

September 11, 2024

Mr. Mark Radley
Director, Consumer Affairs, Financial Sector Policy
Department of Finance
14th Floor, 90 Elgin Street
Ottawa, Ontario K1A 0G5

Copy to:

Ms. Anne Loosen, Economist, Department of Finance
Ms. Tanjana Islam, Analyst, Department of Finance
Mr. Connor Ward, Economist, Department of Finance

Dear Mr. Radley,

Re: Department of Finance Draft Amendments to the Criminal Code

The Canadian Association of Financial Institutions in Insurance (CAFII) would first like to thank you for the opportunity to provide feedback to proposed amendments to the Criminal Code, specifically with respect to provisions to include all insurance costs in the calculation of interest.

Amendments do not Align with Policy Intent

CAFII understands that the amendments to the Criminal Code intend to better regulate predatory lending and payday loans; however, the department's proposed approach has the unintentional potential to make insurance less accessible to Canadians. The proposed amendments take a broad approach to including all insurance premiums in the calculation of interest. As a result, the amendments risk capturing products like optional credit protection insurance (CPI) and optional balance protection insurance (BPI)¹ offered by Federally Regulated Financial Institutions (FRFIs). These insurance protections, as discussed in more detail later in this letter, offer critically important insurance protections to Canadians, a majority of which are underinsured or uninsured.

¹ Credit Protection Insurance and Balance Protection Insurance are included in the class of insurance named Creditor's Group Insurance within provincial insurance acts.

The proposed amendments could capture optional CPI and optional BPI because they are "related to" the lending product in the sense that if the insured borrower incurs a life or health related event and makes a claim under the policy, a claims payout will be applied against their lending obligation.

Although our comments focus on CPI and BPI, CAFII notes that the current definition of "insurance charge" in the amendments could be interpreted to include many forms of insurance beyond CPI and BPI, such as mortgage default insurance, property insurance, and auto insurance distributed by either the lender or other third parties to the borrower where a lender is named as loss payee.

CAFII does not believe that CPI or BPI offered by FRFIs, or the other aforementioned insurance products were the products or lenders that the Department of Finance intended to target in this effort. These FRFIs are already well-regulated, tied-selling is prohibited, and they have robust consumer protections in place. As drafted, the proposed amendments could have a number of unintended consequences on consumers, lenders, and insurers.

For group policies such as CPI, insurance policy pricing is also not based on interest calculations or credit risk but instead is based on actuarial modeling tied to such factors as longevity and morbidity risks. These proposed amendments could make accessing insurance more difficult for Canadians who may need it the most. For example, less healthy, older clients who require credit will face greater challenges getting insurance if these amendments are passed since their insurance premiums may be higher given their insurance health risks being covered, which could bring the cumulative "interest" into the criminal range.

The core issue here is that the definition appears to include any optional insurance product offered in conjunction with (but separate from) a credit instrument like a mortgage, loan, Home Equity Line of Credit (HELOC), or credit card from any insurance provider. There seems to be no consideration that optional insurance fills an important consumer need to provide life, health, or job loss protection that is unrelated to the extension of credit. In summary, the scope of this definition seems much broader than necessary to adequately address predatory lending and payday loans.

Further, if CPI/BPI insurance is no longer available to certain consumers, they will have lost access to the benefit of insurance payments that could have kept their credit obligation in good standing during difficult times, which could, in turn, negatively impact their credit rating and ultimately push them towards the predatory lending market. This would actually be contrary to the policy objective of protecting consumers from predatory lending.

Therefore, any adjustment to the definition of “credit charge” or “interest” needs to be narrowed to ensure that it does not capture more than intended to avoid any negative consequences for consumers.

It is also unclear whether the amendments are intended to capture personal products only or include business credit cards, loans, operating lines of credit, or mortgages as well.

CPI and BPI Premiums Should Not be Included in the Determination of Interest Rate Levels

CPI and BPI is a category of optional group insurance products that provides coverage if a consumer passes away, becomes critically ill or disabled, or in some instances, loses their job. Enrolling in creditor insurance does not impact the credit decision or the extension of credit or borrowing rate from the lender, and it is completely optional. The choice to enrol for CPI or BPI is based on whether the consumer believes it is appropriate based on their financial circumstances. It is often chosen by consumers for peace of mind and its ease of execution since no medical assessment is required. The premium charged can fluctuate on a monthly basis based on outstanding balance of the debt and the consumer's age along with other actuarially determined health risk factors. This product can be cancelled at any time by the consumer with a refund of pro-rated premiums.

At a policy level and as a matter of principle, CAFII is of the view that insurance premiums charged by FRFIs in association with loan instruments offered by them do not constitute interest either conceptually or practically, and that it is inaccurate to include those premiums in the calculation of interest rate. These products are not tied to the extension of credit, nor do they protect against credit risk, but rather they provide optional insurance risk protection against a borrower's life, health, and employment-related risks. These insurance coverages stand separate from the credit instrument and are transacted under separate contracts for customers who choose to purchase this protection.

The calculation of the cost of borrowing in the *Financial Consumer Protection Framework Regulations* aligns with this approach by excluding charges for optional insurance (and costs for other types of insurance) from the cost of borrowing calculation. On the other hand, including interest charges in the calculation of criminal rates of interest does not align with the cost of borrowing calculations currently disclosed to customers under federal law.

More specifically, the Financial Consumer Agency of Canada (FCAC) has specified which charges are and are not associated with the cost of borrowing:

Section 48 (2) Charges not included in the cost of borrowing:

The cost of borrowing for a loan does not include any of the following fees or charges:

- a) *Charges for insurance on the loan if*
 - i) *The insurance is optional*
 - ii) *The borrower is its beneficiary, and the amount insured reflects the value of an asset that is security for the loan*

Similarly, s.70 of the Quebec CPA also specifically excludes optional insurance when defining “credit charges”:

Section 70. ...Despite any provision to the contrary, the following do not constitute credit charge components: (a) the premium for insurance of persons if the merchant does not subject the entering into of the credit contract to subscribing to or participating in the insurance...

Optional CPI and BPI fill an important need of providing Canadian consumers with life, health, disability and job loss protection based on consumer personal circumstances. The amendments could limit access to insurance for consumers who might not be able to afford or qualify for more traditional individual insurance products. Some customers might not receive an offer of CPI or BPI from the lender based on where the interest rate calculation falls for their credit product following calculation with insurance included, to avoid the risk of breaching the criminal rate of interest provisions. This could result in unintended negative consequences for consumers, leading to increased complaints associated with unfair treatment and limited access

to insurance that they desire, and could result in underserved or unserved consumers not having access to these protections and coverages.

For example, one use case which may result in undue consumer harm would be a client in their mid-50s who is seeking an unsecured debt consolidation loan. These loans are often used to combine multiple repayment obligations, which helps improve cash flow and credit history for consumers. Clients seeking debt consolidation help may not have access to traditional insurance coverage. As a result of these proposed changes, these same clients may no longer be in a position to benefit from the protection offered by CPI. This could leave consumers unreasonably exposed should job loss, critical illness, or death occur.

The calculation of interest would be very difficult to administer on a month-to-month basis as a calculation would need to consider the fluctuation of insurance charges based on outstanding debt amount and changes in the customer's age to ensure that the interest charge does not exceed the criminal interest rate threshold. Furthermore, it is possible that a customer could obtain optional CPI and BPI through a channel other than a lender, and thus, the lender may not know about the existence or cost of the coverage, leading to the risk of inadvertent non-compliance. The possibility also exists that a one-month fluctuation would result in the threshold being met, and then unmet in a subsequent month. Is the FRFI required to reinstate the insurance in those months where the threshold is not met?

The lending institution's lack of visibility regarding insurance premiums requires emphasizing. Lending institutions do not determine the premiums, rates, or conditions for insurance offered in conjunction with a loan instrument. More specifically, lending institutions are not "charging" the premium; they are treating it as a bill payment. The money does not go to the lending institution; it goes to the insurance company.

In some situations, it is not possible to monitor charges from third-party insurers so they can be added to other charges. Lending institutions do not directly control what insurers will charge for optional insurance and sometimes have no visibility in terms of the premiums being charged to customers obtaining insurance against their loan. For example, if a mortgage is sold through a broker to be held by a bank who then arranges for the credit to be optionally insured by an insurance company not affiliated with that bank, it would not be able to monitor the 35% threshold as the lending institution would have no visibility on the existence of optional Insurance being in place and even less information about the specific rate.

For these reasons, the proposed amendments would only increase the costs of providing loans, which may, in turn, restrict access to credit.

We also note that insurers can amend premiums on notice to customers from time to time. In addition, if the legislation is broad enough to capture other insurance where the lender is named as a loss payee (like property insurance or auto insurance), then compliance with the legislation becomes even more challenging. Lenders would not know the premiums consumers pay for such insurance.

Lenders should not face the risk of criminal sanctions because of changes to the cost of insurance determined by the actions of the consumer or the insurer.

If interest does exceed the threshold as a result of premiums for CPI or BPI, it is unclear what the consequences would be. If the Department of Finance believes insurance should be cancelled, we note that CPI and BPI are normally set up as a group insurance policy with individual insurance certificates issued to customers. The lender or insurer normally cannot unilaterally cancel the coverage unless the group policy is terminated, which would impact all customers who have enrolled in the insurance product.

It is an important principle of insurance that, once obtained, the provider cannot cancel the coverage unless premiums have not been paid or some other termination event specified in the terms of the insurance has occurred. Forcing the cancellation of CPI or BPI would be harmful to consumers as they would lose the insurance coverage they believed they needed. If the expectation is that the insurance should stay in place, then would the Department of Finance expect lenders to reduce interest rates on the underlying credit product, all while the insurer providing CPI or BPI retains the full premium?

It should also be noted that financial reporting and taxation requirements have different definitions of interest than what is being proposed. With an expanded definition of interest, multiple calculations of interest would be required to demonstrate compliance with these amendments, which could potentially impact financial statements or tax return filings.

Life, Health, and Job Loss Products Provide Critical Protection for Underinsured and Uninsured Canadians

By incorporating the costs of CPI and BPI into the criminal insurance rates, the Department of Finance risks both deterring and preventing Canadians' optional purchase of insurance even though these products serve an important role in the marketplace. The credit instruments that CPI and BPI are associated with are not at all similar to payday loans and any implication that they should be viewed similarly is misleading and inaccurate.

CAFII believes that restricting access to these optional insurance products for these loan instruments will have an undesirable and harmful impact on Canadian consumers. We believe it could result in consumers who would otherwise benefit from these coverages not having the opportunity to obtain these protections, which could very well compound an existing underinsurance problem.

A March 2024 survey of Canadians commissioned by CAFII and conducted by independent research organization LIMRA found that Canadians are underinsured and uninsured against their lives and health.² The study found a concerning trend among Canadian homeowners: a significant 80% lack sufficient insurance coverage, being either uninsured or underinsured with CPI or traditional life insurance³. This shortfall in coverage leaves many families inadequately protected against unforeseen life events. Low-income homeowners are significantly more likely to be uninsured compared to those in higher income brackets. Of those who are insured, 75% of low-income homeowners are underinsured, meaning they lack sufficient coverage to protect their financial well-being.

Despite the alarming rate of underinsurance, only 55% of all homeowners with credit own some form of CPI. This discrepancy is even more pronounced among low-income homeowners, who have notably less CPI coverage compared to their high-income counterparts. This suggests a gap in understanding of and access to CPI, highlighting the need for increased awareness and education about this form of insurance and its benefits.

² The full study can be found on the CAFII website here: <https://www.cafii.com/cafii-limra-insurance-among-canadian-homeowners/>

³ Underinsured is defined as Canadians with insurance coverage of less than 7-10 times their income, which is the definition used by the Financial Consumer Agency of Canada (FCAC).

While 80% of Canadian homeowners are underinsured or uninsured, among low-income homeowners with credit, 24% have no life or health insurance and another 10% rely solely on CPI for their insurance needs. This is significantly more than other income groups and highlights the importance of this form of protection for financially vulnerable households.

Finally, a significant portion of Canadian homeowners, 38%, fall into the category of “at risk.” These are homeowners with credit, who are uninsured or underinsured, and have survivors such as partners or dependents. This group is particularly vulnerable to financial hardship in the event of unexpected life events. Taken together, these findings demonstrate the importance of not impeding access to these insurance protections, and not unfairly tarnishing the reputation of this industry or the access to these products by underinsured and uninsured Canadians.

These products offered by banks and credit unions provide critical protections in the marketplace and treat consumers fairly. The insurance is optional; full disclosure of premiums, exclusions, and limitations are made; and the industry has a strong record around claims payout. For example, separate research commissioned by CAFII and conducted by polling company Pollara Insights found that 95% of mortgage life insurance claims were paid out.

Life and Health Insurance Is Regulated by Provinces and Territories, and Bank Distributors are Regulated by the Bank Act and the FCAC

Credit protection insurance and balance protection insurance are a class of life, health, and job loss insurance products that are regulated across the country under the jurisdiction of provincial and territorial regulators and policy-makers. While we recognize the authority of the federal government with respect to the Criminal Code, the outcome of these amendments will have an impact on the perception and possible availability of products that are squarely within the jurisdiction of provinces and territories.

CAFII understands that the Department of Finance may be intending to address practices by parties not regulated by the Bank Act, federal regulation, and provincial and territorial regulators. If that is the case, we believe that the approach to take is to explicitly exempt those regulated parties and associated optional CPI and BPI products that do meet the Department’s regulatory expectations and to make clear in your definitions of key terms what the legislation is intending to achieve and what parties are subject to it. The definitions should make clear that your focus is on issues related to the extension of credit by non-regulated lenders.

For greater clarity, Charter I and Charter II banks are subject to all the applicable federal regulatory requirements, including the Bank Act and oversight by the FCAC, and all CAFII members offering CPI and BPI are subject to provincial regulations and oversight. Tied-selling is prohibited, and CAFII members are committed to fair disclosure, rigorous oversight of products offered, and the fair treatment of customers.

Consultation Period is Short

While in principle, we are very concerned if optional credit protection insurance and balance protection insurance are intended to be captured by the proposed amendments, in practice, we are also concerned about such a short consultation period for a change of this magnitude. CAFII has fifteen members that represent large, complex financial institutions and there are many other industry stakeholders who would be impacted by this change. We believe that better regulatory outcomes and protections occur when there is dialogue and detailed consultation with industry; the compressed timeline for this consultation has compromised the ability to achieve this important outcome. As a result, we feel that the amendments should not be moved forward until there has been an opportunity for a fulsome engagement between the Department of Finance and industry.

Final Comments and Recommendations

If the policy intent of the proposed amendments is to address concerns around optional insurance offered in conjunction with predatory lending and payday loans, we are concerned that many other legitimate loan instruments offered by FRFIs have associated optional insurance like CPI and BPI that are being inadvertently captured by these amendments, which could lead to negative consequences for consumers. CAFII respectfully suggests that criminal provisions are not the appropriate mechanism to address concerns that the government might have relating to the cost of insurance or sales practices by non-regulated lenders. This unfairly casts a shadow of criminality over what are legitimate forms of insurance that benefit consumers. It can also have the consequence of limiting access to insurance to consumers who may benefit from it, particularly those who may be underinsured. We strongly believe that insurance premiums should continue to be excluded from the calculation of interest, as was the approach prior to the introduction of these draft amendments and as is the current approach for calculating the cost of borrowing.

To the extent the Department of Finance is not open to removing insurance charges from the calculation of interest, the amendments should explicitly define the specific products offered that are targeted by this change as opposed to a broad, all-encompassing definition of insurance. The definition should make it clear that optional CPI and BPI insurance offered by regulated entities is not intended to be captured by the amendments and should consider an exemption for parties offering this optional insurance that are not the intended subjects of these amendments. As it stands, the broad definition could produce unintended consequences on consumers and is a disservice to many Canadian consumers who need these products and whose access to them should not be limited. At a practical level, it would be extremely difficult for industry to operationalize these proposed changes.

We encourage the Department of Finance, if it has not already done so, to engage in consultations with the provinces' and territories' insurance regulators on the amendments as insurance regulation falls under the jurisdiction of provinces and territories.

Thank you again for the opportunity to provide input and feedback on the Department of Finance's consultation on amendments to the Criminal Code. Should you require further information from CAFII or wish to meet with representatives from our Association at any time, please contact Keith Martin, CAFII Executive Director, at keith.martin@cafii.com or 647.460.7725.

Sincerely,



Karyn Kasperski
Board Secretary and EOC Chair

About CAFII

CAFII is a not-for-profit industry Association dedicated to the development of an open and flexible insurance marketplace. Our Association was established in 1997 to create a voice for financial institutions involved in selling insurance through a variety of distribution channels. Our members provide insurance through client contact centres, agents and brokers, travel agents, direct mail, branches of financial institutions, and the internet.

CAFII believes consumers are best served when they have meaningful choice in the purchase of insurance products and services. Our members offer credit protection, travel, life, health, and property and casualty insurance across Canada. In particular, credit protection insurance and travel insurance are the product lines of primary focus for CAFII as our members' common ground.

CAFII's diverse membership enables our Association to take a broad view of the regulatory regime governing the insurance marketplace. We work with government and regulators (primarily provincial/territorial) to develop a legislative and regulatory framework for the insurance sector which helps ensure that Canadian consumers have access to insurance products that suit their needs. Our aim is to ensure that appropriate standards are in place for the distribution and marketing of all insurance products and services.

CAFII's 15 members include the insurance arms of Canada's major financial institutions--BMO Insurance, CIBC Insurance, Desjardins Insurance, National Bank Insurance, RBC Insurance, Scotia Insurance, and TD Insurance, along with major industry players Assurant Canada, The Canada Life Assurance Company, Canadian Tire Bank, Canadian Western Bank, Chubb Life Insurance Company of Canada, CUMIS Services Incorporated, Manulife (The Manufacturers Life Insurance Company), and Securian Canada.