**CCIA**
Consumer Credit Industry Association

Consumer Credit Industry Association
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May 28, 2020

Consumer Financial Protection Bureau
Taskforce on Federal Consumer Financial Law
Submitted via email: 2020-RFI-Taskforce@cfpb.gov

Re: Request for Information to Assist the Taskforce on Federal Consumer Financial Law
Docket No. CFPB-2020-0013

Dear Taskforce Members,

These comments are submitted on behalf of the Consumer Credit Industry Association ("CCIA"). CCIA is a national trade association comprised of manufacturers, administrators and distributors of optional consumer asset and credit protection products such as credit insurance, debt protection, guaranteed asset protection, service contracts and motor clubs ("Voluntary Protection Products" or "VPPs"). Typically made available to U.S. households through lenders and automobile dealers as part of the extension of a loan, these products help U.S. borrowing households withstand financial shocks by helping households cover payment obligations when something unforeseen occurs. For over 60 years, CCIA has worked to foster the financial security of American households by assuring a healthy market for these consumer financial protection products, a market where consumers enjoy freedom of choice.

The Consumer Financial Protection Bureau ("CFPB") established the Taskforce on Consumer Financial Law ("Taskforce") to examine the existing legal and regulatory environment facing consumers and providers of consumer financial products and services and report its recommendations for ways to improve and strengthen Federal consumer financial laws. The Taskforce is seeking input through a Request for Information ("RFI") to help it evaluate recommendations that might promote the welfare of consumers in connection with the market for consumer financial products and services.[1]

CCIA commented previously on the CFPB's Notice of Proposed Rulemaking and concurrent RFI on Payday, Vehicle Title, and Certain High-Cost Installment Loans, and the FDIC Small-Dollar Lending RFI. In those responses, CCIA identified two main themes which are reinforced in this material:

- Retain the cost of credit disclosure as prescribed by Regulation Z

[1] CFPB, "Request for Information to Assist the Taskforce on Federal Consumer Financial Law," Docket No. CFPB-2020-0013, April 1, 2020

- Affirm that states have exclusive authority to regulate the business of insurance

CCIA will draw out these themes in two sections of this RFI: Section A. Expanding Access and Section D. Federal and State Coordination.

**Retain the cost of credit disclosure as prescribed by Regulation Z**

I. Section A. Expanding Access

In **Section A. Expanding Access**, the RFI explores potential obstacles to financial inclusion. Specifically, under subsection 4, the RFI invites comments to, in part:

> *There is consumer demand for short-term, small-dollar credit. What impediments exist for expanding access to short-term, small-dollar loans and ensuring that this market is fair, transparent, and competitive? What has been the impact of State and Federal efforts to regulate such credit? Is the annual percentage rate a meaningful measure for a very short-term loan? If not, what other measures might be more useful to help consumers in understanding and assessing the cost of short-term credit?*

CCIA supports the current Regulation Z[2] calculation and disclosure of the annual percentage rate as a "meaningful measure" to compare the cost of credit for loans of similar sizes and duration, including very short-term loans. CCIA supports the current treatment of VPPs in the Regulation Z calculation, in that they are not treated as a cost of credit.

**Congress stipulates the federal APR, Not Regulators.**

Almost fifty years ago, Congress enacted the Truth in Lending Act ("TILA")[3] and Regulation Z was implemented to promote the informed use of consumer credit by requiring creditors to uniformly disclose the terms and cost of credit through the "finance charge" and as an annual percentage rate (the "APR"). These terms have remained largely unchanged since their inception.

The definition of APR distills the "finance charges" the consumer will pay on the credit obligation to a quantifiable and uniformly calculated percentage rate. "Finance charges" include the interest that will accrue over the term of a credit obligation plus other "costs of credit" required by the lender:

- Interest, time price differential, and any amount payable under a point, discount, or other system of additional credit cost charges;
- Service or carrying charge;
- Loan fee, finder's fee, or similar charge;
- Fee for an investigation or credit report;
- Premium or other charge for any guarantee or insurance protecting the creditor against the obligor's default or other credit loss;
- Life, accident and health insurance premiums;

[2] 12 CFR Part 1026
[3] 15 U.S.C. § 1601 et seq. [add public law citation to 1968]

- Property damage and liability insurance premiums.

TILA and Reg. Z, however, also provide that certain charges properly disclosed are excluded from the finance charge and corresponding APR calculation:

- Application fees
- Charges for actual unanticipated late payment, for exceeding a credit limit, or for delinquency, default, or a similar occurrence.
- Charges imposed by a financial institution for paying items that overdraw an account, unless the payment of such items and the imposition of the charge were previously agreed upon in writing.
- Fees charged for participation in a credit plan, whether assessed on an annual or other periodic basis.
- Insurance, debt cancellation and debt suspension coverage, and
- Certain security interest charges.[4] *(emphasis added)*

TILA specifically provides that life, accident and health insurance premiums may be excluded from the finance charge if the products are voluntary and certain disclosures are provided (Reg. Z extends the exclusion to other debt protection and debt suspension products).[5] TILA also provides for the exclusion of credit property premiums if the products are voluntary and certain disclosures are provided.[6]

TILA and Reg Z likewise make clear that products and services that a borrower can purchase in a comparable cash transaction are not a cost of credit.[7] The Official Commentary identifies various types of products that meet this definition and are thus not a cost of credit.[8]

TILA was conceived to encourage the informed use of credit and to provide consumers with an "apples to apples" means of comparing the cost of different credit products:

> "It is the purpose of this subchapter to assure a 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."[9]

Accordingly, the APR is the vehicle Congress created for such disclosure. It creates no obligation for the consumer; it is solely a disclosure, i.e., it is not itself a term of a credit obligation unless specifically provided by the credit agreement.[10]

The express exemption of VPPs makes perfect and logical sense because they simply are not a cost of obtaining the credit. The cost of credit generally includes charges that relate to the four

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[4] 15 U.S.C. §1605; 12 C.F.R. §1026.4(c)-(e)
[5] 15 U.S.C. § 1605(b); 12 C.F.R. §1026.4(d).
[6] Id.
[7] Reg Z, 12 CFR 1026.4
[8] The discussion in this section that references VPPs includes all other products that can be purchased in a comparable cash transaction.
[9] 15 U.S.C. §1601(a).
[10] For instance, when a credit obligation contains no finance charges other than interest accrual, many credit agreements contractually provide that interest will accrue at the rate disclosed as the APR.

characteristics of the credit: origination, servicing, funding or forbearance, and risk bearing.[11,12,13] Congress correctly exempted VPPs because each of the four characteristics of credit are lacking.

**Federal agency tampering with the APR.**

In its 2016 Notice of Proposed Rulemaking on Payday, Vehicle Title, and Certain High-Cost Installment Loans ("Proposed Rule")[14], the CFPB sought to create a different calculation of the cost of credit by overriding TILA's exclusion of voluntary and properly disclosed insurance and debt protection products and various other types of credit-related ancillary products. This is contrary to the express terms of TILA itself, as indicated above, and there is no authority in the Dodd Frank Act ("DFA") for the CFPB to contravene the express provisions of TILA.

The Proposed Rule stated that: "…charges the consumer pays in connection with credit insurance and credit-related ancillary products and services must be included in the total cost of credit calculation to the extent the charges are incurred…"[15] This the so-named "**all-in APR**." For clarification, "credit-related ancillary product" is any product or service sold directly or indirectly by the creditor to a borrower as an optional product to the consumer credit transaction subject to the Proposed Rule that, in whole or in part, waives, pays, reduces, or satisfies an amount due to a creditor from the borrower. Products that can be sold separate from the credit transaction, are not credit related ancillary products and therefore, not subject to the Proposed Rule.

The CFPB contended that the DFA provided it the authority to issue the Proposed Rule to identify as unlawful unfair and abusive acts or practices.[16] In doing so, however, the CFPB's rulemaking authority is limited by the standards outlined in the APA and *Chevron*. If Congress has directly spoken to the precise question at issue, a court will "give effect to the unambiguously expressed intent of Congress."[17] Here, Congress in no uncertain terms has instructed the CFPB how to define the cost of credit in TILA and the CFPB is required to give effect to this unambiguously expressed intent of Congress. Similar to the *Chevron* analysis, a court has the authority under the APA to set aside the definition of the cost of credit because the Proposed Rule was contrary to the CFPB's authority to redefine this term.

The CFPB pointed to the Military Lending Act ("MLA") to support its Proposed Rule to expand the definition of the cost of credit to include VPPs.[18] The CFPB implied that it had the authority to expand the definition of the cost of credit because the MLA's calculation of the Military Annual Percentage Rate ("MAPR") does so and includes VPPs.[19] However, the CFPB's reliance was

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[11] See generally Ralph J. Rohner and Thomas A. Durkin, TILA "Finance" and "Other" Charges in Open End Credit: The Cost-of-Credit Principle Applied to Charges for Optional Products or Services," 17 Loyola Consumer Law Review 137, 156-66 (2005). [bluebook]
[12] For extended discussion, see Thomas A. Durkin, "Conceptual Difficulties with the 'All In' Finance Charge and APR Proposed by the Consumer Financial Protection Bureau," Consumer Finance Law Quarterly Report 67, nos.1–2 (2013).
[13] See Thomas A. Durkin. "Baggage of Consumer Installment Cash Lending: A New Sorting of the Suitcases" at 47-48, Mercatus Working Paper, Mercatus Center at George Mason University, Arlington,VA, December 2016.
[14] See Docket No. CFPB-2016-0025, RIN 3170–AA40
[15] Proposed Rule at 47
[16] Dodd Frank 1031
[17] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).
[18] Proposed Rule at 41.
[19] Proposed Rule at 165.

misplaced because it was Congress that required the inclusion of VPPs in the MAPR, not the Department of Defense ("DoD").[20]

Through TILA, Congress unambiguously declared that the cost of credit does not include VPPs and federal agencies such as the CFPB lack the authority to rewrite this definition.

**All-in APR harms consumers.**

Conventional installment loans would have fallen under the Proposed Rule if they have an all-in APR of more than 36%, and the lender took a vehicle security or a leveraged payment mechanism. On loans at or near a 36% All-in APR, lenders may choose to forego selling VPPs in order to avoid the requirements of the rule. Because of this, the Proposed Rule would have *increased* the debt risk to many consumers.

The Proposed Rule asserted that "as the cost of a loan increases, the risk to the consumer increases".[21] This may be true if the cost of the loan increases with no additional value provided to the consumer. But the VPPs (if financed) increase the amount of the loan *because the consumer receives significant additional value* in return for purchasing a VPP. Thus, while the loan amount may be higher, the protections offered to the consumer via the VPPs actually *decreases* the overall risk to the consumer. Lenders that stop offering VPPs ultimately will provide less value to consumers and consumers will be forced to take on more risk. Thus, if a consumer dies, becomes disabled, or loses his or her job, his or her loan will not be covered, and his or her estate will be forced to cover the debt. If, on the other hand, the customer is able to purchase VPPs, his or her loan could be paid off or payments made for the household while going through an unexpected rough time.

The CFPB appeared to recognize this point in the corresponding request for information where it noted on multiple occasions that consumers face additional risks on account of disability, illness, loss of employment, family disruptions such as divorce or separation, and many other unexpected expenses.[22] Lenders of conventional installment loans and auto dealers help solve this problem by offering VPPs that cover these various risks. As drafted, the Proposed Rule would have led to consumers having less access to VPPs. The Proposed Rule would have created the very void that the request for information was seeking to fill.

The elimination of VPPs would have been particularly acute in the auto loan market and other purchase money transactions. Under the Proposed Rule, the CFPB attempted to exempt purchase-money loans for goods and vehicles. However, if the amount financed is more than the amount required to acquire the goods or vehicle, then the loan does fall under the Proposed Rule. This would have almost certainly eliminated the sale of important VPPs in these market segments.

At a state level, very few states have implemented all-in APR measures for non-payday loans. In 2016 the voters in South Dakota passed a referendum in support of all-in APR. This led to an Initiated Measure (IM 21) which amended 54-4-44 to require an "all-in 36% APR" for licensed

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[20] 10 U.S.C. § 987(i)(4).
[21] Proposed Rule at 175.
[22] Request for Information on Payday Loans, Vehicle Title Loans, Installment Loans, and Open-End Lines of Credit, Docket No. CFPB-2016-0026, at 20 & 30 (June 1, 2016).

lenders with the exemption of national banks and other federally insured financial institutions. This affected payday, title, traditional installment and auto and personal loans. In 2017 54-4-36 (13) was amended to exempt retail installment sales contracts.

This feel good strategy unfortunately left borrowers without a choice to protect their finances, as CCIA members report consumer purchases of credit insurance have dropped more than 90% since the implementation of this law.

It is important to note that lenders figure in the cost of VPPs when determining the consumer's ability to repay conventional installment loans.[23] For such loans, lenders typically work within the monthly payment that the consumer has indicated he/she can afford, and the parameters of the loan and VPPs are determined accordingly.

**Including [credit] insurance costs in the "total cost of credit" is regulating the business of insurance, in violation of federal laws.**

The **McCarran Ferguson Act**, *15 U.S.C. §§ 1011 et seq.* ("MFA"), exempts the "business of insurance" from federal antitrust and other regulation, providing:

> *(a) State regulation*
>
> *The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.*
>
> *(b) Federal regulation*
>
> *No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . ."*[24]

Congress enacted the MFA to allow the states to regulate the business of insurance "free from inadvertent preemption by federal statues of general applicability."[25] The MFA reverses the usual rules for preemption, creating a "clear-statement rule . . . that state laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise."[26]

The MFA does not define the term "business of insurance," but case law supports the contention that the term includes more than simply underwriting risk. For example, the 9th Circuit has declared,

> *"The phrase 'business of insurance' refers to 'the relationship between the insurance company and the policyholder" and includes "the fixing of rates[,] ... [t]he selling and advertising of policies, and the licensing of companies and their agents."*[27]

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[23] Ironically, the Proposed Rule asks lenders to take volatility of income into account in their ability to repay analyses for longer term loans. VPPs address income volatility for consumers but the Proposed Rule will increase volatility since lenders will stop offering VPPs to avoid increased operational costs and compliance risks associated with offering "covered loans" under the Proposed Rule.

[24] 15 U.S.C. § 1012

[25] *Merchant's Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1488-89 (9th Cir. 1995)

[26] *United States Dept. of the Treasury v. Fabe*, 508 U.S. 491, 507 (1993)

[27] *Gerling Global Reinsurance Corp. of America v. Low*, 240 F.3d 739, 744 (Ninth Circuit, 2001), citing, *SEC v. National Sec., Inc.*, 393 U.S. 453, 460, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969)

The Supreme Court has characterized statutes aimed, directly or indirectly, at protecting or regulating the relationship between insurer and insured, are laws regulating "the business of insurance" within the meaning of 15 U.S.C. §1012(b). *See*, Fabe at 501 (quoting SEC v. Nat'l Secs., Inc., 393 U.S. 453, 460, 89 S.Ct. 564, 568, 21 L.Ed.2d 668 (1969). Fabe further states that:

> *"The broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance."*[28]

To determine whether the MFA pre-empts the Proposed Rule to the extent it proposes to include credit and other insurance premiums in the total cost of credit trigger and thus limit consumers' ability to finance or purchase such products, it is necessary to consider:

1. Whether the proposed rule or action "specifically relates to the business of insurance";
2. Whether state laws regulating the offering of credit life, accident, health, GAP and loss-of-income insurance, among other products, were enacted "for the purpose of regulating the business of insurance";
3. If a proposed rule or action does not specifically relate to the business of insurance, whether it invalidates, impairs or supersedes state laws regulating the offering of credit life, accident, health and loss-of-income insurance.

The Proposed Rule was not intended to specifically relate to the business of insurance. By its terms, the Proposed Rule sought to regulate and proscribe so-called abusive practices in payday, vehicle title, and certain high-cost installment lending. However, if adopted, the Proposed Rule would have directly impinged on the ability of licensed insurance agents to sell and finance certain state-regulated insurance products.

The remaining question, therefore, was whether the Proposed Rule, using a 36% total cost of credit trigger, which would include the cost of credit life, accident, health, GAP and loss-of-income insurance, would "be construed to invalidate, impair, or supersede" state laws that regulate these products.

The U. S. Supreme Court considered when a federal law invalidates, impairs or supersedes a state insurance law for purposes of the MFA, indicating that the term "invalidate" ordinarily means" to render ineffective, generally without providing a replacement rule or law."[29] The Court concluded that federal law impairs state insurance law when it directly conflicts with state regulation, and when application of the federal law frustrates any declared state policy or interferes with a State's administrative regime.[30] The Court further stated that the term "supersede" ordinarily means "to displace (and thus render ineffective) while providing a substitute rule."[31]

Including the cost of credit insurance and other products in a "total cost of credit" trigger such as All-in APR materially inhibits the ability of state-licensed insurance agents to sell or finance the cost of state-approved and regulated credit insurance in any covered longer-term loan. The Proposed Rule trigger included:

> *"Total cost of credit means the total amount of charges associated with a loan expressed as a per annum rate and is determined as follows: . . . Any charge that the consumer*

[28] *Id.* at 505 (quoting Black's Law Dict. 1236, 1286 (6th ed.1990))
[29] *Humana Inc. v. Forsyth*, 5252 U.S. 299 (1999)
[30] Id. at 307
[31] Id.

> *incurs <u>in connection with</u> credit insurance before, at the same time as, or within 72 hours after the consumer receives the entire amount of funds that the consumer is entitled to receive under the loan, including any charges for application, sign-up, or participation in a credit insurance plan, and any charge for a debt cancellation or debt suspension agreement. . ."*[32]

The Proposed Rule included credit and other insurance charges in the 36% trigger without regard to whether the premiums are financed or paid for in cash, sold by a third-party insurance agent or obtained through any other means within 72 hours after loan funds are disbursed. The charge for the insurance needed only to be "associated" with a loan for it to be captured in the trigger calculation. Taken together, it appears credit insurance and other VPPs were included in the 36% trigger solely for the purpose of banning their sale in high cost loans in the CFBP's definition of high-cost loans -- this, the MFA does not permit absent explicit authorization by Congress.

Pursuant to the MFA, credit and other insurance sales are regulated by State law, and the CFPB's efforts to impose limitations on when and how a credit or other insurance product may be sold impair a state-licensed insurance agent's ability to engage in the business of insurance on terms authorized under State law. Not only will this limitation block consumers with the greatest need for these products from obtaining them, it will have a negative economic impact on: (1) lenders who seek to offer it as an option for consumers to enhance consumers' ability to repay a loan after a covered occurrence, (2) credit insurance providers and agents in every State by limiting their ability to generate revenue from the business of insurance and (3) the States and municipalities by decreasing their revenue collected from premium taxes.

The DFA does not and cannot support the impositions the CFPB's Proposed Rule placed on credit and other insurance sales in the loans it proposes to regulate, i.e., nothing in the DFA overrides pre-existing law under the MFA. Limits on the timing of insurance sales and using the cost of insurance products as part of a calculation to determine whether loans should be subject to onerous restrictions strays well into the authority reserved to the States under the MFA. Simply put, the DFA does not give the CFPB the authority to regulate insurance in contravention of the MFA, and Congress has not otherwise explicitly authorized the CFPB to do so.

In addition, the **DFA** specifically recognizes the limitations imposed by the MFA by providing, *"[t]he term "financial product or service" does not include (i) the business of insurance . . ."*[33] It defines the "business of insurance" as:

> *"[T]he writing of insurance or the reinsuring of risks by an insurer**<u>, including all acts necessary to such writing or reinsuring and the activities relating to the writing of insurance or the reinsuring of risks</u>** conducted by persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons."*[34] (emphasis added)

One can reasonably conclude that in legislating this rather broad definition, Congress accepted the jurisprudence of States defining the "business of insurance" at the time the DFA was enacted, e.g., <u>*Gerling*</u> and <u>*Fabe*</u>, *supra*.

Thus, the CFPB's proposed all-in APR violates federal laws, namely the MFA and DFA.

[32] Proposed Rule at 1131.
[33] 12 U.S.C. §5481(15)(C)
[34] 12 U.S.C. §5481(3)

**Including credit insurance costs in the "total cost of credit" is a constructive ban on the sale of such products, in violation of the DFA and MFA.**

By including the credit insurance premiums in a 36% total cost of credit trigger for covered longer-term loans, the CFPB would have effectively banned the sale of such products in connection with any loan within the scope of the Proposed Rule. This constructive ban violated both the DFA and MFA, in that it is an attempt by a federal agency to regulate the business of insurance by impeding a licensed insurance agent's ability to sell a state-approved and regulated insurance product.

The MFA leaves the regulation of insurance to the States, absent an act of Congress to the contrary. By exempting the "business of insurance" from CFPB jurisdiction, Congress reinforced the primacy of MFA in leaving the regulation of insurance to the States; it did not confer power on the CFPB to regulate any aspect of insurance regulation covered by the MFA. The Proposed Rule's inclusion of credit and other insurance premiums in the "total cost of credit" trigger for covered longer-term loans was a de facto ban on such products in light of the high interest rates at which small dollar lenders are authorized to make loans in many states. The CFPB cannot, either directly or indirectly, impede the sale of State-approved, legally distributed insurance products without violating both the DFA and MFA.

*For all of these reasons, whether the Taskforce recommends a new disclosure for finance charges to replace the APR or continue with the APR for the small-dollar lending market, the Taskforce should continue the definition of a finance charge as prescribed by Regulation Z, which allows for excluding VPPs as finance charges.*

**States have exclusive authority to regulate the business of insurance**

II. Section D. Federal and State Coordination

In section **D. Federal and State Coordination**, the RFI inquires into the overlap among federal and state regulatory enforcement with respect to financial institutions. CCIA expects that financial institutions and their trade associations will offer their perspective into the costs and benefits of this overlap. CCIA will focus its comments on how such overlap affects the sale of VPPs during the loan transaction.

Since VPPs are typically offered during the consumer lending process, it has become important to clarify the primacy of state insurance departments to regulate these products.

Unfortunately, the CFPB has demonstrated a disregard for its statutory boundaries delineated by Congress in DFA, sometimes incorrectly empowering its own actions via its UDAAP authority. CCIA commented previously[35] that the CFPB has very narrow authority to regulate insurance, namely:

- Consumer insurance products are "the business of insurance" which the DFA specifically and clearly prohibits the Bureau from regulating – including via its UDAAP authority -- unless specific authority is provided under the enumerated consumer laws, and

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[35] CCIA Responses to RFIs regarding CFPB Enforcement Processes, Docket No. CFPB-2018-0003, Supervision Processes Docket, No. CFPB-2018-0004, and Rulemaking Processes, Docket No. CFPB-2018-0009

- Consumer insurance products are not "financial products or services" under the DFA and the Bureau is prohibited from defining such insurance products as "financial products or services."[36]

**Rulemaking**. The portion of DFA that provides for CFPB rulemaking on UDAAP also requires the CFPB to consult with other Federal agencies:

> CONSULTATION.—in prescribing rules under this section, the Bureau shall consult with the Federal banking agencies, or other Federal agencies, as appropriate, concerning the consistency of the proposed rule with prudential, market, or systemic objectives administered by such agencies.[37]

If the CFPB is authorized to regulate the business of insurance through such means as an "All-in APR," Congress would have explicitly required the CFPB to consult with the state insurance departments. The clear absence of state insurance regulators from this UDAAP section makes a clear statement by Congress that CFPB should not touch anything that includes or involves insurance. Rather, insurance regulation is sole domain of the States, which gives full meaning to the business of insurance exemption and the separate prohibition of exercising enforcement powers toward a person regulated by a State insurance regulator.

Yet in the original Proposed Rule (and associated RFI) the CFPB exceeded its statutory authority by attempting to regulate insurance in myriad ways, as outlined above. CCIA offered almost 50 pages of comments plus attachments to the CFPB[38] in this regard. Specific to the CFPB RFI on Rulemaking, CCIA proposed a process to better align the CFPB with federal statutes:

> Step 1: The CFPB begins with the presumption that it has no authority to regulate insurance products except as specifically provided in the federal consumer financial laws it administers (e.g., the federal Truth in Lending Act and the Bureau's Regulation Z provide for disclosures required to prevent insurance premiums from being treated as finance charges)
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> Step 2: The CFPB applies a filter(s) in the end-to-end rulemaking process (i.e., gathering data, engaging stakeholders, proposing ideas, etc.), such as:
>
> A. Does this step/deliverable in the rulemaking process align with the CFPB's statutory authority, and/or
> B. Does this step/deliverable in the rulemaking process give proper deference to State insurance regulators

[36] See 12 U.S.C. §5481(3) and 12 U.S.C. §5481(15)(C)
[37] See 12 U.S.C. §5531(E)
[38] See CCIA responses to the CFPB Proposed Rule on Payday, Vehicle Title and Certain High-Cost Installment Loans (Docket No. CFPB-2016-0025), October 7, 2016, and the associated RFI (Docket No. CFPB-2016-0026), November 7, 2016

The application of filters would be an iterative process as the CFPB progresses down the path of rulemaking. Such a series of checkpoints would help assure that CFPB rulemaking maintains alignment with its authority under federal statutes.

**Supervision**. Even though the DFA exempts the business of insurance from CFPB oversight, the CFPB Supervision and Examination Manual includes insurance products within its purview and our industry has seen no evidence of the CFPB deferring to (or, at a minimum, coordinating with) state insurance departments. In fact, as of this writing, in contravention to DFA, one of our member companies reports that the CFPB is illegally inquiring into insurance claims at one of their customers, a regulated entity.

**Enforcement**. The CFPB entered into a consent order in 2017 against a financial institution regarding servicing of its credit insurance portfolio. While the CFPB cited numerous federal laws to assert its jurisdiction, none of them authorize the CFPB to regulate the business of insurance, including a product like credit insurance that is offered during the lending transaction.

Indeed, it seems the CFPB asserted jurisdiction over credit insurance merely because the insurance was mentioned in the promissory note and subsequently in the periodic statements sent to consumers. This specious rationale suggests the CFPB would therefore regulate all personal lines insurance products such as auto and homeowner insurance since they are also noted in the lending documents as required products when the relevant collateral (vehicle, home) is pledged as collateral securing a loan. Clearly that was and is not the intent of Congress in crafting the DFA, nor does a plain reading of statute draw this conclusion.

**Marketing and Sale of Insurance Products Is NOT Subject to UDAAP Authority under DFA.**

When a financial institution makes an offer to extend credit and proceeds to consummate that transaction with a consumer, the financial institution is acting pursuant to either the State or Federal authority that it was organized under. However, when a financial institution markets and sells insurance, its actions are pursuant to its authority as an appointed and licensed insurance agent. *Accordingly, all sales, marketing, policy fulfillment and other activities in support of credit and other insurance products are "the business of insurance" and are not subject to the CFPB's UDAAP authority.*

The demarcation between financial products and services and insurance products and services is preserved in the DFA. For the sake of clarity, the demarcation point arises once the Reg Z disclosures are provided regarding the voluntary nature of the insurance products and everything from that point on is the business of insurance. In its definitions, the DFA provides "(15)(C) EXCLUSIONS.—The term 'financial product or service' does not include—(i) the business of insurance." In pertinent part, the business of insurance includes "all acts necessary to such writing…and the activities relating to the writing of insurance…conducted by persons who act as, or are,…**agents**…of insurers or who are other persons authorized to act on behalf of such persons."[39] Given the explicit inclusion of the term "agent" within this definition, there is no question that Congress intended to protect the activities of lenders acting as insurance agents from the scope of the DFA.

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[39] 12 U.S.C. 5481(C)

Indeed, insurance agents have to be appointed and licensed by the insurance company. These insurance agents are subject to the authority of the Departments of Insurance ("DOI") in the States for all their actions taken as an agent, including sales and marketing practices, premium collection and remittance to the insurer, policy fulfillment and any other actions taken on behalf of the insurer or insured. The DFA recognizes this division between State DOI regulatory authority and CFPB regulatory authority over financial institutions:

> (f) EXCLUSION FOR PERSONS REGULATED BY A STATE INSURANCE REGULATOR.—
>
> (1) IN GENERAL.—No provision of this title shall be construed as altering, amending, or affecting the authority of any State insurance regulator…Except as provided in paragraph (2), **the Bureau shall have no authority to exercise any power to enforce this title with respect to a person regulated by a State insurance regulator.** (emphasis added)
>
> (2) DESCRIPTION OF ACTIVITIES.—Paragraph (1) does not apply to any person described in such paragraph to the extent that such person is engaged in the offering or provision of any consumer financial product or service or is otherwise subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H.[40]

Applying this DFA language to the activities of a financial institution, its activities throughout the lending transaction and up to and including the Reg Z disclosures, are activities within the meaning of "to the extent that such person is engaged in offering or provision of any consumer financial product or service." However, <u>those consumer financial service activities end and the business of insurance begins as soon as the lender begins marketing, selling, fulfilling or performing any other activities as the agent of the insurance company.</u>

Given that insurance products are not "financial products and services" and therefore not within the jurisdiction of the CFPB, CCIA suggests the following simple approach:

1. The CFPB defers regulation of insurance products (except for its narrowly limited authority over enumerated consumer laws), even if offered during a loan transaction, to the state insurance departments[41]
2. The CFPB excludes insurance products from its Supervision Program[42]
3. To the extent the CFPB *inadvertently* discovers a potential issue with an insurance product as part of its *authorized* exam processes, the CFPB immediately alerts the covered person and defers the matter to the State insurance department

*The DFA preserves state-based insurance regulation. Except for its very narrow authority under enumerated consumer laws, the CFPB should accordingly defer to state insurance regulators to regulate the business of insurance.*

[40] 12 U.S.C. 5517(f)
[41] Again, except for CFPB authority to regulate consumer credit disclosures per Regulation Z
[42] See previous

## Conclusion

The "cost of credit disclosure" was defined by Congress over 50 years ago and CCIA appreciates the need to reevaluate its utility, in particular for the small-dollar lending market. VPPs deliver distinct value separate from the loan, loan decisioning is not predicated on their inclusion in the loan, and TILA provides for their exclusion from the cost of credit. VPPs are not finance charges. Whether the Taskforce recommends replacing or continuing with the APR, the Taskforce should recommend the exclusion of VPPs as finance charges.

For consumer insurance products, the CFPB has inappropriately intruded into the jurisdiction of state departments of insurance. CCIA urges the Taskforce to recommend that the CFPB course-correct its programs to avoid regulation of the business of insurance, in particular for Rulemaking, Supervision and Enforcement. In this way, the primacy and effectiveness of the 150+ year state-based insurance regulatory system is maintained, inuring to the benefit of the consuming public and industry alike.

Thank you for your consideration.

Sincerely,

Tom Keepers

Tom Keepers