Bureau Aims for More Disclosure Trials by Proposing Revamp of “Disclosure Sandbox” Policy

Overview: Last week, the Bureau of Consumer Financial Protection (the “Bureau”) issued a proposal (the “Proposal”) setting forth a suite of revisions to an existing policy on trial disclosure programs (“TDPs”). The Proposal characterized the original policy—adopted in 2013 to encourage private research and testing on improving financial regulatory disclosures and model forms—a failure because the Bureau has yet to permit a single TDP under the policy’s provisions. In an effort to revive the Bureau’s original goal, the Proposal creates a new “Disclosure Sandbox” with a series of updates “designed to more effectively encourage companies to test new disclosures.”

Many Federal consumer financial protection laws, as well as their implementing regulations, contain provisions that require financial services providers to provide consumers with relevant and understandable information that can enable them to make informed financial decisions. The Bureau, as the agency charged with implementing and enforcing these laws, utilizes its authority in the Proposal to present a new, streamlined TDP framework as a way to identify and improve disclosure requirements.

In particular, the Proposal capitalizes on a section of the Dodd-Frank Act that permits the Bureau to provide a legal “safe harbor” for companies wishing to experiment with ways to improve existing disclosures by applying for a TDP waiver. This safe harbor would “deem a participating company to be in compliance with, or exempt from, identified Federal disclosure requirements,” and would prohibit lawsuits against such companies—including by private entities as well as Federal and State regulators—based on the companies’ use of experimental trial disclosures.

The Proposal is intended to revise the original policy by facilitating the following four goals:

1. Reduce the application burden and review time frame.

According to the Bureau, the original policy’s application for a TDP waiver included several duplicative and unnecessary elements. The Proposal attempts to streamline the application process by not only eliminating these elements, but also by substantially reducing the factors the Bureau considers during application review. The Bureau will also be subject to a new 60-day time frame expectation for granting or denying an application for a waiver. The Proposal also now clarifies that groups of companies or trade associations—rather than just individual companies—may apply for a TDP waiver. This provision may be attractive to several industry sectors whose members are nearly unanimous in clamoring for revised disclosure obligations.
(2) **Increase guidance about the testing waiver.**

Companies granted a waiver would have to comply with additional requirements throughout their TDPs that keep the Bureau apprised of any adverse impact the trial disclosures may be having on consumers. For instance, participating companies would have to notify the Bureau of “material changes in complaint patterns” or other relevant information that could demonstrate such impacts so that the Bureau may investigate the matter.

(3) **Specify procedures for extending successful TDPs.**

The Proposal anticipates that most waivers will provide a two-year testing period for a TDP. Extensions may be granted to those that can demonstrate successful testing of their trial disclosures, meaning test result data shows an improvement upon existing requirements “based upon cost-effectiveness, delivery mechanism, or consumer understanding.” The Proposal outlines the procedures and factors the Bureau would consider in granting an extension. In addition, if the trial disclosures are shown to be successful, “the Bureau will endeavor to amend disclosure rules accordingly and to permit the use of validated trial disclosures until such amendment is effective.” During this time, the Bureau may also consider permitting other covered entities to use the improved disclosures.

(4) **Provide for coordination with programs to facilitate innovation offered by other regulators.**

Finally, a new section calls for the Bureau to coordinate with other Federal, State, or even international regulators that offer programs similar to the TDP waivers. The Proposal emphasizes the Bureau’s intention to facilitate innovation in consumer protection, in particular by contracting with States to permit applicants to conduct TDPs through the State’s own sandbox. States would be required to share related data with the Bureau and implement minimum safeguards for their sandboxes. Federal and State sandbox coordination, however, will likely take time. So far, the only state to have created its own regulatory sandbox via statute is Arizona, which passed legislation in March to provide licensing exemptions for companies testing innovative financial products or services.

**Outlook:** Overall, the new TDP Proposal aims to make trial disclosure programs more attractive to issuers of financial products or services who believe that the disclosures they offer are overly burdensome and/or do not discernibly help consumers. The Bureau notes that it intends to publish notice on its website of any TDP that is granted a waiver or waiver extension, including the identity of the successful applicant; a summary of the new disclosures and how long they will be used; and a statement explaining how the waiver will be applied. Any other information that is ultimately disclosed to the public (e.g., test data or other information about TDPs), however, will be limited according to the Freedom of Information Act and to protect consumers’ privacy interests. The public is invited to comment on the Proposal through October 10, 2018.