Comments of the National Consumer Law Center

(on behalf of its low-income clients)

and the National Association of Consumer Advocates

on

Policy to Encourage Trial Disclosure Programs

Docket No. CFPB-2012-0046

77 Fed. Reg. 74625 (Dec. 17, 2012)

Submitted

February 15, 2013

I. Introduction

Thank you for the opportunity to submit comments on the proposed policy to encourage trial disclosures. These comments are submitted by the National Consumer Law Center[1] on behalf of our low-income clients and by the National Association of Consumer Advocates[2] ("NACA").

While we support the concept of testing alternate versions of consumer disclosures, as authorized by 12 U.S.C. § 5532(e), we cannot support the Bureau's open-ended proposal. The Bureau's proposal runs the risk of inflicting harm on consumers, without any corresponding benefit. The Bureau's proposal offers, at best, weak guidance for improving disclosures and permits creditors to propose trial disclosures that offer no improvement in disclosure but only save the creditor

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[1] Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness. NCLC publishes a series of consumer law treatises including *Truth in Lending*, *Mortgage Lending*, and *Foreclosures*. These comments were written by Andrew Pizor and Diane E. Thompson.

[2] The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers.

money. Worse, the trial disclosures could weaken standard consumer protections by immunizing some creditors from liability for making non-standard and potentially misleading disclosures. As a result, creditors may be incentivized to seek approval for trial disclosures that conceal the cost of credit or other important information from consumers. Any trial disclosure program must incorporate protections that, at a minimum, ensure that the consumer benefits of the trial programs sufficiently outweigh the risks to consumers inherent in the Bureau's associated grant of waiver of civil liability for misdisclosure.

A pilot project, instituted with sufficient safeguards and controls, across multiple market participants, could provide useful information about disclosures. Disclosures need improvement; testing often fails to replicate real-world conditions. But corporate-driven trial disclosures with limited disclosure and no protections for consumers may harm consumers without improving disclosures.

II. The Proposed Policy Should Be Withdrawn

The Board's proposal for trial disclosures will undermine existing disclosures, weaken consumer protection, and harm consumers. Moreover, while trial disclosure programs are authorized under 12 U.S.C. § 5532(e), the Board's proposal appears to exceed its statutory authority. The Bureau's proposal fails to set necessary parameters and safeguards for effective testing of consumer disclosures.

The most fundamental requirement for effective disclosure is standardization across all market participants. Disclosure of a single product is seldom, if ever, the point. In most cases, disclosure across products is what matters. Standardized disclosures enable meaningful comparison shopping, promote competition, and stabilize the national economy.[3] Trial disclosures are inherently problematic if they result in non-standardized disclosures.

The CFPB's proposal will make it difficult and perhaps impossible for consumers to comparison shop for credit. Under the CFPB's proposal, consumers will have no way to know if the disclosures they are receiving are the mandated ones and whether failure to disclose a statutory term is an actionable violation of the law or a deviation blessed by the CFPB. Compliance officials inside companies and bank examiners will also face increased complexity in determining whether the disclosures in any given file are in fact compliant. Creditors using trial disclosures of their own design will be able to evade liability for disclosure omissions for which competitors, without the immunity granted under a trial disclosure plan, may face significant liability. Creditors proposing trial disclosures will have every incentive to propose disclosures that show their products in the best possible light and minimize their legal exposure. As a result, the CFPB's proposal is fundamentally anti-competitive and invites market failure. Opportunities for innocent errors and intentional abuse in disclosure will multiply. In consequence of the market asymmetries introduced by the CFPB's trial disclosure program, consumers in the real-world marketplace will likely face real-world

[3] *See, e.g.,* 15 U.S.C. § 1601(a) (finding that informed use of consumer credit will promote competition and economic stabilization).

consequences, with increased barriers to consumer understanding, heightened price disparities in credit, and reduced ability on the part of consumers to compensate for those price disparities.

The Bureau's authority only extends to trial programs that are "designed to improve upon any model form."[4] Unfortunately, the Bureau's proposal fails even to require compliance with the basic requirements for a model form as set forth in 12 U.S.C. § 5532(b). These include "plain language comprehensible to consumers," "clear format and design," and succinct explanation of information communicated to consumers for model forms. At a minimum, in order to meet the statutory requirements, the Bureau must align its criteria for approving trial disclosures with those set forth for model forms in the statute.

In addition to §5532(e), the Bureau identifies 12 U.S.C. §5511(b)(5) as authority for approving trial disclosure programs intended to reduce costs. That section of the statute asks the Bureau to consider transparency and efficiency in operation of consumer markets, as one of five criteria to which the Bureau must adhere in exercising its rulemaking authority. To the extent the Bureau intends to permit programs that would test cost savings alone, we believe the Bureau is mistaken that its authority extends that far. Efficiency is only to be considered when it is coupled with transparency. Nothing in 12 U.S.C. § 5511 or §5532(e) or (b) suggests that cost-effectiveness, by itself, is a legitimate criterion for approving trial disclosure programs—or any consumer disclosure regulation. Instead, trial disclosure programs must be designed to improve on existing disclosures—the aim of which is to provide consumers with useful information, not to save corporations money. Indeed, corporations can clearly realize the most cost savings by failing to make disclosures altogether—an absurd result that runs counter to the very purpose of federal disclosure law.

Cost-effectiveness is not an appropriate justification for allowing trial disclosures. In mandating consumer disclosure, Congress has already balanced the costs and benefits of requiring disclosure. In every case, creditors will achieve at least a short-term cost benefit by withholding disclosure. But none of the statutes mandating disclosures provide for disclosure only when it is of no consequence to the creditor to do so. The very reason Congress mandated disclosures is because creditors did not find it cost-effective to provide effective disclosures. The Consumer Financial Protection Bureau lacks authority to override congressionally-mandated consumer protection disclosures for the sake of creditor cost-effectiveness alone.

Any trial disclosure program will have risks associated with it for consumers and the marketplace. But the Bureau's proposal does not provide for any of the necessary safeguards to protect consumers, promote market transparency and competition, and enable the effective development of improved disclosures. In the next section, we discuss the protections the Bureau should adopt in any trial disclosure program. Under the Bureau's control and oversight, subject to sufficient safeguards and after careful testing in the laboratory, pilot projects in actual transactions

[4] 12 U.S.C. § 5532(e).

could be successful. Without adoption of these safeguards, the Bureau's proposal fails to meet the basic requirement of protecting the public from harm.

III. If the Bureau Permits Trial Disclosures, More Protections for Consumers and the Marketplace Must Be Built In

If the CFPB goes forward with this proposal, it must build in protections for consumers and the marketplace and take steps to ensure that the trial disclosure programs are designed to produce improved disclosures. Corporations should not be permitted to provide experimental non-standard disclosures selectively to segments of the market without rigorous accountability and transparency. No matter how good the trial disclosures are, they cannot help consumers compare products if they will only be offered by one marketplace competitor.   We believe the following steps are essential:

- The CFPB must retain control over the process. All information must be made available to the CFPB; the CFPB should take an active role in overseeing and managing the testing, and the CFPB should monitor test results closely.
- The CFPB should approve market-based trial disclosure programs only after initial consumer testing in a controlled, non-market setting indicates that the proposed approach is likely to be an improvement in disclosures and successful with consumers.
- Proposals should only be approved after a full public notice-and-comment period on each individual proposal.
- All testing data, including information about any harm occasioned consumers, must be publicly available.
- Initial trial disclosure programs must be limited to ones where creditors would not face statutory damages for misdisclosure under existing law, to prevent dishonest creditors from using the trial disclosure program to gain a market advantage by evading civil liability. Initially, the Bureau should only permit trial disclosures where the risk of harm to consumers is slight. Only after the success of the trial disclosure approach has been demonstrated should the Bureau move onto market testing of more critical disclosures.
- Trial disclosure programs should be run across multiple market participants. Ideally, all creditors in the trial disclosure market area should participate in the trial disclosure program to reduce consumer confusion and increase validity of results.
- Trial disclosures must be clearly identified as such.
- Testing of new disclosures in the mortgage market should be delayed until after the implementation of the CFPB's new combined TILA-RESPA form. The changes in disclosure in the mortgage market in recent years have been seismic; adding additional variability to disclosures will only confound matters further.
- The CFPB must monitor pilot projects for harm to consumers and make provision made for stopping any pilot immediately upon a showing of harm to consumers and redress to harmed consumers.

- Any consumer experimentation should adhere to scientific and ethical standard for human subjects, including informed consent and the use of matching control groups.
- Metrics for measuring the results of the testing should be established in advance by the Bureau. To the extent possible, the same metrics should apply to all trial disclosure programs.
- Only proposals that look to improve consumer understanding, and further the basic purpose of disclosure law, should be approved. Creditors will be motivated on their own to design more cost-effective disclosures and do not need the Bureau's intervention.
- The Bureau should set the agenda for trial disclosure programs, using consumer testing to identify disclosures where a market-based trial disclosure approach will provide particular benefits. It should authorize only a small number of trial disclosure programs initially until the safety and soundness of using trial disclosures is established.

Notice and Comment Period. Providing a single comment period on the policy alone is not sufficient. Every proposed waiver of disclosure rules should trigger a new and independent comment period. Some lenders have a history of abusive lending or of manipulating disclosures. Those lenders should not be permitted to alter disclosures to further their abusive practices or shield themselves from legal liability. Some disclosures are more critical to consumer protections than others. Some disclosures have more testing and research behind them already. For all of those reasons, the Bureau should seek specific information from the public as to the potential risks and benefits of every proposed trial disclosure. Just as the comment period for mergers under the Community Reinvestment Act allows consumers to bring to the agencies' attention significant gaps in CRA compliance, and the agencies to proactively address those gaps in approval of the merger, so too the Bureau should permit the public a say in the waiver of disclosure requirements. Providing a comment period for each proposed trial disclosure would enlist the public at large, as well as creditors, in improving disclosures.

Transparency of Testing Data. Consumers and the public at large, as well as the Bureau, must have full access to the testing data. Disclosures make up much of our framework of consumer protection in this country. Changing the nature of the disclosures implicates our entire consumer protection regime. Consumers will be handicapped in challenging proposed changes to the subject disclosures without access to the data. Independent researchers must have access to the full data to evaluate the utility of the trial disclosures.

It is not enough to require that the data be provided to the Bureau. The public at large has a right to know—and to scrutinize--the data on which public policy is made.

Nor is it sufficient to weigh the extent to which the creditor proposes to make the data public as one criterion among others in approving a trial proposal. Creditors who are granted permission to make trial disclosures of their own design will have wrested a significant concession from consumers. The price of that lopsided benefit must at least include full disclosure of what the data shows. The Bureau must mandate that the public have full access to the testing data, subject to reasonable privacy safeguards for consumers.

Limit Disclosures That May Be Tested. In general, disclosures linked to statutory damages liability should be excluded from any initial trial disclosure testing program. Otherwise, dishonest creditors will be encouraged to game the system to evade civil liability at the cost of both honest competitors and consumers. Only after the trial disclosure program has been shown to produce reliable and useful information and adequate safeguards have been implemented should disclosures whose misdisclosure is linked to statutory damages be market-tested, and then only after other consumer testing, in a controlled environment, indicates that the proposed alternative disclosure is, in fact, superior.

Some disclosures should probably be per se excluded from the trial disclosure testing program. For example, the stakes for both homeowners and creditors of the correct disclosure of the right to rescind and the related material disclosures are so high that no creditor should be allowed to implement its own testing regime. Disclosures implemented under the ability-to-repay rules mandated by Dodd-Frank and embedded in the Qualified Mortgage rule should probably also not be waived, for any creditor under any circumstances. The potential harm to consumers—the loss of their homes—is too high to justify any potential benefit to be gained from a creditor testing of alternate disclosures.

Where testing of trial disclosures linked to statutory damages liability is undertaken, immunity from civil liability must be circumscribed to variations between the tested disclosure and the model form and must not include immunity for violations of related provisions, such as timing rules. For example, any waiver of civil liability granted for testing of trial HOEPA disclosures must be limited to violations only of the disclosure rules themselves, and not to prohibited practices.

Data Monitoring. During the period of any trial disclosure pilot, the effectiveness of the trial disclosures must be constantly monitored by the Bureau. In addition to other quantitative or qualitative testing, consumers should be interviewed to determine their understanding. Loan and product terms must be scrutinized to verify that consumers are not ending up in disproportionately risky or expensive products, or having their privacy compromised, or suffering other adverse consequences. The results of the creditor's monitoring and the CFPB's oversight must be available to the public shortly after its collection. If harm occurs, provision must be made for redress to consumers, as well as immediate discontinuation of the program.

Harm to Consumers. The Bureau includes risk of harm to consumers as a factor in the approval process, but not as a basic eligibility screen. This is inadequate. Proposals should not be approved unless there are adequate provisions to protect consumers from harm, to measure any harm that does occur, and to redress consumers for any harm. If the company's products are more expensive than its competitors will consumers be refunded the difference? If the privacy protections are weaker and result in identity theft, what redress will be afforded consumers? If a consumer winds up with an unaffordable loan because the disclosure proves inadequate to explain the cost, will the creditor modify the loan? No trial or pilot project should be allowed to proceed without guarantees that the project adequately protects consumers from harm. In order to minimize the risk of harm, all disclosures should be lab-tested before they are market-tested.

Consumer Consent. Ordinarily, studies involving experimentation on humans require disclosure of the risk and informed consent.[5] Even children conducting science fair experiments must explain how they will protect human subjects from harm and assess the risks posed by their proposed experiments.[6] In most cases, consumers should be offered the option to participate in the experiment, or to opt out and receive standard disclosures. In order to facilitate consumer consent, and minimize confusion in the marketplace, trial disclosures should be clearly identified as such. Consumers who request the trial and standard disclosures should receive both sets. This would enhance consumer understanding, provide additional feedback on the strengths and weaknesses of the trial and standard disclosures, and provide safeguards against creditor overreaching. Without these protections, the proposed policy seems destined to run afoul of standard ethical rules for human research.

Control Group. If the research is actually to be useful in designing improved disclosures, the Bureau must mandate the use of a control group. The control group should consist of consumers at the same creditor who are offered standard disclosures. Consumers given the standard disclosure must be identical in every material respect—education, geography, race, nationality, language of origin, credit score, gender, type of credit plan, and, within a narrow range, amount of credit. Otherwise, perceived improvements in the disclosures are likely to reflect cherry-picking of groups of consumers by the creditors. Consumers using a different creditor are inadequate as a control; the products, marketing, and customer service vary significantly from one creditor to another and could well influence the testing data.

Metrics for Measuring Success of Consumer Testing. The Bureau must take the responsibility for identifying the ways in which improvements in disclosures will be measured, and the Bureau must make those metrics available for public notice and comment. The testing metrics, including timing and content, should be consistent across all trial programs to the extent feasible. The measure of the success or failure of the trial disclosure program must focus on objective measures of consumer understanding of the disclosure and whether consumer understanding of the alternative disclosure is improved compared to the model form. Tests of consumer understanding should not rely exclusively on self-reporting by consumers: consumers are not always the best judge of their understanding of complex financial transactions. All metrics must be set by the Bureau, after notice and comment, and be publicly available.

A Limited Number of Targeted Trial Disclosure Programs. Trial disclosure programs should start with lab-based testing, in order to identify fruitful—and less risky—areas for market-based testing. But the Bureau should set the agenda for trial disclosure programs, not individual

[5] Guidelines for Research Ethics in Social Sciences, Law and the Humanities 12-14 (2006).
[6] Humans as Test Subjects Endorsement, in Illinois Junior Academy of Science Policy and Procedures Manual 46, *available at* https://sites.google.com/a/ijas.org/ijas/documents-forms.

corporations. The Bureau should limit, at least initially, the number and size of trial disclosure programs and only authorize further trial disclosure programs if the initial programs are completed successfully and provide useful and robust information.

We believe that trial disclosure programs run by the CFPB could provide useful information for improving the marketplace and addressing systematic market failure to develop meaningful disclosure. But, without the protections outlined above, the proposed policy is likely to do more harm than good and fail to achieve the Bureau's goal of improved disclosure.

IV. Conclusion

The authority granted to the Bureau by 12 U.S.C. § 5532(e) permits the Bureau to design trial disclosure programs. But, like a chainsaw, this tool must be used carefully and in appropriate circumstances. Recent history shows that creditors lack market incentives to provide good disclosures. Disclosures can often be used to hide the price of credit, to sell abusive products, or to otherwise mislead consumers. Corporations spend billions of dollars on market research and consumer studies, the ultimate aim of which is not increased consumer understanding but increased corporate profitability. Sometimes increased corporate profits align with increased consumer understanding, but often the two do not align. It is against those market failures that our system of consumer disclosure laws was enacted. As it seeks to improve consumer disclosures, the Consumer Financial Protection Bureau must remember those market failures.

The trial disclosure policy as proposed fails to recognize the origin of our disclosure laws and threatens to undermine the protections, albeit limited, they offer consumers. Accordingly, we urge the Bureau to reconsider and withdraw this policy.

Thank you again for the opportunity to submit comments.