Increasing Transparency in the Forum Selection Process: When Should the CFPB Use Its Administrative Forum?

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Those critical of the Consumer Financial Protection Bureau (“CFPB”) assert that the CFPB has an unduly broad amount of discretion to use the administrative adjudication process whenever it sees fit.1 To be sure, when Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”), it did not expressly limit the CFPB’s administrative adjudication authority.2 In fact, Congress eroded the differences between judicial and administrative proceedings involving the CFPB, by making clear that the relief available in federal court is also available in the administrative forum. To the same extent as federal judges, under section 1055 of the Dodd-Frank Act, the agency has jurisdiction in the administrative forum to “grant any appropriate legal or equitable relief,” which “may include, without limitation rescission or reformation of contracts; refund of moneys or return of real property; restitution; disgorgement or compensation for unjust enrichment; payment of damages or other monetary relief; public notification regarding the violation, including the costs of notification; limits on the activities or functions of the person; and civil money penalties.”3 Accordingly, there appears to be a lack of clear statutory restriction on the agency’s exercise of its administrative adjudicatory powers.

In addition to Congress’ silence on the scope of the CFPB’s administrative adjudication authority, Congress was silent as to the organizational placement of the Office of Administrative Adjudication (“OAA”). Currently, the CFPB’s organizational chart has the OAA office under the Director, which results in the administrative law judge (“ALJ”) reporting directly to the Director. In this way, the CFPB’s organizational placement of the OAA4 mirrors the placement of the Securities and Exchange Commission’s (“SEC”) Office of Administrative Law Judges.5 However, unlike the SEC, the CFPB does not have a nonpartisan commission structure and instead has a single Director. Nonetheless, the CFPB has stated that the OAA is “an independent judicial office within the CFPB.”6

Testing the scope of this adjudicative authority, and effectively its organizational structure, in June 2015 the CFPB issued its first final ruling in a contested administrative proceeding.7 Upholding the ALJ’s November 2014 Recommended Decision only in part, in the final order, Director Richard Cordray held, among other things, that enforcement actions

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4 12 U.S.C. 5565(a) (emphasis added).

5 The CFPB’s organizational chart is available at http://www.consumerfinance.gov/the-bureau/.

6 The SEC’s organizational chart is available at http://www.sec.gov/images/secorg.pdf.

7 The CFPB’s OAA website is available at http://www.consumerfinance.gov/administrativeadjudication/. Given the lack of a nonpartisan commission structure, there may not be a right answer to the OAA’s organizational placement.

7 To date, the CFPB has brought three contested actions administratively, one of which ultimately settled (3-D Resorts-Bluegrass, LLC, CFPB No. 2013-CFPB-0002 (Dec. 3, 2013)), and another of which is still pending (Integrity Advance, LLC and James R. Carnes, CFPB No. 2015-CFPB-0029).
brought administratively are not subject to a statute of limitations. However, perhaps most troubling to industry observers is that the Director increased the $6.4 million dollar disgorgement penalty recommended by the presiding ALJ to $109 million. With a single Director authorized to initiate enforcement proceedings and issue the final administrative rulings, it is unsurprising that the respondent promptly appealed to the D.C. Circuit Court of Appeals, in part on constitutional grounds.

The procedural basis underlying this controversial ruling highlights, in part, the concerns of CFPB critics, who have long advocated for a commission structure similar to that of the Federal Trade Commission and the Securities and Exchange Commission (“SEC”). Solely adopting a commission structure, however, does not eliminate every concern underlying the use of administrative proceedings. For example, the SEC’s use of administrative proceedings is also currently under scrutiny. At the same time that Congress granted the CFPB broad adjudication authority under the Dodd-Frank Act, Congress also expanded the SEC’s ability to bring certain enforcement actions administratively. In response, the SEC announced that it intended to bring more actions, both contested and noncontested, in the administrative forum. The SEC filed roughly 81% of all enforcement actions in an administrative forum during the 2014 fiscal year, up from 63% prior to passage of the Dodd-Frank Act in 2010. Unsurprisingly, critics argued that the SEC is seeking an unfair advantage by increasingly trying contested actions before “in-house” judges.

In May 2015, presumably in response to criticism that the forum selection process was unfair and opaque, the SEC’s Division of Enforcement released a list of four criteria that it considers when selecting the appropriate forum for its contested actions. In order to preempt similar criticism, it may be instructive for the CFPB to review these criteria to understand the merits of each and whether and how similar criteria could be applied in the context of the CFPB’s forum selection process. Although the CFPB does not have a nonpartisan commission structure, the SEC’s criteria provides a starting point to develop a transparent and objective approach to forum selection, which could prove to alleviate industry concern over the breadth of the CFPB’s adjudicatory authority.

SEC Criteria

1. Availability of Desired Claims, Legal Theories, and Forms of Relief

Although the SEC’s administrative remedial powers are largely comparable to the equitable powers of federal courts, there are certain causes of action and remedies that are exclusively available in either an administrative proceeding or district court action.

In contrast, the CFPB is generally not subject to similar limitations. The CFPB is, however, constrained by case law. For example, whether the Fair Debt Collection Practices Act (“FDCPA”) applies to certain conduct turns on whether the section 803(4) definition of “creditor” and the section 803(6) definition of “debt collector” are

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8 PHH Corp., CFPB No. 2012-CFPB-0002 (June 4, 2015).
10 Advocates for reforming the CFPB assert that the single director structure leads to deprives the agency of necessary internal checks that typically arise from bi-partisan deliberation and compromise. See Roa, supra note 1.
13 Jean Eaglesham, SEC Wins with In-House Judges (May 6, 2015), available at http://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803 . Lawsuits by plaintiffs in pending SEC ALJ proceedings have in some instances succeeded in preliminarily enjoining the SEC from proceeding with its administrative action against them on the grounds that the SEC’s process for selecting ALJs is likely flawed. See Duka v SEC, (cite) and Hill v. SEC, (cite). The plaintiff in Duka, a former executive of a credit reporting agency, has argued that the SEC should not have “unbounded authority” to require plaintiffs to defend themselves in an SEC administrative proceeding before having the right to contest “patently unconstitutional or unauthorized administrative charges” in federal court.
15 In instances where these four factors may conflict, the CFPB could employ a balancing test taking into consideration the relative merits of each factor.
16 As explained by the Division of Enforcement, “charges of failure to supervise or causing another person’s violation can only be pursued in the administrative forum; liability as a controlling person or as a relief defendant can only be pursued in district court actions.” SEC Forum Selection at 1.
mutually exclusive terms under the statute, which is far from settled law.\textsuperscript{17} Consistent with case law in the U.S. Seventh Circuit, the CFPB sued a for-profit college chain in the Northern District of Illinois, alleging that it was a “debt collector” under the meaning of the FDCPA. Such an argument, however, likely would not have been fruitful in other U.S. Circuits where only entities that either have a principal purpose to collect debt or regularly collect debt owed to others would be subject to the FDCPA.\textsuperscript{18} When confronting such circuit splits, the CFPB could consider using the administrative forum to avoid further disparities in the application of law, particularly given that the agency will be better able to apply the law both consistently and in the manner it deems most appropriate based on its own reading of the law.

2. \textit{Source and Scope of Agency Jurisdiction}

Prior to choosing a forum, the SEC evaluates its source and scope of jurisdictional authority over the charged party.\textsuperscript{19} As the SEC notes, “[r]egistered entities and associated persons have long been subject to the Commission’s regulatory oversight, which has long included Commission administrative proceedings.”\textsuperscript{20} As a result, the SEC typically pursues sanctions against registered entities in administrative proceedings, and cases against non-registered entities have traditionally been within the purview of federal courts.\textsuperscript{21}

Much like the SEC, the CFPB’s enforcement authority extends over more entities than its supervisory authority.\textsuperscript{22} The CFPB may want to consider limiting its use of the administrative forum in contested actions by bringing contested administrative proceedings against only those entities over which it has supervisory and enforcement authority. When bringing contested actions against entities that are merely subject to the CFPB’s broader enforcement authority, the judicial forum may be a more equitable choice. In this way, the full impact of the CFPB’s administrative adjudicatory authority would be limited to those entities that are also expressly subject to the full extent of the CFPB’s jurisdictional authority.

3. \textit{Agency Resource Efficiencies and Effectiveness}

According to the SEC, its choice-of-forum decisions consider the “cost-, resource-, and time-effectiveness of litigation in each forum.”\textsuperscript{23}

In comparison to the Federal Rules of Civil Procedure that govern district court actions, the CFPB Rules of Practice for Adjudication Proceedings provide for, among other things, an expedited and streamlined pre-trial process. Notably, once the CFPB has officially commenced an administrative proceeding by filing charges, it has

\textsuperscript{17} Compare Schlosser v. Fairbanks Capital Corp., 323 F.3d 534, 536 (7th Cir. 2003) (“[T]hese two categories—debt collectors and creditors—are mutually exclusive”) with Davidson v. Capital One Bank, N.A., 2014 WL 4071891, *5 (N.D. Ga. 2014) (“A determination that a person is a ‘creditor’ for FDCPA purposes does not itself foreclose that the creditor can also meet the definition of ‘debt collector’ for purposes of coverage under [section 803(6)] of the FDCPA”), aff’d, 797 F.3d 1309 (11th Cir. 2015) In Schlegal v. Wells Fargo Bank, 720 F.3d 1204, 1208 (9th Cir 2013), the Ninth Circuit rejected the argument that a person who meets the definition of “creditor” is per se not a “debt collector,” stating that “this per se rule…finds no support in the text of the FDCPA.”

\textsuperscript{18} See e.g., Schlegal, 720 F. 3d. 1204.

\textsuperscript{19} SEC registered entities and associated persons have long been subject to the SEC’s regulatory oversight, including administrative proceedings, and registrants are well aware that the SEC may bring enforcement actions against them administratively. After the passage of the Dodd-Frank Act, the SEC began bringing administrative matters against non-registrants, such as insider trading cases against non-registered entities that are traditionally considered within the purview of federal courts. This practice drew intense criticism from certain sectors of the securities industry, including a federal judge. Perhaps in an attempt to avoid future criticism, the SEC’s Director of Enforcement, in October 2015, purportedly instructed senior attorneys to bring contested actions alleging insider trading in federal court, unless there is good reason to bring a case administratively.


\textsuperscript{22} Under the CFPB’s enforcement authority, it may investigate any covered person whose conduct may constitute a violation of any provision of federal consumer laws (generally, Title X of the Dodd-Frank Act and the eighteen enumerated consumer laws). In contrast, under the agency’s supervisory authority, the CFPB may only supervise certain covered persons such as very large depository institutions and participants of certain markets for consumer financial products or services. Section 1025 of the Dodd-Frank Act gives the CFPB supervisory authority over depository institutions with over US$10 billion in net assets and their affiliates, and section 1024 gives the agency supervisory authority over only certain nondepository or nonbank institutions. The CFPB has supervisory authority over all nonbank covered persons, regardless of size, that offer or provide three types of consumer financial products or services: (1) origination, brokerage or servicing of consumer loans secured by real estate and related mortgage loan modification or foreclosure relief services; (2) private education loans; and (3) payday loans. However, for all other consumer financial products or services, the CFPB must first engage in rulemaking under section 1024(a)(1)(B). To date, the agency has finalized only five such larger participant rules: credit reporting, debt collection, student loan servicing, international money transfers and automobile financing.

\textsuperscript{23} SEC Forum Selection, at 2.
300 days to conduct the hearing and issue a recommended decision. Under such a compressed schedule, respondents may find it difficult to conduct the full range of discovery that they would otherwise be able to as defendants in civil actions. This can become a significant issue in cases where the crux of the CFPB’s evidence is witness testimony. Further, any judicial review of an administrative decision in district court must defer to the ALJ’s factual findings, thus underscoring the potential harm from limited discovery.

Pursuant to this criterion, the CFPB could carefully consider all of the relevant factors in determining where to bring an action, and evaluate whether the procedural efficiencies in an administrative proceeding outweigh the protections afforded in a judicial forum.

4. Administrative Expertise

Finally, the SEC considers the “fair, consistent, and effective resolution of securities law issues and matters,” which is closely tied to the first factor. The SEC argues that its nonpartisan Commission, which is comprised of five members (no more than three of which may be from the same political party), and the ALJs have unparalleled technical knowledge to resolve complicated issues of laws. The Division of Enforcement claims that where “a contested matter is likely to raise unsettled and complex legal issues under the federal securities laws, or interpretation of the Commission’s rules, consideration should be given to whether, in light of the Commission’s expertise concerning those matters, obtaining a Commission decision on such issues, subject to appellate review in the federal courts, may facilitate development of the law.” At least one federal judge, however, has taken the opposite approach, asserting that the SEC hinders the “balanced development of the securities laws” when it bring such cases administratively instead of before a federal court.

In comparison, the CFPB does not have a nonpartisan Commission to impart technical knowledge and a diversity of views. To date, the CFPB has not hired a dedicated ALJ who brings subject-matter expertise to actions involving novel legal issues. In fact, because many of the laws the CFPB is charged with enforcing have been within the realm of federal courts for decades, there may be many instances in which a federal court judge has more subject-matter expertise than an ALJ within the CFPB’s OAA. Accordingly, the CFPB may want to consider both the relative subject-matter expertise necessary to hear the case and the ultimate effect administrative adjudication would have on the development of law.

Taking into account the unique structure of the CFPB, and in light of concerns expressed by critics, the CFPB may want to carefully evaluate its use of the administrative forum. To this end, in order to increase transparency in its use of its administrative adjudication authority, the CFPB could issue a bulletin setting forth its framework for choice-of-forum decisions in contested actions. Such a bulletin could increase the integrity and objectiveness of administrative enforcement proceedings.

24 12 C.F.R. § 1081.400(a).
27 According to the CFPB’s organizational chart, the position remains vacant.