



JONES DAY
COMMENTARY

CFPB RELEASES INVESTIGATION AND ADJUDICATION RULES—SEPTEMBER 26, 2011 COMMENT DEADLINE

In one of its first official acts after formally commencing operations on July 21, 2011, the Consumer Financial Protection Bureau (the “CFPB”) issued interim final rules regarding civil investigations (the “Investigation Rules”) and adjudicative proceedings (the “Adjudication Rules”) under Title X of the Dodd-Frank Act. The Investigation Rules outline the CFPB’s authority to conduct civil investigations according to the rights of individuals and entities from whom information is sought, while the Adjudication Rules govern the proceedings of the CFPB’s administrative adjudications. The CFPB also released rules regarding public access to information from the CFPB under the Freedom of Information Act (the “FOIA”) as well as rules for coordinating enforcement proceedings with state regulators. In general, both the Investigation and Adjudication Rules tend to follow those of the Federal Trade Commission, although important differences appear, and ambiguities may be addressed in the comment process.

These rules mark the significant “first steps” of the CFPB’s Division of Enforcement, and entities

regulated by the CFPB should consider submitting comments on the rules before the September 26, 2011 deadline.

THE INVESTIGATION RULES

Section 1052 of the Act authorizes the CFPB to investigate potential violations of: (1) “Federal consumer financial law”; (2) the provisions of Title X; (3) any CFPB rules or orders; and (4) the laws and rules transferred to the CFPB’s authority under the Dodd-Frank Act. The transferred laws include, for example, TILA and FDCA. Under the newly prescribed Investigation Rules, which are modeled after the nonadjudicative procedures of the Federal Trade Commission (“FTC”), the CFPB may initiate investigations when such conduct affects the public interest, but it will not take action in matters of private controversy.

The Investigation Rules allow the Assistant Director of the CFPB’s Division of Enforcement (the “Assistant Director”) to issue civil investigative demands

("CIDs") for documentary material, tangible things, written reports or answers to questions, and oral testimony. Within 20 days, persons receiving a CID may petition the Executive Secretary of the CFPB, with a copy to the Assistant Director, for an order modifying or setting aside the demand. If an agreement cannot be reached, either the CFPB's General Counsel or the Assistant Director may seek to enforce a CID in federal district court. The Investigation Rules also permit the Assistant Director to petition a federal district court for enforcement of the CID or seek civil contempt or other relief in cases where a court order enforcing the CID has been violated. Hearings conducted regarding a CID will not be open to the public.

Persons under investigation and compelled to produce documents or testimony pursuant to a CID shall be advised of the conduct being investigated and the applicable provisions of law. The Assistant Director is authorized to request approval from the U.S. Attorney General to issue subpoenas for the production of materials or testimony, as well as grant immunity in exchange for such production. With regard to information protected by the attorney-client privilege or other privileges, the Investigation Rules allow a person to withhold material or testimony on such grounds, but the CFPB may request a description of the materials withheld and the specific grounds for claiming privilege.

The Investigation Rules also provide protection for inadvertently disclosed privileged information. The disclosure of privileged or protected information shall not operate as a waiver if: (1) the disclosure was inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including notifying a CFPB investigator of the claim and the basis for it. Once notified, the CFPB must promptly return, sequester, or destroy the specified information and any copies, and it must not use or disclose the information until the claim is resolved.

Any witness compelled to appear in person may be accompanied, represented, and advised by counsel. After producing materials or testimony, the Investigation Rules permit the producing party to retain or request a copy of the materials or a transcript. However, the CFPB may deny such requests for good cause and limit the witness to inspection of the

official transcript of the testimony. A witness will have an opportunity to read the transcript of his or her testimony, and any changes that the witness wishes to make shall be entered and identified upon the transcript with a statement of the reasons given by the witness.

If the civil investigation indicates that an enforcement action is warranted, further proceedings may be instituted in federal or state court, or may be referred to other federal, state, or foreign governmental agencies. If the investigation indicates that no enforcement action is necessary, the investigation will be closed, but the matter may be further investigated at any time if circumstances so warrant.

COMPARISON OF THE INVESTIGATION RULES TO FTC'S RULES

The Investigation Rules closely follow the FTC's rules governing nonadjudicative procedures. However, unlike the FTC's rules, the Investigation Rules do not clearly indicate how the CFPB may be asked to initiate an investigation. Also, compared to the FTC rules, the Investigation Rules offer more protection of the respondents' information by explicitly protecting against the accidental disclosure of privileged information and providing the confidential treatment of materials demanded by CFPB investigations.

RULES FOR ADJUDICATION PROCEEDINGS

Section 1053 of the Act authorizes the CFPB to use administrative adjudications to ensure or enforce compliance with the Act and other federal laws or regulations within the CFPB's jurisdiction. The CFPB modeled the Adjudication Rules after the uniform rules and procedures for administrative hearings adopted by the prudential regulators pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, the FTC's Rules of Practice for Adjudicative Proceedings, and the SEC's Rules of Practice. The Adjudication Rules do not, however, apply to temporary cease-and-desist orders, which are governed by Section 1053(c) of the Act. The CFPB intends the Adjudication Rules to simultaneously provide for expeditious resolution of claims and ensure the fairness of hearings. Parties may seek a

protective order shielding confidential information, and they may make offers of settlement at any time.

Under the Adjudication Rules, respondents in all cases are required to file an answer. The CFPB's hearing officer has 300 days, beginning with the service of the notice of charges, to issue a recommended decision. Extension of the 300-day deadline is permitted, but the CFPB intends to grant such extensions only in rare circumstances. Hearings under the Adjudication Rules will be presumptively public, and failure to appear may constitute a waiver of rights and be deemed an admission of the facts alleged. The hearing officer is required to make a recommended decision no later than 90 days after the deadline for filing post-hearing responsive briefs and no later than the aforementioned 300-day deadline.

The recommended decision may be appealed within 10 days, or the CFPB's Director may order additional briefing. The Adjudication Rules require the Director to notify the parties that the case has been submitted for final CFPB decision at the expiration of the time permitted for filing reply briefs with the Director and to issue a final decision within 90 days of such notice. Parties may file petitions for reconsideration within 14 days of the final decision, which would otherwise become effective 30 days after service. Any party subject to a final order, other than a consent order, may apply to the Director for a stay of all or part of the order pending judicial review within 30 days of the service of the final order.

The Adjudication Rules require the Division of Enforcement to provide any party in an adjudication proceeding with access to documents obtained by the Division of Enforcement from persons not employed by the CFPB in connection with the adjudication proceeding, as long as the material is not privileged or otherwise protected from disclosure, such as the work product of the CFPB or the identity of confidential sources. The disclosure requirement, however, applies only to documents obtained by the Division of Enforcement and not to documents located only in the files of the other divisions or offices of the CFPB. Respondents may also request access to witness statements. The Adjudication Rules provide for the deposition of witnesses unavailable

for the hearing, subpoenas for the production of documents, and expert discovery. However, to ensure expeditious and efficient proceedings, prehearing interrogatories and depositions are not allowed.

COORDINATION WITH STATE OFFICIALS AND FOIA

The CFPB also issued an interim final rule, with request for public comment, by which state officials notify the CFPB of actions or proceedings undertaken by their respective states to enforce the Act or its regulations (the "State Official Notification Rules"). According to the State Official Notification Rules, state officials must adhere to procedures for the timing and content of the notice required to be given to the CFPB. Upon receipt of such notice, the CFPB may elect to participate "as appropriate" in an action brought by state officials. The interim rules do not indicate any criteria by which the CFPB will determine whether intervention is appropriate. The State Official Notification Rules clearly specify that the notice provisions "do not create any procedural or substantive rights" for parties litigating against the United States or any state under the Act.

With regard to requests for information under the FOIA, the CFPB opted not to provide a detailed analysis of its rules because "CFPB's FOIA regulations track the statute itself and set forth requirements and procedures that are typical of most federal agencies." Indeed, the CFPB's rules on FOIA requests are modeled upon regulations promulgated by the Treasury Department with input from the Department of Justice and National Archives and Records Administration.

CONCLUSION

The Investigation and Adjudication Rules are substantially similar to those used by the FTC and, in some areas, provide additional protection for persons under investigation. However, entities subject to CFPB regulation may wish to seek further clarity on these rules by submitting comments by September 26, 2011. For example, it is uncertain what "appropriate" circumstances would warrant the CFPB becoming involved in actions brought by state officials under the Act.

Jones Day's Consumer Financial Products & Services team has represented clients in investigations, enforcement actions, and litigation brought by, among others, the FTC, SEC, and state attorneys general. Jones Day's team is well-prepared to advise companies subject to CFPB investigation or enforcement.

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