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October 10, 2018

Via Email: FederalRegisterComments@cfpb.gov

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

**Re: Docket No. CFPB-2018-0023
Policy to Encourage Trial Disclosure Programs**

Dear Acting Director Mulvaney:

We, the undersigned attorneys general, submit this comment in response to the Bureau of Consumer Financial Protection's ("Bureau") proposed revisions to its current trial disclosure program ("Disclosure Sandbox").¹

Dodd-Frank² authorized the Bureau to create a trial disclosure program for covered persons to propose disclosures that improve upon model or other mandated disclosures.³ Pursuant to this authority, the Bureau promulgated initial procedures for a trial disclosure program on October 29, 2013 ("Current Policy").⁴ The Bureau's Current Policy states that waivers will not be granted on the basis of cost-effectiveness alone, sets forth clear criteria on when the Bureau will grant a waiver and when the Bureau will revoke a waiver, provides that the Bureau will make public its reasons for granting a waiver, and makes clear that the Bureau intends to use its Current Policy to inform future rulemaking.

The Bureau's proposed Disclosure Sandbox modifies the Current Policy in a manner that is at odds with the text and purpose of Section 5532(e). Section 5532(e) was designed to supplement the Bureau's rulemaking authority rather than act as a substitute for rulemaking or provide covered

¹ See Policy to Encourage Trial Disclosure Programs, 83 Fed. Reg. 45,574 (Sept. 10, 2018) ("Disclosure Sandbox").

² Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank") (codified in scattered parts of the United States Code).

³ See 12 U.S.C. § 5532(e).

⁴ See Policy to Encourage Trial Disclosure Programs, 78 Fed. Reg. 64,389 (Oct. 29, 2013) ("Current Policy").

entities with a broad safe harbor from complying with their existing disclosure obligations. The proposed Disclosure Sandbox allows the Bureau to broadly grant waivers for any specified reason, with minimal to no consumer safeguards, without transparency, and for potentially indefinite periods of time. Moreover, there is no indication that the Bureau intends to use the Disclosure Sandbox to inform its future rulemaking. For the reasons set forth below, we ask the Bureau to withdraw its proposed Disclosure Sandbox or substantially modify its proposal in a manner consistent with the text and purpose of Section 5532(e).

I. The Bureau’s proposed Disclosure Sandbox is fundamentally at odds with the text and purpose of Section 5532(e).

One of the many themes animating Dodd-Frank was better consumer disclosures and Section 5532 reflects this goal.⁵ Section 5532(b) requires that model forms accompanying any rule are written in plain language, reflect a clear form and design, and are succinct.⁶ Section 5532(b) further requires that the Bureau demonstrate compliance with this provision through extensive consumer testing, which the Bureau has done.⁷

Section 5532(e) was designed to supplement rather than replace the Bureau’s rulemaking authority. Specifically, Section 5532(e) recognizes that a private company may be in a better position to develop and test consumer disclosures and allows private companies to propose disclosures that are improvements on the Bureau’s existing disclosures.⁸ To the extent a company can demonstrate that its proposed disclosure is an actual improvement upon existing disclosures, the Bureau can use the proposed disclosure as a template for improved rulemaking. As the Bureau makes clear in its Current Policy:

The Policy should not be viewed as substituting for the normal process of rulemaking. In the event that information learned from trial disclosure programs triggers or otherwise informs follow-on rulemaking, the Bureau would follow the standard rulemaking process, which affords the public the opportunity of submitting comments on a proposed regulation.⁹

⁵ See U.S. DEP’T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION 63 (2009), *available at* https://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf (describing the purpose of what would become section 1032(b) of Dodd-Frank: “[m]andatory disclosure forms should be clear, simple, and concise. This means the [Consumer Financial Protection Act] should make judgments about which risks and costs should be highlighted and which need not be. Consumers should verify their ability to understand and use disclosure forms with qualitative and statistical tests”).

⁶ See 12 U.S.C. § 5532(b).

⁷ See, e.g., SUMMARY OF FINDINGS: DESIGN AND TESTING OF PREPAID CARD FEE DISCLOSURES (Nov. 2014), *available at* https://files.consumerfinance.gov/f/201411_cfpb_summary-findings-design-testing-prepaid-card-disclosures.pdf; QUALITATIVE TESTING OF SMALL DOLLAR LOAN DISCLOSURES (Apr. 2016), *available at* https://files.consumerfinance.gov/f/documents/Disclosure_Testing_Report.pdf.

⁸ See Treasury Report, *supra* note 5 at 63-64 (explaining “[a] regulator is typically limited to testing disclosures in a ‘laboratory’ environment. A product provider, however, has the capacity to test disclosures in the field, which can produce more robust and relevant results. For example, a credit card provider can try two different methods to disclose the same product risk and determine which was more effective by surveying consumers and evaluating their behaviors. We propose that the [Consumer Financial Protection Act] should be authorized to establish standards and procedures, including appropriate immunity from liability, for providers to conduct field tests of disclosures.”).

⁹ Current Policy, *supra* note 4 at 64,392, fn. 10.

In addition, the Bureau indicates that in granting a waiver, the Bureau will consider:

1. The extent to which the program may help the Bureau develop disclosure rules or policies that better enable consumers to understand the costs, benefits, and risks associated with consumer financial products or services; [and]
2. The extent to which the program may help the Bureau develop more cost-effective disclosure rules or policies[.]¹⁰

The Bureau's proposed Disclosure Sandbox deletes the language above from its Current Policy. In addition, the Bureau's proposal grants two-year waivers to participants¹¹ and offers participants the opportunity to extend waivers beyond the two-year window.¹² We are concerned that the Disclosure Sandbox could provide a broad and open-ended safe harbor from compliance with existing federal disclosure obligations.

II. The Bureau lacks authority to grant waivers to trial disclosures that decrease consumer understanding.

Dodd-Frank provides, in relevant part, that:

The Bureau may permit a covered person to conduct a trial program that is limited in time and scope, subject to specified standards and procedures, for the purpose of providing trial disclosures to consumers that are designed to *improve* upon any model form issued pursuant to subsection (b)(1), or any other model form issued to implement an enumerated statute, as applicable.¹³

Although Dodd-Frank does not define “improve,” we can glean the relevant standard for when a trial disclosure improves upon an existing disclosure by examining Section 5532(b), which sets forth the standard the Bureau must follow in developing and promulgating model disclosure forms. Section 5532(b) provides that the Bureau may prescribe model forms for any rule but that such disclosures must meet both of the following requirements:

(2) FORMAT A model form issued pursuant to paragraph (1) shall contain a clear and conspicuous disclosure that, at a minimum—

(A) uses plain language comprehensible to consumers;

(B) contains a clear format and design, such as an easily readable type font; and

(C) succinctly explains the information that must be communicated to the consumer.

(3) CONSUMER TESTING

Any model form issued pursuant to this subsection shall be validated through consumer testing.¹⁴

It is clear from the statute that model forms issued by the Bureau must be drafted in a manner that is clear to consumers, which the Bureau must demonstrate through rigorous consumer testing. It

¹⁰ *Id.* at 64,393.

¹¹ *See* Disclosure Sandbox, *supra* note 1 at 45,577, fn. 23.

¹² *See id.* at 45,577.

¹³ 12 U.S.C. § 5532(e)(1) (emphasis added).

¹⁴ 12 U.S.C. § 5532(b)(2) & (3).

follows that any trial disclosure only *improves* upon a model or other form if it either enhances consumer understanding or, at a bare minimum, preserves existing consumer understanding. A trial disclosure that is cost-effective but that does not improve or preserve existing consumer understanding is not permitted under Dodd-Frank.

The Bureau recognized this when it promulgated its Current Policy, stating that:

Trial disclosures should be “designed to improve upon” existing disclosures. 12 U.S.C. 5532(e)(1). Intended improvements may go to consumer use and understanding of the relevant product or service and/or to the cost-effectiveness of disclosures. The Bureau anticipates approving trial disclosure programs that are intended to improve both consumer use and understanding, and cost-effectiveness. Although the Bureau considers cost-effectiveness an appropriate metric of disclosure improvement, *it will not approve a trial disclosure that it believes will weaken consumer understanding of valuable information that is the focus of a regulatory obligation, no matter the cost savings obtained.*¹⁵

The proposed Disclosure Sandbox eliminates the Bureau’s Current Policy regarding cost-effectiveness and instead replaces it with language that suggests a trial disclosure can improve upon existing disclosures or delivery mechanisms with “cost effectiveness, increased consumer understanding, *or* otherwise[.]”¹⁶

The Bureau lacks regulatory authority to grant waivers to *any* trial disclosure that decreases consumer understanding. The Bureau’s proposed Disclosure Sandbox is fundamentally at odds with the text and purpose of Section 5532(e). Section 5532(e) was meant to supplement and support rulemaking in order to provide improved disclosures to consumers regarding costs and features of financial products; it was not intended to merely lessen costs or regulatory burden on financial institutions regardless of whether there is an attendant improvement in consumer disclosures.

III. The Bureau’s proposed Disclosure Sandbox allows the Bureau to broadly grant waivers for any specified reason, with minimal to no consumer safeguards, and without transparency.

The Bureau’s Current Policy not only makes clear that trial disclosures must improve or preserve consumer understanding, but also sets forth clear guidelines on how the Bureau will ensure that trial disclosures comply with Dodd-Frank and the Bureau’s Current Policy. First, the Bureau lists a number of factors it will consider in determining whether to approve a proposed trial disclosure. Among the factors include:

- The strength and record of the company’s compliance management system relative to the size, nature, and complexity of the company’s consumer business;
- How effectively the program will test for potential improvements to consumer understanding and/or the cost-effectiveness of disclosures, and how narrowly the program is tailored to the testing objectives;

¹⁵ Current Policy, *supra* note 4 at 64,393, fn. 14 (emphasis added).

¹⁶ Disclosure Sandbox, *supra* note 1 at 45,576-77 (emphasis added).

- The extent to which existing data or other evidence indicate that the proposed changes will realize the intended improvements; and
- The extent to which the company intends to permit public disclosure of test results.¹⁷

The Bureau's Current Policy further provides that:

- Approvals will be accompanied with terms and conditions the testing company must certify, document, or otherwise demonstrate compliance with;¹⁸
- The Bureau may revoke an approved waiver if a testing company fails to comply with terms and conditions;¹⁹
- Iterative testing, whereby a company iteratively tests its trial disclosures on very small consumer populations, are permitted but subject to the following requirements:

If a proposal is for iterative testing, it should include copies of all forms of the disclosure that are known at the time of initial submission. It should explain why iterative testing is the more effective means of proceeding with respect to the particular disclosure concept. In addition, it should include a proposal for a streamlined approval process for different iterations of the disclosure. Again, no disclosure can be subject to a waiver under Section 1032(e) unless the specific tester has been approved to test that specific disclosure.²⁰

- The Bureau will publish notice on its web site that summarizes the scope of an approved waiver and the Bureau's reasons for granting it.²¹

The Bureau's proposed Disclosure Sandbox substantially narrows or effectively eliminates the provisions above. The Bureau eliminates the approval criteria in the Current Policy and replaces it with an amorphous standard where the Bureau "will consider the quality and persuasiveness of the application."²² Although the Bureau indicates it will consider how a proposed disclosure will improve upon existing disclosures and any consumer risk identified in the application, by removing the specific factors to be considered, it is unclear how the Bureau will analyze and weigh these factors. Indeed, factors in the Current Policy such as a testing company's size and compliance capacity, arguments for why proposed disclosures improve consumer understanding, details about proposed consumer testing, and information about whether a company will publicize the results of its consumer testing appear to be no longer relevant or substantially less relevant to the Bureau's decision to grant or deny a waiver.

In addition, the Bureau will no longer require that a company certify compliance with any terms or conditions but rather notify the Bureau of "material changes in customer services inquiries, complaint patterns, default rates, or other information."²³ However, what constitutes a "material" change and, thus, triggers a reporting requirement is not specified in the Bureau's proposal and is

¹⁷ See Current Policy, *supra* note 4 at 64,394.

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ *Id.* at 64,393, fn. 12.

²¹ See *id.* at 64,394.

²² Disclosure Sandbox, *supra* note 1 at 45,577.

²³ *Id.*

left to a company's discretion. The Bureau's proposal further permits a testing company to engage in iterative testing without any of the current exacting specifications on such testing. Finally, the Bureau's proposal makes clear that the Bureau does not intend to publicize the scope of an approved waiver or the Bureau's reasons for granting the waiver.

Taken together, the Bureau's changes permit the Bureau to broadly grant waivers for any specified reason, with minimal to no consumer safeguards, and without transparency.

IV. The Bureau cannot bar State officials from enforcing the laws of their respective States.

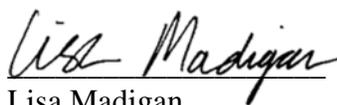
The Bureau's official comments on the Current Policy make clear that, unlike federal disclosure requirements, "[T]he Bureau lacks authority to waive state disclosure requirements."²⁴ Whether intentionally or inadvertently, the Bureau's comments accompanying the proposed Disclosure Sandbox omit this statement of law as accurately observed in the Current Policy. The Bureau cannot bar State officials from enforcing the laws of our respective States.

Conclusion

The proposed Disclosure Sandbox is at odds with the text and purpose of Section 5532(e). The proposed Disclosure Sandbox allows the Bureau to broadly grant waivers for any specified reason, with minimal to no consumer safeguards, without transparency, and for potentially indefinite periods of time. In its current form, the proposed Disclosure Sandbox appears to be nothing more than a broad safe harbor from federal disclosure law and not a program designed to supplement and improve upon the Bureau's disclosure regulations. For the foregoing reasons, we ask the Bureau to withdraw its proposed Disclosure Sandbox or substantially modify its proposal to comply with the text and purpose of Section 5532(e).

We appreciate the opportunity to submit this comment. Please contact our office if you have any questions or need additional information.

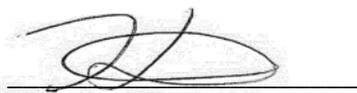
Sincerely,



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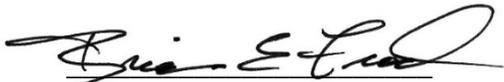


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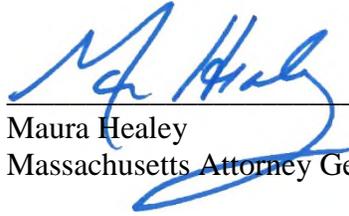


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²⁴ Current Policy, *supra* note 4 at 64,391 (emphasis added).



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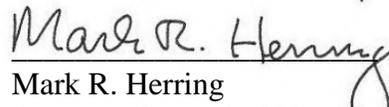
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