



February 15, 2013

Ms. Monica Jackson  
Office of the Executive Secretary  
Consumer Financial Protection Bureau  
1700 G Street, NW  
Washington, DC 20552

**Re: Docket No. CFPB-2012-004 – Policy to Encourage Trial Disclosure Programs; Information Collection**

Dear Ms. Jackson:

The Consumer Bankers Association,<sup>1</sup> the American Bankers Association,<sup>2</sup> and the American Bankers Insurance Association<sup>3</sup> (collectively, the “Associations”) appreciate the opportunity to submit comments on the Proposed Policy (“Proposal”) to exempt individual companies, on a case-by-case basis, from current federal disclosure requirements in order to test “trial disclosures.”<sup>4</sup> The Associations generally support the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) which seek to “promote consumer access and innovation” and improve “consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits to consumer financial products or services.”<sup>5</sup> In addition, we applaud the Consumer Financial Protection Bureau (“CFPB” or “Bureau”) on its effort to promote in-market testing involving companies and consumers in real world situations, rather than simulated or focus-group testing, and for encouraging financial services companies to propose alternatives to existing disclosures.

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<sup>1</sup> The Consumer Bankers Association (“CBA”) is the trade association for today’s leaders in retail banking - banking services geared toward consumers and small businesses. The nation’s largest financial institutions, as well as many regional banks, are CBA corporate members, collectively holding two-thirds of the industry’s total assets. CBA’s mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business.

<sup>2</sup> The American Bankers Association represents banks of all sizes and charters and is the voice for the nation’s \$14 trillion banking industry and its two million employees. The majority of ABA’s members are banks with less than \$165 million in assets.

<sup>3</sup> The American Bankers Insurance Association is a separately chartered subsidiary of the American Bankers Association.

<sup>4</sup> 77 Fed. Reg. 74625 (2013).

<sup>5</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010) (“Dodd-Frank Act”), §§ 1021 and 1032(b)-(e).

## **Summary of the Associations' Comments**

- The CFPB should provide financial services companies with more incentives to participate in a trial disclosure program. Companies and trade associations should be allowed to jointly develop test proposals, and be permitted to use approved trial disclosures for at least a one-year period and for the period time after the test during which the Bureau is evaluating the results.
- The safe harbor for trial disclosures should be broadened to encompass both federal and state disclosure rules, and the CFPB should explicitly declare in the waiver that an approved trial disclosure is not deceptive.
- Due process procedures should be incorporated into the trial disclosure program to provide participating companies with an opportunity to correct a violation of a waiver's terms and conditions and to appeal a waiver revocation decision.
- The CFPB should be responsible for informing a test population about its participation in and the results of a trial disclosure program. Placing this obligation on participating companies would unfairly and unnecessarily expose them to the risk of reputational harm.
- The Associations suggest the CFPB engage in preliminary discussions with companies expressing an interest in proposing a trial disclosure program, as this would allow a company to gauge the agency's level of interest before making any substantial commitment of resources.
- We request that the Bureau provide further clarification and guidance on the Proposal's use of the terms "metrics" and "market failure."

## **The CFPB Should Provide Sufficient Incentives for Financial Services Companies to Develop Trial Disclosures**

The Associations agree with the underlying intent of this Proposal and with section 1021 of the Dodd-Frank Act, which is that consumers would benefit from simpler, clearer disclosures that provide them with a better opportunity to make informed financial decisions. Unfortunately, the Proposal offers few incentives for financial services companies to participate. For example, the CFPB would restrict participation in any one trial disclosure program to include a single company and its third-party vendors. This restriction would require a bank to amend its disclosures, implement system changes, develop and track metrics to measure the effectiveness of the trial disclosure, share this data with the CFPB, and dedicate a portion of its staff to conduct a successful trial. At the same time, the bank would also have to maintain compliance with federal disclosure rules for its preexisting disclosures, and the bank would receive little assurance from the Bureau that it could continue to use a successful trial disclosure past the specified test period or that the agency would adopt any changes to the existing disclosure rules based on the test program.

As the industry shares the CFPB's interest in promoting better disclosures, a few changes to the Proposal would provide financial services companies with better incentives to participate. For instance, the CFPB should allow companies and trade associations to jointly develop trial disclosure programs. There is no good reason a single company must bear all the cost and burden of developing a trial disclosure, as jointly developed disclosures can meet all of the Proposals' eligibility criteria. Furthermore, the CFPB acknowledges its ability to approve any specific trial disclosure program will be limited by the "scope and nature of programs currently underway as well as the Bureau's currently available resources."<sup>6</sup> Allowing companies and trade associations to work together to develop a trial disclosure program would efficiently marshal resources at these companies and the CFPB, thus improving the odds of achieving the Proposal's intended results.

In addition, the CFPB should allow companies to use their approved trial disclosures for at least a one-year test period, and for the period of time after the test during which the Bureau is evaluating the results. As noted above, financial services companies will have to make a substantial investment of time and resources to participate in a trial disclosure program. Providing at least a one-year test period gives these companies a better incentive to participate as they will be assured of the benefits of making these resource investments for a minimum period of time. Furthermore, permitting the use of trial disclosures during the post-test period would provide these companies with more time to collect useful information, and allows for the possibility of their uninterrupted use if the CFPB were to adopt them in a rulemaking. Without these incentives, it is difficult to imagine that many companies would take on the cost and burden of developing new disclosures.

### **The Safe Harbor for Trial Disclosures Should Be Broadened to Encompass Both Federal and State Disclosure Rules**

The Proposal correctly recognizes financial services companies will be unwilling to participate in a trial disclosure program without any assurances that these activities would be protected under the federal disclosure rules. Thus, the CFPB proposes a safe harbor from legal action pursuant to these rules in the form of a waiver, which would "deem the testing company's disclosure, to the extent it is used solely by the testing company under the terms and conditions approved by the Bureau, to be in compliance with, or hold it exempt from, applicable federal disclosure requirements."<sup>7</sup>

However, the waiver proposed by the CFPB falls short of the level of protection needed to persuade financial services companies to participate in a test program. While the waiver would cover participating companies under federal disclosure rules, it leaves these companies exposed to possible legal action taken pursuant to state disclosure rules, state unfair or deceptive acts and practices ("UDAP") laws or private rights of action. We are particularly concerned that participating companies may be sued under state UDAP laws alleging that a trial disclosure is deceptive.

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<sup>6</sup> 77 Fed. Reg. 74627.

<sup>7</sup> *Id.* at 74626.

The Associations suggest the CFPB work with the States to provide a more comprehensive safe harbor for participating companies. This could be accomplished through an accord between the CFPB and the States, in which the activities of a company made in accordance with the terms and conditions of a waiver are deemed to be in compliance with federal and state disclosure rules. This would also apply to new and revised disclosures that are subsequently approved by the CFPB for use on a permanent basis. In addition, when approving a trial disclosure program, the CFPB should explicitly declare in the waiver issued to participating companies that the Bureau has reviewed the trial disclosure and found it not to be unfair, deceptive or abusive. Without the assurance provided by such a comprehensive safe harbor, few of our members would be willing to expose themselves to legal risk in order to participate in a test disclosure program.

### **The CFPB Should Provide Participating Companies with Due Process Procedures in order to correct a Violation of a Waiver's Terms and Conditions and to Appeal a Waiver Revocation Decision**

As would be expected, the Proposal makes clear the CFPB will not issue a waiver from the federal disclosure rules unless a testing company abides by the terms and conditions set out in the waiver. However, the Proposal empowers the CFPB to revoke a waiver, in whole or in part, without offering participating companies an opportunity to contest the Bureau's findings or to fix the problem. The Associations are concerned that a lack of explicit procedural safeguards may result in harm to participating companies after they have invested significant resources in developing and running a trial disclosure program. This concern is heightened by the provision in the Proposal requiring participating companies to disclose to consumers that the CFPB has revoked a waiver, potentially exposing these companies to reputational injury. The establishment of due process procedures would be in the best interests of both the CFPB and the industry as financial services companies would be more inclined to participate in a trial disclosure program if it is made clear the CFPB will not unilaterally revoke a waiver without giving a participating company an opportunity to correct a violation or to dispute the agency's findings.

The CFPB already has a model for due process which, with some modification, could be used for the trial disclosure program. Bulletin 2012-07 sets out the CFPB's appeals policy on examination reports and supervisory letters.<sup>8</sup> This policy outlines both a pre-appeals resolution process and a formal appeals process. Under the former process, the CFPB encourages its staff to share preliminary findings with supervised entities as it "anticipates that most disputes can be resolved before an examination is final."<sup>9</sup> As for the formal appeals process, the CFPB provides supervised entities with an opportunity to appeal an examination report or supervisory letter – orally and in writing – before a committee composed of CFPB managers not involved in the supervisory matter, with a final decision rendered by the Associate Director for Supervision, Enforcement and Fair Lending.<sup>10</sup> Moreover, the entire appeals process is protected as confidential supervisory information. The Associations urge the CFPB to adopt an appeals

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<sup>8</sup> CFPB Bulletin 2012-07, Appeals of Supervisory Matters (Oct. 31, 2012).

<sup>9</sup> *Id.* at 3.

<sup>10</sup> *Id.* at 4-5.

policy modeled on Bulletin 2012-07 for the trial disclosure program. At a minimum, this policy should include pre-appeal resolution mechanisms and a formal appeals process, which should include confidentiality protections for these proceedings.

### **The CFPB Should be Responsible for Disclosing Trial Disclosure Results to a Test Population**

Under the Proposal's eligibility criteria, the CFPB would require companies to explain in their test proposals how they will address disclosure requirements for the consumer test population at the end of the program. While the Associations agree that a test population should be informed about its participation in a trial disclosure program, we are concerned that placing the onus on participating companies to disclose this fact would unfairly expose them to unnecessary reputational risk. The potential always exists for some members of a test population to believe, without justification, that participating companies are taking advantage of them by providing them with illegitimate or deceptive disclosures.

The Associations believe these concerns could be quelled by simply having the CFPB, and not participating companies, inform consumers about the development, operation and results of a trial disclosure program. This way, consumers would recognize that their participation in a trial disclosure program was approved, monitored and supervised by a government agency, increasing their trust in the legitimacy of the process.

### **The CFPB Should Engage in Preliminary Discussions with Interested Companies**

The Associations urge the CFPB to modify the Proposal to further incentivize companies to participate in a trial disclosure program. Specifically, the CFPB should engage in preliminary discussions with companies expressing an interest in proposing a trial disclosure program. This would allow a company to gauge the Bureau's level of interest in a revised disclosure before making any substantial commitment of resources. One possible approach could be to allow a company to submit a preliminary outline of a trial disclosure program, rather than a full proposal. The outline would identify the disclosure at issue, discuss the changes that would be made to improve the disclosure, and provide initial ideas on the scope of the test and metrics to be used to measure its effectiveness. In turn, the CFPB would provide the company with feedback, particularly about its interest in pursuing the test program further.

### **Further Clarification is needed on Certain Provisions of the Trial Disclosure Proposal**

The Associations request the CFPB provide further clarification and guidance concerning the following provisions of the Proposal:

- Under the Proposal's eligibility requirements, the CFPB requires companies to provide "metrics" in their test proposals, which will be used to measure the effectiveness of a trial disclosure versus an existing one.<sup>11</sup> However, the Proposal is unclear about exactly what type of metrics companies should use to gauge performance. When testing new

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<sup>11</sup> 77 Fed. Reg. 74627.

disclosure forms, our members generally rely upon qualitative metrics due to the difficulty of developing useful quantitative metrics. The Associations ask that the CFPB provide a more granular description of the types of metrics companies should include in their test program proposals.

- Under the factors to be used by the CFPB in deciding whether to approve a trial disclosure program for a waiver, the Bureau states that it will consider “[t]he extent to which the program may help the Bureau develop rules or policies to correct or mitigate market failure.”<sup>12</sup> We are not exactly sure what the CFPB means when it refers to a market failure. We do not believe our members are using disclosures as a means of inappropriately steering consumers into any specific product or service. Disclosures are used by the industry, as mandated by the federal disclosure rules, to inform consumers about the terms and conditions associated with our products and services. We ask that the CFPB explain what it means when it uses the term “market failure” in the Proposal.

## Conclusion

Thank you for the opportunity to comment on the proposed policy on testing trial disclosures. If you have any questions, please feel free to contact any of the undersigned individuals.

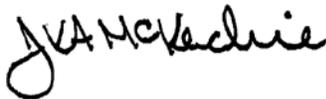
Respectfully submitted,



Steven I. Zeisel  
Executive Vice President & General Counsel  
Consumer Bankers Association  
(202) 552-6363  
[szeisel@cbanet.org](mailto:szeisel@cbanet.org)



Nessa Feddis  
Senior Vice President & Deputy  
Chief Counsel  
Center for Regulatory Compliance  
American Bankers Association  
(202) 663-5433  
[Nfeddis@aba.com](mailto:Nfeddis@aba.com)



Kevin McKechnie  
Senior Vice President and Director  
Office of Insurance Advocacy  
American Bankers Insurance Association  
(202) 663-5172  
[kmckechn@aba.com](mailto:kmckechn@aba.com)

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<sup>12</sup> 77 Fed. Reg. 74627.