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CFPB PUBLISHES PROTOTYPE CREDIT CARD AGREEMENT

On December 7, 2011, the Consumer Financial Protection Bureau (CFPB) launched a new Know Before You Owe project with a prototype "simplified" credit card agreement. The prototype is a two-page agreement with a separate set of incorporated definitions to be provided online or in paper. The prototype agreement (roughly 1,100 words) is highly formatted, with text in boxes of varying sizes, shapes and colors. It is organized into three sections: costs, changes and additional information. The prototype definitions (roughly 1,800 words) are presented on a web page that is four pages long when printed. The prototype definitions are missing a few terms (such as "protected balance"), however, which could increase the word count.

Criticizing current credit card agreements as confusing, long, dense, complex, complicated and intimidating, with key information "surrounded by legal fine print," the CFPB offers this informal (*i.e.*, not required by any law) "thought starter" concept of a simple agreement. The CFPB suggests that its prototype will be easier for consumers to understand because it is short, clear, consumer-friendly and consistent and notes that the prototype is not a model form and use is not mandatory.

Despite a professed intention to maintain "issuers' freedom to design credit card products" and recognition of the need for "fully enforceable contracts," the prototype is undeniably consumer-centric. Describing "a lot of the information in a credit card agreement" as "contractually necessary but generally uninformative to consumers," the CFPB shows a strong bias toward (supposed and highly subjective) consumer understanding at the expense of black letter contract law. Indeed, the prototype looks more like a notice than a contract. It lacks basic provisions that would be informative to consumers, such as an explanation that use of the card is a loan and the consumer's promise to pay. And the "changes" section is essentially a summary of federal law requirements and restrictions, as if the agreement were an educational brochure.

The CFPB also mentions that millions of consumers receive credit card agreements *and do not read them*, but does not explain why consumers would be any more willing to read the prototype (not to mention the definitions, which by necessity will include many relevant terms and conditions) than any other agreement.

The prototype also fails to take into consideration existing federal and state law requirements. Most notably, the prototype does not contain the account-opening table or billing rights notice that are required by federal Regulation Z. Accordingly, *an issuer who used the prototype as is would be in violation of current federal law*. In addition, state law requirements are conspicuously absent.

The credit card agreement is the third project in CFPB's Know Before You Owe campaign, which includes efforts to improve the transparency of information about mortgages and student loans. The mortgage project, in contrast, related to a specific legal mandate. Section 1032(f) of the Dodd-Frank Act directs the CFPB to propose a single integrated model disclosure that combines the disclosures required by the federal Truth in Lending and Real Estate Settlement Procedures Acts. The CFPB's authority with respect to student loans and credit card agreements is more limited. Section 1032(a) and (b) permit the CFPB to prescribe rules to ensure that the features of financial products or services are fully, accurately and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits and risks and authorize promulgation of optional model forms. This latest initiative is merely an "informal proposal" and not a rulemaking, however.

The CFPB will pilot test the prototype with one of the largest credit unions in the country, Pentagon Federal Credit Union. The CFPB also solicits feedback from the public and issuers. For example, the press release and blog post ask whether issuers would be able to offer their products consistently with the prototype approach and whether the approach offers opportunities to reduce compliance and printing costs.

Issuers might be well served at this point to provide comments on a macro level. That is, to take a position on the concept as a whole rather than just the feasibility of the prototype itself. Only highlighting particular sections or headings or definitions could be construed as tacit endorsement of the concept as presented.

Please do not hesitate contact us if you have any questions.

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