MORTGAGE BANKERS ASSOCIATION

October 10, 2018

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

Re: Policy to Encourage Trial Disclosure Programs, Docket No. CFPB-2018-0023

Dear Ms. Jackson:

The Mortgage Bankers Association ("MBA")[1] appreciates the opportunity to comment on the Bureau of Consumer Financial Protection's ("BCFP" or the "Bureau") *Policy to Encourage Trial Disclosure Programs* ("TDP Policy").[2] The Bureau's effort to create a "Disclosure Sandbox" through revision of its TDP Policy is a welcome step towards encouraging innovation that will result in increased consumer understanding of financial products.

MBA has in the past recommended that the Bureau seek modernization of existing regulations in light of the rising tide of financial innovation.[3] Improvements to the regulatory landscape have the potential to remove barriers to the adoption of technology solutions that lower costs, improve efficiency and enhance the customer experience.[4] The need for such change was underlined in the Treasury's recent report in response to the President's Executive Order calling for the identification of laws and regulations that are inconsistent with certain identified core principles of financial regulation.[5]

Additionally, MBA encouraged the improvement of the No-Action Letter Policy[6] ("NAL Policy") in response to the Bureau's Request for Information ("RFI") on Guidance and

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[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,300 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mba.org.

[2] Docket No. CFPB-2018-0023 (September 10, 2018).

[3] *See CFPB 2.0: Advancing Consumer Protection*. Available at https://www.mba.org/assets/Documents/Policy/17897_MBA_CFPB_Paper.pdf.

[4] *See* MBA, "RE: FinTech Regulation of Non-Depository Institutions." Comment letter to Treasury, March 26, 2018. Available at https://www.mba.org/Documents/Comment%20Letters/MBA-Letter-Treasury-FinTech.pdf.

[5] *A Financial System That Creates Economic Opportunities: Nonbank Financials, Fintech, and Innovation.* July 31, 2018 ("Treasury Report"). Available at https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation_0.pdf.

[6] MBA, "RE: Request for Information Regarding Bureau Guidance and Implementation Support, Docket No. CFPB-2018-0013." Comment letter to BCFP, July 2, 2018. Available at

Implementation Support.[7] As components of the former Project Catalyst, the previous NAL Policy and TDP Policy were far too restrictive and heavily caveated to encourage participation. This was duly reflected in the low number of participants. The proposed revision of the TDP Policy is an encouraging step towards addressing those issues.

To more effectively encourage market participants to conduct trial disclosure programs it is important to recognize the realities underlying the need for innovation. The creation and adoption of different content delivery channels is rapidly evolving. Consumers are now increasingly seeking speed and convenience.[8] Clear and effective communication is a vital component of doing business. The current disclosure regulations are intended to ensure consumer awareness within the limits of the technological frameworks of their time, but innovation and consumer preferences can outpace the rate of regulatory change. For these reasons, it is important for regulators to support innovation by encouraging responsible experimentation. The revisions proposed to the TDP Policy will be very helpful in encouraging stakeholders to address the gap between what is expected by consumers and what is currently permitted by regulations.

We support the proposal's goal to reduce the application burden, clarify timing requirements, and facilitate coordination to increase the functionality of the TDP. Increased clarity in the application procedures and a commitment to responsiveness satisfies industry concerns over investing valuable time and resources without knowledge of the result. The Bureau's stated willingness to maintain an open dialogue with applicants provides transparency that was missing with the original TDP. Additionally, successful applicants can build continued success through extensions from the Bureau. In addition to these revisions, the Bureau should endeavor to provide a commitment that it will exercise its authority to revise disclosure rules in light of a successful trial disclosure program. The investments made by participants that create a successful disclosure eventually warrant the opportunity for broader market adoption.

Coordination with other regulators and innovation programs is also critical. Investing resources in an innovation program that fails to provide some measure of regulatory reciprocity is likely to be inefficient and of limited value. Cross-regulatory cooperation is thus essential to all parties. The Bureau's initiative in seeking to negotiate agreements with State regulatory authorities is an important form of reciprocity that will encourage participation. Innovators can be expected to invest resources in the TDP, particularly if the Bureau invests its own resources in encouraging other regulators to similarly engage in innovative programs. The Bureau's initiative is a welcome change and it would be helpful if the final policy provides specificity on how it intends to

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https://www.mba.org/Documents/Comment%20Letters/MBA%20Comment%20Letter%20on%20Guidance%20RFI%207%202%202018.pdf.

[7] BCFP, "Request for Information: Bureau Guidance and Implementation Support" Docket No. CFPB-2018-0013 (April 2, 2018).

[8] *See generally,* "Beyond Digital: How can banks meet customer demands?" Accenture, 2017. Available at https://www.accenture.com/t20170125T114252Z__w__/us-en/_acnmedia/Accenture/next-gen-3/DandM-Global-Research-Study/Accenture-Banking-Global-Distribution-Marketing-Consumer-Study.pdf.

coordinate with federal and State authorities. A stated blueprint would give stakeholders an opportunity to aid the Bureau in identifying areas of concern.

It is most important that the Bureau provide protection from liability when industry engages in the TDP and takes on substantial risk. Responsible experimentation under the regulatory framework is untenable without the assurance of limits on liability for participants. The Bureau's determination that "no basis exists… for a private suit based on [a] company's use of [an approved] trial disclosure" is a critical component to this program.[9] Entities cannot reasonably be expected to invest in innovative programs without such protection, and the Bureau's decision to help manage risk will fuel greater involvement with the TDP. The Dodd-Frank Act supports the ability to offer these assurances by encouraging the Bureau to promulgate standards and procedures to offer limited relief from potential liability in order to help facilitate participation in the TDP.[10]

Complementary to regulatory coordination is industry coordination, particularly with disclosures that have the potential for broad benefits but confer little proprietary business advantage. A single entity is capable of providing an innovative disclosure, but whether that product is viable within the industry—and thus the larger population of consumers—can best be determined by the participation and feedback of other stakeholders. MBA and other trade associations can play a crucial role in helping establish industry-wide norms and standards while encouraging a level playing field for all participants. The Bureau's proposal to accept applications from trade associations on behalf of its members is thus a valuable route for innovation. Indeed, MBA has already received enthusiastic responses from some members about our participation in this program.

As noted above, the proposed revisions to the TDP Policy are a step in the right direction. To further achieve the goals outlined in the policy, the Bureau could also consider additional clarifications to certain provisions. Most importantly, the Bureau should clarify that the legal safe harbor extends to an agent of a TDP participant. The proposed TDP policy anticipates groups of companies engaging under a single umbrella program in certain instances. It is important the Bureau recognize the necessity of clear protections for vendors or affiliated third parties of participants that assist in development or deployment of the trial disclosure.

Additionally, the Bureau should clarify its intent to consider new delivery mechanisms for disclosures. While the Bureau's authority to interpret the Electronic Signatures in Global and National Commerce Act ("E-Sign Act") is limited,[11] encouraging new delivery mechanisms may implicate electronic consent requirements under the E-Sign Act. Fostering innovation necessarily includes providing clarity in areas of regulatory uncertainty. Waivers that are provided under the TDP should clearly address this issue and any other similar conflicts.

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[9] Docket No. CFPB-2018-0023.
[10] 12 U.S.C. § 5532
[11] CFPB Compliance Bulletin 2015-06, November 23, 2015.

The details regarding revocation of a waiver also require further clarification. The Bureau's approach at the outset is positive, but this is an issue that should have clearly defined processes within the policy rather than be relegated to a footnote. The processes outlined in the policy provide a good initial framework and should be formalized within the policy itself. Also, the effect and process of a revocation should be detailed. Revocation of a waiver should not create or confer liability on the participant and all activities conducted pursuant to the waiver should be deemed in compliance, *regardless* of a later revocation. Further, any revocation should provide a reasonable grace period to ensure a good-faith participant has sufficient opportunity to cease the trial disclosure program.

Finally, the Bureau should consider making an application form available on its website. Potential participants would be better equipped to forecast their involvement with a concrete mechanism for application.

MBA appreciates your consideration of these comments and the Bureau's willingness to engage with stakeholders on the revision of the TDP Policy. MBA supports these proposed revisions, which will encourage the industry to conduct trial disclosure programs. We welcome the opportunity to meet and discuss the Bureau's innovation policy as well as specific regulatory changes that would benefit consumers, industry, and other stakeholders. Should you have any questions or wish to discuss any aspects of these comments, please contact Justin Wiseman, Associate Vice President and Managing Regulatory Counsel (jwiseman@mba.org) or Sheraz Syed, Regulatory Associate (ssyed@mba.org).

Sincerely,

Pete Mills
Senior Vice President, Residential Policy & Member Engagement
Mortgage Bankers Association