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Concerns About CFPB Trial Disclosure Policy Are Misplaced

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Financial goods and services are complex, and the disclosures that accompany them can make or break a consumer's understanding of just what they're buying. Unfortunately, there are many ways that disclosures can fail consumers. Disclosures can be too skimpy, or too simple — but they can also be so long or complex that they go unread or are misunderstood.[1] Indeed, who among us has not skimmed — or wholly ignored — a federally mandated disclosure?

Congress instructed the Consumer Financial Protection Bureau, also known as the Bureau of Consumer Financial Protection, to work to improve consumer disclosures. The very first objective set forth in the Dodd-Frank Act for the new agency is to ensure that "consumers are provided with timely and understandable information to make responsible decisions about financial transactions."[2] Accordingly, the bureau's first director, Richard Cordray, issued a trial disclosures policy to "enhance consumer protection by facilitating innovation in financial products and services and enabling companies to research informative, cost-effective disclosures."[3] Unfortunately, that program was not a success, as the bureau did not approve any disclosures in the five years that followed.

The bureau is trying again. Earlier this fall, it issued a "Proposed Policy to Encourage Trial Disclosure Programs" that seeks "to more effectively encourage companies to conduct trial disclosure programs" by streamlining the application process and enhancing the protections provided to successful applicants.[4] This effort to encourage controlled experiments with new forms of disclosures presents an opportunity for industry, government and consumer groups to work together. As then-professor Elizabeth Warren explained years ago, "making disclosures smarter" should be a key goal for the new bureau because a "disclosure that runs on for pages is not real disclosure."[5]

Unfortunately, the bureau's new trial disclosure policy — like the policy it would replace — is opposed by some advocates for the very consumers the policy is intended to benefit. This opposition appears rooted in a wholly appropriate concern that the policy not become a way to undermine, rather than advance, the bureau's mission. Fortunately, the relevant statute, the proposed policy and compelling empirical evidence all indicate that this concern is misplaced, and that consumers would benefit from the use of the policy to promote innovation in disclosures.

The legal argument advanced by a coalition of groups led by the National Consumer Law Center is that the Dodd-Frank Act allows the bureau only to amend certain model forms.[6] To be sure, Section 5532(e)(1) of the statute allows the bureau to "permit a covered person to conduct a trial program ... for the purpose of providing trial disclosures to consumers that are designed to improve upon any model form."[7] However, the very next section of the statute — Section 5532(e)(2) — provides the bureau with even broader authority to create a safe harbor, which is "a limited period during which a covered person conducting a trial disclosure program shall be deemed to be in compliance with, or may be exempted from, a requirement of a rule or an enumerated consumer law."[8]

The NCLC's argument that the broad safe harbor in Section (e)(2) should be shrunken to fit only revisions to model forms is inconsistent with the NCLC's own arguments regarding statutory construction. In a 2017 amicus brief to the U.S. Supreme Court, the NCLC and other consumer groups argued that a statute should be construed to serve the overall statutory purpose, avoid making any language superfluous, and give deference to the federal agency charged with enforcing the statute.[9] Here, the statutory purpose is explicit: "The standards and procedures issued by the Bureau shall be designed to encourage covered persons to conduct trial disclosure programs."[10] A narrow reading of the safe harbor would discourage such programs. More generally, a narrow reading of the safe harbor would interfere with the bureau's efforts to ensure that "consumers are provided with timely and understandable information."[11] Reading the safe harbor to apply only to model forms would also make Section 5532(e)(2) superfluous, since Section 5532(e)(1) already permits modifications of model forms. Finally, the NCLC's argument flouts the bureau's long-standing reading of the scope of the trial disclosure statute.[12]

In particular, the NCLC claims that "section 5532 does not authorize the Bureau to allow trial programs that change or eliminate the substantive information required to be disclosed, or to deviate from any other substantive requirements of the statutes."[13] In fact, the safe harbor provision says exactly that: A person conducting a trial disclosure program "shall be deemed to be in compliance with, or may be exempted from, a requirement of a rule or an enumerated consumer law."[14] This statutory language would be meaningless if the trial disclosure did not vary from existing law.

Policy concerns regarding the bureau's trial disclosure policy are largely answered by the terms of the bureau's proposal. The trial disclosure policy makes clear that the bureau's focus will be on "the extent to which the trial disclosures are likely to be an improvement over existing disclosures, and the extent to which the testing program mitigates risks to consumers."[15] In other words, the 2018 policy seeks to seize the opportunity, identified by the bureau in 2013 under Cordray, "to enhance consumer protection by facilitating innovation" in disclosures.[16] Any concern that the trial disclosure policy would enable financial services companies to mislead consumers by, for example, obscuring the total cost of a loan product should be alleviated by the criteria and process established by the bureau for applying and obtaining approval for a trial disclosure.

The bureau's effort to spur innovation in disclosure would be more controversial if existing disclosures were working flawlessly to educate consumers. In fact, "the empirical evidence show[s] that mandated disclosure regularly fails" because it "rests on false assumptions about how people live, think, and act."[17] As Obama administration official Cass Sunstein explained in his landmark article, "Empirically Informed Regulation," a "central point is that disclosure policies should be based on an understanding of how people process information."[18]

Under the trial disclosures policy, financial institutions will be able to propose new and improved ways of fostering consumer understanding. The bureau likely will approve only a fraction of these proposals, focusing on those that offer the richest opportunities for improving existing disclosures. Each application will be required to explain how the benefits to consumers will be measured and how any risk to consumers will be mitigated, both at the outset and during the course of the test.[19] In short, the bureau is following a goal set by professor Sunstein: "to promote empirical testing, including randomized experiments, of disclosure policies to learn whether they will work or are actually working."[20]

Any kind of innovation requires trial and error and a willingness to learn over time. The trial disclosure policy will foster this process by allowing experiments, which will be limited in time and scope, that will educate the bureau and the industry on how to better inform consumers. Indeed, the bureau itself is innovating by pursuing one of its core missions — ensuring that consumers have timely and understandable information — by rethinking and updating its trial disclosure policy. Consumers and financial institutions alike have much to gain if the bureau's innovation leads to improvements in the way disclosures are written and displayed.

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[1] See generally, More Than You Wanted to Know: The Failure of Mandated Disclosure by Omri Ben-Shahar and Carl. E. Schneider, Princeton University Press (2014).

[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5511(b)(1) (2010).

[3] Bureau of Consumer Financial Protection, Policy to Encourage Trial Disclosure Programs; Information Collection, Fed. Reg. Vol. 78, No. 209, 64392 (October 29, 2013) ("2013 Trial Disclosure Policy")

[4] Bureau of Consumer Financial Protection, Policy to Encourage Trial Disclosure Programs; Information Collection, Fed. Reg. Vol. 83, No. 175, 45574 (Sept. 10, 2018).

[5] Elizabeth Warren, Three Myths about the Consumer Financial Product Agency, The Baseline Scenario (July 21, 2009) https://baselinescenario.com/2009/07/21/three-myths-about-the-consumer-financial-product-agency/.

[6] See Comments of the National Consumer Law Center, et.al. on Policy to Encourage Trial Disclosure Programs, Docket No. CFPB-2018-0023, 83 Fed. Reg. 45,574 (Sept. 10, 2018), submitted Oct. 10, 2018, at 2-3; available at https://www.regulations.gov/document?D=CFPB-2018-0023-0023

[7] Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5532(e)(1) (2010).

[8] Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5532(e)(2) (2010).

[9] Brief of National Consumer Law Center et. al. as Amici Curiae supporting Petitioners, in Henson et. al. v. Santander Consumer USA Inc., (Feb. 24, 2017), 582 U.S. ___ (2017) (no. 16-349), at 8, 12-21, 22-29;

available at http://www.scotusblog.com/wp-content/uploads/2017/03/16-349_amicus_pet_national_consumer_law_center.pdf.

[10] 12 U.S.C. § 5532(e)(2).

[11] 12 U.S.C. § 5511(b)(1).

[12] See 2013 Trial Disclosure Policy, supra n. 3at 64389 (rejecting limitation of trial disclosures to model form amendments).

[13] NCLC Comments, supra n. 6, at 3.

[14] 12 U.S.C. § 5532(e)(2).

[15] Bureau of Consumer Financial Protection, supra note 4, at 45574-75.

[16] Bureau of Consumer Financial Protection, supra note 3, at 64392.

[17] More than You Wanted to Know, supra n. 1, at 11.

[18] Cass R. Sunstein, Empirically Informed Regulation, 78 U. Chi. L. Rev. 1349, 1366 (2011).

[19] Bureau of Consumer Financial Protection, supra note 4, at 45576-77.

[20] Sunstein, supra note 18, at 1366.