

CFPB Seeks Comment on Policy to Encourage Trial Consumer Disclosure Programs

BY KEVIN L. PETRASIC AND CARLA LAROCHE

In an effort to encourage more innovation in consumer finance, the Bureau of Consumer Financial Protection (“CFPB”) recently proposed its Policy to Encourage Trial Disclosure Programs (“Proposal”).¹ The Proposal seeks comments from interested parties, including depository institutions, other financial services companies, and other federal agencies, on the CFPB’s proposed trial disclosure program and information collection policy (“Policy”). Pursuant to the Policy, companies would be able to seek the CFPB’s approval to operate a specific trial disclosure program while being deemed to be in compliance with federal consumer protection disclosure requirements during the approved trial period. Offered as part of the CFPB’s Project Catalyst initiative, the Policy is designed to find ways to make consumer disclosures less costly to financial services providers, while being more effective and accessible for consumers.

Statutory Background

The Proposal is based on the CFPB’s authority to organize trial programs, set forth in Sections 1032(e)² and 1021(b)(5)³ of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Pursuant to the Dodd-Frank provisions, the CFPB may deem that approved financial institutions are “in compliance with, or ...exempted from,”⁴ “otherwise applicable federal disclosure requirements”⁵ in order to advance innovation in consumer financial products and services markets.

Policy Requirements and Procedures

To participate in the program and receive legal protection from the CFPB, interested companies would have to abide by the requirements of the four sections of the CFPB’s proposed Policy:

- ***Trial Program Eligibility.*** Identifying the information that a financial institution seeking a waiver will have to provide in its trial disclosure proposal.⁶
- ***Program Approval Process.*** Detailing the factors the CFPB will consider when exercising its discretion to approve a proposed program.⁷
- ***Waiver Approval and Compliance Procedures.*** Requiring a written waiver specifying the terms and conditions under which a trial program is approved; and evidence required to be submitted to the CFPB during the trial to demonstrate compliance with the waiver terms.⁸
- ***Public Disclosure of Trial Program.*** Noting that the CFPB will publish information about approved trial programs.⁹

Information Collection from Participating Institutions

Along with the key Policy requirements, institutions participating in the trial disclosure program will be required to share with the CFPB the data they collect.¹⁰ The CFPB intends to use the information it acquires from the trial programs to understand better the technology and methods available to provide more effective consumer disclosure information.¹¹ Instead of conducting its own limited studies, the CFPB is proposing to use its authority to obtain information on a larger scale while offering legal protection to those willing to do so.

Uncertainty Regarding the Scope of Protections

Perhaps the most important consideration for a financial institution interested in participating in the trial disclosure program is the potential lack of other federal and state agencies' endorsement. This is anticipated with the invitation extended to other federal agencies (but not specifically State Attorneys General or other state agencies) to comment on the Proposal. While the CFPB may elect to provide a legal safe harbor to program participants, there are no indications about how the Policy would be implemented given the CFPB's overlapping consumer protection jurisdiction with other federal and state agencies, including the federal banking agencies, Federal Trade Commission, and State Attorneys General. This is a critical consideration for the proposed Policy and success of the proposed trial disclosure programs. Failing to address this issue will inevitably constrain the effectiveness of and information that the CFPB can glean from the trial programs. More importantly for the industry, institutions will have to proceed at their peril where other federal or state agencies (or State Attorneys General) have overlapping jurisdiction with the CFPB of consumer disclosure or related consumer protection laws.

Institutions will have to proceed at their peril where other federal or state agencies have overlapping jurisdiction with the CFPB.

A similar consideration is the extent to which the CFPB's blessing to operate a trial disclosure program would inoculate – if at all – an institution from a consumer class action or individual lawsuit based on a claim of unfair, deceptive or abusive acts or practices under state law.

Review and Planning Considerations

In considering whether to comment on the Policy with a view toward possibly structuring and participating in a trial disclosure program, institutions should consider the types of disclosure programs they may want to pursue, and examine the potential risks and benefits in participating in such a program. In doing so, institutions will be better able to develop and provide an in-depth and informed view (and comment letter, if warranted) on the potential regulatory and supervisory issues at stake under the proposed Policy.

While the Policy provides a good general framework for how the program would operate, there are a number of important considerations that are not yet addressed. These include: (i) details on the type of information the CFPB would require covered institutions to share while conducting trial programs; (ii) enforcement of applicable federal and state consumer protection laws (as noted above) by other federal and state regulators; (iii) the circumstances under which the CFPB could revoke an institution's legal protections, and whether it could/would do so retroactively where there is a disagreement about whether program requirements have been violated;¹² and (iv) the potential consequences of a consumer (individual or class action) civil lawsuit alleging unfair, deceptive or abusive acts or practices by an institution in connection with the operation of a trial program.

The comment period on the Proposal, which ends February 15, 2013, provides financial institutions an opportunity to discuss the potential risks they foresee with the CFPB's proposed Policy. This provides an important opportunity for financial services providers to identify and address potential issues and concerns with the structure and operation of the proposed Policy and the extent to which enforcement or litigation risks could be minimized for covered institutions that elect to operate a trial disclosure program.

Paul Hastings attorneys are actively assisting clients with a variety of matters involving CFPB regulatory and supervisory matters and are available to address questions or issues relating to the proposed Policy, the comment process, and the applicability of other federal or state disclosure laws and potential enforcement or litigation risks under such laws.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

Atlanta

Chris Daniel
1.404.815.2217
chrisdaniel@paulhastings.com

Heena A. Ali
1.404.815.2393
heenaali@paulhastings.com

Todd W. Beauchamp
1.404.815.2154
toddbeauchamp@paulhastings.com

Kevin Erwin
1.404.815.2312
kevinerwin@paulhastings.com

Diane Pettit
1.404.815.2326
dianepettit@paulhastings.com

Palo Alto

Cathy S. Beyda
1.650.320.1824
cathybeyda@paulhastings.com

San Francisco

Thomas Brown
1.415.856.7248
tombrown@paulhastings.com

Stanton R. Koppel
1.415.856.7284
stankoppel@paulhastings.com

Kristin M. Hall
1.415.856.7071
kristinhall@paulhastings.com

Samuel Zun
1.415.856.7206
samuelzun@paulhastings.com

Washington, D.C.

V. Gerard Comizio
1.202.551.1272
vgerardcomizio@paulhastings.com

Behn Dayanim
1.202.551.1737
bdayanim@paulhastings.com

Kevin L. Petrasic
1.202.551.1896
kevinpetrasic@paulhastings.com

Erica Berg-Brennan
1.202.551.1804
ericaberg@paulhastings.com

Lawrence D. Kaplan
1.202.551.1829
lawrencekaplan@paulhastings.com

Ryan A. Chiachiere
1.202.551.1767
ryanchiachiere@paulhastings.com

Michael A. Hertzberg
1.202.551.1797
michaelhertzberg@paulhastings.com

Amanda M. Jabour
1.202.551.0376
amandajabour@paulhastings.com

Carla Laroche
1.202.551.1768
carlalaroche@paulhastings.com

Helen Y. Lee
1.202.551.1718
helenlee@paulhastings.com

Lily Woodland
1.202.551.1977
lilywoodland@paulhastings.com

¹ See CFPB, Policy to Encourage Trial Disclosure Programs; Information Collection (December 13, 2012), available at http://files.consumerfinance.gov/f/201212_cfpb_trial_disclosures.pdf.

² 12 U.S.C. § 5532(e).

³ 12 U.S.C. § 5511(b)(5).

⁴ 12 U.S.C. § 5532(e).

⁵ See Proposal at 5.

⁶ See *id.* at 6-8.

⁷ See *id.* at 8-9.

⁸ See *id.* at 9-10.

⁹ See *id.* at 10-11.

¹⁰ See *id.* at 7 n. 11.

¹¹ See *id.* at 5-6.

¹² Although the CFPB may offer a covered company a chance to correct a waiver violation, the Policy does not explain when a violation warrants a full revocation of a waiver, a partial revocation, a chance to correct the violation, a different type of penalty, or no response at all. See Proposal at 9 n. 15.