.111(a), 1081.113(d)(2), and 1081.405(e) (Rules 111(a), 113(d)(2), and 405(e)) regarding filing of certain papers by the hearing officer and Director and service of those papers by the Office of Administrative Adjudication.

No comments opposed these technical amendments, and the Bureau is retaining them.

[41] Fed. R. Civ. P. 1, advisory committee's notes to 2007 amendment.

V. Section 1022(b)(2) Analysis

In developing the Updated Rules of Practice and this rule, the Bureau has considered the rule's benefits, costs, and impacts in accordance with section 1022(b)(2)(A) of the CFPA.[42] In addition, the Bureau has consulted or offered to consult with the prudential regulators and the FTC, including regarding consistency of the Updated Rules of Practice and this rule with any prudential, market, or systemic objectives administered by those agencies, in accordance with section 1022(b)(2)(B) of the CFPA.[43]

The Updated Rules of Practice included the below analysis of costs, benefits, or impacts. No commenter addressed that analysis, and this rule adopts the Updated Rules of Practice without change, so the Bureau is adopting the same analysis for this rule.

As with the 2012 Rule, the Updated Rules of Practice neither impose obligations on consumers, nor are expected to affect their access to consumer financial products or services. For purposes of this 1022(b)(2) analysis, the Bureau compares the effect of the Updated Rules of Practice against the baseline of the Rules of Practice as they existed before the Updated Rules of Practice, as established by the 2012 Rule and amended by the 2014 Rule.

The Rules of Practice are intended to provide an expeditious decision-making process. An expeditious decision-making process may benefit both consumers and covered persons to the extent that it is used in lieu of proceedings initiated in Federal district court. A clear and efficient process for the conduct of adjudication proceedings benefits consumers by providing a systematic process for protecting them from unlawful behavior. At the same time, a more

[42] 12 U.S.C. 5512(b)(2)(A).

[43] 12 U.S.C. 5512(b)(2)(B). Whether section 1022(b)(2)(A) and section 1022(b)(2)(A)(B) are applicable to this rule is unclear, but in order to inform the rulemaking more fully the Bureau performed the described analysis and consultations.

efficient process affords covered persons with a cost-effective way to have their cases heard. The 2012 Rule adopted an affirmative disclosure approach to fact discovery, pursuant to which the Bureau makes available to respondents the information obtained by the Office of Enforcement from persons not employed by the Bureau prior to the institution of proceedings, in connection with the investigation leading to the institution of proceedings that is not otherwise privileged or protected from disclosure. This affirmative disclosure obligation was intended to substitute for the traditional civil discovery process, which can be both time-consuming and expensive. By changing this process to allow for a limited number of depositions by both the Office of Enforcement and respondents, the Updated Rules of Practice increases the cost of the process in both time and money, relative to the baseline. At the same time, to the extent that a limited number of depositions makes hearings proceed more efficiently, the rule may reduce costs. In addition, since promulgating the 2012 Rule, the Bureau has only brought two cases through the administrative adjudication process from start to finish. As such, the Bureau expects there to be few cases in the future that would have benefited from the more limited deposition procedure in the 2012 Rule. The Bureau expects the amended procedure to still be faster and less expensive than discovery through a Federal district court. To the extent that adding additional discovery enables more cases that would otherwise be initiated in Federal court to instead be initiated through the administrative adjudication process, both consumers and covered persons will benefit.

In addition, in the 1022(b)(2) analysis for the 2012 Rule, the Bureau stated that a benefit of the Rule was its similarity to existing rules of the prudential regulators, the FTC, and the SEC. The SEC has since amended its rules, and many of the changes in these amendments will align the Bureau's rules with the new SEC rules and those of other agencies. The similarity of the

Updated Rules of Practice to other agencies' rules should further reduce the expense of administrative adjudication for covered persons.

Further, the Updated Rules of Practice have no unique impact on insured depository institutions or insured credit unions with less than $10 billion in assets described in section 1026(a) of the CFPA. Finally, the Updated Rules of Practice do not have a unique impact on rural consumers.

VI. Regulatory Requirements

The preamble to the Updated Rules of Practice explained that, as a rule of agency organization, procedure, or practice, it was exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act.[44] However, the Bureau accepted comments on the rule and is issuing this rule after considering those comments.[45]

Because no notice of proposed rulemaking was required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis for this rule.[46] Moreover, the Bureau's Director certifies that this rule will not have a significant economic impact on a substantial number of small entities. Therefore, an analysis is also not required for that reason.[47] The rule imposes compliance burdens only on the handful of entities that are respondents in adjudication proceedings or third-party recipients of discovery requests. Some of the handful of affected entities may be small entities under the Regulatory Flexibility Act, but they would

[44] 5 U.S.C. 553(b).

[45] The comment by the group of trade associations requested that the Bureau propose a new rule based on their objections to aspects of the Updated Rules of Practice. However, the Bureau has considered these objections and does not agree with them for the reasons discussed in the section-by-section analysis, so the Bureau is not issuing a new proposal based on them.

[46] 5 U.S.C. 603, 604.

[47] 5 U.S.C. 605(b).

represent an extremely small fraction of small entities in consumer financial services markets. Accordingly, the number of small entities affected is not substantial.

The Bureau has also determined that this rule does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[48]

List of Subjects in 12 CFR Part 1081

Administrative practice and procedure, Banks, banking, Consumer protection, Credit unions, Law enforcement, National banks, Savings associations, Trade practices.

PART 1081 – RULES OF PRACTICE FOR ADJUDICATION PROCEEDINGS

Accordingly, the procedural rule; request for public comment that amended 12 CFR part 1081, which was published at 87 FR 10028 on February 22, 2022, is adopted as final without change.

/s/ Rohit Chopra

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[48] 44 U.S.C. 3501-3521.