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June 14, 2019

Comptroller Joseph Otting
Office of the Comptroller of the Currency
400 7th Street, SW
Washington, D.C. 20219

RE: OCC Innovation Pilot Program

Dear Comptroller Otting:

Woodstock Institute offers this comment in response to the Office of the Comptroller of the Currency's (OCC's) request for comment on its proposed Innovation Pilot Program (the "OCC Program"). Thank you for the opportunity to comment on this important subject. Overall, Woodstock strongly supports the OCC Program. The OCC Program (1) is intentionally proposed as an alternative to regulatory sandboxes and their associated waivers, exemptions, and safe harbors; and (2) is focused on the absolute importance of protecting consumers from harm.

About Woodstock Institute

Woodstock Institute is a leading nonprofit research and policy organization in the areas of equitable lending and investments; wealth creation and preservation; and safe and affordable financial products, services, and systems. Woodstock Institute works locally and nationally to create a financial system in which lower-wealth persons and communities of color can safely borrow, save, and build wealth so that they can achieve economic security and community prosperity. Our key tools include: applied research; policy development; coalition building; and technical assistance. Woodstock Institute has been a recognized economic justice leader and bridge-builder between communities and policymakers in this field since it was founded in 1973 near Woodstock, Illinois. Among the issues recently on Woodstock's policy agenda are payday and auto title lending, check-cashing fees, small business lending, abusive municipal fines & fees, and the Community Reinvestment Act.

About the Author

Woodstock Senior Vice President of Policy & Communication Brent Adams began working on consumer financial protection as the Policy Director at Citizen Action/Illinois from 2003-2006. In 2006, the Illinois Department of Financial & Professional Regulation (IDFPR) hired him as a deputy general counsel overseeing legal matters involving non-bank financial institutions:

credit unions, installment lenders, and check cashers, among others. In 2009, Governor Pat Quinn appointed Brent to serve as Secretary of IDFP, making him the State’s chief regulatory official overseeing most of the State’s financial institutions, including state banks and licensed professions. Brent served in that role until 2012. In 2016, Brent began his current role at Woodstock, advocating for regulatory reform to protect consumers.

Sandboxes¹ vs. the OCC Program

A regulatory sandbox is essentially a regulation-free zone in which so-called financial innovators can experiment on consumers. A regulatory sandbox is akin to teaching someone to drive by handing them the keys to your car and saying, “Go. Drive.” They’ll learn to drive eventually, but there is a high risk that both people and property will be damaged in the process. The OCC’s approach is more like learning to drive by taking a drivers’ education course. It may take longer (although not necessarily), but there is a dramatically less risk that they will leave behind a path of destruction when then new driver hits the road (after obtaining the necessary permit or license). In a certain way, the OCC Program is the opposite of a sandbox. With a sandbox, the regulator effectively steps out of the room to allow the innovator to try out its product on consumers. Under the OCC Program, the regulator gets *more* involved: “The program is designed to provide eligible entities with regulatory input early in the development of proposed innovative activities.” While we have various suggestions detailed below, Woodstock strongly supports this overall approach.

For two years, we have helped lead a coalition opposed to establishing a sandbox in Illinois.² One of my successors at IDFP was a leading advocate on the national stage *for* regulatory sandboxes. (Leadership at the agency changed following the election of a new governor in 2018.) Our coalition includes a diverse set of groups, including labor, consumer groups, and even Illinois fifth largest city, the City of Rockford.

As you know, sandbox advocates assert that sandbox policies encourage financial innovation, but history shows that some financial innovations (such as the toxic mortgage products that led to the foreclosure crisis) lead to consumer harm. A fraudster in the sandbox could defraud consumers without fear of having a regulator examine its activities. Older adults, especially older adults of color may be at heightened risk, as they have historically been more vulnerable than younger consumers to financial scams and predatory financial products and services. The many scams involving reverse mortgages – “innovative” at one time – are a prime example of the potential harms.

We published a report recently regarding the digital divide that risks leaving older adults out of our financial system.³ In that report, we recommend that policymakers pursue strategies that encourage innovation without sacrificing oversight and consumer safeguards. Rather, consumer safeguards should be at the forefront of any plan to provide special treatment to financial products or systems that claim to be innovative. The OCC Program seems to share this concern, identifying risk of consumer harm as the most important risk posed by new forms of regulatory engagement.

A sandbox – creating a safe space for companies to experiment on consumers – creates an incentive for unscrupulous actors to try and disguise their products or services as innovations so as to gain entry into the sandbox. The Consumer Financial Protection Bureau’s (CFPB’s) “product sandbox” proposal practically

¹ For purposes of this comment letter, the discussion about sandboxes refers only to U.S. models.

² The Illinois House approved a sandbox bill in 2018 (HB 5139), but the bill, which was opposed by the leading consumer advocates in the state, failed to make it out of committee in the Illinois Senate. A sandbox bill was reintroduced in 2019 (HB 2825), but it lies dormant as of this report’s publication.

³ Lauren Nolan, Woodstock Institute. *Digitally Divided: Older Adult Banking Vulnerabilities in the Chicago Region* (Apr. 2019). <https://woodstockinst.org/wp-content/uploads/2019/04/REPORT-Digitally-Divided-Older-Adult-Banking-Vulnerabilities-in-the-Chicago-Region.pdf>

invites such behavior by establishing no standards around what qualifies as an “innovation.” As pointed out in a recent report from the National Consumer Law Center, “vague definitions of innovation could apply to any company.”⁴ The OCC Program, by contrast, would be a hostile environment for shady behavior. The OCC Program provides detailed criteria for program eligibility. The detailed criteria and enhanced regulatory involvement substantially reduce the risk that bad actors will try to use the cloak of innovation to prey on consumers.

Live Testing

The OCC Program allows for “live testing” under certain circumstances, and this raises obvious concerns. In the sandbox context, we have said that consumers should not be treated like guinea pigs, but we are realistic that pilot programs can often not be conducted meaningfully in an entirely and exclusively simulated environment. The OCC Program lists certain controls and safeguards that companies “could” establish to protect consumers. The controls and safeguards listed should be mandatory, and the OCC should strengthen the first of the three controls: “consumer notification or consent.” Notification is insufficient for live testing on consumers, and the standards for “consent” should be clarified. There is no reason why consent in the financial services setting should be weaker than in the academic setting. A financial experiment gone awry could exact as much or more harm than a sociological experiment, for example. “Informed consent” is the standard used for research on human subjects in the academic setting. One definition of informed consent is as follows:

Fully informing participants of the risks, benefits, and procedures involved in a study is a standard requirement in research with human participants. Ethically and legally, consent is not considered to be “informed” unless the investigator discloses all the facts, risks, and discomforts that might be expected to influence an individual’s decision to willingly participate in a research protocol. This applies to ALL types of research including surveys, interviews, and observations in which participants are identified⁵

Clicking a box on a screen following several paragraphs of legalese is insufficient to establish informed consent. Moreover, companies conducting live testing should require participants to opt in to the test, as opposed to opt out. Put another way, test subjects, i.e., consumers, should take an affirmative act to volunteer for the test *and* should also provide informed consent; it is a two-step process. Many websites offer consumers the option of completing a survey to provide feedback on their experience. Agreeing to an optional survey is a good example of opting in that could be applied here that is not overly burdensome. The informed consent process would be next.

The standards for what constitutes informed consent would and could vary depending of the possible risks involved. The OCC Program description lists “beta testing” as an example of a live test. Beta testing of a website could in many circumstances pose little to no risk to the consumer. Correspondingly, getting informed consent for such a test would be less exacting. We recommend the OCC publish more examples

⁴ Lauren Saunders, National Consumer Law Center. *Fintech and Consumer Protection: A Snapshot* (Mar. 2019). https://www.nclc.org/images/pdf/cons-protection/rpt-fintech-and-consumer-protection-a-snapshot-march2019.pdf?mc_cid=8e79ec33a0&mc_eid=f4987fcaf0

⁵ Cornell University, Office of Research Integrity and Assurance, Institutional Review Board. <https://www.irb.cornell.edu/faq/#con5>. See also U.S. Food & Drug Administration, Office of Good Clinical Practice. *Guidance for Institutional Review Boards and Clinical Investigators: Institutional Review Boards Frequently Asked Questions* (Jan. 1998). <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/institutional-review-boards-frequently-asked-questions#Informed%20Consent%20Process>.

of “live testing” involving varying degrees of risk, examples of sufficient opt-in processes, and the standards for informed consent under various scenarios.

Forced Arbitration

We urge the OCC to prohibit forced arbitration clauses in any consumer agreements used in connection with a pilot program. Such clauses, in our view, would not qualify as the type of “remediation” contemplated in the section regarding “controls and safeguards.” The OCC Program contemplates remediation mechanisms that include “fair compensation” for any consumer harm. Pre-dispute arbitration clauses in consumer contracts fail to meet this standard.

Woodstock opposes forced arbitration in all instances. Consumers are not able to negotiate the terms of their contracts with financial product and service providers. (Imagine a consumer trying to haggle over the fine print of his credit card agreement!) Thus, an arbitration “agreement” in a consumer financial contract is not an agreement at all, but rather, is a “take it or leave” provision that is forced on the consumer. Moreover, in the vast majority of instances, consumers are unaware that they are “agreeing” to sign away their rights.

As part of an arbitration study required by Section 1028(a) of the Dodd-Frank Act,⁶ the Consumer Financial Protection Bureau conducted a nationwide telephonic study of credit card users to measure their awareness of the dispute resolution provisions in their credit card agreements. Less than 7% of consumers whose credit card agreements included pre-dispute arbitration clauses stated that they could not sue their credit card issuers in court. As noted by the CFPB, “[e]ven this 7% share may not, in fact, have knowledge of the clause. A statistically similar proportion of consumers without a clause in their agreement reported that they could not sue their issuers in court. (7.7% compared to 6.8%).” The fact that these waivers of rights are neither knowing nor voluntary makes them inherently unfair.

Transparency

The OCC has noted that it may periodically develop publicly available materials “regarding the results of the program,” including “best practices or lessons learned when conducting a pilot, general topics explored within the program, and any supervisory approaches or policies stemming from pilot experiences.”

We urge the OCC to commit to greater transparency. This is particularly important considering the uncertainty involved in the innovation context. While Woodstock is not a supporter of the Arizona sandbox program, the state’s web page listing and describing the program participants is well done: <https://www.azag.gov/fintech/participants>. The OCC should also publish reports – drawn from the information it will be requesting from participants – identifying issues discovered and remedial action taken, along with publications that describe the outcome of approved pilots when an entity leaves the OCC Program for any reason.

⁶ CFPB. *Arbitration Study: Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, at 3.1 (Mar. 2015). https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf

Conclusion

Sandboxes have been trending as a regulatory response to innovation. The OCC could have easily followed this path. We very much appreciate the agency choosing a different approach. The OCC Program's emphasis on consumer protection is borne out in the manner in which the program is constructed.

Please let us know if we can be of any assistance.

Very truly yours,

A handwritten signature in black ink, appearing to read "B.E.A.", with a long horizontal flourish extending to the right.

Brent E. Adams
Senior Vice President of Policy & Communication