3138 10th Street North
Arlington, VA 22201-2149
703.522.4770 | 800.336.4644
f: 703.524.1082
nafcu@nafcu.org | nafcu.org

National Association of Federally-Insured Credit Unions

October 10, 2018

Paul Watkins,
Director, Office of Innovation
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 Mr. Watkins:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), the only national trade association focusing exclusively on federal issues affecting the nation's federally-insured credit unions, I am writing in regard to the Bureau of Consumer Financial Protection's (Bureau) proposed Policy to Encourage Trial Disclosure Programs (TDP Policy).

General Comments

NAFCU supports the Bureau's efforts to promote innovation in the financial marketplace and welcomes revisions to the TDP Policy that will better enable credit unions to improve member experiences. As credit unions continue to invest in digital delivery channels for products and services, an opportunity exists to reduce regulatory burdens, streamline traditional disclosures, and reconsider the utility of existing disclosures that are confusing or unhelpful. However, creating new disclosures necessitates significant operational and legal investments which are cost-prohibitive for most credit unions. NAFCU urges the Bureau to be mindful of these costs as it seeks to further refine the trial disclosure program.

In general, NAFCU believes that the proposed TDP Policy improves upon the current process for obtaining a trial disclosure program waiver, which has so far yielded no successful applications. Although the improvements are modest, NAFCU is pleased to see greater clarity on issues such as application review timeframes and extensions of existing waivers. NAFCU believes that the Bureau's commitment to a 60-day review process for trial disclosure program applications may encourage broader industry engagement; however, NAFCU asks that the Bureau include with any formal denial an explanation of the application's strengths and weaknesses.

NAFCU also supports new clarifications regarding how extensions of existing trial disclosure waivers should be made and how they will be evaluated. Whereas the current TDP Policy lacked any explanation of how the Bureau would evaluate such requests—or whether they were permitted in the first place—the proposal articulates a common framework for extending waivers. To the

extent that the Bureau anticipates permitting longer waiver extensions where it is considering amending disclosure requirements, NAFCU believes that further guidance on this aspect of the TDP Policy would be beneficial. Specifically, the Bureau should explain whether pre-rulemaking activity warrants longer waiver extensions, and whether the agency will proactively inform waiver recipients when it is considering amendments to relevant disclosure language.

Most importantly, the Bureau should consider ways to reduce burdens for potential applicants seeking to test new disclosures—particularly smaller institutions that may not be able to bear the full cost of complying with the Bureau's rigorous program requirements. For credit unions, the cost of conducting legal due diligence at the application phase and supplying test data during the trial phase represents a major burden. Many credit unions are overwhelmed by the sheer volume of compliance tasks necessitated by the Bureau's existing regulations and cannot spare additional staff to review new disclosures. While the current and proposed TDP Policy permits group trial disclosure program applications (such as through a trade association), distributing development and application costs does little to offset a credit union's ongoing operational costs, such as compliance assessments, data collection to support Bureau monitoring, and technical support to ensure that test disclosures are properly distributed when systems are updated. NAFCU believes the Bureau can and should do more to make the trial disclosure program more accessible to institutions with limited financial resources.

The Bureau should grant credit unions additional flexibility when identifying laws or regulations to be waived in a trial disclosure application.

Section A of the proposed TDP Policy includes specific proposal elements that an applicant must address. In general, these elements are similar to those that exist under the current TDP Policy; however, NAFCU is pleased to see that the Bureau has moderated its strict requirement that applicants "identify with particularity" which provisions of current rules or enumerated consumer laws are to be temporarily waived.

NAFCU believes that an applicant should be permitted to explain generally the rules or laws it seeks to temporarily waive without needing to produce a comprehensive list of citations. As the Bureau recognizes in the proposal, "in some cases it may be difficult to determine precisely which regulatory requirements would apply, in the normal course, to a proposed test disclosure."[1] Furthermore, the Bureau correctly anticipates that not every financial institution will have the legal resources necessary to make a precise determination. For most credit unions, consulting counsel to prepare a detailed inventory of applicable rules relevant to a test disclosure would be cost prohibitive. According to the National Credit Union Administration's (NCUA) most recent Call Report data, 75 percent of credit unions are smaller than $126 million in assets.

NAFCU appreciates the Bureau's willingness to accommodate smaller institutions by permitting waiver applicants to "provide the maximum specification practicable under the circumstances."[2]

[1] Bureau of Consumer Financial Protection, Policy to Encourage Trial Disclosure Programs, 83 Fed. Reg. 45574, 45577 n.25 (September 10, 2018).
[2] Id.

However, NAFCU believes that additional clarity is needed to elucidate the Bureau's expectation that a resource-constrained applicant should explain limits on its ability to provide a detailed list of applicable laws or regulations. While asset size may serve as a convenient proxy for determining a credit union's legal budget, credit unions of a similar size may have vastly different risk profiles, which may be reflected in compliance staffing levels. Accordingly, the Bureau should evaluate applicant justifications using a broad range of factors in order to promote use of the trial disclosure program among institutions of all sizes and varieties.

NAFCU does not believe that the Bureau should expect resource-constrained applicants to produce detailed information regarding their legal or compliance budgets before approving an application that contains a general description of laws or regulations to be waived. Credit unions may be hesitant to share such data, even in broad terms, if there is a risk that the content in a waiver application could be publicly revealed through a *Freedom of Information Act* (FOIA) request.

Lastly, the Bureau should clarify whether it will afford group trial disclosure applications a similar degree of flexibility with regard to enumerating particular rules or laws to be waived. If such flexibility is anticipated, the Bureau should explain what justification a trade association must provide if it applies for a waiver on behalf of its members. A trade association may want to provide a more generalized description of applicable rules or regulations since it may be difficult to anticipate how individual members will implement the trial disclosure.

The Bureau should, as a matter of policy, grant applicants an opportunity to cure alleged breaches of waiver provisions before revoking the waiver.

The proposed TDP Policy specifies that before issuing a revocation, the Bureau will notify the affected company (or companies) of the grounds for revocation, and permit an opportunity to respond. However, where the Bureau determines that the company failed to follow the terms of the waiver, "it ***may*** offer an opportunity to correct any such failure before revoking the waiver."[3]

NAFCU believes that the opportunity to cure should not be discretionary. While a company is granted the right to respond to a notice of revocation and challenge its basis, there is no corresponding right to correct errors or other actions that might violate the terms of the waiver. NAFCU believes that the absence of this important right will likely discourage credit union applicants from using the trial disclosure program. The costs of developing new test disclosures can be substantial depending on the complexity of the rule (or rules) involved. Credit unions will not want to make such investments if the Bureau reserves the right to identify minor, technical violations of the waiver agreement and deny a right to cure—which could potentially lead to further supervisory action.

The Bureau should publish guidance in connection with any revised TDP Policy that explains how it will evaluate trial disclosure test data.

[3] Id. at n.30 (emphasis added).

To evaluate risks to consumers associated with proposed trial disclosures, the Bureau intends to consider company data at both the application and testing phases. At the application stage, a company must provide a reasonable basis for expecting and measuring the improvements of the disclosure, such as comparisons with consumer payment/response rates, and must also commit to sharing test result data with the Bureau. During the trial phase, the Bureau intends to require companies to disclose material changes in customer service inquiries, complaint patterns, default rates, or other information that should be investigated to determine if the trial disclosures may be causing harm.

The Bureau should clarify how it will evaluate consumer complaint metrics and what methods it will use to normalize complaint data during the transition to new test disclosures. Additionally, the Bureau should specify at the application approval stage what types of data it intends to review in order to give credit unions and other applicants sufficient time to prepare internal reporting systems. The Bureau should also avoid data collections that are only marginally useful for assessing the proposed test disclosure, and should actively phase out data collections if it is determined that certain information is not needed to conduct a reasonable evaluation.

The Bureau should seek to maximize assurances that it will not pursue actions against waiver recipients under its unfair, deceptive, or abusive acts or practices (UDAAP) authority.

NAFCU is supportive of the Bureau's effort to articulate limits on the agency's UDAAP authority through the proposed TDP Policy. Section C of the TDP Policy provides that the Bureau will affirm, in any waiver agreement, that it "will not make supervisory findings or bring a supervisory or enforcement action against the company or companies under its authority to prevent unfair, abusive, or deceptive acts or practices predicated upon its or their use of the trial disclosures during the waiver period, provided the company engages in good faith, substantial, compliance with the terms of the waiver."

NAFCU believes that the Bureau should also address statutory limits on the legal safe harbor granted in the waiver to alleviate supervisory concerns that might otherwise discourage participation in the trial disclosure program.

Section 1032(e)(2) of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank Act) provides that the Bureau "may establish a limited period during which a covered person conducting a trial disclosure program shall be deemed to be in compliance with, or may be exempted from, a requirement of a rule or an enumerated consumer law." The Bureau's ability to bring enforcement actions under its UDAAP authority does not constitute a rule or enumerated law. Accordingly, while the Bureau may state as a matter of policy that it will not pursue UDAAP violations predicated upon a company's use of trial disclosures during the waiver period, such a policy does not prevent a state attorney general from bringing a similar action pursuant to section 1042 of the Dodd-Frank Act. To achieve a minimum level of jurisdictional certainty for a legal safe harbor, NAFCU urges the Bureau to coordinate with state regulatory agencies and state attorneys general to ensure that the Bureau's policy regarding supervisory and enforcement actions is mirrored in state sandboxes. The Bureau should work to achieve such assurances through

frequent and transparent coordination among all stakeholders as state regulatory sandboxes are developed.

Finally, as NAFCU has observed in previous comment letters, enforcement actions resulting from alleged UDAAP violations have not always followed clearly from existing guidance on prohibited policies and practices. In many instances, the Bureau has pursued enforcement proceedings despite never having provided specific guidance on the policies and practices at issue. Furthermore, in the absence of a clear definition for "abusive" practices, credit unions have adopted extremely conservative compliance guidelines that may hinder the type of innovation sought by the TDP Policy. NAFCU and its member credit unions agree that UDAAP violations can cause extensive injury to consumers, erode consumer confidence, and undermine the financial marketplace; however, the institutions subject to the Bureau's enforcement authority must have a clear understanding of the rules and prohibited behaviors from the start, particularly if they are looking to develop innovative disclosures.

Conclusion

NAFCU appreciates the opportunity to provide comments on the Bureau's revised TDP Policy. NAFCU believes that to properly promote innovation in consumer financial services, the Bureau must take steps to reduce regulatory burdens that stand in the way of efforts to improve credit union member experiences. If you have any questions or concerns, please do not hesitate to contact me at amorris@nafcu.org or 703-842-2266.

Sincerely,

Andrew Morris
Regulatory Affairs Counsel