



CFPB RELEASES FINAL TRIAL DISCLOSURE POLICY

The Bureau of Consumer Financial Protection recently issued its final "Policy to Encourage Trial Disclosure Programs," which is intended to encourage banks, thrifts, credit unions and other financial services companies to innovate by proposing and conducting such programs, consistent with the protections for consumers that are described in the Policy. The information that is generated by such programs may help the CFPB to establish more effective disclosure rules and practices.

The CFPB published its proposed Policy in December 2012 (see our prior ALERT dated January 4, 2013) and received 18 formal comments on the proposal. Comments received from industry trade associations and other industry groups, financial services providers, consumer groups and individuals supported the stated goals of the proposed Policy. The CFPB did not make substantive changes to the Policy; however, it revised the Policy to provide additional clarity and elaboration of a number of specific areas.

The final Policy covers the following four areas:

- Eligibility – Describes which proposed programs will be considered eligible for a temporary waiver.
- Approval – Lists factors the CFPB will consider in deciding which eligible programs to approve for such a waiver.
- Waivers – Describes the CFPB's procedures for issuing waivers.
- Disclosures – Describes how the CFPB will disclose information about these programs.

Most comments on the proposed Policy concerned the approval process, focusing on the areas of cost-sharing, development costs, iterative testing, additional safeguards and guidance on CFPB disclosure priorities. As to cost-sharing, the CFPB indicated that it would welcome collaboration and cost-sharing and has clarified the final Policy to that effect. The CFPB stated that it sees no reason why a single trial disclosure program may not properly be proposed and implemented by more than one covered person. It also indicated that the Policy should not be read to prevent a trade association or any other entity from helping to facilitate cost-spreading. As to development costs, the CFPB made clear that the Policy is not

intended to limit preliminary discussion of a potential trial disclosure proposal before a complete application is submitted. As to iterative testing, which involves a sequence of smaller tests that enable ongoing improvements to a test disclosure concept (as opposed to a single, larger test, of a preset disclosure), the CFPB indicated that it intends for the Policy to support both approaches. As to additional safeguards, the CFPB rejected requests (i) to subject proposed disclosures to full notice and comment and (ii) that tests be approved only when there is no statutory liability associated with the disclosure process. Finally, as to guidance, the CFPB indicated that it may at some point in the future identify one or more priority areas for potential tests, but not at this time.

With respect to waivers, several trade associations and industry participants asked for clarification regarding the scope of the safe harbor that will be provided to approved participants. Specifically, they asked whether participants would be shielded both from private litigation by consumers and enforcement by other regulators. The CFPB stated that approved entities whose conduct is in accord with the terms of approval should not face private liability exposure for violating provisions of a federal disclosure statute or rule that the CFPB identifies as being within the scope of the waiver. Because such a waiver deems the trial disclosure to be in compliance with or exempt it from the provisions identified by the CFPB, there is no basis under those provisions for a private suit based on the company's use of the disclosure. The same rationale, the CFPB stated, applies to other federal and state regulators. The CFPB also noted that it would confer, as appropriate, with other federal and state regulators to secure their support for a particular trial disclosure program.

Finally, with respect to disclosures, comments focused on consumer awareness of tests and disclosure of test results. The CFPB determined that it will not require direct disclosure of testing to test populations, as such notice likely would prevent effective testing. It also will not require that all test results be made public, as it may discourage valuable potential programs.

The Policy became effective October 29, 2013. □

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