REVENUE BASED FINANCE COALITION

January 18, 2023

Via Regulations.Gov
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
Attn: Comment Intake

RE: Intent to Make Preemption Determination under the Truth in Lending Act (Regulation Z) (Docket No. CFPB-2022-0070)

On December 7, 2022, the Consumer Financial Protection Bureau ("CFPB") issued a Notice of Intent to Make a Preemption Determination (the "Notice") that certain provisions under New York State's Commercial Financing Disclosure Law (the "New York Law")[1] are not preempted by the Truth in Lending Act ("TILA"),[2] and solicited public comments in response to the Notice. We respectfully submit these comments for the CFPB's consideration and thank the CFPB for the opportunity to do so. For the reasons set forth below, we urge the CFPB to reconsider its initial determination and to conclude that the New York Law (and any similar laws) are preempted by TILA to the extent that the law defines the terms "finance charge" or "annual percentage rate", or requires calculations for those amounts, in a manner inconsistent with TILA.

TILA and its implementing regulation, Regulation Z,[3] provide the framework within which the CFPB must make its preemption determination. TILA provides that it does not preempt state disclosure laws "except to the extent that those laws are inconsistent with TILA, and then only to the extent of the inconsistency."[4] Regulation Z clarifies that a disclosure is inconsistent with TILA if it "contradict[s] the requirements of Federal law"[5] and that a state law contradicts Federal law if it:

- Requires the use of a term to represent a different amount or a different meaning than the Federal law; or

[1] N.Y. Fin. Serv. § 801 *et seq*.
[2] 15 U.S.C. §§ 1601 *et seq*.
[3] 12 C.F.R. Part 1026
[4] 15 U.S.C. § 1610(a)(1).
[5] 12 C.F.R. § 1026.28(a)(1)

- It requires the use of a term different from that required in the Federal law to describe the same term.[6]

We believe the New York Law contradicts the requirements of TILA under the first bulleted category above – namely, the New York Law requires use of terms ("finance charge" and "annual percentage rate") required by TILA and Regulation Z in connection with calculations that are different from calculations required by TILA and Regulation Z. As a result, the New York Law contradicts TILA by requiring use of the terms "finance charge" and "annual percentage rate" to represent different amounts and different meanings than those terms have under Federal law.

In concluding that the New York Law does not contradict TILA and Regulation Z, the CFPB relies on the fact that the New York Law regulates only commercial-purpose transactions and TILA regulates only consumer-purpose transactions.[7] The CFPB concludes that the New York Law does not frustrate the purposes of TILA and Regulation Z "because lenders are not required to provide the New York disclosures to consumers seeking consumer credit."

We respectfully submit that the fact that the New York Law's disclosures would not be provided for a transaction subject to TILA is not a sound basis upon which to conclude that there is no contradiction between a state law and TILA. The CFPB's position ignores that TILA's purpose is not merely to provide cost of credit disclosures, but also assure that a borrower can "compare more readily the various credit terms available to him and avoid the uninformed use of credit."[8] TILA's express purpose assumes that the recipient of a TILA disclosure will compare it with other cost disclosures. The issue is whether the New York Law's cost disclosures using terms from Federal law ("finance charge" and "annual percentage rate") provide reliable comparisons to the disclosures TILA requires, or, alternatively, whether the New York Law's cost disclosures frustrate the purposes of TILA and Regulation Z. We believe it to be the latter.

In order to ensure that a borrower is able to "avoid the uninformed use of credit",[9] the CFPB must ensure that well-established cost of credit terms made familiar to the borrowing public by TILA are uniformly applied. Uniform application of these concepts (and calculation of the disclosed amounts) is paramount in order to achieve the proverbial apples-to-apples comparison that was the promise of TILA's disclosure regime, and the "annual percentage rate" disclosure, in particular.

To bolster this position, we offer the following from the American Bar Association's TILA treatise, *The Law of Truth in Lending*:

> "Of all the credit terms that TIL requires the creditor to disclose, consumer borrowers are most aware of the APR. Indeed the APR is probably the most valuable TIL disclosure, for

[6] *Id.*
[7] The Notice states, "The Bureau notes that the statutes govern different transactions, so the New York law appears to be far afield of a law that contradicts TILA and Regulation Z…"
[8] 15 U.S.C. § 1601(a).
[9] *Id*.

> APRs allow debt alternatives to be compared conveniently and meaningfully even if the borrowings differ in amount or duration or repayment arrangements…
>
> A primary purpose of TILA is to enhance cost awareness and to promote market information about credit terms and price, any success that TIL enjoys in this regard is due in large part to the credit cost comparisons that APR permits. A rate comparison allows debts configured quite differently to be compared as to *level* of cost, that is, the relative cost of a unit of credit for a constant amount of time. Such a comparison is only possible if a comprehensive effective "interest rate" measure (such as APR) is available."[10]

In light of this, it is hard to see how the New York Law, which requires disclosure of an APR that does not track the APR calculation under TILA, does not impair the informed use of credit. If each state is permitted to impose a different calculation for APR, then APR is no longer a means to provide a level, uniform cost of credit disclosure for comparison purposes. If these inconsistent state laws are not preempted, transactions with the exact same credit costs will result in different disclosed finance charges and APRs solely based on whether the transactions are classified as primarily for consumer purposes versus commercial purposes. The impact of this inconsistency is amplified where the credit terms vary between offers.

We believe small business owners are particularly susceptible to being misled when states define the terms "finance charge" and "APR" in a manner that is inconsistent with TILA. Small business owners, often sole proprietors, regularly shop for both consumer and commercial credit or funding options to fund their business ventures (e.g., consumer loans, home equity loans, credit cards). A 2017 study by the U.S. Small Business Administration found that 46% of all small businesses used personal credit cards for both business and personal expenses.[11] These business owners are interested in securing financing on the best terms available to them. A determination that TILA does not preempt the New York Law leaves small business owners vulnerable to confusing and inconsistent disclosures of the APR and finance charge among various financing options, and undermines TILA's purpose to create a regime for a level comparison of credit costs. In short, a financing marketplace saturated with offers of "APR"s that are inconsistently calculated does not promote the informed use of credit. It has the opposite effect.

Finally, the CFPB's reasoning that the New York Law is not preempted "because lenders are not required to provide the New York disclosures to consumers seeking consumer credit" suggests that a state also could enact laws that are inconsistent with TILA for *consumer-purpose transactions* so long as these laws apply only to transactions with amounts financed exceeding

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[10] Ralph Rohner & Frederick Miller (Alvin C. Harrell, editor), The Law of Truth in Lending (2014) at 255-257, citing T.Durkin & G. Elliehausen, 1977 Consumer Credit Survey 17 (Federal Reserve Board 1978) and associated tables for evidence that "APR is key disclosure, ranked 'most important' nearly seven time as often as the finance charge disclosure, which ranked second" and "APR is the most common item of information sought by credit shoppers." We note that other studies show that APR is not the most important measure of the cost of capital. However, to the extent a state or Federal law requires an APR disclosure, an APR disclosure should have a consistent meaning.

[11] *See https://www.sba.gov/blog/10-stats-explain-why-business-credit-important-small-business#:~:text=46%25%20of%20all%20small%20businesses,denied%20due%20to%20business%20credit.*

TILA's coverage limit, currently $66,400.[12] In both scenarios, the state law would apply only to transactions that are not subject to TILA.

Under the CFPB's rationale, a state law that requires disclosure of the "finance charge" and "APR" for a consumer transaction greater than $66,400 is not inconsistent with TILA because TILA's disclosures are not required for these transactions, regardless of how the state law requires the lender to calculate the "finance charge" or "APR" on the loan. In that light, it seems wholly inappropriate for the CFPB to determine that there is no inconsistency in the New York Law and TILA because both laws can never apply to the same transaction. The fact that a state law and TILA cannot apply to the same transaction, in and of itself, is not a basis upon which to conclude that laws are not inconsistent, as the above hypothetical lays bare.

For these reasons, we respectfully request that the Bureau reconsider its preliminary conclusion that the New York Law's inconsistent use of the terms "finance charge" and "APR" are not preempted by TILA.

The Notice states that the Bureau also is considering making determinations regarding whether TILA preempts state laws in California, Utah and Virginia that require disclosures in certain commercial financing transactions. Similar to the New York Law, California has adopted regulations that require disclosure of "finance charge" and "APR" in connection with different calculations than the calculations required by TILA and Regulation Z.[13] Accordingly, we respectfully request that the Bureau issue a determination that California's inconsistent use of the terms "finance charge" and "APR" is preempted by TILA.

The Virginia and Utah disclosure laws, both passed in 2022, are not preempted by TILA. Virginia's Sales-Based Financing Disclosure Law requires providers to disclose the "finance charge."[14] Virginia's implementing regulations define the term "finance charge" as follows:[15]

> "Finance charge" for purposes of [Virginia's Sales-based Financing Disclosure Law] means the amount of any and all costs of the sales-based financing provided to the recipient represented as a dollar amount, including all charges that would be included in the finance charge under 12 CFR 1026.4 if the transaction was a consumer credit transaction and the provider was a creditor under Regulation Z (12 CFR Part 1026). This definition is intended to require finance charges to include any charge that would be a finance charge under 12 CFR 1026.4, regardless of whether the transaction would be considered an

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12 *See* 87 Fed. Reg. 63,671 (Oct. 20, 2022)**.**

13 *See* California's Commercial Financing Disclosure Regulations, Sections 940 (Calculation of Annual Percentage Rate), 941 (Additional Assumptions for Factoring Transactions), 942 (Estimated Annual Percentage Rate – Sales-based financing) and 943 (Finance Charge) available at https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/06/PRO-01-18-Commercial-Financing-Disclosure-Regulation-Final-Text.pdf.

14 Va. Stat. § 6.2-2228.

15 10 VAC § 5-240-10.

"extension of credit" or the provider would be considered a "creditor" under Regulation Z.

Accordingly, Virginia's use of the term "finance charge" is consistent with TILA and is not subject to preemption.

Utah's Commercial Financing Registration and Disclosure Act[16] does not require either a "finance charge" or "APR" disclosure. Instead of appropriating defined terms from TILA, Utah elected to use commonly understood terms such as "total dollar cost" in its disclosure law.[17] Accordingly, Utah's commercial financing disclosure requirements are not inconsistent with TILA and not subject to preemption.

In order to preserve the purpose and benefit of TILA's required disclosure of "finance charge" and "APR", the use of those terms must be consistent across all products. We recognize that states may require disclosure of the finance charge and APR on commercial transactions. However, states must do so in a way that is consistent with these terms under TILA and Regulation Z or else they frustrate the purpose of Regulation Z to provide a uniform measure of credit cost for comparison purposes. If states want to adopt disclosures and calculations that differ from those required by TILA and Regulation Z, we believe they must use terminology that differs from that required by TILA and Regulation Z.

We respectfully urge the CFPB to conclude that any state law that requires disclosure of "finance charge" and/or "APR" in connection with different calculations than the calculations required by TILA and Regulation Z are preempted.

Sincerely,

Deveron Gibbons

Deveron Gibbons, Executive Director
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[16] Utah Code Ann. §§ 7-27-101 *et seq.*
[17] Utah Code Ann. § 7-27-202(2).