

Comments of

Americans for Financial Reform Education Fund
Better Markets
California Reinvestment Coalition
Center for Responsible Lending
Community Service Society of New York
Consumer Reports
Empire Justice Center
Main Street Alliance
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low income clients)
New Economy Project
Public Citizen
Small Business Majority
U.S. PIRG
Woodstock Institute
To
CONSUMER FINANCIAL PROTECTION BUREAU
On
Intent To Make Preemption Determination
Under the Truth in Lending Act (Regulation Z) (commercial lending)

12 CFR Part 1026
Docket No. CFPB-2022-0070
87 Fed. Reg. 76551 (Dec. 15, 2022)

Submitted Jan. 20, 2022

Americans for Financial Reform Education Fund, Better Markets, California Reinvestment Coalition, Center for Responsible Lending, Community Service Society of New York, Consumer Reports, Empire Justice Center, Main Street Alliance, National Association of Consumer Advocates, National Consumer Law Center (on behalf of its low income clients), New Economy Project, Public Citizen, Small Business Majority, U.S. PIRG, and Woodstock Institute submit these comments on the Consumer Financial Protection Bureau’s (CFPB) intent to make a preemption determination concerning whether the Truth in Lending Act (TILA) preempts a New York State commercial financing law with respect to certain disclosure provisions. We agree that TILA does not preempt the New York law or similar laws. Even though the specific question before the CFPB affects only business lending, a ruling that the New York law was preempted would set a very dangerous precedent for consumers. Such a broad scope of preemption would invite challenges to thousands of state consumer protection laws, making them much more difficult for consumers and state enforcement authorities to enforce.

Importantly, the scope of TILA preemption is quite narrow. TILA generally does not preempt state laws. TILA contains a provision governing “Effect on other laws” that is supportive of complimentary state laws:

Except as provided in subsection (e), this part and parts B and C, *do not annul, alter, or affect* the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this subchapter, and then *only to the extent of the inconsistency*.¹

Accordingly, TILA only preempts state laws that are inconsistent with its provisions.² Even then, the statute emphasizes that inconsistent state laws are preempted “only to the extent of the inconsistency.”³ Thus, TILA mandates the minimum amount of preemption required to harmonize federal and state law.

Moreover, when Congress passed the Consumer Financial Protection Act (CFPA), which created the CFPB and gives the Bureau its powers, Congress took additional pains to ensure that the CFPB’s preemption powers were narrow. It made clear that a state law that affords greater protection to consumers is not inconsistent with the CFPA.⁴

As the Bureau notes, the New York law, as well as similar laws in California, Utah and Virginia, only addresses commercial lending, which is exempt from TILA. Thus, even if the New York law required annual percentage rate (APR) or other disclosures that were wildly different from and inconsistent with the APR disclosures required by TILA, there would be no inconsistency with the requirements for the consumer lending that is the subject of TILA, and thus no preemption.

Extending APR disclosures to commercial lending gives information about the cost of loans that is important to commercial borrowers just as it is for consumers. The use of an estimated APR in some circumstances also helps creditors to provide the best available information to borrowers when the precise details of payment amounts and frequencies are not known, just as TILA allows use of estimates in some circumstances.⁵ Thus, the New York law promotes the same general purpose as TILA: providing accurate information about the cost of credit, albeit business credit, in a way that can be compared across different credit products. But even if states took a radically different tack for commercial lending, there would be no inconsistency because it does not impact consumer lending.

The CFPB also asked whether the Bureau should clarify the description of the applicable preemption standard that the Federal Reserve Board (FRB) included in preemption determinations from 1983 to 1990.⁶ The FRB stated, without citations, that a state law is contradictory and preempted if, *inter alia*, it “interferes with the purposes of the federal statute.”⁷ However, the TILA statute only preempts state

¹ 15 U.S.C. § 1610(a)(1) (emphasis added).

² 15 U.S.C. § 1610(a)(1).

³ *Id.*

⁴ 12 U.S.C. § 5551(a)(2).

⁵ Reg. Z, 12 C.F.R. § 126.5(c) (“If any information necessary for accurate disclosure is unknown to the creditor, it shall make the disclosure based on the best information reasonably available and shall state clearly that the disclosure is an estimate.”).

⁶ CFPB, Notification of intent to make preemption determination, 87 Fed. Reg. at 76551-76552 (Dec. 15, 2022).

⁷ 48 Fed. Reg. 4454, 4455 (Feb. 1, 1983); see also 50 Fed. Reg. 8737 (Mar. 5, 1985) (making the same statement, again without citations); 55 Fed. Reg. 13282 (Apr. 10, 1990) (same).

laws that are “inconsistent with *the provisions* of this subchapter,”⁸ not with the statute’s broader purposes. Given the statute’s emphasis on a narrow preemptive scope, and the vague way that purposes can be articulated, it would not be appropriate to search for inconsistent purposes if there is no conflict with TILA’s specific provisions. The CFPB should also note that under TILA, as under the CFPB, a state law is not inconsistent if it affords greater protection to consumers than TILA does.

Thank you for the opportunity to submit these comments. If you have any questions, please contact Lauren Saunders at lsaunders@nclc.org.

Yours very truly,

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