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The Honorable Mick Mulvaney
Acting Director
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, D.C. 20552

Submitted via: <https://www.regulations.gov/comment?D=CFPB-2018-0002-0010>

Re: Request for Information Regarding Bureau Rules of Practice for
Adjudication Proceedings; Docket No. CFPB-2018-0002

Dear Acting Director Mulvaney:

On behalf of the 1.3 million members of the National Association of REALTORS®, I appreciate the opportunity to comment on the Request for Information Regarding Bureau Rules for Practice of Adjudication Proceedings. Any proceeding that has the potential to result in civil or criminal penalties should be managed in a fair and impartial manner. As a result, the Bureau of Consumer Financial Protection's focus on ensuring such practices are conducted in accordance with statutory and regulatory objectives is greatly welcomed by the real estate industry.

The National Association of REALTORS® (NAR) is America's largest trade association, including NAR's five commercial real estate institutes and its societies and councils. REALTORS® are involved in all aspects of residential and commercial real estate transactions and belong to one or more of the approximately 1,200 local associations and boards, and 54 state and territory associations. The activities of NAR members are regulated by many statutes, including the *Real Estate Settlement Procedures Act* (RESPA) and therefore NAR has a vested interest in the Bureau's management of administrative adjudications.

NAR appreciates the ability to provide feedback through the series of Requests for Information (RFIs) to advance the Bureau's goals to protect consumers' financial interests. The Bureau's thorough assessment of how administrative adjudications are carried out should focus on maximizing transparency of Bureau processes, not unduly burdening affected parties with irrational timelines, and most importantly, ensuring the Bureau's actions are fair and reasonable.

The recent case of *PHH v. CFPB* illustrates the importance of ensuring that fair and reasonable practices are followed. In this case, the CFPB filed an administrative claim against PHH and the administrative law judge (ALJ) held that mortgage reinsurance premiums received by PHH were illegal



kickbacks paid in exchange for the referral of mortgage insurance business in violation of RESPA. As a result, the ALJ found that disgorgement of the kickbacks was best remedy, where the appropriate penalty would be the net amount received by PHH from the reinsurance premiums, totaling \$6.4 million.

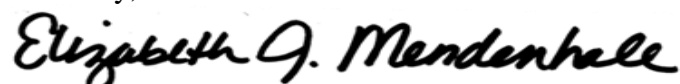
Upon appeal to the Director of the Bureau, Richard Cordray, the disgorgement penalty was increased to \$109 million. Even more concerning was Cordray's broadened interpretation of RESPA, which was substantially different from prior interpretations long relied upon by industry. The Bureau's new direction included: no statute of limitations for RESPA administrative actions; accrual of RESPA claims upon payment or receipt of kickbacks; indirect referrals being actionable under RESPA; and section 8(c)(2) not automatically shielding fair market value payments made to other settlement service providers. With this interpretation, Director Cordray went well beyond the ALJ's decision and focus, calling into question lawful marketing practices being used by real estate professionals.

In this case, NAR argued that the Directors' decision on RESPA was an "unprecedented departure from substantial, uniform precedent and agency guidance," which was ultimately supported by the U.S. Court of Appeals for the D.C. Circuit.¹ How the Director was able to issue such a decision, departing from the ALJ's recommendations, without a reasonable basis for support, had a profound impact on practitioners in the industry and continues to cause confusion for those still fearful of broad Bureau authority. As the Bureau examines its processes for administrative adjudications, lessons learned from this case should be heeded so that future adjudications are conducted fairly and justly.

Additionally, as the Bureau examines timelines for responses, extensions, hearings, and decisions, NAR advocates for increased flexibility, improved communication, and a better recognition of the demands imposed on affected parties. REALTORS®, for example, are primarily independent contractors or small business owners who may not have legal compliance teams or substantial resources to navigate the unclear procedural hurdles of Bureau adjudications. The costs associated with complying with Bureau demands, in addition to, the costs for putting business operations essentially on hold during the process, should be considered when evaluating these steps in favor of more friendly timetables. The Bureau must further understand the business practices being questioned and how those function with the underlying laws, regulations, and guidance at issue, to ensure an effective proceeding is carried out with necessary due process and not just to expedite timing.

NAR, and the real estate industry as a whole, have a strong interest in the proper and consistent application of Bureau administrative adjudications. In assessing the efficiency and effectiveness of administrative adjudications, the Bureau should review past cases that substantially affected the way in which real estate business practices are conducted. NAR appreciates the Bureau's incorporation of feedback through the RFI when making this assessment and implementing future changes to administrative adjudications that are in the best interests of consumers and the industry.

Sincerely,



Elizabeth Mendenhall

2018 President, National Association of REALTORS®

¹ Brief for the Nat'l Assn. of REALTORS®, as Amici Curiae Supporting Petitioners, PHH Corporation v. Consumer Financial Protection Bureau, 839 F.3d 1 (2016).