

**BUREAU OF CONSUMER FINANCIAL PROTECTION**

**12 CFR Chapter X**

**[Docket No. CFPB-2018-0023]**

**Policy to Encourage Trial Disclosure Programs**

**AGENCY:** Bureau of Consumer Financial Protection.

**ACTION:** Policy guidance and procedural rule.

**SUMMARY:** The Bureau of Consumer Financial Protection (Bureau or CFPB) is creating the CFPB Disclosure Sandbox through issuance of its revised Policy to Encourage Trial Disclosure Programs (Policy), which is intended to carry out the Bureau’s authority under section 1032(e) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act).

**DATES:** This Policy is applicable on September 10, 2019.

**FOR FURTHER INFORMATION CONTACT:** For additional information about the Policy, contact Paul Watkins, Assistant Director; Edward Blatnik, Deputy Counsel; Albert Chang, Counsel; Thomas L. Devlin, Senior Counsel; Will Wade-Gery, Senior Advisor; Office of Innovation, at [officeofinnovation@cfpb.gov](mailto:officeofinnovation@cfpb.gov) or 202-435-7000. If you require this document in an alternative electronic format, please contact [CFPB\\_Accessibility@cfpb.gov](mailto:CFPB_Accessibility@cfpb.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

In section 1032(e) of the Dodd-Frank Act, Congress gave the Bureau authority to provide certain legal protections to covered persons to conduct trial disclosure programs.<sup>1</sup> This authority furthers the Bureau’s statutory purpose, stated in section 1021(a) of the Dodd-Frank Act, to

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<sup>1</sup> 12 U.S.C. 5532(e).

ensure that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.<sup>2</sup> Furthermore, this authority advances the Bureau’s statutory objectives in section 1021(b) of the Dodd-Frank Act to ensure consumers are provided with timely and understandable information to make responsible decisions about financial transactions; outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens; and markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.<sup>3</sup>

More specifically, under section 1032(e), the Bureau may permit covered persons to conduct trial disclosure programs, limited in time and scope, for the purpose of providing trial disclosures designed to improve upon model forms within the Bureau’s jurisdiction.<sup>4</sup> Such permission may include providing a legal safe harbor; *i.e.*, the Bureau may deem a covered person conducting such a program to be in compliance with, or exempt from, a requirement of a rule or enumerated consumer law.<sup>5</sup> Such trial disclosure programs must be subject to standards and procedures that are designed to encourage covered persons to conduct such programs.<sup>6</sup> Similarly, although Bureau rules must provide for public disclosure of such programs, such public disclosure may be limited to the extent necessary to encourage covered persons to conduct effective trials.<sup>7</sup>

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<sup>2</sup> 12 U.S.C. 5511(a).

<sup>3</sup> 12 U.S.C. 5511(b)(1), (b)(3), (b)(5).

<sup>4</sup> 12 U.S.C. 5532(e)(1). As explained below, the Bureau interprets section 1032(e) to grant the Bureau authority to permit trial disclosure programs focused on any disclosures required by an enumerated consumer law or a Bureau rule (hereafter, Federal disclosure requirements), so long as such programs are designed to improve upon model forms under Federal consumer financial law.

<sup>5</sup> 12 U.S.C. 5532(e)(2). *See also* 12 U.S.C. 5481(12) (defining enumerated consumer laws).

<sup>6</sup> 12 U.S.C. 5532(e)(1), (2).

<sup>7</sup> 12 U.S.C. 5532(e)(3).

Pursuant to the purpose, objectives, and authority listed above, the Bureau proposed the original version of its Policy to Encourage Trial Disclosure Programs in December 2012, and finalized it in September 2013 (2013 Policy). However, the 2013 Policy failed to effectively encourage trial disclosure programs: The Bureau did not permit any such programs under the 2013 Policy.

## **II. Overview of Public Comments**

On September 10, 2018, the Bureau published a notice in the *Federal Register* inviting the public to comment on its proposal to create a Disclosure Sandbox through its revised Policy to Encourage Trial Disclosure Programs.<sup>8</sup> The Bureau received 26 unique comments on the proposed Policy during the comment period. Industry trade associations and other industry groups submitted 12 comment letters. Individual financial services providers submitted two comment letters. There were four comment letters from consumer groups, two from groups of State Attorneys General, two from groups of State financial regulators, and one from a law firm. Individuals submitted a further three comments.

Industry commenters uniformly supported the proposed Policy, and stated that it is more likely to encourage companies to conduct trial disclosure programs than the 2013 Policy. In contrast, consumer groups stated that the proposed Policy is a step backwards vis-à-vis the 2013 Policy and asked the Bureau not to finalize it as proposed. One of the two groups of State Attorneys General was supportive of the proposed Policy; the other group was not.

Although generally supportive of the proposed Policy, industry commenters requested greater protection from liability and greater assurance that any information or data provided to the Bureau would be protected from public disclosure and disclosure to other Federal and State

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<sup>8</sup> 83 FR 45574 (Sept. 10, 2018).

regulators. To the extent consumer groups recommended revisions, they urged the Bureau to limit the scope of the proposed Policy or build in consumer protections that go beyond those included in the 2013 Policy, in some cases reiterating recommendations such groups made on the proposed 2013 Policy that were not adopted by the Bureau.

The Bureau appreciates all of the comments received and has given each of them careful consideration. In determining whether to adopt recommended revisions for purposes of the final Policy, the Bureau's guiding light is Dodd-Frank Act section 1032(e), which evinces a specific congressional intent for the Bureau to encourage covered persons to conduct trial disclosure programs limited in time and scope pursuant to specified standards and procedures. As noted, the 2013 Policy did not effectively encourage covered persons to conduct trial disclosure programs. Commenters urging the Bureau to return to the 2013 Policy or to add requirements or limitations to the proposed Policy that go beyond those in the 2013 Policy did not explain how such approaches would enable the Bureau to fulfill Congress' intent. That said, the Bureau has adopted suggested revisions designed to increase consumer protections that it believes are consistent with this intent. The Bureau has also adopted a number of suggested revisions that it believes will provide further encouragement to companies to conduct trial disclosure programs. But it has endeavored not to make any revisions of this type that it believes will diminish the consumer protections built into the Policy.

Many comments from stakeholders across the spectrum requested greater specificity or detail regarding various provisions of the proposed Policy. The Bureau has provided such additional specificity and detail in a number of instances, as explained below. However, the Bureau believes that, in many cases, providing greater specificity and detail is premature. As the Bureau gains experience implementing the final Policy and engages in additional stakeholder

outreach, it will consider the extent to which additional clarifications or adjustments are necessary or appropriate.

### **III. Summary of Comments, Bureau Responses, and Resulting Policy Changes**

This section provides a summary of the significant comments received by subject matter. It also summarizes the Bureau's assessment of such comments by subject matter and, where applicable, describes the resulting changes that the Bureau is making in the final Policy.<sup>9</sup>

#### **A. Legal Authority**

A letter from several consumer groups declared that the proposed Policy exceeds the Bureau's authority under Dodd-Frank Act section 1032(e) in various respects.<sup>10</sup> First, they stated that the proposed Policy exceeds the Bureau's authority under section 1032(e) because that section does not authorize trial disclosure programs that change or deviate from substantive disclosure requirements. The Bureau does not agree with this contention, as it appears to read out of the statute section 1032(e)(2), which expressly gives the Bureau authority to exempt covered persons conducting trial disclosure programs from disclosure requirements under an enumerated consumer law or a Bureau rule. Indeed, this waiver authority is the central pillar of section 1032(e): to identify improvements to Federal disclosure requirements, companies must be able to test disclosures that deviate from those requirements. The consumer groups appear to base this view on a claim some of the same groups made in comments on the 2013 Policy, namely, that section 1032(e) must be read in the context of the Bureau's authority to prescribe model forms – both in section 1032(b) and in the enumerated consumer laws – such that trial disclosures must meet the criteria for model forms in those sources. A group of State Attorneys

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<sup>9</sup> The Bureau has also made a number of technical changes to the final Policy to accommodate the revisions described below and to increase clarity.

<sup>10</sup> These claims were echoed in a letter from an assemblage of other consumer groups.

General made the same point in their letter. In 2013, the Bureau explained why it believes this to be an unpersuasive interpretation of section 1032(e), and it remains of the same view.<sup>11</sup>

Second, the consumer groups asserted that the proposed Policy exceeds the Bureau's authority under section 1032(e) because it would permit trial disclosure programs based on cost-effectiveness alone, *i.e.*, even where consumer understanding is diminished. This point was echoed by several other commenters, including the same group of State Attorneys General. The Bureau does not intend to permit trial disclosures that it believes will cause a material, adverse impact on consumer understanding, regardless of potential cost-savings. Accordingly, the Bureau has added a footnote in the final Policy to clarify this point.

Third, the consumer groups stated that the proposed Policy exceeds the Bureau's authority under section 1032(e) because that section only gives the Bureau authority to permit covered persons to engage in trials of disclosures found in existing model forms. By this they appear to mean that section 1032(e) does not authorize the Bureau to permit trial disclosure programs unless such programs relate directly to disclosure requirements for which model forms already exist.

The Bureau believes this construction of section 1032(e) is unduly restrictive and risks frustrating Congress' intent. Section 1032(e)(1) authorizes the Bureau to permit trial disclosure programs "that are designed to improve upon any model form issued pursuant to" section 1032(b)(1) or any other enumerated consumer law. Consistent with the policy objective of section 1032 to develop new ways and means of enhancing consumer understanding, the Bureau believes section 1032(e)(1) should be interpreted to incorporate model forms that have been

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<sup>11</sup> 78 FR 64389, 64389 (Oct. 29, 2013).

issued by the Bureau prior to a particular trial disclosure program, as well as model forms that could be issued by the Bureau subsequent to a particular trial disclosure program.

The Bureau generally has broad discretion to issue model forms as a component of its broad authority to issue disclosure rules under the Federal consumer financial laws. A trial disclosure program that involved testing changes to Federal disclosure requirements could assist the Bureau in developing model forms with respect to those disclosure requirements. The resulting model forms would improve upon model forms that would be issued by the Bureau with respect to those Federal disclosure requirements without the benefit of the trial disclosure program. This reading of section 1032(e)(1) is consistent with section 1032(e)(2), which gives the Bureau broad authority to waive Federal disclosure requirements, irrespective of the current existence of an associated model form. The commenters' contrary interpretation would preclude the Bureau from relying on the results from such trial disclosure programs when establishing new model forms. Such a result would be inconsistent with Congress's recognition that in-market disclosure testing can provide an invaluable supplement to traditional consumer testing.<sup>12</sup>

Even assuming *arguendo* that section 1032(e)(1) encompasses only existing model forms, the Bureau still believes that the consumer groups' interpretation of the provision as limited to disclosure requirements for which model forms already exist is unduly restrictive. Specifically, the interpretation fails to recognize the various ways and means by which the Bureau may improve upon an existing model form. Indeed, trial disclosures not included in

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<sup>12</sup> See U.S. Dep't of the Treasury, Financial Regulatory Reform: A New Foundation 63-64 (2009), *available at* [https://www.treasury.gov/initiatives/Documents/FinalReport\\_web.pdf](https://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf) ("A regulator is typically limited to testing disclosures in a 'laboratory' environment. A product provider, however, has the capacity to test disclosures in the field, which can produce more robust and relevant results. For example, a credit card provider can try two different methods to disclose the same product risk and determine which was more effective by surveying consumers and evaluating their behaviors. We propose that the [Consumer Financial Protection Act] should be authorized to establish standards and procedures, including appropriate immunity from liability, for providers to conduct field tests of disclosures.").

existing model forms may lead to improvements of the disclosures that are included in such forms. For example, they could inform the Bureau on the best means to deliver the form, on enhanced ways of presenting the content in the form, or on a range of other lessons learned. Further, even where the Bureau has not issued a model form with respect to a particular or discrete disclosure requirement that is the subject of a trial disclosure program, the program could improve upon the universe or class of model forms that have been issued with respect to the product or service or rule in question. For example, following a successful trial disclosure program, the Bureau could decide to add the additional tested content to an existing form, thereby improving upon it.

Accordingly, the Bureau interprets section 1032(e) to permit trial disclosure programs designed to improve upon any model form that has been issued or could be issued by the Bureau, irrespective of the existence of a model form directly tied to the particular disclosure requirement that is the subject of the trial disclosure program.

Fourth, the consumer groups claimed that the proposed Policy exceeds the Bureau's authority under section 1032(e) because that section provides that trial disclosure programs must be of limited time and scope. For example, the consumer groups stated that permitting two-year trial disclosure programs is not sufficiently limited in time, and permitting groups of companies to conduct trial disclosure programs is not sufficiently limited in scope. And they faulted the proposed Policy for not placing any limits on the size of the testing population or the range of products or services. The Bureau disagrees with this line of comment. Although the trial disclosure programs the Bureau permits under section 1032(e) must indeed be limited in time and scope, that language should not be read in isolation. Rather, it should be read in the context of section 1032(e)'s instruction to the Bureau to issue standards and procedures designed to



encourage covered persons to conduct such programs. Developing a robust trial disclosure program requires significant resources. If the proposed Policy limited trial disclosure programs to a period of time the commenters deem to be sufficiently limited and did not permit extensions for successful programs, a company would have little or no incentive to expend such resources. In addition, the comment appears not to appreciate the difference between the Policy and particular trial disclosure programs permitted under the Policy. Section 1032(e) requires particular trial disclosure programs to be limited in scope. It does not follow that the Policy must specify precise scope limitations in advance that are applicable to every trial disclosure program.<sup>13</sup>

## **B. Protection from Liability**

A group of State Attorneys General, a group of State financial regulators, and several industry commenters asked the Bureau to clarify the effect of a waiver provided under the proposed Policy on State law. As noted in the 2013 Policy, such a waiver provides a safe harbor from liability as to the Federal disclosure requirements within the scope of the waiver. This means that there would be no predicate under the described Federal disclosure requirements for a private suit or Federal or State enforcement or supervisory action based on the recipient's permitted use of the trial disclosures in question within the scope of the waiver.

Several industry commenters expressed concern about the proposed Policy based on the authority State Attorneys General have under Dodd-Frank Act section 1042 to enforce provisions of title X, including especially the prohibition of unfair, deceptive, or abusive acts and practices (UDAAP).<sup>14</sup> They noted that a State Attorney General could use this authority to bring a

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<sup>13</sup> The consumer group letter also asserted that section E of the proposed Policy regarding Regulatory Coordination exceeds the Bureau's authority under section 1032(e). This claim is discussed below in the section III.C.

<sup>14</sup> 12 U.S.C. 5536(a)(1)(B).

UDAAP action against a recipient of a waiver, and asked the Bureau to urge State Attorneys General not to bring such actions. As an initial matter, the Bureau notes that there would be no basis for such a title X UDAAP action predicated on a violation of the Federal disclosure requirements within the scope of the waiver. Rather, a State Attorney General would have to show that, despite the consumer protections built into the Policy and despite the Bureau's issuance of a waiver under the Policy, which the Bureau would not issue if it believed the relevant conduct was unfair, deceptive, or abusive, the applicable elements of its title X UDAAP action had been established.

Moreover, if requested by the applicant, the Bureau intends to coordinate with Federal and State regulators to attempt to secure their support for a trial disclosure program, or at least a commitment not to initiate enforcement actions predicated on permitted use of the trial disclosures. The Bureau notes in this regard that, prior to issuing a No-Action Letter to Upstart Network, Inc. (Upstart) in September 2017<sup>15</sup> under its related Policy on No-Action Letters,<sup>16</sup> the Bureau consulted with both other Federal regulators and State regulators regarding the application. No other regulator has brought an enforcement action against Upstart for engaging in the acts or practices that are the subject of the letter.

In comments on the proposed 2013 Policy, a number of commenters asked the Bureau to clarify the liability protections provided by a section 1032(e) waiver. In the preamble of the final 2013 Policy, the Bureau explained that such a waiver would provide complete liability protection, including against actions brought by other regulators and private plaintiffs.<sup>17</sup> Several

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<sup>15</sup> See Bureau of Consumer Financial Protection, CFPB Announces First No-Action Letter to Upstart Network (Sept. 14, 2017), available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-first-no-action-letter-upstart-network/>.

<sup>16</sup> 81 FR 8686 (Feb. 22, 2016).

<sup>17</sup> 78 FR 64389, 64391 (Oct. 29, 2013).

industry commenters on the proposed Policy asked the Bureau to include such a statement in the Policy itself. The Bureau agrees that it is important for all stakeholders that such language be included in the Policy itself, and in the TDP Waiver Terms and Conditions document (WT&C) provided to recipients under section C of the Policy. Accordingly, the Bureau has revised section C of the final Policy to specify that it expects the WT&C will include a statement that, subject to good faith, substantial compliance with the WT&C, the Bureau deems the waiver recipient to be in compliance with, or exempt from, described Federal disclosure requirements and that, as a result of this determination, there is no predicate under the described Federal disclosure requirements for a private suit or Federal or State enforcement or supervisory action based on the recipient's permitted use of the trial disclosures within the scope of the waiver.<sup>18</sup>

Several industry commenters asked the Bureau to clarify that a waiver under the Policy would extend to agents of the waiver recipient, as well as all the necessary participants in a particular kind of transaction, explaining that failure to do so could have a chilling effect on applications. The Bureau acknowledges the general point that parties involved in a transaction in which a recipient is using non-compliant disclosures might have concerns about being a party to the transaction. To address this issue, the Bureau has revised the final Policy to state that the Bureau will entertain requests from applicants to extend waiver protection to identified or described agents, as appropriate, and that, where such a request is granted, the scope of the waiver included in the WT&C will extend to those identified or described agents. To address the

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<sup>18</sup> Relatedly, the Bureau had included a provision in section C of the proposed Policy specifying that the WT&C will include a statement that, in the exercise of its discretion, the Bureau 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 permitted use of the trial disclosures during the waiver period, provided the company engages in good faith, substantial, compliance with the terms of the waiver. Several industry commenters supported this aspect of the proposed Policy, and it has been retained in the final Policy. The Bureau is including this provision to assure waiver recipients that the Bureau does not intend to bring supervisory or enforcement UDAAP actions based on the very conduct the Bureau has permitted under the waiver.

concern about other necessary participants in a type of transaction, the Bureau may include, as appropriate, language in the WT&C designed to assure such parties that there is no basis for such concerns.

Finally, several industry commenters asked the Bureau to clarify the liability effects of termination<sup>19</sup> of a waiver on a company's providing trial disclosures during the period in which the waiver was in effect. At least two such commenters urged the Bureau to specify that no such "retroactive" liability would apply regardless of the grounds for termination. Another industry commenter suggested that if the termination was based on a ground other than the recipient's failure to comply with the terms and conditions of the waiver, there should be no retroactive liability. The Bureau notes that, prior to a termination of a TDP Waiver, the recipient's use of the trial disclosures covered by the waiver is lawful; *i.e.*, there is no basis for a retroactive action based on failure to comply with existing disclosure requirements. To clarify this point, section D.3 of the final Policy states that, by operation of law, no retroactive action premised on the recipient's permitted use of the trial disclosure will lie under provisions within the scope of a TDP Waiver.

### **C. Coordination with Other Regulators**

The Bureau received a range of comments on section E of the proposed Policy, entitled Regulatory Coordination, specifically, as well as on the topic of coordination with other regulators more generally.

A joint consumer group letter stated that section E of the proposed Policy exceeds the Bureau's authority under section 1032(e) because that section does not authorize the Bureau to

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<sup>19</sup> In the final Policy, the Bureau is replacing the term "revocation," which was used in the proposed Policy, with the term "termination," to more accurately convey the nature of the action and for consistency with the Bureau's other innovation policies. For convenience, the Bureau is also using the term "termination" when describing comments despite the fact that the comments used the term "revocation."

“transfer” or “offload” its own statutory duties to the States or give the States authority to waive Federal requirements. This comment appears to be based on a misunderstanding of section E. That section – which is Section F in the final Policy – does not involve a transfer of the Bureau’s authority under section 1032(e) to permit trial disclosure programs and to issue waivers. Nor does it give States authority to waive Federal disclosure requirements. Rather, section F expresses the Bureau’s interest in entering into agreements with State authorities that operate or plan to operate a State sandbox, which may include a process to receive a TDP Waiver under this Policy in a coordinated manner with regulatory assistance from the State sandbox.

An association of State financial regulators urged the Bureau to exercise caution in the implementation of section E of the proposed Policy, as the agreements between the Bureau and State authorities contemplated in that section risk creating a “race to the bottom;” *i.e.*, they could encourage some States to reduce consumer financial protections. The Bureau believes that section F will not lead to a “race to the bottom” and is committed to implementing it in a manner designed to ensure that it will not. As noted in section F of the final Policy, the Bureau does not intend to enter into such agreements unless consumers are provided sufficient protections in the State sandbox program.

The same association of State financial regulators urged the Bureau to include, within the scope of its intention to coordinate with other regulators, coordination for purposes of assessing the impact of trial disclosure programs on consumers. The association noted that State regulators possess information relevant to such assessment, including consumer complaints, and advised the Bureau to seek such information from State regulators. The Bureau welcomes this type of information and assistance from State regulators.

#### **D. Disclosure of Information and Data Provided to the Bureau**

Dodd-Frank Act section 1032(e)(3) provides that the Bureau's rules shall provide for public disclosure of trial disclosure programs, but that such disclosure may be limited to the extent necessary to encourage covered persons to conduct effective trials. Section F of the proposed Policy described the Bureau's expectations regarding public disclosure of information regarding permitted trial disclosure programs. Proposed section F did not include, however, a detailed description of the Bureau's expectations regarding disclosure of information submitted to the Bureau by applicants for and recipients of a trial disclosure program waiver.

Under the anticipated operation of the Policy, the Bureau expects to receive various types of information or data from applicants and recipients. Most, if not all, of this information and data is expected to serve more than one purpose. For example, test result data submitted by recipients will enable the Bureau to assess the extent to which the trial disclosures improve upon Federal disclosure requirements. To the extent that such data shows that the trial disclosures are such an improvement, it may also be used to support a rulemaking that changes disclosure requirements in the direction of the trial disclosures. Proposed section F indicated that disclosure of such information and data would be governed by the Bureau's rule on Disclosure of Records and Information (Disclosure Rule).<sup>20</sup>

Several industry commenters urged the Bureau to make various changes to the proposed Policy to provide greater assurance that trade secrets and proprietary business information provided to the Bureau by applicants and recipients would be protected from public disclosure. A law firm commenter recommended that section A of the proposed Policy be revised to expressly permit applicants to request and be assured that such information included in applications receive confidential treatment from the Bureau. The Bureau believes that aspects of

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<sup>20</sup> 12 CFR part 1070.

this recommendation are reasonable and has revised the Policy accordingly. Specifically, the Bureau has added a paragraph to section A that instructs applicants wishing to request confidential treatment for certain information included in the application to identify the information as specifically as possible.

A joint trade association letter stated the Bureau should commit to applying the exemption from disclosure under the Freedom of Information Act (FOIA) for trade secrets and confidential commercial or financial information that is privileged or confidential.<sup>21</sup> The same commenter asked the Bureau to clarify that trial disclosure applications and associated communications with the Bureau are confidential information under the Bureau's Disclosure Rule.<sup>22</sup> Similarly, a law firm commenter requested that the Bureau confirm that information or data submitted by an applicant that describes the applicant's business processes constitutes business information under the Disclosure Rule.<sup>23</sup> The Bureau agrees that such clarifications are warranted and has accordingly revised proposed section F – which is section G of the final Policy – to clarify that the Bureau anticipates that information or data that is responsive to sections of the Policy that request such information or data will qualify as confidential information, and, more specifically, business information.

The joint trade association letter also asked the Bureau to specify that any testing data provided to the Bureau by a recipient of a TDP Waiver be treated as confidential supervisory information (CSI) under the Disclosure Rule. The trade associations reasoned that such testing data should be treated as CSI because CSI is defined to include any information provided to the Bureau by a financial institution to enable the Bureau to monitor for risks to consumers in the

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<sup>21</sup> 5 U.S.C. 552(b)(4).

<sup>22</sup> 12 CFR 1070.2(f).

<sup>23</sup> 12 CFR 1070.20.

offering or provision of consumer financial products or services.<sup>24</sup> A law firm commenter went further, recommending that all information submitted by an applicant to the Bureau be treated as CSI.

The Bureau declines to make the suggested revisions regarding CSI to the Policy for two reasons. First, the Bureau notes that commenters' interpretation of the definitional clause in question is at odds with the Bureau's stated interpretation of the clause, which reads it to refer to information collected under the Bureau's "market monitoring" authority.<sup>25</sup>

Second, the Bureau believes that the suggested revisions are unnecessary. As indicated above, the fundamental concern expressed by industry commenters is that trade secrets and proprietary business information submitted to the Bureau by applicants and recipients not be publicly disclosed. The Bureau has revised section G to clarify that the Bureau anticipates that much of this information will qualify as confidential information, and, more specifically, business information protected from public disclosure. In addition, in light of a recent Supreme Court opinion concerning FOIA Exemption 4,<sup>26</sup> the Bureau is adding a statement in the final Policy making clear that where information submitted to the Bureau is both customarily and actually treated as private by the submitter, the Bureau intends to treat it as confidential in accordance with the Disclosure Rule. Revising section G to provide that such information will also qualify as CSI thus would not significantly increase the level of such protection.

The Bureau notes that the preceding protections from public disclosure must be balanced against the Bureau's potential need to publicly disclose test result data in some form – as permitted by applicable law and/or the consent of recipients – if it decides to revise disclosure

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<sup>24</sup> 12 CFR 1070.2(i)(1)(iv).

<sup>25</sup> 12 U.S.C. 5512(c)(1); *see also* 81 FR 58310, 58312 (Aug. 24, 2016).

<sup>26</sup> *See Food Mktg. Inst. v. Argus Leader Media*, 139 S.Ct. 2356 (June 24, 2019).



requirements through notice-and-comment rulemaking based, in part, on trial disclosures that test successfully. Indeed, many of the commenters that recommended the clarifications discussed above also asked the Bureau to commit to amending its disclosure regulations in light of successful trial disclosure programs.

Section F of the proposed Policy provided that the Bureau intends to publish on its website certain information about permitted trial disclosure programs, including the identity of recipients and a summary of the trial disclosures. Two industry commenters urged the Bureau to delay such publication until after the recipient has begun providing the trial disclosures in the market, reasoning that earlier publication would discourage potential applicants from investing the resources needed to develop innovative products or services, as earlier publication would permit competitors to copy the recipient's innovative product or service prior to market launch.

The Bureau appreciates this general concern, but believes that the commenters' suggested remedy goes further than is necessary to address it. Section 1032(e)(3) of the Dodd-Frank Act instructs the Bureau to provide for some degree of public disclosure of trial disclosure programs, but gives the Bureau authority to limit such disclosure in order to encourage covered persons to conduct such programs. The proposed Policy attempted to balance these competing concerns, but the Bureau acknowledges that further clarification of its intentions regarding publication of information about permitted trial disclosure programs would be beneficial to all stakeholders.

Section G of the final Policy clarifies that, consistent with applicable law, the Bureau intends to publish on its website, as soon as practicable, its final disposition of applications processed pursuant to sections A, B, C, D.1, D.2, E.1.b, and E.2 – including both grants and

denials of applications.<sup>27</sup> In each case, the Bureau expects that the published order will not include information protected from public disclosure under applicable law, including proprietary information and trade secrets that could be used by a competitor of the recipient.

Finally, one industry commenter requested clarification regarding the extent to which the Bureau intends to share information or data provided to the Bureau under the proposed Policy with other Federal and State agencies. Disclosure of such information to other Federal and State agencies is governed by applicable law, including the Dodd-Frank Act<sup>28</sup> and the Disclosure Rule. The Bureau has added the requested clarification in the final Policy.

## **E. Application Scope**

### **1. Third Party Applications**

Several commenters addressed the Bureau's intention to consider applications that involve testing by more than one company, including applications from trade associations or other groups applying on behalf of their members. Commenters on this topic were generally supportive of the Bureau's intention to consider these types of applications, noting, for example, that group applications could spread trial disclosure development costs in a manner that could enable smaller entities to participate in a trial disclosure program. Some industry trade associations noted that the final Policy could further allow smaller entities to participate in a trial disclosure program if third parties other than trade associations, such as Credit Union Service Organizations or data processing vendors, were allowed to apply for a trial disclosure program waiver. Several industry trade associations also requested more specificity on the steps required for a trade association to apply for a waiver on behalf of its members. One industry trade

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<sup>27</sup> Section G also provides that, when the Bureau grants an application for a TDP Waiver Template under section E.1.a, the Bureau expects to publish on its website the TDP Waiver Template and a version or summary of the application.

<sup>28</sup> *See, e.g.*, 12 U.S.C. 5512(c)(8).

association noted possible challenges to submitting a trade association application, as some information required for the application might not be readily available to a trade association.

In light of these comments, the final Policy seeks to clarify the application process that service providers, trade associations, consumer groups, or other third parties may use. This clarification includes adding a separate section to the Policy on this topic and providing greater detail and specificity regarding the various steps of the process. In particular, under new section E.1 of the final Policy, a service provider or facilitator (e.g., a trade association, consumer group, or other third party) could provide the application information specified in section A with appropriate adjustments given that the applicant itself will not be using the trial disclosures in question. The section also describes the manner in which the Bureau intends to assess the application information provided and the type of document successful applicants should expect to receive from the Bureau. The final Policy refers to this type of document as a “TDP Waiver Template.” New section E.1 also describes the Bureau’s anticipated application, assessment, and issuance procedures for applications for a standard TDP Waiver based on a TDP Waiver Template.

## **2. Iterative and Concurrent Testing**

Several industry commenters suggested that the final Policy should offer greater flexibility as to the range of disclosures tested under a trial disclosure program. In particular, some industry commenters addressed the proposed Policy’s allowance for iterative testing, in which an applicant might engage in a sequence of relatively short tests that enable ongoing improvements to a trial disclosure concept. Under the proposed Policy, an applicant would be expected to specify the initial disclosures and describe the range or type of modifications intended for iterative testing. These contemplated modifications would then be reflected in the

associated waiver. Commenters recommended that the Bureau consider other ways to support iterative testing, including in instances where the initial application and waiver do not contemplate trial disclosure iterations that would address ongoing test findings. One commenter suggested that a staggered application process could address this issue, while another commenter noted that a defined process for modifying a waiver could address instances where a company seeks to change the scope of a trial disclosure program based on test results.

The Bureau intends for the final Policy to support iterative testing when appropriate and generally agrees that the Policy should include anticipated procedures for modifying TDP Waivers. Accordingly, the final Policy includes a new section (D.2) that specifies the Bureau's anticipated procedures regarding requests for modification of a TDP Waiver.

Section A of the final Policy also addresses the possibility of concurrent testing during a trial disclosure program. As one trade association noted, some companies may wish to test multiple variations of a disclosure at the same time. Section A of the final Policy instructs applicants seeking to conduct such concurrent testing to identify the range of variations to be tested concurrently.

#### **F. Bureau Assessment of Applications**

Some comments, particularly from industry trade associations, urged the Bureau to provide greater clarity regarding its assessment of applications for a waiver under section B of the proposed Policy. One industry trade association asked that the Bureau identify certain additional factors that it will consider in determining whether a trial disclosure is designed to improve upon Federal disclosure requirements. The same industry trade association urged the Bureau to explain how it intended to assess an application's quality and persuasiveness under section B of the proposed Policy. The trade association suggested that the Bureau might do so

by confirming the types of proposals it will consider, such as those involving new methods for providing disclosures or disclosures for long-established products.

Under the final Policy, the Bureau intends to consider the general quality and persuasiveness of an application when deciding whether to permit a proposed trial disclosure program. The Bureau expects to place particular emphasis on items covered in sections A.3, A.4, and A.5 of the final Policy as well as information about the applicant and the trial disclosures in question derived through Bureau due diligence processes. Section A.3 of the final Policy provides examples of ways in which trial disclosures may be designed to improve upon Federal disclosure requirements, but the examples are by no means exclusive. The final Policy does not exclude applications involving disclosures associated with long-established products or applications that describe a new method for providing disclosures. Indeed, like the proposed Policy, the final Policy expressly invites applications involving changed delivery mechanisms.

The proposed Policy stated that the Bureau would review reasonable requests for reconsideration of a denial of an application. Some industry trade associations asked the Bureau to commit to a timeframe for responding to a request for reconsideration of a denied application. The Bureau agrees that such a timeframe would be beneficial for stakeholders, and has revised the Policy to specify that the Bureau expects to respond to reasonable requests for reconsideration of a denied application within 60 days of the request.

A trade association recommended that the Bureau revise the Policy to include an expedited application process for companies wishing to test trial disclosures that already have been permitted by the Bureau. The Bureau agrees that processing such applications likely would not require the same amount of time as the initial application regarding the trial disclosures in question. New section E.2 of the final Policy provides for expedited processing of any

application that seeks to conduct a trial disclosure program that is substantially similar to one that is the subject of an existing TDP Waiver.

## **G. Extension and Termination of Waivers**

### **1. Extension**

Industry trade associations sought more time to apply for an extension prior to expiration of a trial disclosure program and associated waiver. Under section D of the proposed Policy, waiver recipients would have had to submit extension requests no later than 150 days prior to the expiration of the waiver. One industry trade association recommended that the Bureau allow extension requests to be filed up to 90 days prior to expiration. Another industry trade association contended that extension request deadlines should be scalable and contingent on the period of time for which the trial disclosure program was originally permitted, noting that the proposed Policy would require the recipient of a waiver lasting one year to apply for an extension at approximately the halfway mark of the trial disclosure program. The Bureau considers these requests to be reasonable and has revised the final Policy to permit extension requests up to 90 days prior to expiration of the waiver. When issuing a waiver for a testing period of one year or less, the Bureau may consider an extension deadline appropriate for the testing period.

### **2. Termination**

A number of industry comment letters sought additional specificity regarding the proposed procedures for terminating waivers. More specifically, some industry commenters urged the Bureau to clarify the circumstances under which it would terminate a waiver. One trade association requested that the Bureau clarify how it will evaluate certain information, such as complaint patterns and customer service inquiries, to determine if trial disclosures are causing

a material, adverse impact on consumer understanding. Another trade association and a financial services firm asked the Bureau to define material, adverse impact on consumer understanding.

Industry commenters also requested clarification of the termination procedures described in the proposed Policy and additional procedural protections during the termination process. Some commenters asked the Bureau to grant waiver recipients an opportunity to cure any failure to comply with the terms and conditions of a waiver prior to termination. One industry commenter argued for a reasonable grace period following termination to permit the recipient to wind down the trial disclosure program. Other commenters sought explicit timelines and procedures for the termination process.

The Bureau considers many of the comments regarding termination to have merit and has amended the Policy accordingly. Under section D.3 of the final Policy, the Bureau intends to provide waiver recipients (i) the grounds for termination, (ii) a reasonable period of time to respond, (iii) as appropriate, an opportunity to address the grounds for termination within a reasonable period of time before terminating a waiver, (iv) the reason(s) why an attempt to cure such a failure to comply was deemed inadequate, and (v) a period of six months before termination to wind down use of the trial disclosures, unless the termination was based upon the disclosures causing material, adverse, impact to consumers and a wind-down period would permit such injury to continue.

With respect to requests for additional detail regarding circumstances under which termination might be triggered, section D.3 of the final Policy provides that the Bureau anticipates basing termination on three grounds. The final Policy does not, however, define material, adverse impact on consumer understanding – except to identify examples of objective criteria the Bureau intends to use to determine whether such impact has occurred. These

determinations will depend significantly on the type of information provided by a waiver recipient and the facts and circumstances associated with the testing. To the extent practicable, the Bureau expects to provide additional clarity regarding the appropriate criteria in the WT&C associated with each waiver.

## **H. Additional Consumer Safeguards**

Under the proposed Policy, recipients would have been required to notify the Bureau of material changes in customer service inquiries, complaint patterns, default rates, or other effects indicating that trial disclosures may be causing a material, adverse, impact on consumer understanding. Consumer groups expressed concern about the efficacy of this requirement, noting in particular that it would not require recipients to record such information, and that the “material” standard is too vague. The consumer groups asserted that this would create a risk that the Bureau would fail to detect consumer harm caused by trial disclosures in a timely fashion. The Bureau acknowledges this point and has revised the final Policy to mitigate such risk. Under section C of the final Policy, the Bureau anticipates that the WT&C will require recipients to report to the Bureau information about the effects of trial disclosures on relevant objective indicators of consumer behavior, such as customer service inquiries, complaint patterns, default rates, or other objective criteria, that will enable the Bureau to determine if the trial disclosures are causing a material, adverse, impact on consumer understanding. In addition, under the final Policy, the Bureau anticipates that, in most cases, it will be appropriate for the recipient to provide such information three months after the start of the trial disclosure program and then every six months thereafter for the duration of the program.

Several consumer groups urged the Bureau to revise the Policy to provide for public comment on a proposed trial disclosure program prior to the Bureau permitting the program.



The Bureau received this same comment on the proposed 2013 Policy. The Bureau declined to add such a requirement based on its belief that it would discourage rather than encourage companies to conduct trial disclosure programs, and remains of the same opinion.<sup>29</sup>

An association of State financial regulators recommended that the Policy should require companies conducting trial disclosure programs to obtain consumers' consent before providing them with trial disclosures. This is likewise a comment the Bureau received on the proposed 2013 Policy, and the Bureau remains of the view that obtaining such consent would significantly limit the ability of trial disclosure testing to lead to improved disclosures.<sup>30</sup>

#### **IV. Regulatory Requirements**

The Bureau has concluded that this Policy constitutes an agency general statement of policy and a rule of agency organization, procedure, or practice exempt from the notice and comment rulemaking requirements under the Administrative Procedure Act, pursuant to 5 U.S.C. 553(b). Because the Policy relates solely to agency procedure and practice, it is not substantive, and therefore is not subject to the 30-day delayed effective date for substantive rules under section 553(d) of the APA. Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.<sup>31</sup>

#### **V. Congressional Review Act**

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Bureau plans to submit a report containing this Policy and other required information to each House of Congress and the Comptroller General prior to the Policy's applicability date. The Office of Information

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<sup>29</sup> 78 FR 64389, 64390 (Oct. 29, 2013).

<sup>30</sup> 78 FR 64389, 64391-92 (Oct. 29, 2013).

<sup>31</sup> 5 U.S.C. 603(a), 604(a).

and Regulatory Affairs has designated this Policy as not a “major rule” as defined by 5 U.S.C. 804(2).

## **VI. Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), Federal agencies are generally required to seek the Office of Management and Budget (OMB) approval for information collection requirements prior to implementation. According to the PRA, the Bureau may not conduct or sponsor, and, notwithstanding any other provision of law, a person is not required to respond to an information collection unless the information collection displays currently a valid control number assigned by OMB. The information requested in section A of this Policy has been previously approved by OMB and assigned OMB control number 3170–0039. The Bureau has determined that the revisions to this Policy do not introduce any new or substantively or materially revised collections of information beyond what has been previously approved by OMB.

## **VII. Final Policy**

The text of the final Policy is as follows:

### **Policy to Encourage Trial Disclosure Programs**

Consumers need timely and understandable information to make the financial decisions that they believe are best for themselves and their families. Much Federal financial consumer protection law, therefore, rests on the assumption that accurate and effective disclosures will help Americans understand the costs, benefits, and risks of consumer financial products and services.

In section 1032 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Congress gave the Bureau of Consumer Financial Protection (Bureau) authority to prescribe rules to ensure that consumers receive such disclosures, and to include in

such rules model forms to facilitate compliance.<sup>32</sup> Furthermore, in section 1032(e) of the Dodd-Frank Act, Congress gave the Bureau authority to provide certain legal protections to covered persons to conduct trial disclosure programs.<sup>33</sup> This authority furthers the Bureau’s statutory purpose, stated in section 1021(a) of the Dodd-Frank Act, to ensure that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.<sup>34</sup> Furthermore, this authority advances the Bureau’s statutory objectives in section 1021(b) of the Dodd-Frank Act to ensure consumers are provided with timely and understandable information to make responsible decisions about financial transactions; outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens; and markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.<sup>35</sup>

More specifically, under section 1032(e), the Bureau may permit covered persons to conduct trial disclosure programs, limited in time and scope, for the purpose of testing disclosures designed to improve upon model forms within the Bureau’s jurisdiction.<sup>36</sup> Such permission may include providing a legal safe harbor; *i.e.*, the Bureau may deem a covered person conducting such a program to be in compliance with, or exempt from, a requirement of a

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<sup>32</sup> 12 U.S.C. 5532(a)-(d).

<sup>33</sup> 12 U.S.C. 5532(e).

<sup>34</sup> 12 U.S.C. 5511(a)

<sup>35</sup> 12 U.S.C. 5511(b)(1), (b)(3), (b)(5).

<sup>36</sup> 12 U.S.C. 5532(e)(1). The Bureau interprets section 1032(e) to grant the Bureau authority to permit trial disclosure programs focused on any disclosures required by an enumerated consumer law or a Bureau rule (hereafter, “Federal disclosure requirements”), so long as such programs are designed to improve upon model forms under Federal consumer financial law. For purposes of the Policy, Federal disclosure requirements encompass required notifications, including required notifications of any adverse action.

rule or enumerated consumer law.<sup>37</sup> Such trial disclosure programs must be subject to standards and procedures that are designed to encourage covered persons to conduct such programs.<sup>38</sup> Similarly, although Bureau rules must provide for public disclosure of such programs, such public disclosure may be limited to the extent necessary to encourage covered persons to conduct effective trials.<sup>39</sup>

The Policy implements the statutory requirement to issue standards and procedures for trial disclosure programs and is designed to encourage covered persons to innovate by proposing and conducting such programs, consistent with the protections for consumers described in the Policy.<sup>40</sup>

For permitted trial disclosure programs, the Bureau expects to deem the applicant to be in compliance with, or exempt from, described Federal disclosure requirements, for a limited period of time.<sup>41</sup> As a result of the issuance of such a waiver by the Bureau, no basis exists under the described provisions for a private action based on the recipient's permitted use of the trial disclosures in question. The same is true with respect to supervisory or enforcement actions by other Federal and State regulators even if they have enforcement or supervisory authority as to

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<sup>37</sup> 12 U.S.C. 5532(e)(2). As used in section 1032(e)(2), the term “rule” includes: (i) rules implementing an enumerated consumer law; and (ii) rules implementing the Consumer Financial Protection Act of 2010, including rules promulgated by the Bureau under its authority to prevent unfair, abusive, or deceptive acts or practices (12 U.S.C. 5531(b)), or to enable full, accurate, and effective disclosure (12 U.S.C. 5532(a)).

<sup>38</sup> 12 U.S.C. 5532(e)(1), (2).

<sup>39</sup> 12 U.S.C. 5532(e)(3).

<sup>40</sup> 12 U.S.C. 5532(e). As specified in section C of the Policy, if the Bureau grants an application for a TDP Waiver, the terms and conditions of the waiver will specify certain legal protections granted to the recipient(s). Those protections, however, are based on the waiver, and not on the Policy. The Policy is not intended to nor should it be construed to create or confer upon any covered person (including one who is the subject of Bureau supervisory, investigation, or enforcement activity) or consumer, any substantive rights or defenses that are enforceable in any manner. Nor should the Policy be viewed as substituting for the normal process of legislative rulemaking. In the event that information learned from trial disclosure programs triggers or otherwise informs follow-on rulemaking, the Bureau would follow the standard rulemaking process, which affords the public the opportunity of submitting comments on a proposed regulation.

<sup>41</sup> For convenience, this statutory authority to deem covered persons in compliance with or to exempt them from disclosure requirements—in each case for a limited period of time—is referred to in the Policy as the authority to issue waivers.

Federal consumer financial laws under which the Bureau has rulemaking authority. There can be no predicate for an enforcement or supervisory action by such a regulator that is based on the recipient's permitted use of the trial disclosures in question within the scope of the waiver – including actions to enforce the prohibition of unfair, deceptive, or abusive acts and practices<sup>42</sup> predicated on a violation of waived provisions.

The Bureau believes that there may be significant opportunities to enhance consumer protection by facilitating innovation in financial products and services through enabling responsible companies to research informative, cost-effective disclosures in test programs. The Bureau also recognizes 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.<sup>43</sup>

The Policy consists of seven sections:

- Section A describes information to be included in an application for a Trial Disclosure Program Waiver (TDP Waiver);
- Section B describes factors the Bureau intends to consider in deciding whether to grant an application for a TDP Waiver;
- Section C describes the standard procedures the Bureau intends to use for issuing TDP Waivers;
- Section D describes procedures the Bureau intends to use for granting extensions of, modifying, and terminating TDP Waivers;

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<sup>42</sup> 12 U.S.C. 5536.

<sup>43</sup> See U.S. Dep't of the Treasury, *Financial Regulatory Reform: A New Foundation 63-64 (2009)*, available at [https://www.treasury.gov/initiatives/Documents/FinalReport\\_web.pdf](https://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf) (“A regulator is typically limited to testing disclosures in a ‘laboratory’ environment. A product provider, however, has the capacity to test disclosures in the field, which can produce more robust and relevant results. For example, a credit card provider can try two different methods to disclose the same product risk and determine which was more effective by surveying consumers and evaluating their behaviors. We propose that the [Consumer Financial Protection Act] should be authorized to establish standards and procedures, including appropriate immunity from liability, for providers to conduct field tests of disclosures.”).

- Section E describes alternative application, assessment, and issuing procedures that the Bureau may use for certain circumstances;
- Section F describes how the Bureau intends to coordinate with other regulators with respect to TDP Waivers; and
- Section G describes the Bureau’s intentions regarding disclosure of information relating to TDP Waivers.

## **A. Submitting Applications for TDP Waivers**

Potential applicants are strongly encouraged to contact the Office of Innovation at [officeofinnovation@cfpb.gov](mailto:officeofinnovation@cfpb.gov) for informal, preliminary discussion of a contemplated proposal prior to submitting a formal application.<sup>44</sup> Applications for a TDP Waiver should include the following:

1. The identity of the applicant;<sup>45</sup>
2. A description of the trial disclosures or delivery mechanisms in question;<sup>46</sup>
3. An explanation of how the trial disclosures or delivery mechanisms are designed to improve upon Federal disclosure requirements with respect to consumer understanding, cost effectiveness, or otherwise, along with metrics for evaluating whether such improvements are realized, such as comparisons with existing costs or consumer payment or response rates for the applicant or the relevant industry;<sup>47</sup>

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<sup>44</sup> The email subject line should begin “CFPB Disclosure Sandbox Inquiry.”

<sup>45</sup> For convenience, the term “applicant” is used in the Policy to refer both to single applicants and joint applicants. Applicants may request that the waiver extend to identified or described agents of the applicant.

<sup>46</sup> An application could propose testing (i) modifications to a model form or other disclosures, (ii) replacement of a model form or other disclosures with a new form or disclosures, (iii) alternative delivery mechanisms, or (iv) elimination of disclosure requirements. If disclosures consist of modified or replacement disclosure content, that content should be in plain language, reflect a clear format and design, and be succinct. If an application is for iterative testing, it should specify the initial disclosures and the range or type of modifications contemplated. If an application is for concurrent testing, it should specify the range of variations to be concurrently tested.

<sup>47</sup> Although the Bureau considers cost-effectiveness an appropriate metric of disclosure improvement, it does not intend to permit trial disclosures that it believes will cause a material, adverse impact on consumer understanding, regardless of potential cost-savings.

4. An explanation of the potential consumer risks associated with the trial disclosures, how the applicant intends to mitigate such risks, and how such risks will be assessed during the course of the trial disclosure program;
5. An identification of the statutory and regulatory provisions with respect to which the applicant seeks a TDP Waiver;<sup>48</sup>
6. The requested duration of the testing program, and a plan to wind down or modify activity at its conclusion;<sup>49</sup>
7. The size, location, and nature of the consumer population to be involved in the testing program, an explanation of how the population was chosen, and a description of any plans to scale or modify the population over the duration of the testing program;
8. A description of test result data that the applicant expects to share with the Bureau, and a schedule for sharing that data;<sup>50</sup>
9. If the applicant wishes to request confidential treatment under the Freedom of Information Act (FOIA),<sup>51</sup> the Bureau's rule on Disclosure of Records and Information (Disclosure Rule),<sup>52</sup> or other applicable law for certain information included in the

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<sup>48</sup> Applicants should describe the relevant provisions with as much specificity as practicable, in part to enable the Bureau to respond expeditiously to the application. The Bureau recognizes that in some cases it may be difficult to determine precisely which statutory or regulatory requirements would apply, in the normal course, to the trial disclosures in question. In other cases, the applicant may lack the legal resources to make a fully precise determination. In such circumstances, the applicant should provide the maximum specification practicable under the circumstances and explain the limits on further specification.

<sup>49</sup> The Bureau expects that a two-year testing period will be appropriate in most cases.

<sup>50</sup> Such a schedule is intended for sharing data after the conclusion of the testing, but the applicant may also choose to share data with the Bureau during the testing. The data the applicant expects to share with the Bureau should be limited to aggregate data.

<sup>51</sup> 5 U.S.C. 552.

<sup>52</sup> 12 CFR part 1070.

application, the applicant should identify this information as specifically as possible, and may reference the Bureau's intentions regarding confidentiality under section G,<sup>53</sup> and

10. If the applicant wishes the Bureau to coordinate with other regulators, the applicant should identify those regulators, including, but not limited to, those that the applicant has contacted about providing the trial disclosures in question.<sup>54</sup>

Applications may be submitted via email to: *officeofinnovation@cfpb.gov* or through other means designated by the Office of Innovation.<sup>55</sup> Submitted applications may be withdrawn by the applicant at any time.

## **B. Assessment of Applications for TDP Waivers**

The Bureau may grant or deny a TDP Waiver application in its sole discretion. If it chooses to grant an application, the Bureau also has discretion to grant the application in whole or only in part. In deciding whether to grant an application for a TDP Waiver, the Bureau intends to balance a variety of factors in considering the quality and persuasiveness of the application, with particular emphasis on the information specified in sections A.3, A.4, and A.5; as well as information about the applicant, the proposed trial disclosures, or the associated product or service derived through Bureau due diligence processes. The Bureau intends to grant or deny an application within 60 days of notifying the applicant that the Bureau deems the application to be complete.

## **C. Procedures for Issuing TDP Waivers<sup>56</sup>**

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<sup>53</sup> Applicants should describe the relevant legal bases for confidentiality with as much specificity as practicable. The Bureau recognizes that some applicants may lack the legal resources to provide a detailed and complete showing. In such circumstances, the applicant should provide the maximum specification practicable under the circumstances and explain the limits on further specification.

<sup>54</sup> When requested by an applicant, the Bureau intends to coordinate with other Federal and State regulators identified by the applicant, as appropriate. However, depending on the extent of coordination requested, the Bureau may not be able to respond to the application within the time frame specified in section B.

<sup>55</sup> Except as provided in sections A.1 and A.10, applications should not include any personally identifiable information (PII).



When the Bureau permits a trial disclosure program and issues a TDP Waiver, it intends to provide the recipient with the terms and conditions of its permission and the waiver in a document entitled: TDP Waiver Terms and Conditions (WT&C), which will be signed by the Assistant Director of the Office of Innovation, and by an officer of the recipient.<sup>57</sup> The Bureau expects that the WT&C will:

1. Identify the recipient;<sup>58</sup>
2. Specify the subject matter scope of the TDP Waiver, *i.e.*, the new disclosures or delivery methods to be tested by the recipient;
3. Describe the test population(s) and the duration of the TDP Waiver;
4. Require the recipient to report to the Bureau information about the effects of the trial disclosures on relevant indicators of consumer behavior, such as customer service inquiries, complaint patterns, default rates, or other objective criteria, that will enable the Bureau to determine if the trial disclosures are causing a material, adverse, impact on consumer understanding;<sup>59</sup>
5. Specify any other terms or conditions, such as the terms of testing, data sharing, and the extent that the Bureau intends to publicly disclose information about the trial disclosure program;<sup>60</sup>

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<sup>56</sup> The procedures specified in section C may be modified pursuant to coordination efforts with other regulators, as specified in section F.

<sup>57</sup> If the Bureau decides to deny an application, it will inform the applicant of its decision. The Bureau intends to respond to reasonable requests to reconsider its denial of an application within 60 days of such requests. Applicants may withdraw, modify, or re-submit applications at any time.

<sup>58</sup> For convenience, the term “recipient” is used in the Policy to refer both to a single recipient and joint recipients. If the application requested that the waiver extend to identified or described agents of the applicant, the WT&C may also identify or describe such agents.

<sup>59</sup> The Bureau anticipates that, in most cases, it will be appropriate for the recipient to provide such information three months after the start of the trial disclosure program and then every six months thereafter for the duration of the program.

<sup>60</sup> If an applicant objects to the disclosure of certain information and the Bureau insists that the information must be publicly disclosed if a TDP Waiver is issued, the applicant may withdraw the application. In the event of such

6. State that, subject to good faith, substantial compliance with the WT&C, the Bureau deems the TDP Waiver recipient to be in compliance with, or exempt from, described Federal disclosure requirements and that, as a result of this action, there is no predicate under the described Federal disclosure requirements for a private suit or Federal or State enforcement or supervisory action based on the recipient's permitted use of the trial disclosures in question within the scope of the waiver;<sup>61</sup>
7. State that, unless or until terminated by the Bureau as described in section C.8, the Bureau will not make supervisory findings or bring a supervisory or enforcement action against the recipient under its authority to prevent unfair, abusive, or deceptive acts or practices<sup>62</sup> predicated upon the recipient's permitted use of the trial disclosures in question within the scope of the waiver.<sup>63</sup>
8. State that (a) the recipient may reasonably rely on any Bureau commitments made in the waiver; and (b) the Bureau may terminate<sup>64</sup> a TDP Waiver if: (i) the recipient fails to substantially comply in good faith with the WT&C; (ii) the Bureau determines that the recipient's use of the trial disclosures is causing a material, adverse impact on consumer understanding based upon the objective criteria identified in the WT&C pursuant to section C.4; or (iii) the Bureau determines that the legal basis for its

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withdrawal, the Bureau intends to treat all information related to the application as confidential to the full extent permitted by law.

<sup>61</sup> The Bureau maintains the authority to obtain information relating to the consumer financial product or service subject to a TDP Waiver under its applicable supervision, enforcement, and other authorities in the same manner and frequency that it obtains information relating to consumer financial products or services not subject to a TDP Waiver.

<sup>62</sup> 12 U.S.C. 5531, 5536.

<sup>63</sup> Implicit in this statement is that the Bureau has not determined that the acts or practices in question are unfair, deceptive, or abusive.

<sup>64</sup> No retroactive action premised on the recipient's permitted use of the trial disclosures will lie under provisions covered by a TDP Waiver. Actions that are not premised on the recipient's permitted use of the trial disclosures associated with a particular TDP Waiver are, by definition, not subject to any such restriction.

permission and the waiver has changed as a result of a statutory change or a Supreme Court decision.<sup>65</sup>

#### **D. Procedures for Extension, Modification, and Termination of TDP Waivers**

##### *1. Extension Procedures*

Recipients may request an extension of permission to conduct a trial disclosure program and of a TDP Waiver for a specified period of time. In considering applications for extensions, the Bureau expects to place particular weight on the extent to which the information provided under section C.4 and the data provided pursuant to the WT&C shows that the trial disclosures are improving upon Federal disclosure requirements, without causing a material, adverse impact on consumer understanding. Such applications for an extension should specify the proposed duration of the extension and should be submitted no later than 90 days prior to the expiration of the TDP Waiver.<sup>66</sup> The recipient should explain the reasons for the requested extension, such as whether it is intended to last until a possible amendment to Bureau regulations.

Upon the presentation of persuasive information and data, the Bureau anticipates granting such extension requests for a period at least as long as the period of the original waiver. The Bureau anticipates permitting longer extensions where the Bureau is considering amending disclosure requirements in a manner consistent with the trial disclosures in question.<sup>67</sup> During

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<sup>65</sup> If the legal basis for the Bureau's permission and the waiver has changed as a result of a Circuit Court of Appeals Decision, the Bureau may consider modifying the waiver so that it is inoperative within that Circuit.

<sup>66</sup> Assuming the two-year testing period the Bureau expects to be appropriate in most cases, the Bureau believes recipients would have sufficient time to gather evidence supportive of an extension request. For testing periods of one year or less, the Bureau may consider a deadline for submitting an application for an extension appropriate for the testing period.

<sup>67</sup> The Bureau's plans regarding rulemaking activity are set forth in its Semiannual Regulatory Agenda, published in full on [www.reginfo.gov](http://www.reginfo.gov). Rule amendments that follow successful trial disclosure programs could permit an alternative method of compliance, rather than replacing existing requirements with new ones. If the period of an extension were tied to the Bureau's consideration of amending relevant disclosure requirements and the Bureau announced it was discontinuing its plans to amend the disclosure rules in question, the extension period would be adjusted accordingly, *e.g.*, to end on a specific date.

the time period pending such a rule amendment, the Bureau intends to consider means of making the improved disclosures available to other covered persons subject to the disclosure requirements in question.

## *2. Modification Procedures*

A recipient of a TDP Waiver may apply for a modification of the waiver. The recipient may seek modification to address an anticipated or unanticipated change in circumstances, such as test results that warrant subsequent, unanticipated iterations to an initial trial disclosure.

Applications for a modification should include the following:

- a. Any material changes to the information included in the original application;
- b. The specific requested modification to the TDP Waiver;
- c. The grounds for modifying the TDP Waiver; and
- d. Any other information the recipient wishes to provide in support of the modification application.

In deciding whether to grant an application for modification, the Bureau intends to balance a variety of factors, including the quality and persuasiveness of the application. The Bureau expects to grant or deny such applications within 30 days of notifying the applicant that the Bureau deems the application to be complete. When the Bureau grants an application for modification, it intends to provide the recipient with a modified WT&C in accordance with the procedures specified in section C.

## *3. Termination Procedures*

The Bureau intends that the recipient of a TDP Waiver should be able to reasonably rely on any Bureau commitments made in the associated WT&C. The Bureau expects terminations prior to any pre-determined expiration date to be quite rare based, in part, on its knowledge of

similar programs operated by other Federal agencies. The Bureau expects that its practice with respect to termination will be in line with the practices of these agencies.

The Bureau expects that a TDP Waiver will state that (a) the recipient may reasonably rely on any Bureau commitments made in the waiver; and (b) the Bureau may terminate a TDP Waiver if: (i) the recipient fails to substantially comply in good faith with the WT&C; (ii) the Bureau determines that the recipient's use of the trial disclosures is causing a material, adverse impact on consumer understanding based upon the objective criteria identified in the WT&C pursuant to section C.4 or data provided pursuant to the WT&C; or (iii) the Bureau determines that the legal basis for its permission and the waiver has changed as a result of a statutory change or a Supreme Court decision.<sup>68</sup> By operation of law, no retroactive action premised on the recipient's permitted use of the trial disclosure will lie under provisions within the scope of a TDP Waiver.

In accordance with principles of fair notice, before terminating a TDP Waiver, the Bureau intends to notify the recipient of the grounds for termination, and permit an opportunity to respond within a reasonable period of time. In appropriate cases, the Bureau intends to offer the recipient an opportunity to address the grounds for termination within a reasonable period of time before terminating a TDP Waiver. The Bureau intends to allow the recipient to wind-down the use of trial disclosures during a period of six-months before formal termination, unless the trial disclosures are causing a material, adverse impact on consumer understanding, and a wind-down period would permit such injury to continue. If the Bureau terminates a TDP Waiver, it intends to do so in writing and specify the reasons for its decision. The Bureau intends to publish termination decisions on its website.

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<sup>68</sup> If the legal basis for the Bureau's permission and the waiver has changed as a result of a Circuit Court of Appeals Decision, the Bureau may consider modifying the waiver so that it is inoperative within that Circuit.

## **E. Alternative Application, Assessment, and Issuance Procedures**

The Bureau recognizes that the process described in sections A, B, and C (Standard Process) may not be appropriate in certain circumstances. These include applications by service providers that develop disclosures for use by covered persons that offer or provide consumer financial products or services; applications facilitated by trade associations, consumer groups, or other third parties that are not themselves covered persons; and applications involving a trial disclosure program that is substantially similar to one that is the subject of an existing TDP Waiver.

### *1. Service Provider and Facilitated Applications*

Service providers that develop disclosures for use by covered persons that offer or provide consumer financial products or services may use the Standard Process if they have secured an applicant that intends to use the service provider's trial disclosures in connection with offering or providing a consumer financial product or service. Similarly, applications facilitated by trade associations, consumer groups, or other third parties that are not covered persons that offer or provide consumer financial products or services may use the Standard Process if the third party has secured an applicant that intends to use the trial disclosures in question.

a. TDP Waiver Template. As an alternative to using the Standard Process, a service provider, trade association, consumer group, or other third party may apply for a TDP Waiver Template. A TDP Waiver Template is (i) non-operative, *i.e.*, it does not provide permission to conduct a trial disclosure program to any party, and (ii) non-binding on the Bureau.<sup>69</sup>

i. Application Information. Such applications should include the information specified in section A, as applicable and with appropriate adjustments given that the applicant itself will not

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<sup>69</sup> In particular, the Bureau may modify a TDP Waiver Template in light of the additional information provided in an application for a TDP Waiver under section E.1.b.

be using the trial disclosures in question. In particular, for service provider applications the applicant should describe how it anticipates its trial disclosures will be used by a provider of consumer financial products or services.

ii. Assessment. In deciding whether to grant an application for a TDP Waiver Template, the Bureau intends to balance a variety of factors, as described in section B, with appropriate adjustments given the alternative nature of the application. The Bureau intends to grant or deny an application within 60 days of notifying the applicant that the Bureau deems the application to be complete.

iii. Issuance. The Bureau expects that a TDP Waiver Template will include many of the elements specified in section C, with appropriate adjustments based, in part, on the non-operative, non-binding nature of a TDP Waiver Template. In addition, a TDP Waiver Template will include a statement that the Bureau intends to grant applications for a TDP Waiver based on the TDP Waiver Template, under section E.1.b, in appropriate cases.

b. TDP Waiver Based on a TDP Waiver Template. A covered person that intends to conduct the trial disclosure program covered by a TDP Waiver Template may apply for a TDP Waiver based on the TDP Waiver Template.

i. Application Information. Such applications should include the information specified in section A, with appropriate adjustments. In particular, the applicant should include (i) a statement that the application is based on a TDP Waiver Template and an identification of the TDP Waiver Template on which it is based; and (ii) a statement identifying the trial disclosures for which a TDP Waiver is being sought and describing how the applicant's use of the trial disclosures is consistent with the framework described in the TDP Waiver Template. The

application may cross reference any relevant information contained in the application for the TDP Waiver Template or the TDP Waiver Template itself.

ii. Assessment. In deciding whether to grant an application for such a TDP Waiver, the Bureau intends to balance a variety of factors, as described in section B, with appropriate adjustments. In particular, the Bureau intends to include in its assessment the additional factor of the degree to which the applicant's use of trial disclosures is consistent with the framework described in the TDP Waiver Template. The Bureau anticipates being able to process such applications in a timeframe shorter than that specified in section B given that the underlying TDP Waiver Template has already been granted.

iii. Issuance. When the Bureau grants an application for such a TDP Waiver, it intends to provide the recipient with a TDP Waiver in accordance with the procedures specified in section C.

## *2. Applications for Substantially Similar Trial Disclosure Programs*

If an applicant intends to conduct a trial disclosure program that it believes is substantially similar to a trial disclosure program that is the subject of an existing TDP Waiver,<sup>70</sup> it may apply for a TDP Waiver based on the existing TDP Waiver.

a. Application Information. Such applications should include the information specified in section A, with appropriate adjustments. In particular, the applicant should include (i) a statement that the application is based on an existing TDP Waiver and an identification of the TDP Waiver on which it is based; and (ii) a statement describing how the trial disclosure program in question is substantially similar to the trial disclosure program that is the subject of

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<sup>70</sup> Such an existing TDP Waiver may have been issued under the Standard Process or the alternative processes described in section E.1.b.



the existing TDP Waiver. The application may cross reference any relevant information contained in the application for the existing TDP Waiver or the existing TDP Waiver itself.

b. Assessment. In deciding whether to grant an application for such a TDP Waiver, the Bureau intends to balance a variety of factors, as described in section B, with appropriate adjustments. In particular, the Bureau intends to include in its assessment the additional factor of the degree to which the trial disclosure program in question is substantially similar to the existing trial disclosure program. The Bureau anticipates being able to process such applications in a timeframe shorter than that specified in section B given that the underlying TDP Waiver has already been granted.

c. Issuance. When the Bureau grants an application for such a TDP Waiver, it intends to provide the recipient with a TDP Waiver in accordance with the procedures specified in section C.<sup>71</sup>

## **F. Regulatory Coordination**

Section 1015 of the Dodd-Frank Act instructs the Bureau to coordinate with Federal agencies and State regulators, as appropriate, to promote consistent regulatory treatment of consumer financial and investment products and services.<sup>72</sup> Similarly, section 1042(c) of the Dodd-Frank Act instructs the Bureau to provide guidance in order to further coordinate actions with the State attorneys general and other regulators.<sup>73</sup> Such coordination includes coordinating in circumstances where other regulators have chosen to offer regulatory assistance to entities offering innovative products and services. One method of providing such assistance is through a State sandbox, or group of State sandboxes, or other limited scope State authorization program

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<sup>71</sup> In unusual circumstances, the Bureau may utilize other procedures that diverge in one or more respects from the Standard Process or the alternative procedures described in section E, consistent with the purposes of the Policy.

<sup>72</sup> 12 U.S.C. 5495.

<sup>73</sup> 12 U.S.C. 5552(c).

(State sandbox).<sup>74</sup> The Bureau is interested in entering into agreements with State authorities that operate or plan to operate a State sandbox, which may include a process to receive a TDP Waiver under this Policy in a coordinated manner with regulatory assistance from the State sandbox.

Furthermore, the Bureau is interested in coordinating with other regulators more generally. To this end, the Bureau intends to enter into agreements whenever practicable to coordinate operation of the CFPB Disclosure Sandbox under the Policy with similar programs operated by State, Federal, or international regulators.

### **G. Bureau Disclosure of Information Relating to TDP Waivers**

Public disclosure of information relating to TDP Waivers is governed by applicable law, including the Dodd-Frank Act,<sup>75</sup> FOIA, and the Disclosure Rule. The Disclosure Rule generally prohibits the Bureau from disclosing confidential information,<sup>76</sup> and defines confidential information to include information that may be exempt from disclosure under FOIA<sup>77</sup> – including Exemption 4 regarding trade secrets and confidential commercial or financial information that is privileged or confidential.<sup>78</sup> Relatedly, the Disclosure Rule defines business information as commercial or financial information obtained by the Bureau from a submitter that may be protected from disclosure under Exemption 4 of FOIA, and generally provides that such business information shall not be disclosed pursuant to a FOIA request except in accordance with section 1070.20 of the rule.<sup>79</sup>

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<sup>74</sup>The concept of a regulatory sandbox is relatively new and does not have a precise, generally accepted definition. The term is used in this Policy to refer to a regulatory structure where a participant obtains limited or temporary access to a market in exchange for reduced regulatory uncertainty or other regulatory barriers to entry.

<sup>75</sup> See, e.g., 12 U.S.C. 5512(c)(8).

<sup>76</sup> 12 CFR 1070.41.

<sup>77</sup> 12 CFR 1070.2(f).

<sup>78</sup> 5 U.S.C. 552(b)(4).

<sup>79</sup> 12 CFR 1070.20(a), (b).

Consistent with applicable law, the Bureau intends to publish on its website its final disposition of applications processed pursuant to sections A, B, C, D.1, D.2, E.1.b, and E.2. If the Bureau decides to grant the application, it intends to publish an order regarding the decision on its website as soon as practicable. The Bureau expects that the order will overlap with the WT&C provided to the recipient, but will contain other information and will not include information protected from public disclosure under applicable law. The Bureau expects the order to:

1. Identify the entity or entities conducting the trial disclosure program and receiving a TDP Waiver;
2. Summarize the trial disclosures;
3. Describe the duration, scope, and other conditions of the TDP Waiver;
4. State the Bureau's reasons for permitting the trial disclosure program and issuing the TDP Waiver; and
5. State that the TDP Waiver applies only to the recipient.

If the Bureau decides to deny the application, it intends to publish an order on its website as soon as practicable that will explain the reason(s) for the Bureau's decision. The Bureau expects that such denial orders likewise will not include information protected from public disclosure under applicable law.<sup>80 81</sup>

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<sup>80</sup> The Bureau intends to publish denials only after the applicant is given an opportunity to request reconsideration of the denial. Upon request, and if disclosure is not required by 5 U.S.C. 552(a)(2) or other applicable law, the Bureau intends to redact identifying information from denials published on its website.

<sup>81</sup> The Bureau likewise expects to publish on its website, as soon as practicable, such grant and denial orders for applications submitted and assessed under section F, but anticipates that the content of the orders may require modification in light of the particular facts and circumstances of the State sandbox in question. The Bureau intends to detail any such modifications in the agreement with the State authority in question.

When the Bureau grants an application for a TDP Waiver Template under section E.1.a, the Bureau expects to publish on its website the TDP Waiver Template and a version or summary of the application.

Where information submitted to the Bureau is both customarily and actually treated as private by the submitter, the Bureau intends to treat it as confidential in accordance with the Disclosure Rule.<sup>82</sup> The Bureau anticipates that much of the information submitted by applicants in their applications, and by recipients during the pendency of the TDP Waiver, will qualify as confidential information under the Disclosure Rule.<sup>83</sup> In particular, the Bureau expects that the information submitted that is responsive to sections A.2, A.3, A.4, A.7, A.8, C.4, and C.5, and parallel information submitted that is responsive to sections D.1, D.2, E.1, and E.2 will qualify as business information under the Disclosure Rule.<sup>84</sup> <sup>85</sup> Other information submitted by the applicant or the recipient may also qualify as confidential information.

Disclosure of information or data provided to the Bureau under the Policy to other Federal and State agencies is governed by applicable law, including the Dodd-Frank Act<sup>86</sup> and the Disclosure Rule.

To the extent the Bureau wishes to publicly disclose non-confidential information regarding trial disclosure programs, the Bureau expects to include the terms of such disclosure in the WT&C. The Bureau intends to draft the WT&C in a manner such that confidential

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<sup>82</sup> See *Food Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356 (June 24, 2019).

<sup>83</sup> To the extent associated communications include the same information, that information would have the same status. But other information in associated communications may be subject to disclosure.

<sup>84</sup> To the extent an applicant or recipient submits information in connection with any of the identified sections that is not actually responsive to those sections, such information may be subject to disclosure.

<sup>85</sup> The Bureau notes that the preceding protections from public disclosure must be balanced against the Bureau's potential need to publicly disclose test result data in some form – as permitted by applicable law and/or consent of recipients – if the Bureau decides to revise disclosure requirements through notice-and-comment rulemaking based, in part, on trial disclosures that test successfully.

<sup>86</sup> See, e.g., 12 U.S.C. 5512(c)(8).

information is not disclosed. Consistent with applicable law and its own rules, the Bureau does not expect to publicly disclose any data or information that would conflict with consumers' privacy interests.

**[THIS SIGNATURE PAGE PERTAINS TO THE DOCUMENT TITLED “POLICY TO  
ENCOURAGE TRIAL DISCLOSURE PROGRAMS”]**

Dated: September 6, 2019.



**Kathleen L. Kraninger**

*Director, Bureau of Consumer Financial Protection.*