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Via electronic submission

May 14, 2018

Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Re: Request for Information Regarding Bureau Enforcement Processes
[Docket No. CFPB-2018-0003]

Dear Ms. Jackson:

The Independent Community Bankers of America (ICBA)¹ appreciates the opportunity to comment on the Bureau of Consumer Financial Protection's (BCFP or Bureau) request for information (RFI) regarding its enforcement processes. The Bureau is publishing this RFI as part of its effort to assess the efficiency and effectiveness of its enforcement processes and to determine whether any changes are necessary. Reiterating comments made in response to previous RFIs, ICBA appreciates this effort.

Background

In the course of executing its enforcement authority, the BCFP is authorized to investigate violations of Federal consumer financial laws and, if appropriate, commence legal proceedings through either administrative adjudication proceedings or civil actions in federal district court.²

¹ The Independent Community Bankers of America®, the nation's voice for nearly 5,700 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services. With nearly 52,000 locations nationwide, community banks employ 760,000 Americans, hold \$4.9 trillion in assets, \$3.9 trillion in deposits, and \$3.3 trillion in loans to consumers, small businesses, and the agricultural community. For more information, visit ICBA's website at www.icba.org.

² 12 CFR Parts 1080 and 1081.

ICBA Comments

Executive Summary

ICBA has been adamant in its support for a balanced regulatory system. Opportunities such as this RFI allows ICBA to reinforce that support by offering recommendations to assist the Bureau in its pursuit to “critically examine its policies and practices”³ on behalf of our members. The Bureau is seeking comments and information regarding the effectiveness of its enforcement process and to that end, and as discussed below, ICBA makes the following recommendations:

1. *Establish Communication Process* - ICBA encourages the Bureau to establish a formal process that governs communications between the Bureau and subjects of investigations. All communications between the Bureau and the subject of an investigation should delineate the specific factors causing concern to the Bureau and clear and concise information pertaining to the status of the investigation.
2. *Permit In-Person Presentations* - ICBA recommends the Bureau allow for in-person presentations before a decision is made which is consistent with legal procedural norms and practices and demonstrates a respect for due process.
3. *Provide Status Updates* - ICBA encourages the Bureau to communicate the status of the investigation to the subject every three months. ICBA further recommends that when there is no communication between the subject and the Bureau for six months, the subject should be able to presume that the investigation is closed.
4. *Length of Investigations* - ICBA strongly urges that enforcement actions conclude within two years of the Bureau opening an investigation.
5. *Notice and Opportunity to Respond and Advise (NORA)* - ICBA strongly urges the Bureau to make the NORA process mandatory, and not a discretionary one subject to the whims of enforcement personnel. Additionally, ICBA strongly urges that: the NORA be made in writing; the oath requirement be removed; and the subject’s response time be increased from 14 calendar days to 45 business days.
6. *NORA Response Letter* – ICBA urges the Bureau to adopt revisions to the Sample NORA Letter to align with our recommendations.
7. *Enforcement Coordination* – ICBA strongly urges the Bureau to coordinate enforcement activity with federal and/or state agencies that may have overlapping jurisdiction.

³ Acting Director Mulvaney Announces Call for Evidence Regarding Consumer Financial Protection Bureau Functions. <https://www.consumerfinance.gov/about-us/newsroom/acting-director-mulvaney-announces-call-evidence-regarding-consumer-financial-protection-bureau-functions/>

Communication Between the Bureau and the Subjects of Investigations

Timing, frequency, and content of communications between the Bureau and subjects of enforcement investigations are not currently addressed by BCFP regulations; however, when Bureau staff communicates with the subjects of investigations this communication typically lacks substantive information and transparency about the status of the investigation, and occurs infrequently; thereby, rendering the exercise inadequate. During these inadequate discussions, enforcement staff is oftentimes unwilling to communicate the factors that triggered the investigation. Fortunately, there are times when a subject of an investigation may find references to the underlying conduct within a Civil Investigative Demand (“CID”) information request, but even in those instances, specific information is difficult to determine.

ICBA encourages the Bureau to establish a formal process governing communication between the Bureau and the subjects of investigations. All communications between the Bureau and the subject of an investigation should delineate the specific factors causing concern to the Bureau and clear and concise information pertaining to the status of the investigation.

Additionally, consistent with the Rules of Practice for Adjudication Proceedings and being mindful of the necessity for fairness and due process, the communication should also include notice to the subject of a potential enforcement action of their right to make an in-person presentation to Bureau personnel. ICBA encourages the Bureau to make this allowance for subjects as this approach is consistent with legal procedural norms and practices and demonstrates a respect for due process.

In the current investigation process, enforcement staff do not provide consistent or scheduled communications pertaining to the status of an investigation. The legal burden and strain on resources resulting from investigations necessitates, at a minimum, that the Bureau update the subject throughout the process. ICBA encourages the Bureau to communicate the status of the investigation every three months. ICBA further recommends that when there is no communication between the subject and the Bureau for six months, the subject should be able to presume that the investigation is closed.

Length of Bureau Investigations

The Bureau does not appear to have an established mechanism governing the length of enforcement investigations. However, one goal laid out in the Bureau’s 2013 *Strategic Plan* is to file or settle actions within two years of opening an investigation.⁴ The Strategic Plan goes further by stating, “*Filing enforcement actions in a timely manner is an important measure of the*

⁴ Consumer Financial Protection Bureau Strategic Plan FY 2013 - FY 2017, Performance Goal 1.2.6 /1.3.6.

CFPB's effectiveness. The Bureau seeks to balance the need to effectively pursue complex and time-consuming cases while minimizing any unnecessary delay between conduct and resolution. Timely pursuit of resolutions increases deterrence and provides consumers with greater protections of law."

The Bureau's goal to file enforcement actions in a timely manner is an important measurement of its effectiveness and aligns with its current desire to assess the "overall efficiency and effectiveness" of its enforcement process.

ICBA is not aware of any community banks under investigation by the Bureau. However, we would be remiss not to urge the Bureau to complete investigations such that filing or settling enforcement actions can be accomplished within the Bureau's stated goal of two years.

The Bureau's NORA Process

Offering notice and an opportunity to respond to potential enforcement actions -- the *Notice and Opportunity to Respond and Advise (NORA) process* -- is one of the only communication methods and opportunities available to subjects to present legal arguments, facts, policies, practices and procedures of the institution, and mitigating factors to support their case. Yet, despite the importance of presenting information favorable to a subject's case, the NORA process is discretionary. In other words, the subject of an enforcement proceeding is not automatically given notice or the opportunity to respond.

A subject's right to respond to legal allegations is a tenet of our nation's judicial system and, thereby, this due process component must be incorporated in the enforcement process. The discretionary process is too flexible and lacks objective parameters and documentation requirements. In instances in which the Bureau provides the subject notice and opportunity, enforcement staff is allowed to contact subjects by phone, informing them of potential enforcement recommendations. Upon receiving oral notice, subjects have 14 calendar days to respond from the date of the phone call. Subjects must then adhere to strict rules regarding their response, including issuing the response under oath. Moreover, the process fails to address documentation requirements for any communications between the Bureau and the subject. What procedures are in place to prevent the Bureau from entering a fictitious oral notice date to deprive the subject of the opportunity to respond?

Fourteen calendar days is not enough time for a subject to gather information, synthesize it, have appropriate staff and/or counsel review, edit, identify an oath official, and submit. Presumably, a significant violation is suspected when the Bureau decides to initiate a proceeding; surely, the Bureau would want to allow the subject adequate time to respond. In its request for information, the Bureau states that it is "authorized to commence legal proceedings for alleged violations of federal consumer financial law through either administrative adjudication proceedings or civil actions in federal district court." A prudent process would allow the subject of these proceedings

adequate preparation time that is more aligned to the process utilized in federal court forums. Further, the pure breadth of the Bureau's authority and power speaks to the necessity for fairness and due process.

The entire process is one that handcuffs and discourages the subject. The likelihood of a subject responding truthfully to a NORA letter is high; the additional requirement of placing the statement under oath is an unnecessary step that chips away from an already unreasonable timeframe to respond.

The NORA process is a very important opportunity for the subject to defend itself before enforcement proceedings commence. As such, ICBA strongly urges the Bureau to make this process mandatory and not a discretionary one subject to the whims of enforcement personnel. When the Bureau provides the subject notice and opportunity, ICBA urges the communication be made in writing and not orally. Further, ICBA urges the removal of the oath requirement as it does nothing more than burden, discourage, and reduce an already unreasonably short timeframe to respond. Finally, ICBA urges the Bureau to increase the response time from 14 calendar days to 45 business days to allow the subject to adequately collect, prepare, edit if needed, and respond to the notice of enforcement proceedings.

Contents of the NORA Response Letter

The Bureau seeks comments on contents of the NORA letter that is sent to subjects of an investigation. Below in Exhibit 1, ICBA proposes revisions to the Bureau's NORA letter. We urge the Bureau adopt this proposed revision as a replacement to the current NORA letter to align with our position on the overall process.

Coordinating Enforcement Activity with Other Federal and/or State Agencies with Overlapping Jurisdiction

Federal and state agencies are constantly encouraged to coordinate regulatory and enforcement activity in areas in which there is overlap. In its 2017 report,⁵ the U.S. Department of the Treasury consulted with the member agencies of the Financial Stability Oversight Council (FSOC) and concluded the FSOC should "be reformed to further facilitate information sharing and coordination among the member agencies regarding financial services policy, rulemaking, examinations, reporting, and enforcement." The report went further:

⁵ "A Financial System That Creates Economic Opportunities: Banks and Credit Unions," June 2017 (Treasury Report), <https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf>

As banking regulators are approaching the full implementation of Dodd-Frank, nearly seven years after its passage, regulation has proven to be insufficiently tailored to depository institutions based on the size and complexity of their business models. Requirements in Dodd-Frank are overseen by multiple regulatory agencies with shared or joint rule-making responsibilities and overlapping mandates. This complicated oversight structure has raised the cost of compliance for the depository sector, particularly for mid-sized and community financial institutions. Moreover, the regulatory agencies often do not engage in sufficient coordination, so financial institutions often face duplication of efforts.⁶

ICBA recommends that the Bureau heed the report's findings and coordinate enforcement activity accordingly. Doing so would not only reduce duplicative efforts and streamline processes, reduce cost and manpower needed to review and assess enforcement activity and documentation, but would also help the Bureau accomplish its Strategic Plan goal of filing or settling a matter within two years of opening an investigation.

ICBA appreciates the opportunity to provide input on this RFI. If you have any questions or would like additional information, please contact Rhonda Thomas-Whitley (Rhonda.Thomas-Whitley@icba.org) at 202-659-8111.

Sincerely,

/s/

Rhonda Thomas-Whitley
Assistant Vice President & Regulatory Counsel

⁶ Treasury Report, page 6.

Exhibit 1- ICBA Proposed NORA Letter Revision

Sample NORA Letter

Month ##, 20##

[Recipient Name] [Company Name] [Street Address] [City, Street, ST, ZIP Code]

Dear [Recipient Name],

~~This letter confirms that I called you today~~ In accordance with the Consumer Financial Protection Bureau's ~~discretionary~~ requirement of Notice and Opportunity to Respond and Advise (NORA) process, ~~During our telephone conversation, I notified~~ this letter serves as notice ~~you~~ that the CFPB's Office of Enforcement is considering recommending that the Bureau take legal action against your client _____, and ~~I offered informed~~ your client ~~the opportunity of their~~ has ~~the~~ a right to make a NORA submission. ~~As we discussed, the~~ The staff expects to allege that your client violated [...]. In connection with the contemplated action, the staff may seek [...] against your client.

A NORA submission is a written statement setting forth any reasons of law or policy why your client believes the Bureau should not take legal action against [HIM, HER, IT]. Any facts presented, or factual assertions relied upon by your client in the written statement must be made under oath by someone with personal knowledge of such facts. The written statement shall be submitted on 8.5 by 11-inch paper, double spaced, in at least 12-point type, and no longer than 40 pages, and must be received no later than ~~{DATE—14 CALENDAR DAYS AFTER TELEPHONE CALL}~~ 45 business days as of the date of this letter. To ensure timely delivery, any submission should be e-mailed to [FIRST.LAST@cfpb.gov], or hand-delivered to me at: Consumer Financial Protection Bureau, [...], Washington, DC [...]. Please inform me by no later than ~~{DATE—7 CALENDAR DAYS AFTER TELEPHONE CALL}~~ 7 business days as of the date of this letter whether your client will be making a submission.

Please be advised that the Bureau may use information contained in any submission as an admission, or in any other manner permitted by law, in connection with CFPB enforcement proceedings or otherwise. For your information, I have enclosed a copy of the NORA bulletin. Please also be advised that submissions may be discoverable by third parties in accordance with applicable law.

As described more fully in the bulletin, this letter does not create or confer upon any person any substantive or procedural rights or defenses that are enforceable in any manner.

If you have any questions, please contact me at (202) 435-####.

Sincerely, [Attorney's Name] Consumer Financial Protection Bureau Enforcement Attorney