

**Comments of the
National Consumer Law Center (on behalf of its low-income clients)**

and

**Americans for Financial Reform
Center for Responsible Lending
Consumer Action
Kentucky Equal Justice Center
Montana Organizing Project
National Association of Consumer Advocates
National Fair Housing Alliance
Public Law Center (Santa Ana, Cal.)
U.S. PIRG
Woodstock Institute**

on

**Policy to Encourage Trial Disclosure Programs
Proposed Rules**

Docket No. CFPB-2018-0023

83 Fed. Reg. 45,574 (September 10, 2018)

Submitted October 10, 2018

Introduction

We appreciate the opportunity to submit comments on the Bureau of Consumer Financial Protection's (the Bureau) Proposed Policy to Encourage Trial Disclosure Programs.¹ These comments are submitted by the National Consumer Law Center on behalf of our low-income clients and Americans for Financial Reform, Center for Responsible Lending, Consumer Action, Kentucky Equal Justice Center, Montana Organizing Project, National Association of Consumer Advocates, National Fair Housing Alliance, Public Law Center (Santa Ana, Cal.), U.S. PIRG, and Woodstock Institute. We strongly oppose the proposed policy, which would potentially permit entire industries to ignore consumer protection disclosure laws indefinitely with no showing that the trials would result in improved or even equivalent consumer understanding.

Summary of Comments

The Bureau is proposing to revise its policy regarding the trial disclosure programs that are authorized by section 1032(e) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5532(e). We support efforts to improve the model forms that the Bureau and its predecessor agencies have created for disclosures required by federal consumer protection statutes, and we recognize a role for trials in this effort.

¹ Bureau of Consumer Financial Protection, Notice of Proposed Policy Guidance: Policy to Encourage Trial Disclosure Programs, 83 Fed Reg. 45,574 (Sept. 10, 2018) [hereinafter Proposed Policy], *available at* <https://www.gpo.gov/fdsys/pkg/FR-2018-09-10/pdf/2018-19385.pdf>.

However, the Bureau's proposed policy is fundamentally unsound:

- It exceeds the Bureau's statutory authority;
- It would authorize trials that do not conform to the limits set by Congress;
- It would fail to ensure essential consumer protections in trials; and
- It proposes a state trial disclosure program that is far outside the Bureau's legal authority.

The proposal appears to permit major changes to consumer protections and disclosure requirements without any compliance with the Administrative Procedure Act (APA), including notice and opportunity to comment by impacted consumers and covered persons. The proposal could result in enabling huge segments of market players governed by the Dodd-Frank Act² to avoid disclosure rules and, possibly, other consumer protections guaranteed by the law. Nothing in the governing law permits such a broad undermining of the consumer protections required by Congress. The Bureau should not go forward with this unlawful proposal.

I. The Proposal Exceeds the Bureau's Statutory Authority.

A. The Law Allows Trials to Relate Only to *Model Forms*, Not All Disclosures as the Bureau Proposes.

The Bureau's statutory authority is limited to allowing covered persons to engage in trials of disclosures found in existing model forms.³ The language in the statute authorizing trials is explicit and clear:

(e) Trial disclosure programs

(1) In general

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.⁴

There is no other language in section 5532 that provides the Bureau any authority to allow trial programs beyond this narrow scope.

Many of the federal statutes that govern the consumer financial products and services that come under the Bureau's jurisdiction require disclosures to be made to consumers⁵ (or to businesses

² Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010).

³ 12 U.S.C. § 5532(e).

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

⁵ The list of these statutes appears in 12 U.S.C. § 5481(12). It includes, most notably: the Truth in Lending Act (TILA also houses the Fair Credit Billing Act, the Consumer Leasing Act, and the Home Ownership and Equity Protection Act), the Electronic Fund Transfer Act, the Equal Credit Opportunity Act, the Fair Credit Reporting Act, the Homeowners Protection Act, the Fair Debt Collection Practices Act, the Home Mortgage

transacting with consumers⁶), and some of these statutes authorize the Bureau to issue model disclosures. However, there are also many disclosure requirements for which there is no model form. For example, there are no model forms for disclosures required by the Fair Debt Collection Practices Act or for certain disclosures mandated by the Fair Credit Reporting Act.⁷

As proposed, the Bureau's trial disclosure program would go far beyond its statutory authority to allow trials designed to improve upon model forms. The Bureau's proposal states that it intends to allow trials of "modifications to an existing form *or other disclosures...*"⁸ And it proposes to approve trials that involve "replacement of a model form *or existing disclosure requirements* with new disclosures or forms."⁹ The Bureau even proposes to authorize trial programs that "include the *elimination* of disclosure requirements."¹⁰

The Bureau can do only what it is explicitly authorized to do by Congress, as set out in the governing statutes.¹¹ Any trial program that goes beyond the improvement of existing model forms is beyond the Bureau's authority to permit. Any safe harbor the Bureau purports to extend to a trial program that involves "other disclosures" would be a nullity.

B. The Bureau Exceeds Its Statutory Authority by Allowing Trials to Change the Substantive Information that Consumer Protection Laws Require Providers to Disclose, or to Deviate from Other Substantive Requirements.

1. Section 5532(e) does not authorize trial programs that change or deviate from substantive requirements.

Disclosure Act, the Real Estate Settlement Procedures Act, the Secure and Fair Enforcement for Mortgage (SAFE) Licensing Act, and the Truth in Savings Act.

⁶ As an example, the Fair Credit Reporting Act, 15 U.S.C. §§ 1681s-2(a)(2)-(5) requires notices between a furnisher and a credit reporting agency.

⁷ Examples under the Fair Credit Reporting Act include: annual file disclosures, credit score disclosures, results of reinvestigation disclosures, and notice and consent required for employment use of a consumer report.

⁸ Proposed Policy, 83 Fed. Reg. at 45,576 n.22 (emphasis added).

⁹ *Id.* (emphasis added).

¹⁰ *Id.* (emphasis added).

¹¹ *Consumer Fin. Prot. Bureau v. Source for Public Data, L.P.*, ___ F.3d ___, 2018 WL 4258966 (5th Cir. Sept. 6, 2018) (CFPB must comply with statutory requirements when issuing a civil investigative demand; not shown here where CFPB failed to adequately describe how the conduct at issue violated the law or to identify the provision of law applicable to each violation; *Consumer Fin. Prot. Bureau v. Accrediting Council for Independent Colleges and Schools*, 854 F.3d 683 (D.C. Cir. 2017) (CFPB's authority to issue subpoenas is created solely by statute; reversing order enforcing civil investigative demand where it did not comply with statutory requirements to state the nature of the conduct constituting the alleged violation and the law applicable to the violation); *Consumer Fin. Prot. Bureau v. The Mortg. Law Group, L.L.P.*, 157 F. Supp. 3d 813, 819 (W.D. Wis. Jan. 14, 2016) (holding that CFPB exceeded its statutory authority in applying certain portions of a rule to attorneys; "agencies must operate within the bounds of reasonable interpretation. ... An agency action falls short of this standard where it 'has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" (citations omitted)).

Even if the Bureau’s proposal were limited to existing model forms as the statute requires, the apparent intent of the proposal to authorize experimentation with the substantive requirements of consumer protection laws would exceed the Bureau’s authority. This intent is revealed in a number of places in the proposal, including note 26:

Under subsection 1032(e)(2), the Bureau has authority to waive a requirement of a rule or an enumerated consumer law, as that term is defined in the Dodd-Frank Act. 12 U.S.C. 5481(12). As used in subsection 1032(e)(2), the term “rule” includes: (i) Rules implementing an enumerated consumer law; and (ii) rules implementing the Consumer Financial Protection Act of 2010, including rules promulgated by the Bureau under its authority to prevent unfair, abusive, or deceptive acts or practices, or to enable full, accurate and effective disclosure.¹²

The Bureau’s stated interpretation of the law is incorrect. Section 5532(e) allows the Bureau to authorize trial programs “for the purpose of providing trial disclosures to consumers that are designed to *improve upon any model form....*” That authority must be read in the context of the Bureau’s model form authority, both in the immediately preceding sections 5532(a) and (b), and in the enumerated statutes.

Model forms create a standardized disclosure that accurately reflects any given statutory or regulatory disclosure rule. Sections 5532(a) and (b) require that model forms use plain language comprehensible to consumers, and that the forms present information in a format, design, and font that are most likely to result in consumers understanding the costs, benefits, and risks of a product or service.¹³ The use of model forms also provides legal certainty for the covered persons by deeming the forms to be “in compliance with the disclosure requirements...with respect to such model form.”¹⁴ By enacting section 5532(e) and allowing trials for model forms, Congress concluded that limited, supervised experiments might identify improvements to the format and understandability of these model forms.

Neither this nor any other part of section 5532, however, gives the Bureau authority to allow covered persons to do anything other than improve upon model forms. 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.

Instead, any authority to revise substantive disclosure requirements must be found in the enumerated consumer protection statutes themselves. To the extent that those statutes give the Bureau authority to revise any substantive disclosure requirements, the Bureau must proceed through notice and comment under the APA.

If the Bureau wishes to experiment with more substantive changes to disclosure requirements before proposing a rule amendment, it may do so through consumer testing or focus groups that do not involve real consumers risking real money. But the Bureau does not have the authority to give individual companies—let alone entire industries—the authority to sell products or services in the real world in a way that violates the law.

That trial programs are limited to the improvement of a model form’s manner of presenting

¹² Proposed Policy, 83 Fed. Reg. at 45,577 n.26.

¹³ See generally 12 U.S.C. § 5532(a), (b).

¹⁴ 12 U.S.C. § 5532(d).

the required information is particularly clear given the context of section 5532(e). It is a subsection of a statute that sets forth general rules for the *format and design* of model forms. Subsection (b)(2) specifies a variety of format goals for model forms, including plain, comprehensible language, an easily readable type font, and succinctness. Nothing in section 5532 allows, or even addresses, changes to the substantive requirements—disclosure requirements or other substantive protections—of the enumerated consumer laws. It would be anomalous to interpret subsection (e), which is embedded in a statute that deals with format and presentation, as authorizing changes to or waivers of substantive requirements.

The Truth in Lending Act (TILA) provides a specific example of the relationship between section 5532 and the substantive requirements of the enumerated consumer laws. TILA is intended “to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit...”¹⁵ Obviously, consumers can compare credit terms only if competing providers disclose them in a uniform, consistent way. If, for example, Provider A calculated the annual percentage rate (APR) by one method, and Provider B used another method, consumers could not make an accurate comparison of the cost of the two providers’ transactions. If Provider A disclosed that it imposed a \$29 late fee, while Provider B imposed an even larger fee but did not disclose it, consumers who were concerned about late fees would be misled. Consistency in the substantive information disclosed is the *sine qua non* for effective comparisons and the informed use of credit.

If trial programs were allowed to test modifications to the accuracy or calculation of numerical disclosures, or to eliminate substantive disclosures, then TILA’s goals would be completely unraveled. Inconsistency in calculation of the APR could lead consumers to select higher-priced credit over lower-priced credit, with long-term and serious financial consequences. Accordingly, it is not surprising that TILA mandates the method of calculating the APR,¹⁶ and specifies the degree of accuracy that the disclosure must achieve.¹⁷ Likewise, it mandates that the late charge (and a number of other specific items) be disclosed.¹⁸ There is no indication in section 5532(e) that Congress intended to override these explicit requirements.

2. The Bureau’s proposal exceeds this limited authority.

The Bureau’s proposal impermissibly exceeds this limited statutory authority. First, the Bureau proposes to authorize trial programs that “include the *elimination* of disclosure requirements...”¹⁹ The Bureau has no authority to eliminate disclosure requirements except to the extent allowed by the underlying consumer protection statute and in compliance with the APA, and it certainly has no authority to allow private parties to experiment with eliminating disclosure requirements.

¹⁵ 15 U.S.C. § 1601(a).

¹⁶ 15 U.S.C. § 1606(a) (“The annual percentage rate applicable to any extension of consumer credit *shall* be determined, in accordance with the regulations of the Bureau” by methods specified in the statute) (emphasis added).

¹⁷ 15 U.S.C. §§ 1605(f), 1606(c) (must be within 1/8 of a per centum, but Bureau may allow greater tolerance for irregular transactions).

¹⁸ 15 U.S.C. § 1638(a)(10) (“the creditor *shall disclose*... (10) Any dollar charge or percentage amount which may be imposed by a creditor solely on account of a late payment...”) (emphasis added).

¹⁹ Proposed Policy, 83 Fed. Reg. at 45,576 n.22 (emphasis added).

Second, the proposed policy expressly encourages applications for trial disclosure programs to seek permission to change “delivery mechanisms.”²⁰ Nothing in subsection (e) even suggests that trial programs can go beyond improvements to the model forms themselves and experiment with changes in how the information is delivered. Nor does section 5532 as a whole address delivery methods—it addresses only the format and design of model forms. The Bureau has no authority to allow trial programs to experiment with delivery methods that do not comply with the underlying statutes and regulations.

Third, the Bureau appears to be interpreting section 5532(e) to allow it to waive *any* requirement of an enumerated consumer law. It proposes to instruct applicants to “[i]dentify the statutory and regulatory requirements”²¹ to be waived, without limiting this to format requirements, and inserts a footnote asserting that section 5532(e) gives it authority to “waive a requirement of a rule or an enumerated consumer law.”²² If these provisions are intended to allow trial programs to change or dispense with other substantive protections in the enumerated consumer laws, they are equally *ultra vires*.

II. The Proposal Impermissibly Allows Trials That Do Not Conform to the Limits Set by Congress.

In section 5532(e)(1), Congress granted the Bureau authority to “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...”²³ The Bureau’s proposal fails to comply with these limitations.

A. The Statute Sets Limits on Who Can Conduct Trials.

The Bureau proposes to allow trade associations to apply on behalf of their members for permission to conduct trials.²⁴ Allowing a trade association to make a blanket application for its members is significantly different from the limited authorization in the law to allow “a covered person” to conduct a trial program. The limitation to “a covered person” in section 5532(e)(1) reasonably allows approval only to a specific person who is proposing to conduct the proposed trial. The Bureau’s proposal to permit trade associations to apply on behalf of their members is beyond the Bureau’s authority under the statute.

Allowing a trade association to make a blanket application for its members would also be contrary to the statute’s mandate that trial programs be “limited in ... scope.”²⁵ Many trade

²⁰ *Id.*

²¹ *Id.* at 45,577.

²² *Id.* at 45,577 n.26.

²³ 12 U.S.C. § 5532(e)(1).

²⁴ “Finally, the proposed Policy clarifies that applications may be submitted by a group, such as a trade association, on behalf of its members, and may propose a scaled or iterative approach to testing.” Proposed Policy, 83 Fed. Reg. at 45,575. *See also id.* at 45,576 n.21 (“A trade association or other group may apply on behalf of its members to test a certain disclosure....”).

²⁵ 12 U.S.C. § 5532(e)(1).

associations include the majority of the members of an entire industry. An application for a trial program that would be conducted by a large portion of an industry is clearly not limited in scope.

B. The Statute Sets Limits on the Length of Time for a Trial Program.

The proposal acknowledges the statute’s requirement that the permitted trials be “limited in time.”²⁶ However, the proposal fails to comply with this requirement both by allowing unlimited trials and by presuming that a two-year period will be appropriate without any oversight of impacts during that period.

The Bureau states that it “expects that a two-year testing period will be appropriate in most cases.”²⁷ But the Bureau makes clear that it may extend trial programs well beyond two years.

The Bureau allows entities to apply for an extension and “anticipates permitting such extension requests for a period *at least* as long as the period of the original waiver”²⁸—in other words, another two years and potentially much longer. The Bureau imposes no limits on the number of extensions an entity may seek. That is, even without any effort to amend the regulation, the Bureau may allow trial disclosures that go on for four years and potentially much longer.

The Bureau also “anticipates permitting longer extensions where the Bureau is considering amending disclosure requirements....”²⁹ That is, if the Bureau is even “considering” amending the requirements, or decides to “endeavor” to amend disclosure rules, the Bureau may “permit the use of validated trial disclosures until such amendment is effective.”³⁰

Even if the Bureau were to swiftly embark upon a rulemaking, these extensions could last years. For example, the Bureau began a rulemaking on prepaid card disclosures in 2012, yet those disclosures will not take effect until seven years later, in 2019—and those were not controversial disclosures. That is, if the Bureau allowed an initial two-year trial, a single extension, and then allowed the trial to continue for seven more years pending a rulemaking, the trial period could last eleven years—more than a decade. That is hardly a “limited” trial.

Trials could go on for years and years even if the Bureau did not actively pursue, or ultimately decided not to go forward with, a rulemaking. The Bureau, like other agencies, often lists “pre-rulemaking” items on its semi-annual regulatory agenda years before the agency undertakes serious efforts to amend a rule. There is nothing in the proposal that limits the time that the Bureau must take to pursue an amendment. The proposal notes that it might set an end to the trial if the Bureau “announced it was discontinuing its plans to amend the disclosure rules in question....”³¹ But agencies rarely make such definitive announcements. Efforts can languish for years and die a quiet, unannounced death.

²⁶ Proposed Policy, 83 Fed. Reg. at 45,576 (“the Bureau may permit companies to conduct trial disclosure programs, limited in time and scope, . . .”).

²⁷ *Id.* at 45,577 n.23.

²⁸ *Id.* at 45,577-45,578 (emphasis added).

²⁹ *Id.* at 45,578.

³⁰ *Id.* at 45,575 (“To the extent that testers are able to show that trial disclosures succeed in improving upon existing requirements, the Bureau will endeavor to amend disclosure rules accordingly and to permit the use of validated trial disclosures until such amendment is effective.”)

³¹ *Id.* at 45,578 n.34.

Moreover, during the limitless time period that a trial may extend, “the Bureau intends to consider means of making the improved disclosure available to other covered entities”³² beyond those involved in the trial.

Both by themselves and taken as a whole, these aspects of the proposal not only go far beyond the authority for “limited” trials, but they also effectively result in an amendment to a regulation without following the requirements of the APA.

Even to the extent that a trial is limited to two years, the policy to treat two years as the presumptive default trial period is inconsistent with the statute’s requirement that trial programs be limited in time.

This is particularly the case because the Bureau has not proposed to review the trial disclosures prior to their use in actual transactions or to monitor their usage. The proposal does not even require preliminary data to be reported as the trial progresses so that the Bureau can assess whether the tests should continue. Instead, while the Bureau states that it intends to require companies to report material changes in customer service inquiries, complaint patterns, and default rates during the course of the trial, it requires only that providers commit to sharing “*test result data* with the Bureau *after the conclusion of the program.*”³³ In its application form, the Bureau is planning merely to ask the applicant to “indicat[e] any test results that will be shared during the program.”³⁴ Allowing a two-year trial without mandating that test result data be shared as the trial progresses would create a risk that harm to consumers resulting from the trial would not be detected until too late for the Bureau to change or terminate the program.

C. The Statute Sets Limits on the Scope of the Trial.

Section 5532(e)(1) also requires that a trial disclosure program be “limited in ... scope.” The Bureau’s lack of specification regarding the scope of trials is just as problematic.

The Bureau imposes no limits on the number of consumers who may be exposed to the trial or the range of different products and services. By definition, the results of a trial will be unclear, and any trial could result in a weakening of consumer understanding. The impact of a trial could also be very different if applied in a wide range of different circumstances that the Bureau has not contemplated. The Bureau should not allow trials that involve thousands of consumers or scope beyond a limited, specific product or service identified in the trial application.

D. The Statute Contains a Requirement that the Bureau Set Standards and Procedures for the Trials.

The statute permits the Bureau to allow a covered person “to conduct a trial program that is limited in time and scope, *subject to specified standards and procedures.*...”³⁵ The proposed policy fails to comply with this directive, as it does not set any specific standards or procedures with which the trials must comply. The most important standards are those that ensure consumer protections, which are lacking, as discussed below. Instead, it appears from the list of issues that applications

³² *Id.* at 45,578.

³³ *Id.* at 45,577 (emphasis added).

³⁴ *Id.*

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

must address³⁶ that the applicants must articulate their own standards and procedures. If that is true, the Bureau would be permitting trials without complying with the statutory mandate.

E. Trials Must Be Designed to Improve Consumer Understanding.

The statute authorizes only trial programs that are “designed to improve upon” model forms. The purpose of model forms is to fulfill the statutory purpose of disclosures, which is to “ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.”³⁷ Yet the proposal does not even point to any consumer benefit as a required product of the trials.

The proposal proposes to allow waivers “within the Bureau’s sole discretion”³⁸ and would permit trials based on “cost effectiveness”³⁹ alone. Although applicants would have to identify risks to consumers, the Bureau does not indicate that it will evaluate those risks independently to ensure that the disclosures (and potentially waivers of other consumer protection requirements) enable “consumers to understand the costs, benefits, and risks” as required by 12 U.S.C. § 5532(a), or to determine that improvements to consumers exceed any potential risk. The proposal is outside the Bureau’s authority because it does not seek to improve consumer understanding.

III. The Proposal Violates the Mandates to Protect Consumers from Unfair, Deceptive or Abusive Practices, to Enforce the Law Consistently, and to Promote Fair Competition.

As noted above, the Bureau is proposing to allow long trials with no concurrent monitoring of the impact of those trials on consumer understanding. Section 5532(b)(3) of the Dodd-Frank Act requires that model disclosure forms be adopted only after consumer testing is conducted. Consumer testing to ensure that a model form achieves its goals is especially important given that the forms are deemed to be compliance with the applicable disclosure requirements.

The Bureau is proposing only the weakest requirements for data collection and analysis. As noted above, the policy does not propose to require participants to report any test result data until after the trial program has ended, so the Bureau’s ability to monitor these programs as they are proceeding will be starkly limited.

During the course of the trials, the Bureau plans to rely on the companies to notify the Bureau of material changes in customer service inquiries, complaint patterns, default rates, or other information that should be investigated. Notably, the Bureau does not require companies to record this information, and even if a company does record this data the vague standard leaves the company to decide what is “material.” Given the Bureau’s intent to allow trade associations to apply on behalf of their members, it will not even have direct agreements with all of the companies that

³⁶ See Proposed Policy, 83 Fed. Reg. at 45,576-45,577.

³⁷ 12 U.S.C. § 5532(a).

³⁸ Proposed Policy, 83 Fed. Reg. at 45,577 n.28.

³⁹ *Id.* at 45,577.

are engaging in trial programs. Nor does the Bureau indicate what analysis it will perform on any data it obtains.

As a result, the pilot programs could result in real consumer harms and contravene the statutory purposes of the Dodd-Frank Act.

As support for its proposal, the Bureau cites its “statutory purpose, stated in subsection 1021(a) of the Act, to ensure that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.”⁴⁰ The Bureau goes on to point to three of the five statutory objectives Congress established for the Bureau:

Furthermore, this authority advances the Bureau’s statutory objectives in subsection 1021(b) of the Act to ensure consumers are provided with timely and understandable information to make responsible decisions about financial transactions; outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens; and markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.⁴¹

The Bureau cites for this principle subsections (1), (3) and (5) of 12 U.S.C. section 5511(b). However, the Bureau fails to note—either in this discussion or elsewhere in the proposed policy—subsections (2) and (4) of that same section. Those sections direct the Bureau to exercise its authority to ensure, with respect to consumer financial products and services, that—

(2) consumers *are protected from unfair, deceptive, or abusive acts and practices* and from discrimination;

...

(4) Federal consumer financial law is *enforced consistently*, without regard to the status of a person as a depository institution, in order *to promote fair competition*...⁴²

Unfortunately, the proposed policy will fail to ensure that either of these two objectives is met. The proposal’s overreach, extending far beyond Congress’s authorization for trial programs to improve model forms, its contemplation of blanket trial programs for all the members of a trade association, and its apparent intent to allow trial programs to extend for years and years with no concurrent monitoring of test result data, along with the Bureau’s failure to specify standards and procedures for the trials, deviate so strikingly from the objectives required by subsections (2) and (4) and create so great a risk to consumers that they comprise yet another basis for a finding that the entire proposal is outside the statutory authority of the Bureau.

The Bureau noted that this is a proposal to create a “Disclosure Sandbox,” which the Bureau describes as:

a regulatory structure where a participant *obtains limited or temporary access to a market* in

⁴⁰ Proposed Policy, 83 Fed. Reg. at 45,574.

⁴¹ *Id.*

⁴² 12 U.S.C. § 5511(b)(2), (4) (emphasis added).

exchange for reduced regulatory barriers to entry or reduced regulatory uncertainty.⁴³

We are not challenging what the Bureau chooses to call this exercise. We are challenging the Bureau’s mistaken and illegal characterization of a trial disclosure program as one that is used to allow a “participant” to obtain access to a market in exchange for “reduced regulatory barriers.” *It is not the purpose of section 5532(e) to ease access by new players in the consumer financial product marketplace. The purpose of the statute is to protect consumers and improve existing model forms to promote consumer understanding.*

The Bureau’s failure to ensure that the strict requirements of the statutory authorization for trial programs are followed, along with its expressions of purposes for this program that run counter to its required statutory mandates to protect consumers, indicate that the entire proposal is wholly beyond its statutory authority.

IV. The Proposal Gives Consumers and the Public No Input and Effectively Allows the Bureau to Amend Regulations without Following Rulemaking Requirements.

As discussed above, the proposal would permit broad, long-lasting trials that potentially pose numerous problems. Yet the proposal provides no opportunity for the public to weigh in before these trials are adopted or extended. Even if the applicants and the Bureau were focused on consumer understanding, public input is essential. This is all the more critical given the insufficient consumer protections, the lack of focus on improving consumer understanding, and the potential to allow trials and waive requirements based solely on cost savings for industry.

Moreover, any “trial” that is not narrowly limited to an identified covered person, a specific product, and a very short, finite time period is effectively a change in a rule. This proposal, in many respects, appears to be an effort to avoid rulemaking requirements. The APA requirements, among others, include an opportunity for notice and comment and discussion of the Bureau’s legal authority.⁴⁴ And under the Dodd-Frank Act, the Bureau, in adopting or amending a rule, must consider “the potential benefits and costs to consumers and covered persons”⁴⁵ and must analyze the impact on small entities.⁴⁶

The Bureau is not following any of these requirements. If the Bureau adopts a “trial” that is effectively a new rule without following rulemaking requirements, it would be exceeding its authority.

V. The Proposed State Sandbox Program Would Exceed the Bureau’s Authority.

The “Regulatory Coordination” portion of the proposed policy expresses the Bureau’s intent to permit covered persons to apply to state authorities rather than to the Bureau, and to conduct

⁴³ Proposed Policy, 83 Fed. Reg. at 45,578 n.37 (emphasis added).

⁴⁴ See 5 U.S.C. § 553.

⁴⁵ 12 U.S.C. § 5512(b)(2)(A)(i).

⁴⁶ 5 U.S.C. § 609(a).

trial disclosure programs through a state “sandbox.”⁴⁷ The Bureau uses the term “sandbox” to “refer to a regulatory structure where a participant obtains limited or temporary access to a market in exchange for reduced regulatory barriers to entry or reduced regulatory uncertainty.”⁴⁸ The Bureau should not proceed with this plan. It is poorly conceived and outside the Bureau’s authority, and would harm consumers.

As described in the proposal, it appears that the Bureau is contemplating that state “sandbox” trials would not be required to meet even the inadequate substantive consumer protection standards for applications submitted directly to the Bureau.⁴⁹ The Bureau’s proposed policy states only that state “sandbox” programs would have to contain safeguards against deception, be limited “in time *or* scope,”⁵⁰ and provide for submission of data to the Bureau.⁵¹ Moreover, the Bureau indicates that it plans to assess whether the disclosures tested through state sandbox programs improve upon existing disclosures “based upon cost effectiveness, consumer understanding, *or otherwise*.”⁵² There is no explanation of what “otherwise” means. And the disjunctive “or” allows a justification to be sufficient if based on only one of the articulated factors (*i.e.*, cost effectiveness or consumer understanding), “or otherwise.”

The concerns and problems described throughout these comments are heightened even further by the proposal’s attempt to offload authority to *states* to allow companies to test disclosures required by *federal* statutes with no effective oversight. States have no authority to alter federal disclosure requirements and the Bureau should never provide a waiver of federal law based on states’ decisions regarding their own regulations. At worst, state sandbox programs could create a race to the bottom as states push to obtain waivers of federal disclosure requirements in order to attract businesses to their respective jurisdictions.

Moreover, as is true of other aspects of this proposed policy, the Bureau exceeds its statutory authority in suggesting this state sandbox program. The Bureau relies on two statutory provisions, 12 U.S.C. sections 5495⁵³ and 5552(c).⁵⁴ It never mentions section 5532, the only provision in the Dodd-Frank Act that addresses the issuance of model forms and the approval of trial disclosure programs.

Section 5495, titled “Coordination,” provides: “The Bureau shall coordinate with [certain identified federal agencies] and other Federal agencies and State regulators, as appropriate, to promote *consistent* regulatory treatment of consumer financial and investment products and services.”⁵⁵ The term “coordination” is defined in the dictionary as “the process of organizing

⁴⁷ Proposed Policy, 83 Fed. Reg. at 45,578.

⁴⁸ *Id.* at 45,578 n.37.

⁴⁹ The deficiencies in the Bureau’s own standards are discussed above in section II of these comments.

⁵⁰ Proposed Policy, 83 Fed. Reg. at 45,578 (emphasis added).

⁵¹ *Id.*

⁵² *Id.* (emphasis added).

⁵³ *Id.* at 45,578 n.35.

⁵⁴ *Id.* at 45,578 n.36.

⁵⁵ 12 U.S.C. § 5495 (emphasis added).

people or groups so that they work together properly and well.”⁵⁶

Thus this statutory language instructs the Bureau to coordinate its work with these other agencies so that they are, to the extent possible, consistent in their approach to performing their independent statutory duties. It does not authorize the Bureau to transfer its own statutory duties to the states, much less give the states authority to waive federal requirements. Moreover, it instructs the Bureau that its coordination efforts should promote “*consistent* regulatory treatment of consumer financing and investment products and services.”⁵⁷ Since state sandbox programs would create *inconsistencies* in the treatment of consumer financial services products, section 5495 provides no authority whatsoever to promote such programs.

Section 5552 as a basis of authority fares even worse. It is titled: “Preservation of enforcement powers of States.” The point of this provision is to permit state attorneys general or their equivalent to bring actions to enforce the provisions of the Dodd-Frank Act. It contains limitations to that authority, requires notice to the Bureau prior to initiation of any such action, and preserves the authority of states to bring actions solely under state law. Subsection (c), the subsection cited by the Bureau, directs the Bureau to issue regulations to implement section 5552 and to “provide guidance in order to further coordinate *actions* with the State attorneys general and other regulators.” (emphasis added).

This section, like section 5495, addresses only *coordination* between the Bureau and the states in the performance of their independent statutory powers and duties. It does not support the transfer of those powers or duties. Moreover, it is confined to coordination of *actions*. The word “actions” in subsection (c) is clearly a reference to enforcement actions, the topic of this statutory section, and not to the word’s more general non-legal meaning (*i.e.*, “fact or process of doing something, typically to achieve an aim”⁵⁸). Thus section 5552 addresses only the coordination of *enforcement actions* brought under the federal consumer laws. It provides no authority for the Bureau to offload its duties to state authorities or to authorize state authorities to institute sandbox programs that would waive federal consumer protections.

The Bureau states in its proposal: “The Bureau’s direction to coordinate includes coordinating circumstances where States have chosen to limit their enforcement or other regulatory authority.”⁵⁹ The Bureau cites no authority for this assertion. Since this assertion comes immediately after a reference to section 5552(c), the Bureau may have intended it to be a further description of its authority under that section. If so, it is a gross overstatement. Section 5552 deals only with enforcement actions, and subsection (c) deals only with guidance for enforcement actions. It does not address the states’ “other regulatory authority.”

The only authority for a sandbox program is section 5532(e), allowing trials of model

⁵⁶ Merriam-Webster Dictionary, online version *available at* <https://www.merriam-webster.com/dictionary/coordination> (accessed Oct. 4, 2018). *See also* Macmillan Dictionary, online version *available at* <https://www.macmillandictionary.com/us/dictionary/american/coordination> (accessed Oct. 4, 2018) (“the process of organizing people or things in order to make them work together effectively” (emphasis added)).

⁵⁷ 12 U.S.C. § 5495 (emphasis added).

⁵⁸ Oxford Living Dictionaries, online version *available at* <https://en.oxforddictionaries.com/definition/action> (last accessed Oct. 4, 2018).

⁵⁹ Proposed Policy, 83 Fed. Reg. at 45578.

disclosures, and it authorizes only the Bureau—not the states—to conduct a sandbox program:

- “The *Bureau* may permit a covered person to conduct a trial program...”
- “The standards and procedures issued by *the Bureau* shall be designed...”
- “[*T*]he *Bureau* may establish a limited period....”
- “The rules of *the Bureau* shall provide....”⁶⁰

It does not authorize any entity other than the Bureau to perform these functions, and does not even use the word “state.”

Any Bureau effort to create or sponsor a state sandbox program would extend beyond its statutory authority. Moreover, any purported waiver of federal consumer protection statutes in reliance on an authorization issued by a state sandbox program would be a nullity. For all of these reasons, the Bureau should not proceed with its proposal regarding state sandbox proposals.

Conclusion

The Bureau’s proposal exceeds its statutory authority in numerous ways and contains wholly insufficient safeguards to protect consumers. Any policy that authorizes trial programs that go beyond the confines of section 5532(e) would be unlawful, and waivers issued under such a program would be a nullity. We urge the Bureau not to adopt this fundamentally flawed proposal.

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⁶⁰ 12 U.S.C. § 5532(e)(1), (2), (3) (emphasis added).