



State of California
Office of the Attorney General

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January 20, 2023

Submitted via Federal eRulemaking Portal

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552

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

Dear Director Chopra:

I am writing in response to the Consumer Financial Protection Bureau's (CFPB) proposed determination regarding whether the Truth in Lending Act (TILA) preempts certain disclosure requirements in California's Commercial Financing Disclosures Law, California Financial Code sections 22800 to 22805 (CFDL), which provides critical protections to small business owners and other commercial borrowers. In short, I agree with the CFPB's preliminary determination that TILA does not preempt the CFDL because the CFDL only applies to commercial financing and not to consumer credit transactions within the scope of TILA. Even if this were not the case, the CFDL still would not be preempted because the required disclosures do not conflict with those required by TILA.

The CFPB should also revisit the Federal Reserve Board's (Board) vague and overbroad articulation of the TILA preemption standard. The CFPB should articulate a narrower standard that emphasizes that preemption should be limited to situations where it is impossible to comply with both TILA and the state law or where the state law stands as an obstacle to the full purposes TILA, which is to provide consumers with full and meaningful disclosure of credit terms in consumer credit transactions. The CFPB should also reemphasize certain principles from prior Board decisions, including that state laws are preempted only to the extent of actual conflict and that state laws requiring additional disclosures—or disclosures in transactions not addressed by TILA—are not preempted.

The California Commercial Financing Disclosures Law

The California Commercial Financing Disclosures Law (CFDL) was enacted in 2018 to help small businesses navigate a complicated commercial financing market by mandating uniform disclosures of certain credit terms in a manner similar to TILA's requirements, but for commercial transactions that are unregulated by TILA. The CFDL applies only to "commercial financing" arrangements, where the funds are "intended by the recipient for use primarily for other than personal, family, or household purposes."¹ When an offer of commercial financing is made, the CFDL requires the financing provider to disclose various terms, including the "total dollar cost of the financing" and the "total cost of the financing expressed as an annualized rate."² California's Department of Financial Protection and Innovation (formerly the Department of Business Oversight) (DFPI) issued regulations interpreting the CFDL as requiring the disclosure of these terms respectively as the "Finance Charge" or "Estimated Finance Charge" and "Annual Percentage Rate (APR)" or "Estimated Annual Percentage Rate (APR)," depending on the specific commercial financing arrangement, as those terms are used in TILA.³

The purpose of the CFDL is to provide uniform information in the market for commercial financing so that borrowers can make informed decisions about their commercial credit options and compare different types of commercial financing arrangements across different types of lenders.⁴ Specifically, the law was enacted to help small businesses and entrepreneurs who might not have access to traditional commercial loans from banks and would have to resort alternative or "non-traditional" financing from a variety of different types of lenders.⁵ The types of financing run the gamut from closed-end loans, open-end credit plans, merchant cash advances, asset-based lending, lease financing, and factoring transactions.⁶ Because there were no disclosure requirements under federal or state law for commercial financing, it was difficult for commercial borrowers to understand the terms of these arrangements and to compare them to each other and to traditional loans.⁷ By mandating a standardized set of disclosures, the CFDL allows small businesses and other borrowers to compare these various financing options and make the best choice for their business.⁸

¹ Cal. Fin. Code § 22800(d)(1).

² Cal. Fin. Code §§ 22802, 22803. The provision requiring disclosure of the "total cost of the financing expressed as an annualized rate" has a sunset clause that expires on January 1, 2024. After that date, that specific disclosure will no longer be required. (*See* 2018 Cal. Stat. 6661, 6661 [S.B. 1235].)

³ Cal. Code Regs. tit. 10, §§ 910-917.

⁴ Cal. Assemb. Floor Analysis of S.B. 1235, 2017-2018 Reg. Sess., at 4 (June 27, 2018).

⁵ Cal. Assemb. Floor Analysis of S.B. 1235, 2017-2018 Reg. Sess., at 4 (Aug. 28, 2018); Cal. S. Judiciary Comm., Rep. on S.B. 1235, 2017-2018 Reg. Sess., at 6, 7 (May 7, 2018).

⁶ *See* Cal. S. Rules Comm., Office of S. Floor Analyses, Analysis of S.B. 1235, 2017-2018 Reg. Sess., at 5 (May 11, 2018); Cal. Fin. Code § 22800(d)(1).

⁷ Cal. Assemb. Floor Analysis of S.B. 1235, 2017-2018 Reg. Sess., at 4 (Aug. 28, 2018); Cal. S. Judiciary Comm., Rep. on S.B. 1235, 2017-2018 Reg. Sess., at 6 (May 7, 2018).

⁸ Cal. Assemb. Floor Analysis of S.B. 1235, 2017-2018 Reg. Sess., at 4 (June 27, 2018); Cal. S. Rules Comm., Office of S. Floor Analyses, Analysis of S.B. 1235, 2017-2018 Reg. Sess., at 6-7 (May 11, 2018).

TILA Does Not Preempt the California Commercial Financing Disclosures Law

I agree with the CFPB’s preliminary determination that TILA does not preempt the CFDL because the two laws do not apply to the same types of transactions. TILA’s preemption provision is narrow. It only preempts state laws “to the extent that those laws are inconsistent with the provisions of [TILA], and then only to the extent of the inconsistency.”⁹ A state law is inconsistent only if it requires disclosures or actions that “contradict” TILA’s mandates.¹⁰ As the Board has previously recognized, “state law requirements that call for the disclosure of items of information not covered by the Federal law ... do not contradict [TILA].”¹¹

As the CFPB has noted, TILA only applies to “consumer credit” transactions—credit that is intended to be used “primarily for personal, family, or household purposes.”¹² TILA expressly exempts from its coverage any “extensions of credit primarily for business, commercial, or agricultural purposes.”¹³ The California CFDL, in contrast, applies only to credit or financing intended for use “primarily for *other than* personal, family, or household purposes.”¹⁴ Because TILA and the CFDL apply to different types of credit transactions and do not overlap, there is no inconsistency or contradiction that would allow preemption under TILA.¹⁵

Additionally, as an independent reason that TILA does not preempt the CFDL, there is no inconsistency or contradiction because there is no material difference between the disclosures required by TILA and those required by the CFDL, even if TILA applied to commercial financing. As noted previously by the Board, a disclosure required by a state law is preempted only if it actually conflicts with the TILA disclosure, not if it may conflict in a hypothetical scenario, and then the state disclosure is preempted only to the extent and in the scenarios where there is actual conflict.¹⁶ Moreover, if the state disclosures are “substantially the same in

⁹ 15 U.S.C. § 1610(a)(1).

¹⁰ 10 C.F.R. § 1026.28(a)(1).

¹¹ Comment for 12 C.F.R. § 1026.28(a), No. 3.

¹² See 15 U.S.C. §§ 1601(a), 1602(i); 12 C.F.R. §§ 1026.2(a)(12), 1026.1(c) (TILA applies only if the “credit is offered or extended to consumers” and the “credit is primarily for personal, family, or household purposes”).

¹³ 15 U.S.C. § 1603; see also 12 C.F.R. § 1026.3(a) (TILA does not cover “[a]n extension of credit primarily for a business, commercial or agricultural purpose” or “[a]n extension of credit to other than a natural person”).

¹⁴ Cal. Fin. Code § 22800(d)(1) (emphasis added).

¹⁵ For the same reason, I agree with the CFPB’s preliminary determination that TILA does not preempt similar New York, Utah, and Virginia laws governing non-consumer transactions. See generally N.Y. Fin. Serv. Law §§ 803-807 (applying to “commercial financing” transactions); Utah Code Ann. § 7-27-202 (applying to “commercial financing transaction[s]”); Va. Code Ann. § 6.2-2231 (applying to “sales-based financing”).

¹⁶ 48 Fed. Reg. 4,454, 4,455 (Feb. 1, 1983); 50 Fed. Reg. 25,068, 25,068 (June 17, 1985); 53 Fed. Reg. 3,332, 3,332 (Feb. 5, 1988).

meaning” as those in TILA, the CFPB has the discretion, on its own motion, to allow the state disclosures to be used in lieu of TILA disclosures.¹⁷

The CFDL itself does not use the terms “finance charge” or “annual percentage rate,” though those terms are required to be disclosed by the implementing regulations.¹⁸ The California DFPI has defined those terms with the intent that they be identical with how those terms are defined in Regulation Z under TILA. For example, “finance charge” under the CFDL is defined as “all charges that would be included in the finance charge under 12 C.F.R. Part 1026.4 (1-1-21 Edition), which is incorporated herein by this reference, if the transaction were a consumer credit transaction and the financier were a creditor under federal law.”¹⁹ The CFDL definition for “annual percentage rate” similarly uses and incorporates Regulation Z: “the annual percentage rate shall be determined in accordance with either the United States Rule method or the actuarial method, as both are set forth in Appendix J, 12 C.F.R. Part 1026 (1-1-21 Edition).”²⁰ To the extent that there are any differences between “finance charge,” “APR,” and “estimated APR” in the CFDL and TILA, they are due to the structure of certain types of commercial financing arrangements—such as sales-based financing or factoring transactions—that are not shared with the consumer credit transactions regulated by TILA. These differences are not material or inconsistent because TILA and Regulation Z does not address those specific financing structures. There is no “actual conflict” that would require preemption.²¹

Moreover, if TILA were to preempt the CFDL’s commercial financing disclosures, there would be no required disclosures at all for commercial credit in California, undermining TILA’s purpose in promoting uniform information and eliminating protections for small businesses and entrepreneurs in California. The commercial financing market would revert to the situation before the CFDL, where creditors could use whatever terms they preferred in advertising their financial offers or provide no meaningful disclosures at all, as there would be no federal or state law mandating common disclosures.²² This would make it difficult, if not impossible, for small business owners and other prospective borrowers to compare different types of commercial financing arrangements or make informed choices about commercial credit.

¹⁷ 15 U.S.C. § 1610(a)(2); 12 C.F.R. § 1026.28(b).

¹⁸ See, e.g., Cal. Code Regs. tit. 10, § 910 (requiring disclosure of “Finance Charge” and “Annual Percentage Rate (APR)” for closed-end transactions); Cal. Code Regs. tit. 10, § 911 (requiring disclosure of “Estimated Finance Charge” and “Annual Percentage Rate (APR)” for open-end transactions).

¹⁹ Cal. Code Regs. tit. 10, § 943(a)(1).

²⁰ Cal. Code Regs. tit. 10, § 940(a); compare with 12 C.F.R. § 1026.22(a)(1) (determination of annual percentage rate for closed-end transactions under TILA). As noted above, the requirement that providers disclose the annualized cost of commercial financing expires on January 1, 2024.

²¹ See 48 Fed. Reg. 4,454, 4,455 (Feb. 1, 1983).

²² See Cal. S. Comm. on Banking and Fin. Inst., Report on S.B. 1235, 2017-2018 Reg. Sess., at 7-8 (April 16, 2018).

The CFPB Should Articulate a Preemption Standard That Protects Consumers and Borrowers in Accordance with TILA's Purpose

In its notice regarding the TILA preemption determination, the CFPB solicited comment on whether it should articulate a new or different standard for preemption under TILA than the Board had articulated in prior decisions in the 1980s. I respectfully submit that the CFPB should articulate a narrower preemption standard, as the Board's prior articulation of the standard is both overly broad and vague, supporting preemption whenever a state law "impedes the operation of the federal law or interferes with the purposes of the federal statute."²³

The Board's prior articulation of the preemption standard is not supported by the language of TILA, which only preempts state laws to the extent that they are "inconsistent with the provisions of [TILA], and then only to the extent of the inconsistency."²⁴ Federal statutes are presumed not to preempt state law absent a "clear and manifest" intent by Congress, and express preemption provisions, such as that found in TILA, should be interpreted narrowly, particularly in fields traditionally occupied by the states, such as the regulation of non-depository lenders.²⁵ The language of the TILA preemption provision shows an intent by Congress to preserve state law whenever possible and preempt state law only in cases of actual conflict with TILA.

I therefore urge the CFPB to hew closer to the language of the statute and the principles of conflict preemption, as articulated by the Supreme Court, and allow preemption under TILA only if it is "impossible" to comply with both TILA and the state law or if the state law "stands as an obstacle to the accomplishment and execution of the full purposes" of TILA.²⁶ This standard is closer to some more recent discussions of preemption by the Board, which noted that state laws are not preempted if "a creditor can comply with both the state and federal provisions."²⁷ TILA should preempt a state law only in cases of actual, irreconcilable conflict with TILA, or where the state law is an obstacle to TILA's primary purpose of assuring "meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices."²⁸

The CFPB should also reemphasize two principles previously articulated by the Board. First, the CFPB should emphasize that state laws requiring *more* disclosure than required by TILA are not preempted.²⁹ State laws that require additional disclosures, either more information than TILA or information in transactions where TILA does not require disclosures, are not

²³ 48 Fed. Reg. 4,454, 4,454 (Feb. 1, 1983).

²⁴ 15 U.S.C. § 1610(a)(1).

²⁵ See *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (citations omitted); Cal. Fin. Code § 22801(a) (the CFDL does not apply to depository institutions).

²⁶ See *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015).

²⁷ 55 Fed. Reg. 42,026, 42,028 (Oct. 17, 1990).

²⁸ 15 U.S.C. § 1601(a); see also 12 C.F.R. § 1026.1(b) ("The purpose of this part is to promote the informed use of consumer credit by requiring disclosures about its terms and cost....").

²⁹ 50 Fed. Reg. 25,068, 25,068 (June 17, 1985); Comment for 12 C.F.R. § 1026.28(a), No. 3.

inconsistent with TILA. It is not impossible to comply with TILA and a state law that requires additional disclosures. And additional disclosures generally further, rather than obstruct, TILA's primary purpose of providing information to consumers to allow them to make informed choices about credit.

Second, the CFPB should reemphasize the principle previously articulated by the Board that a state law should be preempted only where there is actual conflict, not potential or hypothetical conflict.³⁰ This is consistent with the language of TILA's preemption provision, which is to allow preemption "only to the extent of the inconsistency with state law."³¹ State disclosure requirements should not be preempted entirely just because there may be some hypothetical situations, however unlikely, where they are in conflict with TILA. As the Board has found previously, state law should be preempted only in cases of actual conflict and should be preserved for all remaining situations where there is no conflict.³² These limits on federal preemption will allow both TILA and related state disclosure laws to continue to provide protections to consumers, small business owners, and other borrowers, while maintaining a competitive and well-informed marketplace for consumer and commercial credit.

Sincerely,



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Attorney General

³⁰ *See, e.g.*, 48 Fed. Reg. 4,454, 4,455 (Feb. 1, 1983).

³¹ 15 U.S.C. § 1610(a)(1).

³² *See, e.g.*, 48 Fed. Reg. 4,454, 4,455 (Feb. 1, 1983); 50 Fed. Reg. 25,068, 25,068 (June 17, 1985); 53 Fed. Reg. 3,332, 3,332 (Feb. 5, 1988).