

June 25, 2018

Acting Director Mick Mulvaney
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Agency/Docket Number: Docket No. CFPB-2018-0012 -- Request for Information Regarding the Bureau's Inherited Regulations and Rulemaking Authorities – **electronic disclosures, statements, records and other communications**

Dear Acting Director Mulvaney,

The undersigned consumer, community, civil rights and legal services groups submit these comments in response to the Consumer Financial Protection Bureau ("CFPB")'s Request for Information ("RFI") regarding its inherited regulations and rulemaking authorities.

These comments focus electronic communications generally, including electronic disclosures, statements and records. Many of our organizations have also joined other comments that discuss specific regulations that the CFPB inherited.

While electronic communications may work well for many consumers, the CFPB needs to be cognizant of the limitations of electronic information and to enhance consumer choice for consumers who will be better served by paper statements, disclosures and records.

1. Objections to the CFPB's Request for Information Process

We must first note our objections to the burdensome RFI process. The amount of time and attention required to adequately address the CFPB's numerous RFIs on a multitude of subjects in a very short amount of time has diverted valuable consumer advocacy and third party resources to respond to these requests. The very structure of these RFIs, the nature of many of the questions, and the fact that many focus on processes known mostly to industry actors and their lawyers, favor financial institutions with greater resources at their disposal, and we are gravely concerned about any attempts to weaken consumer protection through this process.

The CFPB has ignored our request for an extension of time to respond to this particularly burdensome RFI and the one on adopted regulations. These two RFIs require us to comment on dozens of regulations on many different subjects running many hundreds if not thousands of pages in length. Doing so barely a week after responding to a series of other RFIs has been especially difficult.

These problems have prevented us from responding in more detail, seeking more input or signatories, or publicizing the comment opportunity more widely. The CFPB must not take the limited number of comments from the public as indicative of a lack of broad objections to changes the CFPB might make that would weaken its role in effectively protecting the consumer public.

2. All Regulations: Improve information provided electronically and respect consumers who prefer paper disclosures, statements and records

The CFPB asks for feedback on whether aspects of the adopted/inherited regulations are “incompatible or misaligned with new technologies, including by limiting providers’ ability to deliver, electronically, mandatory disclosures or other information that may be relevant to consumers”

This question covers a wide array of regulations and numerous provisions governing disclosures, records and other information. We do not have the capacity during this comment period to address this question in the context of specific regulations. If the CFPB is considering revisiting particular regulations, it should give notice to the public so that we can respond in more tailored fashion.

As a general matter, we support efforts to make electronic disclosures more noticeable, readable and understandable for consumers who access their information through electronic means. The CFPB considered electronic formats in developing the prepaid rule, and we have suggestions in the Regulation E sections of our comments, above. There may be other examples where statements or model forms that were developed for a paper context should be reformatted for the digital world.

However, we oppose giving providers more latitude to deliver disclosures, statements, records or other information electronically for consumers who prefer a paper format using postal mail. The CFPB also must remember that some products are too complex to be adequately disclosed on a mobile device, and not all electronic information can be saved and retained by the consumer. Moreover, use of electronic formats – such as door to door contractors selling PACE loans on tablets – can be used to prevent consumers from seeing or understanding important information, as discussed below.

Consumers must have the right to receive critical information in the manner that works for them. While electronic disclosures and statements sound eco-friendly, they are not for everyone. Paper versions have a number of advantages over electronic statements, discussed below and further in detail in a 2016 NCLC 2016 report.¹ Paper disclosures and statements must be available for free for consumers who want them, and consumers should not be coerced into electronic versions or steered into them by default if paper is the consumer’s first choice.

Paper is a more reliable way of ensuring that the consumer actually sees the information, can digest it as time permits, and can retain important records. Millions of Americans -- particularly those who are lower-income, less educated, older, and households of color -- are on the other side of the “digital divide,” lacking home broadband Internet access.²

Consumers who access information through mobile devices may especially need the right to receive information on paper. Lengthy or complicated disclosures are difficult to read or understand on mobile

¹ Chi Chi Wu and Lauren Saunders, National Consumer Law Center, Paper Statements: An Important Consumer Protection, March 2016, available at <https://www.nclc.org/media-center/report-paper-electronic-statements.html>.

² John B. Horrigan and Maeve Duggan, Pew Research Center, Home Broadband 2015, Dec. 21, 2015, at <http://www.pewinternet.org/2015/12/21/home-broadband-2015/> (noting that 59% of households with incomes below \$20,000 do not have access to broadband Internet at home, compared to one-third (33%) of all households; about half of Hispanics (50%) and African Americans (46%) do not have home broadband Internet; over half (55%) of Americans 65 years or older do not have home broadband Internet).

devices because of their smaller size and formatting. Information provide on a website, through an app, alert or text message are unlikely to be able to save that information for recordkeeping.

Furthermore, even consumers with ready internet access on a computer may prefer paper disclosures and statements, because electronic documents are easy to overlook due to email overload, and electronic disclosures on websites may be overlooked. Especially with monthly statements, consumers may value a physical mail piece as a record-keeping tool and reminder to pay. Studies show that consumers prefer paper when a payment is due upon receipt.³

We would especially like to note the problems that electronic documents have posed for consumers who have been solicited for Property Assessed Clean Energy (PACE) loans. Contractors go door to door soliciting seniors and others for loans that are added to their tax bill. They frequently make misrepresentations and push people into signing electronically on the spot, without the time to read and consider what they are signing. Here is one example from a recent story about a 74-year old Social Security recipient on a fixed income in Chico, California:

No paperwork exchanged hands. Kathryn reviewed all the legally binding documentation on a computer tablet and signed electronically. They didn't see everything printed out until Ernest asked and Kathryn received documents via email.

"They told us about all this money we were going to save," Ernest said. "We do save on the electric bill; thing is, we're paying three times as much [with] this solar system as what our electric bill was!"

Ernest said his household power costs \$88 a month on average through PG&E; his monthly payments for the solar system are \$268. Additionally, a 30 percent tax credit touted by the salespeople doesn't apply to the Hunleys.

"If they'd have offered a hard copy of the contract and I'd have had time to sit down and read it," he added, "there's no way I'd ever have agreed to it."⁴

This story is emblematic of many others. We have documented several examples of senior homeowners and others with limited English proficiency who were pushed to enter into very problematic home improvement contacts and/or loan agreements on the spot through mobile tablets and esignatures.⁵

³ U.S. Post Office, Office of Inspector General, Will the Check Be in the Mail? An Examination of Paper and Electronic Transactional Mail, Report Number RARC-WP-15-006 (Feb. 9, 2015), *available at* https://www.uspsoig.gov/sites/default/files/document-library-files/2015/rarc-wp-15-006_0.pdf; Emmett Higdon, eBusiness & Channel Strategy Professionals, "Paperless Plight: Growing Resistance Outpaces Adoption Among US Bank Account Holders" at 2 (Nov. 1, 2010).

⁴ Evan Tuchinsky, Chico News & Review, "Not as advertised: Lack of regulation over energy-efficiency program prompts crackdown" (May 24, 2018), <https://www.newsreview.com/chico/not-as-advertised/content?oid=26315850>

⁵ National Consumer Law Center Issue Brief: Residential Property Assessed Clean Energy (PACE) Loans: The Perils of Easy Money for Clean Energy Improvements at 3 (Sept. 2017) ("Technology Meets the Hard Sell and attached stories 1, 7, 9, 10, 13 and 15), https://www.nclc.org/images/pdf/energy_utility_telecom/pace/ib-pace-stories.pdf.

The 2016 NCLC report includes examples of when electronic credit card statements caused consumers to forget to make a payment, and thus triggered late fees and adverse credit reporting consequences.⁶ Electronic statements create barriers for consumers to access vital information because it takes effort to remember the task, find the free time, go to the correct webpage, remember their password, and download the document – as opposed to simply opening an envelope. As the Bureau’s 2015 Credit CARD Act study documented, over half of consumers who opted for electronic credit card statements are not opening or reviewing these statements.⁷

Paper also provides a more permanent (and in some cases the only) record. If statements and disclosures are saved on a hard drive, computers can crash or become outdated. Consumers whose only online access is through a mobile device cannot save electronic records. The records that are available online (or even by phone) may not go as far back as they need. Consumers often lose electronic access to account records after an account is closed, but the records might still be necessary for tax returns, proof of purchase for warranties, and other purposes.

Paper statements, records and disclosures are especially important for older consumers, who are less likely to be completely comfortable online even if they have computer access. For those who face cognitive challenges due to aging, it may be more difficult to remember passwords, to keep on top of email, to know when a bill is due, and even to operate a computer. Electronic delivery may also make older consumers more vulnerable to phishing emails and scammers, increasing identity theft. Paper statements and disclosures also enable family members to more easily assist older consumers or piece together financial transactions.

Despite the importance of statements and the need to preserve consumer choice, providers have aggressively pushed consumers to receive their monthly statements for credit cards, bank accounts, and other financial accounts via electronic delivery. As documented in the 2016 NCLC report,⁸ these efforts can be harmful to consumers. Such efforts are sometimes deceptive, with confusing web pages that make it appear that the consumer must consent to electronic statements in order to proceed to the next screen to see their account online. They sometimes lack a “no thanks” button or hide it in a barely visible location.

Financial institutions can substitute electronic delivery for paper statements, but only in compliance with the Electronic Signatures in Global and National Commerce Act (E-Sign) Act. If the law requires that a statement, disclosure or other record be made in writing, the E-Sign Act requires that: (1) the consumer must affirmatively consent to electronic delivery; (2) the financial institution must make certain disclosures to the consumer; (3) the consumer’s consent must demonstrate that he or she has access to the equipment and programs necessary to receive, open, and read the relevant electronic documents; (4) the consumer must be given notice of the right to withdraw consent for electronic delivery,⁹ and (5) electronic records must be in a form that is capable of being retained and reproduced.¹⁰

⁶ Chi Chi Wu and Lauren Saunders, National Consumer Law Center, Paper Statements: An Important Consumer Protection, March 2016, at 6.

⁷ CFPB, 2015 Credit CARD Act study at 134.

⁸ Chi Chi Wu and Lauren Saunders, National Consumer Law Center, Paper Statements: An Important Consumer Protection, March 2016, at 3.

⁹ 15 U.S.C. § 7001(c)(1).

¹⁰ 15 U.S.C. § 7001(e).

Thus, a consumer always has the right to withdraw consent if they find that electronic statements are not sufficient for their needs. An important aspect of the E-Sign Act is that it does not require any person to agree to use or accept electronic records or electronic signatures. We also note that viewing a disclosure on a tablet held by a sales person, as has happened in the PACE loan context, does not either show that the consumer has access to equipment to read a document nor that the record is capable of being retained and reproduced by the consumer.

While electronic communications may work well for many consumers, the CFPB needs to be cognizant of the limitations of electronic information and to protect consumers who want to keep paper statements, disclosures and records. Among other measures, the CFPB should enhance consumer choice and should not allow companies to charge a fee for paper statements that are required by federal law, though it may permit a modest discount, reflecting the actual cost of paper statements, for those who choose electronic communications.

Thank you for considering these comments.

Respectfully submitted,

Allied Progress
Americans for Financial Reform
Arizona Community Action Association
Arkansans Against Abusive Payday Lending
Atlanta Legal Aid Society, Inc.
CASH Campaign of Maryland
Center for NYC Neighborhoods
Consumer Action
Consumer Federation of America
Equal Justice Society
Georgia Watch
Heartland Alliance for Human Needs & Human Rights
Housing Options & Planning Enterprises, INC.
Illinois People's Action
Main Street Alliance
Maryland Consumer Rights Coalition
Mississippi Center for Justice
National Association of Consumer Advocates
National Association of Social Workers
National Consumer Law Center (on behalf of its low income clients)
National Fair Housing Alliance
New Jersey Citizen Action
People's Action Institute
Public Counsel
Public Justice Center
Texas Appleseed
U.S. PIRG
West Virginia Center on Budget and Policy
Woodstock Institute

