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January 20, 2023

Via Electronic Submission

Comment Intake—TILA Preemption Determination
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

RE: [Docket No. CFPB–2022–0070] Intent To Make Preemption Determination Under the Truth in Lending Act (Regulation Z)

Dear Sir or Madam:

The Independent Community Bankers of America ("ICBA")[1] welcomes the opportunity to provide comment in response to the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") notification of intent to make a preemption determination and request for comment ("RFC").[2] In summary, ICBA is concerned that any deviations in the term "Annual Percentage Rate" ("APR") will confuse the general public. Given the significance and prevalence of the term, the CFPB should go to great lengths to protect its integrity. Variations in its definition, however slight and regardless of marketplace or industry, will sow uncertainty and confusion.

[1] *The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services.*

With nearly 50,000 locations nationwide, community banks constitute roughly 99 percent of all banks, employ nearly 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than $5.8 trillion in assets, over $4.9 trillion in deposits, and more than $3.5 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org.

[2] 87 Fed. Reg. 76551 (Dec. 15, 2022).

Background

The Truth in Lending Act ("TILA") is a consumer financing disclosure law, designed to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available and avoid the uninformed use of credit.[3] Regulation Z, which implements TILA, requires creditors to use specified formulas to determine credit costs and provide cost disclosures before consummation of credit, specifically requiring the creditor to state the "APR."[4]

In determining APR, Regulation Z requires creditors to include certain charges, including interest, transaction fees, credit guarantee insurance premiums, as well as several other charges that are "payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as a condition of or incident to the extension of credit."[5] Regulation Z also explicitly lists certain charges that should be EXCLUDED from calculation of APR, such as participation or membership fees and application fees charged to all applicants.[6]

Given the importance of providing a consistent understanding of terms and conditions of credit across different providers, TILA also provides the public with an opportunity to request the Bureau to determine whether a state law conflicts with or is contradictory to TILA.[7] As such, the Small Business Finance Association provided a written request in January 2021[8] for the Bureau to determine whether TILA preempts a newly enacted State of New York law, the New York Commercial Financing Law ("NY law" or "NYCFL"),[9] with respect to several provisions.[10]

NYCFL applies TILA-like provisions and disclosures to commercial transactions. Among other provisions, the NY law requires creditors to disclose the estimated annual percentage rate, expressed as a yearly rate, using the words "annual percentage rate" or the abbreviation "APR," inclusive of any fees and finance charges.[11] Other sections of the NY law make clear that "APR" should be "expressed as a yearly rate, **inclusive of any fees and finance charges that cannot be avoided by a recipient** and calculated in accordance with the federal Truth in Lending Act,

[3] 15 U.S.C. 1601(a).
[4] 12 CFR 1026.14.
[5] 12 C.F.R. 1026.4(b)
[6] 12 C.F.R. 1026.4(c)
[7] 15 U.S.C. 1610(a)(2).
[8] Letter from Stephen Denis, CEO of the Small Business Finance Association, to Jocelyn Sutton, Executive Secretary of the Consumer Financial Protection Bureau (Jan. 15, 2021). The New York law is available at https://www.nysenate.gov/ legislation/laws/FIS/A8.
[9] NY Financial Services Law (FIS) CHAPTER 18-A, ARTICLE 8.
[10] The Bureau is also considering whether TILA should preempt other, similar state commercial financing laws – notably, California, Utah, and Virginia have each enacted similar laws
[11] NYCFL section 803

Regulation Z, 12 C.F.R. § 1026.22, **regardless of whether such act or such regulation would require such a calculation**."[12]

ICBA Comments

ICBA's interest in commenting on this RFC stems from two areas of concern. First, although community banks are not covered under NYCFL, it is likely that bank subsidiaries and affiliates will still be covered and potentially burdened by providing APR calculations that contradict each other.

Second, and perhaps more importantly, ICBA believes that New York's definition of APR is sufficiently different from TILA's definition to warrant concern about marketplace confusion – not just among commercial borrowers, but also among consumers.

While the Bureau should preempt the NY law's use of "APR" and other identical terms with different definitions, ICBA believes that the Bureau could provide a narrow remedy that would still achieve the purpose of NYCFC.

NYCFL's definition of APR contradicts TILA's definition

In assessing whether TILA should preempt state law, the Bureau looks to prior determinations made by the Board of Governors of the Federal Reserve System ("FRB"), which was responsible for governing TILA before authority was transferred to the Bureau under the Dodd-Frank Act.[13] Under FRB decisions, preemption hinges on whether a state law is inconsistent with TILA. Specifically, "[a] State law is inconsistent if it requires a creditor to make disclosures or take actions that **contradict the requirements of the Federal law.**"[14]

A state law "contradicts" a Federal law, and is therefore preempted, "**if it requires the use of the same term for a different amount or a different meaning** than the federal law, or if it requires the use of a different term than the federal law to describe the same item."[15]

Here, the NY law explicitly requires the use of the same term, "APR," but assigns a different amount and meaning than TILA. Specifically, Regulation Z explicitly *excludes* participation or membership fees and application charges from inclusion in the calculation of APR.[16] In contrast, the NY law requires that those charges be *included* in the calculation. The NY law requires creditors to include fees and finance charges that cannot be avoided by a recipient.[17]

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[12] NYCFL sections law 804 and 805 (emphasis added).
[13] *Supra* note 2.
[14] 55 FR 42025, 42026 (Oct. 17, 1990) (emphasis added).
[15] *Id.* (emphasis added).
[16] *Supra* note 6.
[17] *Supra* note 12.

Application fees charged to all applicants cannot be avoided by a recipient and would be required for inclusion in the NYCFL's definition of APR, yet they are nonetheless excluded from TILA's APR definition. Put simply, the NY law uses the same terminology as TILA but with a different meaning. The NY law is a clear contradiction of Federal law.

Confusion in the marketplace

Despite the contradictory definitions of APR, the Bureau contends that the NY law need not be preempted because it governs commercial transactions whereas TILA governs consumer transactions. The Bureau notes, "[c]onsumers applying for consumer credit should continue receiving only TILA disclosures, which, as normal, will assure meaningful disclosure of credit terms and allow the consumers to compare like products when shopping for financing options."[18]

However, the Bureau's determination does not account for general advertisements in the marketplace, with the potential for different categories of APR. Although the use of APR in the NY law is limited to commercial transactions, solicitations and advertisements for commercial loans will undoubtedly be seen by the general public – commercial customer or not. Conversely, commercial customers will undoubtedly see advertisements and solicitations that are intended for consumer loans.

What is at doubt, though, is whether customers – commercial or consumer – will understand the nuance of state law vs Federal law when they see these advertisements. ICBA contends that the common consumer or business owner would not know the difference, and that the discrepant uses of APR will create a false impression of the prevailing rate in the general marketplace.

When seeing such an advertisement, the general public will not know that one APR is applicable in one situation and a different APR is applicable in a different situation. This could lead to the erroneous conclusion that certain deals are better or worse than others, leading to uninformed or misinformed financial decisions.

Recommended course of action

Although the NY law's definition of APR contradicts TILA's, and such contradiction will lead to confusion due to lack of the general public's understanding of each law's dominion over distinct marketplaces, ICBA believes that the substance and purpose of the NY law can still be salvaged.

[18] *Supra* note 2, at 76553.

ICBA agrees with the Bureau's assessment that TILA does not preempt the entirety of the NY law. A creditor can technically comply with both the NY law and TILA, especially considering that one set of APR definitions would be required for consumer transactions while a different set of APR definitions would be required for commercial transactions. The shared use of the term "APR," though defined differently and contradictorily toward one another, should not preempt the entirety of NYCFL.

Instead, ICBA believes it would be prudent for the Bureau to use a narrow preemption authority by limiting NYCFL's use of the term "Annual Percentage Rate" or "APR." Instead, the use of a different term could still achieve the overall goals of NYCFL.

Conclusion

A major reason for TILA's creation was to remedy the lack of uniformity in the disclosure of credit costs. What is perversely ironic about this present situation is that the term "APR" was designed more than 50 years ago to eliminate the marketplace confusion that the NYCFL presents.

While it is understandable that the NY law seeks to leverage the success of TILA for the commercial marketplace, its goals must not undermine the very essence of TILA's success – namely, a more informed customer. Instead, the Bureau should preempt the usage of "APR" and require the use of a different term that is unique to the NY law.

If you would like to discuss these comments further or if I can be of any assistance, please do not hesitate to contact me at Michael.Emancipator@icba.org or 202-821-4469.

Sincerely,

/s/

Michael Emancipator
Vice President, Regulatory Counsel