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CBA CONSUMER BANKERS ASSOCIATION

October 10, 2018

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

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

Dear Mr. Watkins:

The U.S. Chamber of Commerce,[1] the American Bankers Association,[2] and the Consumer Bankers Association[3] appreciate the opportunity to comment on the proposal (Proposal)[4] of the Bureau of Consumer Financial Protection (Bureau) to revise its "Policy to Encourage Trial Disclosure Programs" (2013 Policy).[5] We share the Bureau's goal of effectively encouraging trial disclosure programs and are pleased that the Bureau has proposed revisions to its policy.

While we appreciate the changes already reflected in the Proposal, we urge the Bureau to refine further its policy regarding trial disclosures in order to:

- Abate risks to companies from participating in a trial disclosure program;
- Ensure that the trial disclosure process is collaborative, fair, and transparent; and
- Commit to changing relevant regulations when a trial disclosure proves effective.

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[1] The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million companies of every size, sector, and region. The Chamber created the Center for Capital Markets Competitiveness to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy.

[2] The American Bankers Association is the voice of the nation's $17 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits, and extend more than $9 trillion in loans.

[3] The Consumer Bankers Association is the trade association for today's leaders in retail banking – banking services geared towards 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.

[4] *See* Bureau of Consumer Financial Protection, *Policy to Encourage Trial Disclosure Programs*, 83 Fed. Reg. 45574, 45574 (Sept. 10, 2018).

[5] *See* Bureau of Consumer Financial Protection, *Policy to Encourage Trial Disclosure Programs*, 78 Fed. Reg. 64389 (Oct. 29, 2013).

DISCLOSURE OVERVIEW

Congress long has recognized the importance of empowering consumer choice through clear and understandable disclosures regarding consumer financial products and services. Likewise, our organizations have consistently supported regulatory approaches that ensure that consumers receive clear and concise disclosures about financial products. Such disclosures allow the consumer financial services marketplace to function efficiently by enabling consumers to determine which product would best meet their specific financial needs.

However, no disclosure is perfect, no matter how well-conceived. A legally mandated disclosure may not convey the key features of an innovative product, or it may be too confusing for a consumer to understand. Alternatively, a business may have found a way to improve the content or format of a disclosure about an established product but may not be legally permitted to use the improved format. For example, a business may seek to modernize disclosures to facilitate review and consumer understanding through electronic disclosures available on smartphones and tablets. Electronic disclosures may allow the customer to access information more quickly and efficiently than through paper-based disclosures, such as by providing summary forms with links to additional information. However, regulatory mandates to use a particular format and delivery mechanism can make it very difficult for companies to ensure that disclosures convey the most useful information in the most accessible format—even when a company sees an opportunity to improve upon an existing disclosure.[6]

Congress sought to address this challenge in Section 1032(e) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) when it authorized the Bureau to exempt individual companies from current disclosure requirements in order to test "trial disclosure programs."[7] The Bureau sought to encourage such programs in its 2013 Policy. As the Bureau now recognizes, however, that policy "failed to effectively encourage trial disclosure programs."[8] The Bureau consequently has not "permit[ted] such a program in the nearly five years since the Policy was issued."[9]

Companies want to participate in a trial disclosure program, but the 2013 Policy does not provide sufficient incentive for a company that seeks to participate. To date, the associated costs

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[6] For further information, please see the American Bankers Association's letter to the Bureau, responding to the Bureau's Request for Information Regarding the Bureau's Inherited Regulations. *See* Letter from Nessa Feddis, Am. Bankers Ass'n, to J. Michael Mulvaney, Acting Dir., Bureau of Consumer Fin. Protection (June 22, 2018), https://www.aba.com/Advocacy/commentletters/Documents/cl-RFI-InheritedRegs20180622.pdf.
[7] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 112-203, § 1032(e) (2010), codified at 12 U.S.C. § 5532(e).
[8] 83 Fed. Reg. at 45574.
[9] *Id.*

and risks of participation have far outweighed any perceived benefit of developing a trial disclosure. Companies must make a substantial financial commitment to develop and test trial disclosures, but they face significant regulatory and legal risks. Without proper guidance from the Bureau, a company may face the possibility of liability in civil litigation or a regulatory enforcement action brought by a state regulatory agency. Likewise, participation in a trial disclosure program could result in competitive or reputational harm through the premature release of information about a company's forthcoming product. Additionally, the benefits of undertaking such a program can be unclear unless the Bureau provides a good-faith commitment to act on a successful trial disclosure by permitting the disclosure to remain in place and making corresponding changes to governing regulations.

DISCUSSION

1. Abate Risks to Companies from Participating in a Trial Disclosure Program.

We are pleased that the Bureau recognizes the "significant opportunities to enhance consumer protection" presented by trial disclosure programs and that "in-market testing, involving companies and consumers in real world situations, may offer particularly valuable information with which to improve disclosure rules and model forms."[10] The Bureau correctly seeks to encourage the use of trial disclosure programs on this basis. At the same time, the Bureau understandably intends to scrutinize each application to ensure that the contemplated trial disclosure promises improvements upon existing disclosures, limits risk to consumers, and achieves other key goals.[11] In short, the Bureau recognizes the benefits of trial disclosures and will have ample opportunity to review these disclosures before the time of a trial to ensure consumers are protected.

To encourage the use of this program, the Bureau should take all reasonable steps to keep to a minimum the risks associated with participating in a trial disclosure program. While the Bureau has taken valuable steps in this direction, we ask that the Bureau refine the Proposal further to protect program participants in four key ways.

a. Protect the confidentiality of sensitive commercial information.

Applications for trial disclosure programs are likely to include highly sensitive commercial information, particularly when the company seeks to use a trial disclosure in relation to an innovative new product. Disclosure of such innovation could cause substantial commercial injury to the submitting company, as premature release of the disclosure could reveal key details about a new product and deprive the company of its commercial advantage gained by being first

[10] *Id.* at 45576.
[11] *Id.*

to market. Simply put, a reasonable company will not pursue a trial disclosure if doing so will give its competitors insight on products and services that have not been released publicly.

Congress granted the Bureau the necessary authority to limit "public disclosure [of a company's program] . . . to the extent necessary to encourage covered persons to conduct effective trials."[12] The Bureau should recognize the commercial sensitivity of information submitted in a trial disclosure application, regardless of whether the application is ultimately granted, withdrawn, or denied, and protect that information to the extent permitted by law.

First, the Bureau should not publish any detail about a trial disclosure until the first public use of the disclosure.[13] Second, the Bureau should commit to applying the exception from disclosure under the Freedom of Information Act for "trade secrets and commercial or financial information" that is "privileged or confidential" to the company's trial disclosure.[14] In doing so, the company's representation about the sensitivity of information submitted through the program should guide the Bureau, including whether that information will continue to be commercially valuable after launch of the disclosure. The Bureau should further clarify that trial disclosure applications and associated communications with the Bureau are "confidential information" subject to the prohibition on Bureau disclosure of such information provided by the Rule on Disclosure of Records and Information.[15]

The Bureau also should protect the confidentiality of the data generated during the trial period. While the Bureau—and other industry participants—will be interested in the success of any trial disclosure, there is no reason to disclose granular information about a trial disclosure in a way that risks public disclosure of confidential information about the product or the company's financial performance. Instead, the Bureau should collect and review granular testing data during the disclosure testing process *only* with the company participating in the trial program.

If the Bureau has supervisory authority over the company, the Bureau should review testing data under the confidentiality afforded to supervisory information. The Bureau can apply confidential treatment to such testing data, because confidential supervisory information includes "any information provided to the CFPB by a financial institution to enable the CFPB to monitor for risks to consumers in the offering or provision of consumer financial products or services."[16]

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[12] 12 U.S.C. § 5532(e)(3).
[13] The Bureau may be able to publish information about a disclosure as part of its report of aggregate statistics without compromising confidentiality, but should use care to avoid unintentionally revealing sensitive commercial information.
[14] *See* 5 U.S.C. § 552(b)(4).
[15] *See* 12 C.F.R. § 1070 *et seq.* "Confidential information" under these regulations includes "confidential supervisory information" and any information exempt from disclosure under the Freedom of Information Act pursuant to 5 U.S.C. § 552(b). 12 C.F.R. § 1070.2(f). Such information may not be disclosed by the Bureau except in specific circumstances. *Id*. § 1070.41(a).
[16] *Id.* § 1070.2(i)(iv).

The testing data enable the Bureau to "monitor for risks to consumers" concerning the financial product or service subject to the disclosure. As such, the data constitute confidential supervisory information.

To provide other companies with suitable insight into the disclosure testing process, it would be helpful for the Bureau to publish appropriate summaries of lessons from trial disclosures in a manner similar to the Bureau's "Supervisory Highlights" publications. Our members find the Supervisory Highlights very helpful, and a similar publication could provide aggregate information regarding trial disclosures.

b. Protect companies from undue liability risk.

We appreciate the Bureau's confirmation that there could be no action brought against a trial disclosure program participant by the Bureau, a state regulator, or a private litigant under any provision of federal law that the Bureau waived pursuant to its approval of a trial disclosure application.[17] The possibility of liability under state law, including under state law prohibitions against Unfair or Deceptive Acts or Practices, nonetheless threatens to chill companies' willingness to participate in a trial disclosure program.

For the trial disclosure program to be successful, it must provide participants with robust protection from legal liability. It would also be contrary to Congress' clear intention if a lack of legal protection for participants stymied such programs. Moreover, companies that have secured approval from the Bureau for a trial disclosure should not be subject to challenge under federal or state law by government or private litigants or government regulators. We consequently urge the Bureau to take steps to insulate companies from legal liability when the Bureau approves those companies' trial disclosure programs. Specifically, we ask the Bureau to take two key steps to reduce the risk of liability.[18]

First, the Bureau should state affirmatively that its approval of a trial disclosure represents the Bureau's conclusion that the proposed disclosure complies with applicable federal law, including the prohibition on Unfair, Deceptive, and Abusive Acts or Practices, and that the disclosure furthers the public interest. In doing so, the Bureau should state that it intends its approval of the proposed disclosure to "occupy the field" with respect to that disclosure, preempting contrary action on the state level, from other regulators, or from private litigants. The Bureau should explain that any attempt to hold the trial disclosure program participant liable under state law would chill use of the trial disclosure program and thus conflict with, and be preempted by, the federal safe harbor established "to encourage covered persons to conduct trial

[17] 83 Fed. Reg. at 45576.
[18] Many companies provide disclosures through trusted agents. We assume – but nonetheless ask that the Bureau clarify – that the agent of a company that receives a waiver benefits equally from the protections provided by that waiver.

disclosure programs."[19] Additionally, should litigation or enforcement activity nonetheless be commenced with respect to an approved disclosure, the Bureau should take all appropriate opportunities to encourage the other entities to abandon such actions or, if those efforts fail, to oppose any such action, including by intervening in any cause of action asserted with respect to an approved disclosure. In cases where intervention would not be feasible, the Bureau should serve as *amicus curiae* in the relevant legal proceeding.

Second, the Bureau should exercise caution in the event that it decides to revoke a waiver it has previously granted. Under the Proposal, the Bureau may revoke a waiver in whole or in part "if the Bureau determines that the disclosure is causing a material, adverse, impact on consumer understanding."[20] The Bureau should confirm in writing that such a partial or full waiver revocation is not a finding of fault with the company or evidence that a disclosure deceived consumers or caused them injury. In particular, the Bureau should confirm that any finding of a "material, adverse, impact" reflects only that the Bureau concluded that the disclosure did not perform as well as intended, including in comparison to existing disclosures, *not* that consumers were in any way misled or injured.[21] The Bureau should undertake such steps regardless of how a waiver is revoked, including after any appeals process, in order to avoid punishing, even indirectly, companies for inadvertent missteps or shortcomings of a trial disclosure that neither the company nor the Bureau foresaw. In addition, there should be no retroactive liability imposed on a company when the disclosure is withdrawn.

c. Coordinate proactively and fully with other regulators.

As the Proposal reflects, companies seeking a waiver from federal disclosure requirements are likely to work simultaneously with other federal and state regulators to ensure that any proposed disclosure does not violate other regulatory requirements or expectations.[22] The Proposal acknowledges the important role that the Bureau can play in coordinating these interactions. However, while the applicant company can be expected to take all reasonable steps to secure approval, the Proposal places the onus on the applicant, not the Bureau, to facilitate coordination with other regulators: "If the applicant wishes the Bureau to coordinate with other regulators, the applicant should identify any governmental authorities that have allowed or been contacted about the trial disclosure in question."[23]

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[19] 12 U.S.C. § 5532(e)(2).
[20] *Id.* at 45777.
[21] As discussed below, we also ask that the Bureau protect companies from undue liability by providing them adequate time to phase out and replace previously permitted disclosures if a waiver is revoked.
[22] As discussed above, we would ask the Bureau to make clear that its approval of a trial disclosure preempts any contrary action by a state regulator. Because they value constructive relationships with all regulators, we would expect companies to want to ensure that state regulators are comfortable with the proposed disclosure even if those regulators may not bring an enforcement action based on that particular disclosure.
[23] 83 Fed. Reg. at 45577 n.24.

As the primary regulator for consumer financial services, the Bureau should lead the development of more effective disclosures and lead coordination among federal and state regulators that are considering a trial disclosure. The Bureau will likely also be better positioned to lead coordination efforts with other regulators than will be the trial disclosure program participant. We urge the Bureau to coordinate proactively and fully with other regulators. The Bureau should not leave companies guessing as to whether the Bureau and another federal or state regulator agree on a disclosure. The Bureau instead should work affirmatively to build regulatory consensus around a trial disclosure. Moreover, we ask the Bureau to ensure that fellow regulators understand the Bureau's program and to request that the other regulators defer to the Bureau's evaluation of a trial disclosure, recognizing that the Dodd-Frank Act assigned the Bureau responsibility for the enumerated consumer protection laws.

d. Clarify Proposal elements to avoid unnecessary confusion.

The Bureau is focused on encouraging the pursuit of trial disclosure programs that will better serve consumers and strengthen their understanding of consumer financial products and services. Uncertainty about the meaning of key terms in the Proposal or about how those terms will be construed in practice may frustrate this goal, however. This is particularly true given the two-year timeframe for most trials. Because future approvals may span leadership changes at the Bureau, companies will be particularly concerned by the prospect of changing interpretations of vague terms within the Bureau's policy. Accordingly, the Bureau should take all reasonable steps to clarify key elements of the Proposal in a way that avoids unnecessary confusion and uncertainty.

Specifically, we urge the Bureau to:

- *Clarify factors that will be considered for a waiver*: The Bureau provides that it will consider waiver applications for disclosures that are "expected to improve upon existing disclosures or delivery mechanisms with respect to cost effectiveness, increased consumer understanding, or otherwise."[24] We are supportive of this provision, as it is largely consistent with Section 1032(e)(1), which states that trial disclosures should be "designed to improve upon" existing disclosures. However, we ask the Bureau to state explicitly that it will consider applications for disclosures that are expected to provide a better consumer experience or expand access to financial services or products. We believe these additional factors are consistent with Section 1032(e)(1) and similar in importance as cost effectiveness and consumer understanding.

[24] *Id*. at 45776-7.

- *Clarify factors for application approval*: The Bureau generally plans to focus its review of a proposed trial disclosure program on the "quality and persuasiveness of the application."[25] The Bureau, however, does not explain what it believes comprises a high "quality" application or identify the basis on which it would judge an application to be more or less "persuasive."[26] We consequently urge the Bureau to clarify how it plans to assess any submitted application. For example, we ask the Bureau to confirm that it will consider proposals to provide disclosures through a new method (*e.g.* addressing requirements under the E-Sign Act). Likewise, we ask the Bureau to confirm that the policy is not limited to innovative products only, but can apply to changes to existing disclosures for long-established products.

- *Clarify how the Bureau will consider applications submitted on behalf of more than one company or by a trade association:* We welcome the Bureau's intent to consider applications that involve testing by more than one company.[27] We ask that the Bureau describe the particular steps that the relevant group should take to apply for approval of a trial disclosure and that its constituent members should take prior to use of such a disclosure.

- *Clarify the meaning of a finding of "material, adverse, impact on consumer understanding"*: As discussed above, we urge the Bureau to clarify that such a finding means only that the Bureau concluded that the disclosure did not perform as well as intended, including in comparison to existing disclosures, not that consumers were in any way misled or injured.

- *Clarify the process at the end of a two-year trial period*: The Proposal explains that the Bureau will consider, "[u]pon the presentation of persuasive test result data, . . . permitting such extension requests for a period at least as long as the period of the original waiver."[28] The apparent purpose of such extension is to permit the company to continue to use the trial disclosure while the Bureau determines whether to amend disclosure requirements for all regulated entities to make those requirements consistent with the approach taken by the trial disclosure.[29] However, beyond providing a general explanation of what information to submit and when, the Bureau gives limited guidance on what companies can expect as the two-year period of a trial program draws to a close. We urge the Bureau to provide more detail on how it envisions this process playing out, with a particular focus on ensuring that companies

[25] *Id.* at 45777.
[26] The Bureau does point to particular elements of an application that it expects to give "particular emphasis" in its review, but it does not explain what would constitute more or less persuasive submissions on those points.
[27] *Id.* at 45575 n.21.
[28] *Id.* at 45578.
[29] *Id.*

do not find themselves facing abrupt transitions from using approved alternative disclosures to finding the same disclosures suddenly prohibited.

- *Clarify the process for modifying a waiver*: The Proposal provides procedures to address instances where the Bureau seeks to revoke a waiver or when a company applies for an extension. The Proposal does not, however, contemplate instances where a company may seek to modify or expand the scope of a trial disclosure program as called for by consumer test results. We ask the Bureau to adopt waiver modification procedures to allow participating companies to expand the use of beneficial trial disclosures to a broader customer base.

2. Ensure that the Trial Disclosure Process Is Collaborative, Fair, and Transparent.

We appreciate the Bureau's commitment to working with companies seeking to participate in trial disclosure programs, as well as to building safeguards into the contemplated process and to sharing information about the program as it develops. We ask the Bureau to take additional steps to ensure that the trial disclosure process is collaborative, fair, and transparent like the Bureau clearly intends, as follows:

a. Build strong collaborative relationships with participating companies.

The Proposal reflects the Bureau's commitment to working with companies to develop trial disclosure programs, including through informal dialogue even before the policy is finalized.[30] We believe that building a strong, collaborative relationship with participating companies will be crucial to the long-term success of the Bureau's trial disclosure policy. While an appropriate written policy is necessary to the Bureau's success, we also encourage the Bureau to establish a robust dialogue with companies built on trust.

To achieve this goal, we encourage the Bureau to take practical steps that allow it to work closely and proactively with companies throughout the application process. Such steps could include the early offer of voluntary "check point" meetings that make clear that the Bureau will dedicate necessary time to working through questions raised throughout the application process. The Bureau could also host forums that include stakeholders to discuss the process, successes, and areas of improvement. As mentioned previously, the Bureau could create a "Trial Disclosure Highlights" document to provide insight into the process, including by describing applications that were approved and those that were not in a confidential manner. We believe that taking these or other steps that the Bureau identifies based on its experience with the program will help the Bureau further demonstrate its commitment to true collaboration—and thereby greatly

[30] *See id.* at 45575 ("[T]he Bureau welcomes informal inquiries during the comment period.").

enhance the likelihood that this program succeeds in a way that previously has not been achieved.

b. Strengthen safeguards to ensure fairness.

Companies participating in trial disclosure programs necessarily will invest heavily in the development and testing of the trial disclosure and be subject to additional risk of litigation or reputational harm (albeit risks that the Bureau will hopefully minimize). Companies consequently will look for guidance from the Bureau as they work to develop disclosures that benefit consumers. Arbitrary or unfair actions by the Bureau will harm individual companies and chill others' willingness to participate in trial disclosure programs in the future. For example, sudden changes in position concerning disclosures that the Bureau previously approved not only will be unfair to the relevant company but also are likely to undermine the program in the long run.

We appreciate that the Bureau has made clear that it is committed to the use of fair processes throughout the trial disclosure program. We appreciate, for example, that the Bureau has indicated that companies will be able to respond before the Bureau revokes a waiver and, in some cases, to address any perceived failure to follow the terms of a waiver before its revocation.[31] Likewise, we are pleased that the Bureau intends to provide "reasonable notice" to a company before revoking a waiver in the event that the trial disclosure testing period has ended and the Bureau decides not to revise governing regulations to permit use of the trial disclosure by all regulated entities.[32]

The Bureau can strengthen these protections by formalizing these process safeguards. While we appreciate the Bureau's intent, further formalizing and documenting these processes will enhance fairness and predictability by standardizing approaches across trial programs and increasing consistency as the leadership of the Bureau or relevant offices changes over time. In particular, we urge the Bureau to create an appeals process that allows an appropriate leader within the Bureau to consider the data and explanations provided by the relevant company prior to revocation of a waiver. In addition, the Bureau should further clarify that each participating company will be provided an appropriate safe harbor period, no shorter than 150 days, absent compelling reasons stated by the Bureau, to phase out use of a trial disclosure after revocation of a waiver. In doing so, the Bureau should reiterate that all the liability protections discussed above are intended to continue throughout the safe harbor period and that no enforcement action or civil suit may be brought at any time about conduct that occurred during the trial or safe harbor period.

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[31] *See* 83 Fed. Reg. at 45577 n.30.
[32] *See id.* at 45578 n.34.

3. Clarify that a Trial Disclosure May Be Used to Modernize Disclosure Mechanisms.

The Bureau should clarify that applications for a trial disclosure program may propose the use of new disclosure mechanisms. Existing disclosure requirements typically involve a physical paper disclosure handed or mailed to consumers. However, consumer financial transactions, like other consumer communications, are increasingly conducted electronically. Online transactions can be accompanied by disclosures displayed on a screen that generally replicates paper disclosures. In addition, interactive technologies offer a means of delivering information that is more consumer friendly than paper-based disclosures. By presenting key terms of information in summary form and including links to additional information, consumers can access information more quickly and efficiently in an interactive electronic format than they can with paper disclosures. The Bureau should facilitate use of these innovative disclosure mechanisms by permitting companies to test these mechanisms through a trial disclosure.

4. Commit to Changing Relevant Regulations When a Trial Disclosure Proves Effective.

We share the Bureau's ultimate goal of developing new and more effective consumer disclosures and delivery mechanisms to advance consumers' understanding. Revising governing rules to permit successfully trialed disclosures will be critical to the long-term success of the trial disclosure program. In short, the Bureau must ensure that its trial disclosure is more than an academic exercise. To that end, the Bureau explains that "[t]o the extent that testers are able to show that trial disclosures succeed in improving upon existing requirements, the Bureau will endeavor to amend disclosure rules accordingly and to permit the use of validated trial disclosures until such amendment is effective."[33] We hope that the Bureau will succeed in these efforts, as we believe that they ultimately may prove critical to the long-term success of the Bureau's efforts in this area.

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Beyond these specific comments on the content of the policy, we also recommend that the Bureau consider submitting the final policy for review by Congress under the Congressional Review Act. As reflected in the Dodd-Frank Act, Congress has specific interest in trial disclosure programs. We do not anticipate congressional objections to the final policy, but believe that, in light of this interest, submission of the policy to Congress will further enhance understanding of the Bureau's policy and further demonstrate the Bureau's commitment to building broad-based support for this important program.

[33] 83 Fed. Reg. at 45575.

Thank you again for the opportunity to submit these comments on how the Bureau can strengthen its policy to encourage trial disclosure programs. If you have any questions, please feel free to contact any of the undersigned individuals.

Respectfully submitted,

Kate Larson Prochaska
Vice President and Regulatory Counsel
U.S. Chamber of Commerce

Virginia O'Neill
Senior Vice President, Center for Regulatory Compliance
American Bankers Association

Dong Hong
Vice President, Senior Counsel
Consumer Bankers Association