CSBS SINCE 1902
CONFERENCE OF STATE BANK SUPERVISORS

December 1st, 2020

Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552
Docket No. CFPB-2020-0026

Re: *Request for Information on the Equal Credit Opportunity Act and Regulation B*

Dear Sir or Madam,

The Conference of State Bank Supervisors ("CSBS")[1] appreciates the opportunity to comment on the notice and request for information issued by the Consumer Financial Protection Bureau (the "Bureau") titled "Request for Information on the Equal Credit Opportunity Act and Regulation B" (the "notice"). As co-enforcers of federal consumer financial laws, including the Equal Credit Opportunity Act ("ECOA"), state financial regulators have a vested interest in preventing credit discrimination and ensuring that fair, equitable, and nondiscriminatory access to credit is available to consumers within their states. CSBS has written this letter to provide the feedback solicited on actions that the Bureau may take with respect to scope of federal preemption of state law under ECOA and Regulation B as such actions may impact the responsibilities and priorities of state financial regulators.

State regulators request that the CFPB:

- publicly disclose and seek comment on preemption determinations,
- adhere to certain precautionary principles outlined in Regulation B when conducting its preemption analysis
- coordinate directly with state regulators in reviewing determination requests.

State regulators and the Bureau exercise concurrent regulatory, supervisory and enforcement authority over certain depository and most non-depository institutions. State regulators appreciate the robust coordination and information sharing that occurs with the Bureau through the State Coordinating Committee (SCC)—an interagency forum established in 2013 to coordinate multi-state, nonbank financial services examinations with the Bureau. Since that time, coordinated efforts between the states and the CFPB demonstrated that this valuable partnership fostered a more efficient and effective regulatory system, provided multiple benefits to industry and consumers alike and reinforced the value of the concurrent-enforcement framework created by Title X of the Dodd-Frank Act.

In any regulatory system where concurrent authority is exercised by federal and state agencies applying distinct federal and state laws, questions will inevitably arise as to how to resolve a conflict between the federal and state law and whether the federal law preempts the state law. Congress has recognized the potential for such conflict in crafting federal consumer financial laws and has generally provided that

[1] CSBS is the nationwide organization of state banking and financial regulators from all 50 states, American Samoa, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. CSBS supports the state banking agencies by serving as a forum for policy and supervisory process development, by facilitating regulatory coordination on a state-to-state and state-to-federal basis, and by facilitating state implementation of policy through training, educational programs, and exam resource development.

federal consumer financial laws serve as a floor for consumer financial protection so that states are able to enact greater consumer protections over and above those afforded by federal laws without state law being preempted.[2]

CSBS has long supported federal consumer financial law serving as a floor for consumer financial protections. The value of a federal floor with respect to preemption of state consumer financial laws is it enables states to retain flexibility to develop and shape regulatory approaches to protecting consumers. With this flexibility, state regulators can assess and attempt to balance the interests of financial services providers operating within their state with the level of consumer protection desired by the consumers residing in their state.

As a federal consumer financial law, ECOA and Regulation B generally serves as a floor for consumer protection. Specifically, ECOA and Regulation B only preempt state laws that are determined to be inconsistent with ECOA and Regulation B and then only to the extent of the inconsistency. In addition, a state law is not inconsistent if it is more protective of an applicant.[3] The regulation allows for creditors, states, or other interested parties to request that the Bureau determine whether a state law is inconsistent with the requirements of ECOA and Regulation B.

The RFI asks whether the Bureau should provide further guidance to assist creditors who are evaluating the impact of state laws on their activities. Since receiving responsibility for implementing ECOA through the Dodd Frank Act, the Bureau has not issued any preemption determinations under ECOA. However, the Bureau has issued preemption determinations under other federal consumer financial laws, for instance, with respect to Tennessee’s unclaimed property law and the Electronic Fund Transfer Act.[4] When making that determination, the Bureau published a notice of intent to make a preemption determination in the Federal Register and sought public comment prior to issuing a final determination. **State regulators ask that the Bureau continue to use a notice and public comment process when evaluating preemption determination requests—whether related to ECOA or any other federal consumer financial law.**

Additionally, as with other regulations implementing certain federal consumer financial laws, Regulation B lists several rules for determining whether certain types of state laws are inconsistent with and therefore preempted by ECOA and Regulation B. Given their long-standing commitment to a federal floor with respect to preemption of state consumer protection laws, **state regulators request that, in considering whether state law is inconsistent with ECOA, the Bureau adhere to the language in Regulation B (12 CFR, 1002.11(a)) which states that for the state law to be inconsistent with ECOA there must be an irreconcilable conflict with the state law that makes compliance with both laws impossible.** Adherence to this principle is particularly important when it is not clear whether a state law is inconsistent with ECOA based on the rules set out in Regulation B, for instance, when state law prohibits an act or practice which ECOA does not prohibit but impliedly permits.

Lastly, **in keeping with our shared mission of protecting consumers across the country, state regulators request that the Bureau consult with the applicable state regulator when requests for preemption determinations are received and prior to making a determination.** State regulators are best positioned to convey their interpretation of applicable state law as well as the impact of their state

[2] See 12 CFR Part 1002.11 (a)

[3] 12 CFR, 1002.11(a)

[4] CFPB Notice of Preemption Determination: Electronic Funds Transfers; Determination of Effect on State Laws (Maine and Tennessee). Federal Register, Vol. 78, No. 80. April 25th, 2013. Available here.

law on financial institutions and consumers. State regulators can be a useful resource for Bureau staff as I they assess preemption determination requests.

We appreciate the opportunity to comment on this request for information and support the Bureau's efforts to develop solutions to regulatory compliance challenges under ECOA and Regulation B. As the Bureau has acknowledged in the RFI, there is a high bar for preemption of state laws related to discrimination in lending. We request that the CFPB publicly disclose and seek comment on preemption determinations, adhere to certain precautionary principles in its preemption analysis, and coordinate directly with state regulators in reviewing determination requests. We believe that closely coordinating to address any potential uncertainties regarding the interplay of state and federal law will ensure that financial institutions clearly understand what is expected of them as they develop new credit products and serve consumers.

Sincerely,

John Ryan
President & CEO