September 10, 2014

Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Re: Request for Information Regarding the Use of Mobile Financial Services by Consumers and Its Potential for Improving the Financial Lives of Economically Vulnerable Consumers (Docket No. CFPB-2014-0012)

Dear Ms. Jackson:

The American Financial Services Association ("AFSA") welcomes the opportunity to comment on the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") request for information regarding the use of mobile financial services by consumers and its potential for improving the financial lives of economically vulnerable consumers ("RFI").

AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its more than 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, mortgage servicers, credit card issuers, industrial banks and industry suppliers.

We support the CFPB's effort to seek information about how consumers, particularly economically vulnerable consumers, use mobile financial services to access products and services, manage finances, and achieve their financial goals. We agree that for everyone, including the economically vulnerable, mobile technology can enhance access to safer, more affordable products and services in ways that can improve their economic lives. Currently, the mobile products and services that many AFSA members offer their customers are limited to bill pay and access to account information. AFSA members are interested in exploring and offering other products and services using mobile technologies, but are somewhat constrained by disclosure requirements. AFSA members are also interested in communicating with consumers using text messages where appropriate, but face barriers in that area as well. We intend to discuss these areas, in addition to the Bureau's question regarding marketing segmentation, in comments herein.

I. Mobile/On-line Financial Services Offered by AFSA Members

The mobile services that most AFSA members offer their customers are bill pay and access to account information. These services are offered on-line on members' websites, which can be accessed from a computer or a mobile device. Many members also have an app specifically designed for bill pay and access to account information. Some members may offer other services on-line, such as being able to close an account or to begin certain transactions. Transactions that may be started on-line often still require paperwork to be completed and mailed due to disclosure requirements.

AFSA members offer their customers the ability to make payments on-line for several reasons. On-line or mobile bill pay is easy for customers. It can save both time and money. With on-line bill pay, customers do not have to take the time to go to a branch to make payments, or spend money on gas or a stamp. This helps all customers, including economically vulnerable customers, whose time and money may be more limited. Recurring on-line bill pay can also help customers avoid late payments, which can cost customers money and negatively impact their credit scores. If a payment has not been made and the due date is approaching or has arrived, the finance company can contact the customer and the customer can immediately make the payment. On-line or mobile payments can also help the finance company (and the environment) by saving paper.

AFSA members tell customers about on-line bill pay options on account statements and in other communications with their customers. For example, one AFSA member walks customers through the on-line bill pay process during the "welcome" call.

II. Mobile/On-line Options Limited by Disclosure Requirements

AFSA members would like to explore making other products and services available on-line or through mobile apps, but are generally constrained by a myriad of disclosure requirements. It is difficult to display lengthy disclosures in an easily readable form on a small screen. It is also difficult to disclose a chart, as is required by certain regulations, without knowing the viewer's screen size.

For example, the Electronic Signatures in Global and National Commerce Act ("E-SIGN Act")[1] requires a number of details be disclosed to obtain consumer consent, including hardware requirements, information on obtaining paper copies, the cost of paper copies if any, etc. Consumers likely do not want to have to go through multiple screens or scrolls to read all of the disclosure, particularly on a small phone screen. But the E-SIGN Act is a precursor to anything else.

For credit cards, Regulation Z[2] requires disclosures to contain solicitation and account-opening tables. Regulation Z also mandates tables in student loan disclosures. Gramm-Leach-Bliley Act privacy notices[3] have to be provided in model chart form to take advantage of the safe harbor provision. While these tables could be displayed easily on a desktop computer, they are not as easily displayed on a small three-inch smart phone screen.

Regulation Z also requires disclosures to be given in a form that the consumer can keep, which can be challenging on mobile devices. We suggest that the CFPB grant financial services companies some flexibility in how disclosures have to be delivered and retained in order to expand mobile loan activity.

[1] 15 U.S.C. § 96.
[2] 12 CFR Part 226.
[3] 15 U.S.C. § 6801 - 6809.

In state law, there are "notice to buyer" and other state-mandated disclosures that by statute must appear in certain type sizes. Some state laws say that disclosures cannot be provided in less than 8-point type. While the finance company may use 8-point or larger type, the consumer could be viewing the disclosure on a small screen so the type could appear much smaller. Some states (such as Ohio for credit insurance) mandate special disclosure forms.

It is difficult to ensure compliance with type-size, legibility, tabular, mandated form and "clear and conspicuous" disclosure requirements without being able to control the display or resolution parameters.

Federal regulators (first the Federal Reserve Board and then the CFPB) faced a similar problem with the disclosure of balance calculation methods in the "old" Schumer Box solicitation disclosure format. The regulators opted for five federally defined standard disclosures, each with a short-hand moniker. Creditors simply select the closest relevant moniker with details set out in the credit agreement. Similarly, in Ohio, there are standard mortgage covenants that are defined by state law and can be referenced by simple shorthand moniker, e.g., "with statutory covenants," which can streamline mortgage disclosures considerably.

We encourage the CFPB to take a broader approach regarding the disclosures mandated by the E-SIGN Act. The E-SIGN Act was enacted in 2000, before the onslaught of smart phones and tablets. Technology has changed significantly since the E-SIGN Act was signed. Internet and email access has expanded dramatically and many of the protections in the E-SIGN Act (disclosing the necessary hardware and software, for example) are not really relevant any longer. Of course, the CFPB cannot revoke the E-SIGN Act. But the CFPB could amend Regulation Z to remove the E-SIGN Act requirements. Instead of the E-SIGN requirements, the CFPB could write disclosure requirements that make sense for today's technology.

Perhaps shorthand can be developed to simplify disclosures in the mobile context in areas like the E-SIGN Act, with only significant deviations requiring immediate further disclosure. Thus, a consumer might agree to "Full Electronic Disclosure" or "Full Electronic Communication" with mandatory links to a corresponding webpage that provides addresses for paper copies and opt-out from electronic communication, etc. The webpage must be accessible from the finance company's home page and relevant subpages.

The Equal Credit Opportunity Act ("ECOA")[4] requires written consent in order for a finance company to provide adverse action notices electronically. The CFPB might consider amending the ECOA to permit the sending of adverse action notices electronically without consent. This would enhance the ability to start the application process on a mobile device.

The fact that the consumer is accessing the disclosure from a mobile or other electronic device suggests a consumer preference for such channel and a measure of facility with such channel in the first place. Thus, it would be reasonable to expect that the consumer is willing to conduct the relationship in that manner, justifying special rules that the consumer can later reject or supplement. The consumer needs to be the judge of utility and should not be precluded from

[4] 15 U.S.C. § 1691.

access just because they choose to use a mobile device. Finance companies should be freed of inordinate responsibility where the company cannot control the output and has made an effort to provide legible disclosure and web-based alternate disclosure.

III. The Use of "Texting" as a Means to Communicate with Customers

Sending text messages can be a very quick and efficient method of communicating with customers. A text is a quick way to notify customers that a payment is due, of a current account balance, that there is a fraud alert on an account, that a lease is almost up, of possible identity theft, of a possible loan modification, etc. However, there are several barriers that can prevent finance companies from communicating with their customers via text, even when the customer has provided express written consent to receiving text messages.

One barrier is the Telephone Consumer Protection Act of 1991[5] ("TCPA"), which is in dire need of modernization. The TCPA and its implementing regulations impose a series of antiquated restrictions on calls and text messages to cell phones. For example, calls or texts made to cell phones using an autodialer or prerecorded voice message, are prohibited unless the caller has the current account holder's prior express consent (or the call is for emergency purposes). There are currently no regulations governing the revocation of that consent or what happens when a number that the caller has consent to call is reassigned. These issues, along with the broad definition of "autodialer" have led to a disproportionate increase in TCPA litigation.

Penalties of up to $1,500 per violation of the TCPA have provided plaintiff's attorneys with a constant flow of fodder for lawsuits that generously compensate the attorneys rather than their clients. In several TCPA class actions, companies settled for millions of dollars, but each class member only received a few dollars while their attorneys walked away with millions. Consumers will experience rising costs as businesses in the 21st century struggle with the massive legal fees incurred in TCPA litigation. Even when companies prevail, the cost of defending a TCPA class action most often exceeds $100,000, which may be devastating for small and mid-size companies.

To mitigate the litigation risk, companies may avoid texting their customers, even though the customer might find such texts helpful.

Other concerns are disclosure requirements. Text messages have character limitations that may be too small for some disclosure requirements. In addition, it can be difficult to send a chart, as required by some regulations, in a text message.

Lastly, finance companies are concerned about the customer's privacy when sending text messages. It is possible that people other than the customer could see the message, which may contain information that the customer would not want shared.

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[5] 47 U.S.C. § 227.

IV. The Creation and Use of Marketing Segments

In its Request for Information, the CFPB asks, "What risks does segmentation of the market through data created by mobile use present for underserved consumers? Is there a risk that data will be used to direct underserved consumers to higher-cost products and services than they would otherwise be eligible to purchase and that may pose greater risk of financial harm?"

The CFPB's question reflects a broader concern that the creation and use of marketing segments may somehow lead to consumer harm. This concern is misplaced. At the outset, it is important to understand that the use of data to predict consumer interests and preferences is not new. In 1912, for example, L.L. Bean purchased a list of out-of-state individuals who had obtained Maine hunting licenses, predicting that they would be interested in an outdoor goods catalog. While today's marketing analytics are more sophisticated, the fundamental goal remains the same – delivering more relevant and timely information to consumers. Data-driven advertising is both a longstanding practice and one that consumers value. A century after L.L. Bean's insight, data-driven marketing does not raise any new policy concerns that are not already addressed by existing legal regimes.

In fact, the responsible use of marketing data – from a variety of sources – creates many advantages for consumers. Data-driven marketing in the financial industry, and particularly the use of segments and other modeled data offered by third-party data providers, helps financial institutions to identify and reach potential new customers. Because competing financial institutions have access to similar data from third parties, the net result is that consumers receive more and better information about the products and services available to them. Consumers are therefore empowered to comparison shop across a wider variety of choices. Consumers who have traditionally been underserved by the financial industry, such as young people or new immigrants, may benefit even more from this competitive marketing process than consumers who already have established relationships with financial institutions. In particular, the ability of financial institutions to reach consumers on their mobile devices will result in more information and offers being provided to consumers who may have been underserved in the past, thereby enhancing their ability to access a variety of financial products and services.

Marketing segmentation, which is used to predict the likelihood that consumers will be interested in certain offers, is fundamentally different from credit scoring that may be used to determine eligibility for financial services. Where analytics are used for marketing, there is no "adverse impact" to consumers – the only potential consequence is irrelevant advertising. Moreover, there is no single marketing "score" that affects access to goods. Rather, there are numerous marketing models that predict a consumer's likely interest in various goods or services, which shift over time as consumers' evolving needs are translated into refreshed data points. The dynamic nature of marketing segments also serves to increase the information available to consumers.

The CFPB's question also may reflect a concern that marketing data could be used for unlawful discrimination. Regulatory examiners can and do use their authorities under fair lending laws, namely the Fair Housing Act[6] and the ECOA, to examine pre-application marketing activities that may rise to the level of unlawful discrimination. However, broadly extending fair lending

[6] 42 U.S.C. § 3601 - 3619.

laws to marketing activities would have the negative effect of limiting companies' ability to advertise widely, ultimately impeding access to financial services. The use of marketing analytics is longstanding, yet the Federal Reserve Board repeatedly declined to engage in broad regulation under the ECOA of "prescreening" and other pre-application marketing activities. In fact, automated decision-making tools in financial services, if properly designed and implemented, can help to reduce the risk of discrimination by reducing reliance on human discretion.

Existing laws governing the consumer finance marketplace appropriately focus on preventing discrimination at decision points that may concretely harm individuals, while generally enabling marketing and advertising activities – which promote access to credit – to continue. This dividing line remains not only appropriate, but critically important, in light of today's data-driven marketing practices.

V. <u>Conclusion</u>

We look forward to working with the CFPB on mobile financial services, which can enhance access to safer, more affordable products and services to improve consumers' lives. Finding solutions to the difficulties imposed by disclosure requirements and updating laws such as the TCPA can lead to innovations that can help everyone, especially the economically vulnerable.

Please contact me by phone, 202-466-8616, or e-mail, bhimpler@afsamail.org, with any questions.

Sincerely,

Bill Himpler

Bill Himpler
Executive Vice President
American Financial Services Association