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Via electronic submission
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October 10, 2018

Mr. Paul Watkins
Assistant Director, Office of Innovation
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Re: Proposed Revisions to the Trial Disclosure Program Policy [Docket No. CFPB-2018-0023]

Dear Assistant Director Watkins:

The Independent Community Bankers of America (“ICBA”)¹ welcomes this opportunity to provide comments on the Bureau of Consumer Financial Protection’s (“BCFP” or “Bureau”) request for comments (“RFC”) regarding its proposal to revise the Policy to Encourage Trial Disclosure Programs (“Policy” or “TDP Policy”). Given the fact that there has not been a single program approved in the five years since the Policy was first established, ICBA deeply appreciates the Bureau’s efforts to reexamine the Policy and identify changes that would improve the framework to increase its adoption and use.

Background

Section 1032(e) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) grants the Bureau the authority to provide legal protections to covered entities that conduct trial disclosure programs. The Bureau first used its section 1032(e) authority in 2013 to implement a TDP Policy that, among other actions, established an application procedure for a waiver. The waiver deemed a company to be in compliance with, or exempt from, a

¹ The Independent Bankers of America® creates and promotes an environment where community banks flourish. With more than 52,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 760,000 Americans and are the only physical banking presence in one in five U.S. counties. Holding more than \$4.9 trillion in assets, \$3.9 trillion in deposits, and \$3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers’ dreams in communities throughout America.

requirement of a rule or enumerated consumer law, so long as the company adhered to the stipulations set out in the waiver.

There have been no approved trial disclosure programs in the five years since the TDP Policy was finalized in 2013. So that more companies are incentivized to innovate and apply for a trial disclosure waiver, the Bureau is currently proposing to revise its 2013 Policy. The Bureau's goals in revising the TDP Policy are to: (1) reduce the applicant burden, (2) increase guidance regarding the testing time frame, (3) specify procedures for extensions of successful trial disclosures, and (4) provide for coordination with other regulators.

ICBA Comments

Executive Summary

Community banks recognize that their success is linked to the overall success of their customer-base; community banks only succeed if their communities succeed. It is therefore in a community bank's interest to ensure that their customers have all the requisite information before making an educated financial decision. Despite best efforts, though, consumers may still lack information about basic financial products. Disclosures can be effective tools in eliminating this information gap, particularly for financial products that are not frequently used by consumers, such as mortgages. At their base, a well-tailored disclosure can result in a more educated consumer, benefiting both bank and customer.

Unfortunately, many federal consumer financial laws have strict requirements. Any deviation or attempt to tailor a model disclosure content or delivery can subject community banks to legal liability. Even though community banks might conceive of superior ways to inform and educate the customer, the risk of liability discourages deviating from model disclosures. This clearly inhibits any motivation to innovate or improve disclosures and better educate consumers. Further, many disclosures required by federal law and regulation are very prescriptive in their content and timing requirements. Community banks dedicate valuable resources just to ensure compliance with these very detailed and nuanced requirements. These resources could be better allocated to direct services for customers.

The Bureau's TDP Policy is an admirable attempt to resolve this impasse. ICBA believes the proposed revisions to the Bureau's TDP Policy strike the proper balance of setting protocols and procedure while still leaving flexibility that facilitates innovation in the markets for consumer financial products and services. The proposed revisions are well-conceived, properly identify the shortcomings of the current TDP Policy, and set out a framework that will allow innovation to flourish.

While ICBA supports the overall revisions, ICBA makes the observations and recommendations noted below that would further encourage community bank participation in the Trial Disclosure Program.

- Tailored disclosures can educate customers and serve as a tool to protect consumers.
- The proposed revisions to the application and the approval process are an improvement from the 2013 Policy. Further improvements should include:
 - An elastic trial period based on the absolute number of disclosures provided as an alternative to a defined number of months.
 - A revised extension request policy that takes account of the length of the original trial.
 - The creation of more explicit protocols for opportunities to cure the cause of revocations.
 - The addition of other federal and state regulators in preliminary application meetings.
- ICBA supports the provision that permits multiple companies to participate in a single trial.
- Iterative testing is a useful process and the Bureau should allow for more flexible use, including staggered testing and concurrent trials of variable disclosures.
- Community banks need greater and more explicit assurances against liability.
- The Bureau should identify, in advance, limits to Freedom of Information Act disclosure requests in the TDP Policy.

Tailored Disclosures Can Educate Customers and Serve as a Tool to Protect Consumers

Financial services product disclosures are components of consumer education. At their core, ideal disclosures educate consumers about the benefits and risks of products so that the consumer can make informed decisions and choose an option that is best for them.

ICBA agrees with the Bureau's belief that in-market testing in real world situations has the potential to offer valuable information for improving disclosure rules and forms as a means to enhancing consumer protection. Research on financial disclosures has found that consumers are confused by disclosures and do not understand key terms such as the APR, amount financed, and discount fees.² Respondents could not identify and explain the terms of their loans.

Researchers have posited that disclosure is only effective when the receivers pay attention to the information, have the capacity to interpret it, and are willing to incorporate it in their decision-making process (i.e., delivered at or before a decision point). However, these criteria are not always met, particularly with regard to consumer financial services.

² See Angela Hung, Min Gong, and Jeremy Burke, *Effective Disclosures in Financial Decisionmaking*, RR-1270-DOL, RAND Corporation, (2015), at 12, available at https://www.rand.org/pubs/research_reports/RR1270.html.

A potential reason why effective disclosures have not taken hold in the financial services sector is regulatory constraints. Although changes in design, such as headings, titles or charts, can increase consumers' willingness to read disclosures and better comprehend them,³ regulatory requirements and legal liability have resulted in staid and static disclosures that have only become more complex over time.

Providing robust information to consumers is the best form of providing consumer protections. Community banks help arm consumers with the knowledge and wherewithal to avoid usurious and abusive products. Consumer education is not only in the best interest of consumers, but it is also in the best interest of community banks. Banks want financially healthy consumers – what's good for the customer is good for the bank. Community banks work hard to accommodate their customers and provide mainstream services that keep customers and their communities from using fringe and unregulated financial services.

Complicated disclosures have the perverse effect of actually disinforming consumers. Poorly designed disclosures can obfuscate important and practical effects of a financial product. ICBA supports the TDP Policy's flexibility so that new disclosures can be tailor-made to fit the needs of the consumer.

The Proposed Revisions to the Application and the Approval Process are an Improvement from the 2013 Policy

ICBA supports the new sections that the Bureau added to the proposed Policy. In particular, ICBA appreciates the addition of Bureau response deadlines, such as the Policy's requirement that the Bureau issue a decision within 60 days of receipt of an application. This will help assure applicants of a timely response and assuage concerns that their applications will be held in non-decision limbo.

ICBA also supports the revised Policy's goal and focus on collaboration with other regulators, as well as with other Bureau departments and staff. For example, working with the Bureau's Office of Fair Lending and Equal Opportunity could help identify key components and issues that should be addressed.

Further, ICBA supports the Policy's facilitation of preliminary, non-formal discussions with Bureau staff. This would help community banks avoid the costs of developing proposals that are unlikely to meet the Bureau's approval process. Additionally, this could help companies detect potential problems before the application is fully developed. To aid in this endeavor, ICBA

³ Jeanne M. Hogarth and Ellen A. Merry, *Designing Disclosures to Inform Consumer Financial Decisionmaking: Lessons Learned from Consumer Testing*, 97 Fed. Res. Bull., (2011), available at <https://www.federalreserve.gov/pubs/bulletin/2011/pdf/designingdisclosures2011.pdf>.

recommends that other federal and state regulators be included in such preliminary conversations.

Regarding waiver revocations, ICBA appreciates the Bureau's Policy to notify companies of potential revocations and opportunities to respond. However, ICBA recommends that the Bureau establish more explicit procedures for opportunities to cure, such as explicit timelines for notice and minimum periods of time for cure or response. This would provide more certainty and remove any suspicion of arbitrary decisions.

In addition to the timing requirements discussed above, ICBA recommends that the Bureau amend its extension request policy. As proposed, companies that would like to extend their trial period would have to submit their request to the Bureau at least 150-days before the trial is set to expire. ICBA contends that extension request deadlines should be scalable and contingent on the period of time for which the trial was originally approved. Under the proposal, trials that have been approved for only one year or less would have to submit an application for extension when the initial trial is barely at its halfway mark. Difficulties with a non-scalable extension framework would only be more pronounced when the trial is even shorter.

Finally, ICBA encourages the Bureau to define trial periods that are reflective of the product being offered. Certain products are used much less frequently than other products. For example, a community bank may originate many fewer mortgages over a one-year period compared to the number of unsecured credit lines. As a result, these products will not provide many instances of trial disclosures if there is a fixed calendar limit. This could mean that the data set would be so small as to not be statistically significant, drastically limiting the benefit of a trial. As an alternative to calendar limits as a defined period of time, ICBA recommends that the Bureau consider setting trial periods based on an absolute number of disclosures provided. This would allow tests to produce enough data that could be used to draw broad conclusions.

Designing disclosures takes time. Document development, testing, and analysis can take several years, depending on the complexity of the product and the disclosure documents needed to meet regulatory requirements.⁴ ICBA encourages the Bureau to liberally provide sufficient trial periods for successful applicants.

⁴ See *id.* at 26.

ICBA Supports the Provision that Permits Multiple Companies to Participate in a Single Trial

Community banks do not typically have research and development divisions dedicated to exploring new ways to inform and educate their customers through the development of new disclosures. In contrast, there are numerous think tanks, academic centers, and other associations that spend considerable time producing empirical research and developing recommendations on ways to better disclose product information. Community banks should be able to partner with those third-parties and participate in the trial of disclosures. As such, ICBA supports the Bureau's allowance for companies to jointly submit applications. Multiparty applications and tests will offer more robust and reliable results.

Although the Bureau's waiver will only apply to the testing company or companies that applied for such waiver, ICBA recommends that the Bureau create an expedited waiver approval process for other companies that wish to participate in a previously approved trial. If a large company applies and receives a waiver for a trial disclosure, then it would be beneficial for other, unaffiliated companies to similarly participate in the trial disclosure program. Without such an option, trial disclosures could become proprietary, thereby depriving community banks and their customers of the trial's potential benefits. If this option were to be pursued, the Bureau would still have final authority on which companies to approve, thereby providing limitation from uncontrolled and widespread proliferation of trial disclosures.

Similarly, there could be scenarios where a third-party, such as a large data processing vendor with thousands of bank-clients, develops new disclosure content. ICBA encourages the Bureau to amend the Policy to include a mechanism whereby clients of that vendor could utilize approved trial disclosures, even though the bank-client was not a party to the original waiver application. This would also allow community banks to participate in trial disclosure programs where they would otherwise be blocked out of the trial by first movers, who are likely to be large-scale financial institutions.

Good ideas should be emulated and widely adopted. If a disclosure is good for one bank's population of customers, then that benefit should be extended to the customers of other community banks that might not have the resources nor risk appetite to develop in-house a new disclosure. ICBA asks the Bureau to acknowledge such realities and to develop an avenue that would allow community banks to participate, as well.

Iterative Testing is a Useful Process

ICBA supports the Policy's flexible application as a means to accommodate the possibility of iterative testing and allow for decision-gates or milestones that either expand the trial's target market or allow it to build upon itself. To further support iterative testing, ICBA recommends

that the Bureau's Policy consider and provide for a staggered application process, when the situation warrants it.

Trial disclosures could include multiple iterations of presenting the same information, depending on the consumer's preference. Visual learners may want to see charts/graphs; social learners may want to communicate and be informed orally. Disclosure could be designed and tailored to the consumer's preference. This creates the possibility of different disclosures based on different categories of consumers.

ICBA also encourages the Bureau to consider concurrent iterations. Rather than test one iteration after another in a sequence, some companies may wish to test multiple iterations at one time in order to better tailor the disclosure to the customer's preferred format. ICBA recommends that the Policy accommodate trials that test multiple versions of the same disclosure at the same time.

Addressing Liability Concerns is Essential – Community Banks Need Greater and More Explicit Assurances Against Liability

ICBA recommends that the document entitled "1032(e) Trial Disclosure Waiver: Terms and Conditions" include an affirmative statement regarding company liability in the face of private rights of action. Specifically, once the Bureau deems a trial disclosure to be in compliance with, or exempt from, the provisions identified by the Bureau, there is no basis under those provisions for a private suit based on the company's use of the disclosure. Similarly, when a Bureau-issued waiver is in effect, the Bureau's waiver document should make clear that a federal or state regulator has no grounds for enforcement or supervisory action based on statutory or regulatory provisions that are within the scope of the Bureau's waiver.

The Bureau's Policy should explore and determine what, if any, retroactive liability would apply to a program upon its expiration or a company's non-compliance with a waiver.

Bureau Should Identify Limits to FOIA Disclosure Requests in Advance

Regarding Bureau disclosure of information, ICBA recommends that the Bureau proactively identify which information will be treated as exempt from Freedom of Information Act (FOIA) requests. For example, although participants in the TDP will be required to transmit consumer complaint information to the Bureau, such information is not currently collected and published for community banks under \$10 billion in assets. Without assurances that the Bureau will not disseminate such information under FOIA requests, ICBA is concerned that community banks might be dissuaded from participating in the program.

The marketplace of ideas and experimentation is a powerful force that can usher in a new wave of innovative disclosures designed to better educate consumers while also mitigating the burdens of administrating such disclosures. ICBA applauds the Bureau's efforts to continue refining its TDP Policy, and community banks look forward to identifying and implementing ways to better inform their customers. If you have any questions or would like to discuss this issue further, please do not hesitate to contact me at Michael.Emancipator@ICBA.org, or 202-659-8111.

Sincerely,

/s/

Michael Emancipator
Assistant Vice President & Regulatory Counsel