A decorative header image showing a green silhouette of a rural landscape with wind turbines, a barn, and a house on the left, and a city skyline with skyscrapers on the right.

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RE: Docket No. CFPB – 2018-0023

This letter is in a response to the Consumer Financial Protection Bureau’s proposal to create a Disclosure Sandbox through its revised Policy to Encourage Trial Disclosure Programs (TDP Policy). The Greenlining Institute submits this letter as an advocate of the Bureau’s statutory purpose of ensuring that all consumers have access to markets and products that are fair and transparent. As such, at this time The Greenlining Institute cannot support the TDP sandbox as proposed and requests increased specificity, transparency, and thought partnership with consumer advocates as this disclosure sandbox is developed.

In line with the CFPB’s primary and statutorily vested purpose as a consumer protection agency, Greenlining intends to work with the Bureau to implement adequate safeguards that ensure that disclosure sandboxes do not infringe on consumers’ right to access fair and transparent products and markets, or on their receipt of timely and accessible information to make knowledgeable decisions.

The Greenlining Institute is a direct response to redlining, the historical public and private practice of denying financial services and products to communities of color. We are a racial equity and policy advocacy organization working to address the effects of redlining in communities of color through responsible race-conscious policymaking and wealth-creation. We represent the Greenlining Coalition, a statewide and multiracial coalition that includes ethnic chambers of commerce, mission-oriented lenders, technical assistance providers, and other community development organizations.

### ***Consumers of color and access to safe and sound credit***

The Greenlining Institute believes any sandbox proposal and subsequent program must remain cognizant of the unfortunate 21<sup>st</sup> century reality that skin color still determines access to safe and sound credit. Ample research and the [CFPB’s own enforcement](#) support the reality of disparate impacts, racism in lending, the need for fair lending enforcement, and the importance of regulation.

It is important to note that even under cornerstone consumer regulations like the Equal Credit Opportunity Act and Truth in Lending Act, consumers of color remain vulnerable to discrimination in lending, are disproportionately targeted by predatory lending, and face higher rates of denials compared to creditworthy White counterparts, among other barriers to credit. These race-based disparities also plague consumers in the [mortgage, auto](#) and [small business lending](#) markets.

Geography and bank branch closures also play an important role in determining access to safe and sound credit. In communities of color, low-income neighborhoods, and disinvested urban and rural

areas, [where there are less bank branches](#), predatory and non-bank lenders are quick to step in and fill the void. In certain regions of California, [financial technology \(FinTech\) lenders have even grown to dominate certain markets](#). While not all FinTech lenders are bad, federal and state regulators are still trying to determine how to best regulate these players and foster transparency, which is severely lacking.

In its research, The Greenlining Institute has found a need for more [transparency and disclosure](#) in the FinTech industry's use of algorithms and data sets to determine creditworthiness, as well as a lack of process to prevent racial discrimination. For example, [some financial institutions](#) use algorithms to target lower-income customers with different, often less attractive, financial products. It is not a stretch of the imagination that companies will selectively roll-out disclosures to specific customers to test their efficacy. Depending on the selection and targeting criteria, certain customers may be unfairly or disproportionately impacted by consumer harms arising from the TDP.

Algorithmic credit underwriting is often a "[black-box](#)" where companies may not understand how their machine learning program came to particular credit decision - in turn they are unable to explain to customers why they were denied. The Greenlining Institute is concerned that FinTech companies may use the TDP sandbox to evade disclosure requirements. Greenlining supports the use of data to increase the availability of financial products to consumers who might not otherwise qualify. However, without proper safeguards, algorithmic decision-making can exacerbate existing inequality, because they can fail to address pre-existing biases in the data sets that they use and the companies using the algorithms often fail to review decisions for discriminatory results.

The FinTech industry's inaction is all the more concerning because firms are operating in consumer, mortgage, and small business markets with a lack of precaution for disparate impact. As [Congressman Emanuel Cleaver's report](#) on small business FinTech lenders notes, although firms know that the majority of their loans go to people of color and they are aware of their *legal obligation* to adhere to fair lending laws, appropriate steps are not being taken: "the issue is not whether laws still apply to the companies - the issue is what they are doing to ensure these laws are being followed." It is unclear how this TDP overlays with the OCC's announced FinTech charter, and especially with requirements around fair lending and financial inclusion plans (FIP's).

For communities of color, the cumulative legacy of past and present discrimination contributes to the growing racial wealth gap. The racial wealth gap is a consequence of redlining, the public and private sector practice of denying mortgages and financial services to neighborhoods of color which were typically low-income. Now is the time for communities of color to rebuild with *responsible innovation*, as they were hit first and worst by [subprime mortgage lending](#), the 2008 financial crisis, [recession](#), and even [recovery](#).

**This serves as the context for the Bureau's proposal. Although this is a sandbox program, the consumers that participate do not live in a sandbox. People of color and all consumers live real financial lives and the impact of sandbox programs have real financial implications.**

The following sections elaborate on our concerns and questions around the Bureau's sandbox proposal as written, as well as recommendations.

## ***Concerns & Questions***

After reviewing this TDP proposal, The Greenlining Institute believes that critical safeguards and information are missing that prevents us from supporting the Bureau's proposal. As written, we believe the proposal's lack of safeguards and transparency will prevent the Bureau from fulfilling its mandate 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."

**Greenlining's concern is that an unspecified rollback of regulations, information and disclosures for consumers, coupled with a lack of enforcement from the CFPB and state regulators, could have a harmful impact disproportionately borne by the consumers that are already harmed the most.**

The Bureau's wording alone speaks to an established pro-relief agenda for the industry without few, if any, instances for the people to shape the Bureau's priorities. For instance, the Bureau repeatedly states that, "outdated, unnecessary, or unduly burdensome regulations" will be "regularly identified and addressed in order to reduce unwarranted regulatory burden." Towards the end of the proposal, the Bureau adds, "trial disclosure programs must be subject to standards and procedures *that are designed to encourage companies to conduct such programs* [emphasis added]." This language suggests that the overarching concern for the Bureau is regulatory relief and incentives for the industry rather than controlling for harm by establishing safeguards and upholding responsible market practices. While The Greenlining Institute supports innovation, we do believe in *responsible innovation* that places consumers' interests – not the industry's – first.

The trial disclosure program aside, The Greenlining Institute cannot help but take stock of current events at the Bureau that have changed the agency's mission, priorities, and will likely determine *equitable outcomes* for any sandbox.

More explicitly, The Greenlining Institute is concerned about the role fair lending enforcement will play in this trial disclosure program, future sandbox proposals, and as a priority for the CFPB. Eric Blankenstein's recently unearthed blogs [questioning hate crimes and racism](#) undermine the Bureau's policing of racial discrimination at financial companies. Yet even before the blogs were discovered, Director Mick Mulvaney began a restructuring of the Office of Fair Lending from a unit of investigations and enforcement to one of internal policy advocacy. Although Dodd-Frank tasks the Office of Fair Lending with, "oversight and enforcement of federal laws intended to ensure the fair, equitable, and nondiscriminatory access to credit for both individuals and communities that are enforced by the bureau," the future of the mandate is unclear now that enforcement has been stripped. Moreover, Director Mulvaney has expressed interest in ignoring the Disparate Impact theory of ECOA liability, which helps address discrimination.

The Bureau also reversed the CFPB's crackdown on payday lenders and went so far as to join a joint motion with a group of payday lenders suing against the Bureau's rule. Director Mulvaney has dropped cases against payday lenders - choosing not to enforce any actions despite the Bureau's legal mandate to enforce fair lending laws - and praised the repeal of anti-discriminatory auto lending guidance. In the midst of these actions - or lack thereof - engagement with community advocates has been scaled back, as with the dissolution of the Community Advisory Board.

## ***Greenlining's Questions for the Bureau***

Given these aforementioned actions by the Bureau, The Greenlining Institute requests additional information to understand the Bureau's priorities and interests for this TDP sandbox. We request increased clarity on the following:

- The Bureau and Office of Innovation names as a statutory objective the identification of “outdated, unnecessary, or unduly burdensome regulations...in order to reduce unwarranted regulatory burden.”
  - **Greenlining response:** Please share the principles guiding the Bureau's vetting of regulations, and what you define as “outdated, unnecessary, or unduly” as it relates to consumer protections and the impact on consumers. Please also name which regulations you are currently reviewing and clarify if the Bureau plans to open public comment before action is taken. The Bureau also cites several times that it is looking to improve disclosure rules. Please share what rules or elements of rules should be improved.
- The Bureau states that it “may deem a company conducting such a program [TDP] to be in compliance with, or exempt from, a requirement of a rule or enumerated consumer law...”
  - **Greenlining response:** Please disclose which consumer laws and rules a company may be exempt from for this TDP. Please also elaborate on what preventive actions the Bureau requires from the company to control for harm to consumers.
- As a revamp of the trial disclosure program, the Bureau states it is preparing to substantially reduce the application and factors considered when reviewing applications. The Bureau says their attention will focus on the “quality and persuasiveness of the application, especially the extent to which the trial disclosures are likely to be an improvement over existing disclosures and the extent to which the testing program mitigates risk to consumers.”
  - **Greenlining response:** Please share the list of elements that were eliminated from the application and review process. Please confirm if consumer advocates will have the opportunity to weigh in to help determine improvement to existing disclosures and the mitigation of risk to consumers. Please also elaborate on how the Bureau plans to balance consumer protections with a decrease in factors considered. Finally, please confirm if applications for the TDP will be made public, and if there will be opportunity for the public to weigh in on proposals from companies.
- The Bureau states that it may grant waivers “for disclosures that improve upon existing requirements based upon cost-effectiveness, delivery mechanism, or consumer understanding.” The Bureau then states: “to facilitate the Bureau's awareness of the effects of trial disclosures on consumers...the Bureau intends to require recipients [companies] of such a waiver to notify the Bureau of material changes in complaint patterns or other information that should be investigated by the Bureau to determine if the trial may be causing a material, adverse impact...”
  - **Greenlining response:** Aside from a report back by the industry, please elaborate on: how the Bureau will do its due diligence to verify a company's reports are accurate and true; what safeguards will be put in place to ensure an accurate portrayal of a lender's performance, aside from what a lender chooses to report; if the Bureau will keep in contact with participating consumers to gauge consumer satisfaction; and what platforms will be provided – such as an online database – where consumers - not industry - can share their experience under the TDP.
- The Bureau states that extensions will be granted “where there is evidence that the trial disclosures have tested successfully.”

- **Greenlining response:** Please define your vision of success for this proposed rule, for consumers and for companies.
- The Bureau cites as a goal “coordination with other regulators...” and states that “applications may be submitted by a group, such as a trade association, on behalf of its members...”
  - **Greenlining response:** This opens the possibility of having a sandbox that reaches several states at once. As it relates to FinTech and non-bank regulation, please elaborate on your vision of FinTech participation in this TDP. Please also confirm if the Bureau will collaborate with the Conference of State Bank Supervisors (CSBS) and their [Vision 2020 initiative](#), which consists of a task force with industry members working to harmonize FinTech regulation across states.
- The Bureau highlights the value of “in-market testing” for the companies in that it will enable companies to “research informative, cost-effective, disclosures” and “enable responsible companies to research informative, cost-effective disclosures in test programs.”
  - **Greenlining response:** Please elaborate on what indicators the Bureau will vet to determine which companies are responsible, and what safeguards the Bureau is embedding into the TDP to control for “material, adverse, impact” on consumers. Please also confirm if companies are being required to pledge reparations to consumers they may harm while testing.
- The Bureau states that once it deems certain companies in compliance with or exempt from identified Federal disclosure requirements, “no basis exists under those provisions for a private suit based on the company’s *use* [emphasis added] of the trial disclosure. The same is true with respect to other Federal and State regulators even if they have enforcement or supervisory authority as to the enumerated consumer laws for which the Bureau has rulemaking authority.” The Bureau then states that, “the Bureau make no 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...use of the trial disclosures during the waiver period, provided the company engages in good faith, substantial, compliance with the terms of the waiver...”
  - **Greenlining response:** *Use* of disclosures aside, please elaborate on: the Bureau’s plan to control for (disparate) *impact* or adverse effects to consumers; and with the Bureau waiving its own authority to ensure safe markets for consumers, what steps the Bureau is taking to control for harm before the TDP is implemented. Please also confirm if the CFPB intends to preempt state regulators from stepping in to protect their constituents if financially abusive practices are found.
- In regard to trial disclosure waivers, the Bureau states that companies “must identify any risks to consumers that may be associated with the proposed program, describe how the program intends to mitigate such risks, and to explain the procedures the will be used to assess for potential risks to consumers...”
  - **Greenlining response:** Please confirm if the Bureau expects companies to outreach to community or consumer advocates to inform the community needs that these trials will address, and procedures to mitigate risk. Given the potential risk to consumers, please also confirm if the Bureau is requiring companies to pledge restitution to participating consumers.
- The Bureau states it will require companies to include in their application, “a commitment to and schedule for sharing test result data with the Bureau...”
  - **Greenlining response:** Please confirm if by “commitment” to share performance data the Bureau is leaving information sharing to the company’s discretion. Also, please confirm if this performance data will be made public.

## *Greenlining's Recommendations*

In the spirit of supporting *responsible innovation* that expands access to economic opportunity while controlling for harm, not replicating it, The Greenlining Institute provides the following preliminary recommendations:

- **The CFPB and its rebranded Office of Innovation must issue an official statement firmly asserting that innovation does not mean lack of accountability, that a “sandbox” is not a free pass for harm and disparate impact, and that racism in lending will not be tolerated.**
- If the Bureau intends to waive enforcement actions from states, attorneys general, and other regulators, that implies that harm from the TDP is very likely. Undoing risk-mitigation rules and regulations for the purpose of this program *without safeguards* does not bode well for communities of color and any consumer. **Any waiver must be coupled with a plan for mitigating harm and disparate impact that includes building in safeguards and reparations for in-market participants.** Please publicly share what actions, assistance, and response lenders will pledge to consumers when disparate impact or adverse impacts are identified.
- **The Bureau should not just rely on companies to understand a company's' performance and identify potential harm to consumers.** The Bureau should create a platform to collect consumers complaints and experience during the span of the TDP.
- If the Bureau considers it a priority to scale back or completely remove rules and regulations they consider burdensome, **the Bureau should be transparent in naming these rules and allowing for public comment before taking action.**
- **The Bureau should provide a transparent process and opportunity for public comment when vetting applications for sandboxes.** A diversity of industries, regions, backgrounds, and perspectives will be key to optimal outcomes for any sandbox.
- **The Bureau should foster thought partnership with consumer advocates to enable true and responsible innovation.**
- **The Bureau and Office of Innovation should ensure that consumer advocates and appropriate stakeholders are notified when requests for comment go out.**
- A good business is not afraid of the public eye. **The Bureau should seriously consider sharing companies' TDP performance data with the public.** If the public is being tested on to inform financial products and disclosures, the public deserves to receive progress updates. In line with the waiving of rules and regulations for companies in a sandbox scenario, rules should also be waived as they relate to transparency around a company's performance and the success of products issued. Data that would identify consumers should be omitted for privacy reasons, but the rest should be shared with the public to foster a true competitive market.
- **The Bureau should consider incorporating Section 1071-like data collection for this consumer trial disclosure program.** This will allow companies to determine the caliber of their service to consumers of color, underbanked communities, and other vulnerable populations. Collecting demographic data would allow companies to assess the impact of “new” disclosures on different communities and population segments and to re-tool these disclosures if necessary. This is particularly important if a company decides to trial a new disclosure to only a select subset of customers.
- **The Bureau should implement rules to ensure that the TDP does not allow automated decision-making algorithms to evade ECOA/adverse action obligations.** Customers have the right to request explanations for adverse credit decisions under the ECOA. However, underwriting models based on machine learning may not be able to properly

explain credit decisions. Decision-making based should never be based solely on automated processing, and the Bureau should require that any trials involving algorithmic decision ensure:

- **Transparency:** firms should not be able to hide disclosure of their decision-making models through claims that the models are proprietary, confidential, or trade secrets.
- **Interpretability/Explainability:** firms must be able to explain how their decision-making models operate, particularly how and why, and based on what data a model makes a particular decision. Additionally, consumers should have a right to explanation of how a decision about them was made.
- **Reviewability:** firms must unpack aggregate measures and identify aggregate effects to audit for disparate results.

### ***Closing***

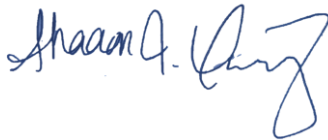
As it relates to financial services, The Greenlining Institute believes two non-contradictory truths. We believe responsible and fair lenders, including FinTech, can expand economic opportunity and access for those who have been marginalized from financial markets. We also believe proper safeguards for consumers are necessary - especially in a trial - and that predatory lending practices and discrimination should not be tolerated. Greenlining hopes the Bureau seeks thought partnership with the consumer advocate community to inform its programs and overall direction, and we look forward to the Bureau's response to our questions.

Sincerely,

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