No. 22-1943

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

William T. Lyons,

Plaintiff-Appellant,

v.

PNC Bank, N.A.,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Maryland

Hon. Stephanie A. Gallagher

Case No. 1:20-cv-02234

Brief of Amicus Curiae Consumer Financial Protection Bureau in Support of Neither Party

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INTEREST OF AMICUS CURIAE

The Consumer Financial Protection Bureau (Bureau) is an independent executive agency of the United States. It is responsible for promulgating rules under, interpreting, and enforcing the two statutes at the center of this appeal—the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601–1667f, and the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. §§ 2601–2617. *See* 12 U.S.C. § 5481(12), (14) (including RESPA and TILA in list of Federal consumer financial laws the Bureau administers); *id.* § 5512(a)–(b) (granting rulemaking authority under these laws); *id.* §§ 5563–5564 (authorizing Bureau to enforce these laws). The Bureau has promulgated rules to implement both statutes. The rules implementing the provisions of TILA relevant here are known as Regulation Z, *see* 12 C.F.R. pt. 1026, while those implementing RESPA are known as Regulation X, *see* 12 C.F.R. pt. 1024.

This case concerns the scope of TILA's and RESPA's coverage. The district court ignored regulatory text, history, and context when it improperly narrowed a provision in Regulation Z that prohibits lenders from unilaterally withdrawing money from a consumer's deposit account to cover debts incurred through a credit card plan. By contrast, the district court correctly recognized the Bureau's statutory authority to exclude

transactions from RESPA's coverage when it evaluated the scope of Regulation X. As the agency responsible for interpreting, implementing, and enforcing both statutes, the Bureau has a substantial interest in this Court's resolution of the questions presented in this appeal.

STATEMENT

A. Statutory and Regulatory Background

1. The Truth in Lending Act and Regulation Z

Enacted in 1968, TILA is a landmark consumer protection statute designed to promote "the informed use of credit." Pub. L. No. 90-321, § 102, 82 Stat. 146, 146 (May 29, 1968) (codified as amended at 15 U.S.C. § 1601 *et seq.*). Shortly after TILA's enactment, Congress passed the Fair Credit Billing Act, which added further protections for "consumer[s] against inaccurate and unfair credit billing and credit card practices." Pub. L. No. 93-495, § 302, 88 Stat. 1500, 1511 (Oct. 28, 1974) (codified as amended at 15 U.S.C. §§ 1666–1666j).

Among the protections in the Fair Credit Billing Act is a limit on when banks can engage in self-help against consumers who both hold a credit card and keep money in a deposit account with the same bank. *Id.* § 306 (codified at 15 U.S.C. § 1666h). The Act provides that, in general, "[a] card issuer may not take any action to offset a cardholder's indebtedness arising in connection with a consumer credit transaction under the relevant credit

card plan against funds of the cardholder held on deposit with the card issuer." 15 U.S.C. § 1666h(a). This provision authorizes banks to take money from a deposit account to "offset" a consumer's credit card debt only if (1) the consumer agrees in advance to "periodically" pay off their debt in this way, and (2) at the consumer's request, the bank does not use this method to recover any debt the consumer "dispute[s]." *Id.* As Congress recognized at the time it enacted the Fair Credit Billing Act, the status quo had allowed banks to go after consumers' deposit account funds without instituting a debt-collection lawsuit in court, and "in spite of any valid legal defense the cardholder may have against the bank." S. Rep. No. 93-278, at 9 (June 28, 1973). The offset provision thus prevented "[b]anks which issue cards and also have the cardholder's funds on deposit" from "obtain[ing] a unique leverage over the consumer." *Id.*

The Federal Reserve Board of Governors—which held the primary authority to administer TILA until 2011—amended Regulation Z to implement this and other provisions of the Fair Credit Billing Act. *See* Fair Credit Billing, Description of Transactions, 40 Fed. Reg. 43,200, 43,209 (Sept. 19, 1975). The relevant regulation—since repromulgated by the Bureau—largely echoes the statutory provision. *See* Truth in Lending (Regulation Z), 76 Fed. Reg. 79,768, 79,791 (Dec. 22, 2011) (repromulgating

rule and commentary under authority transferred by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1061(b)(1), 124 Stat. 1376, 2036 (2010)). It provides that, in general, "[a] card issuer may not take any action, either before or after termination of credit card privileges, to offset a cardholder's indebtedness arising from a consumer credit transaction under the relevant credit card plan against funds of the cardholder held on deposit with the card issuer." 12 C.F.R. § 1026.12(d)(1).

TILA and Regulation Z offer broad definitions for many of the relevant terms in their offset provisions. For instance, the statute defines "credit card" as "any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit," 15 U.S.C. § 1602(*l*), and "card issuer" as "any person who issues a credit card" or their agent, *id.* § 1602(o). Regulation Z similarly defines "credit card" as "any card, plate, or other single credit device that may be used from time to time to obtain credit." 12 C.F.R. § 1026.2(a)(15)(i). Neither includes a definition of "credit card plan," but that term has long been understood to refer to any arrangement that allows consumers to access credit via a credit card.

In 2009, Congress again amended TILA through the Credit Card Accountability Responsibility and Disclosure Act (CARD Act), Pub. L. No. 111-24, 123 Stat. 1734 (May 22, 2009). As relevant here, the CARD Act created several new obligations for certain kinds of open-end credit—i.e., credit reasonably expected to be extended through "repeated transactions," rather than in one lump sum.[1] *See* 15 U.S.C. § 1602(j). In particular, the CARD Act imposes additional disclosure requirements and restrictions on any "credit card account under an open-end consumer credit plan." For example, the Act requires creditors on those accounts to provide advance written notice of changes to the plan's interest rate, *id.* § 1637(i); limits the circumstances in which creditors can increase the interest rate, fees, or finance charges on those accounts, *id.* §§ 1666i-1(a), 1666i-2; and restricts certain fees on those accounts, *e.g.*, *id.* §§ 1665d, 1637(k)–(*l*).

Shortly after the CARD Act's passage, the Federal Reserve Board issued regulations that, as relevant here, exempted home-equity lines of

[1] More specifically, "open-end credit" refers to consumer credit extended by a creditor under a plan in which: (1) "[t]he creditor reasonably contemplates repeated transactions"; (2) "[t]he creditor may impose a finance charge from time to time on an outstanding unpaid balance"; and (3) "[t]he amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid." 12 C.F.R. § 1026.2(a)(20).

credit (HELOCs) from many of the Act's new requirements. *See* Truth in Lending, 75 Fed. Reg. 7658, 7664 (Feb. 22, 2010) (citing exemption authority under 15 U.S.C. § 1604(a) and additional rulemaking authority under Pub. L. No. 111-24, § 2, 123 Stat. at 1736 (codified at 15 U.S.C. § 1602 note)). To effectuate that exemption, the Board introduced a new defined term to Regulation Z—"[c]redit card account under an open-end (not home-secured) consumer credit plan." *Id.* at 7793. It defined that term to exclude HELOCs "even if those lines could be accessed by a credit card." *Id.* at 7664. The Board then used that new defined term when implementing various requirements from the CARD Act. *See, e.g.*, *id.* at 7802 (requiring specific account-opening disclosures for such plans). It did not amend Regulation Z's preexisting offset prohibition to use that defined term. When it took over administration of TILA, the CFPB reissued Regulation Z—with that same term—without substantive change. *See* Truth in Lending (Regulation Z), 76 Fed. Reg. at 79,774.

Regulation Z now defines "[c]redit card account under an open-end (not home-secured) consumer credit plan" to mean "any open-end credit account that is accessed by a credit card, except" "home-equity plan[s] subject to the requirements of § 1026.40 that [are] accessed by a credit

card" and certain "overdraft line[s] of credit," including those "accessed by a debit card." 12 C.F.R. § 1026.2(a)(15)(ii).

2. The Real Estate Settlement Procedures Act and Regulation X

RESPA requires "any servicer of a federally related mortgage loan" to respond to "qualified written request[s]"—correspondence from borrowers that seeks information about a mortgage loan or requests that an error with the loan be corrected. 12 U.S.C. § 2605(e). Under RESPA, a "federally related mortgage loan" includes, with certain limitations not relevant here, "any loan" that is "secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families." *Id.* § 2602(1)(A). Home-equity loans thus qualify.

In 1994, the Department of Housing and Urban Development (HUD)—the agency that held the authority to issue rules under RESPA at the time—adopted a regulation implementing certain aspects of RESPA. Pursuant to its authority "to prescribe such rules and regulations . . . and to grant such reasonable exemptions for classes of transactions[] as may be necessary to achieve the purposes of" RESPA, *id.* § 2617(a) (1994), HUD exempted HELOCs from provisions requiring servicers to respond to borrowers' qualified written requests. Real Estate Settlement Procedures

Act (Regulation X), 59 Fed. Reg. 65,442, 65,443 (Dec. 19, 1994). HUD noted that Regulation Z already outlined comparable procedures for consumers to notify creditors of billing errors on HELOC accounts, and TILA imposed similar penalties on creditors who failed to adequately and timely respond. *See id.*; *see also* 12 C.F.R. § 1026.13 (Regulation Z provisions); 15 U.S.C. § 1640(a)–(b) (TILA liability provisions).

With the Dodd-Frank Act of 2010, Congress transferred authority to administer RESPA to the Bureau and imposed new requirements relating to mortgage servicing, including through amendments to RESPA. Pub. L. No. 111-203, § 1061(b), 124 Stat. at 2036; *see also id.* subtit. XIV. To implement those new requirements, the Bureau in 2013 revamped Regulation X's servicing rules. *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696, 10,696 (Feb. 14, 2013). At the time, the Bureau reevaluated the exclusion of HELOCs from RESPA's mortgage servicing rules. *Id.* at 10,721. The Bureau decided to maintain the exemption because many of Regulation X's rules were irrelevant to HELOCs, which have different risk profiles and are serviced differently from first mortgages. *Id.* at 10,721–22. It also noted that certain potentially relevant requirements "would substantially overlap" with longstanding protections in TILA and Regulation Z that apply to

HELOCs. *Id.* Because it would undercut RESPA's consumer-protection purposes "for servicers to expend resources complying with overlapping or unnecessary requirements that would not benefit consumers," the Bureau declined to bring HELOCs within the scope of the servicing rules. *Id.* at 10,722. Thus, Regulation X's error-resolution and information-request requirements, 12 C.F.R. §§ 1024.35–.36, still only apply to borrowers' communications about "mortgage loan[s]"—a term defined to exclude "open-end lines of credit (home equity plans)," 12 C.F.R. § 1024.31.

B. Factual and Procedural Background

Plaintiff William Lyons, Jr., is a Maryland homeowner. JA 10 ¶¶ 10, 12. In 2005, Lyons opened a HELOC, an open-end line of credit secured by a lien on his home, with National City Bank. JA 10 ¶¶ 12–13. Under the HELOC agreement, National City issued Lyons a credit card, which he used to access this line of credit. JA 11 ¶ 13(b); JA 75. After defendant PNC Bank, N.A. (PNC) acquired and merged with National City in 2009, Lyons opened two deposit accounts with PNC. JA 11 ¶ 14; JA 39; JA 41.

The deposit account agreements contained a provision authorizing the bank to withdraw amounts Lyons owed on "[a]ny loans, overdrafts, obligations or other indebtedness (except for debts arising out of bank credit cards . . . , unless permitted by applicable law)." JA 54. Purporting to

exercise its rights under this provision, in September 2019 PNC withdrew nearly $1,400 from one of Mr. Lyons's deposit accounts to pay amounts due on his HELOC. JA 12 ¶ 17; JA 27 ¶ 12; JA 29 ¶ 17. Mr. Lyons contends that he never authorized this transfer of deposit funds to pay off his HELOC debt. JA 12 ¶ 18. The following month, he wrote to PNC objecting to the offset and requesting a full accounting. JA 81. More than sixty days after it received his written objection, PNC responded, explaining that it believed the September 2019 transfer was "pre-authorized." JA 83. In February 2020, PNC made another withdrawal from Mr. Lyons's other deposit account—this time taking nearly $1,600 to cover further amounts due on his HELOC. JA 13 ¶ 25; JA 30 ¶ 25.

Mr. Lyons filed suit against PNC. He alleged that PNC violated TILA's offset provision and its implementing regulation, 12 C.F.R. § 1026.12(d), by taking funds from his deposit accounts to pay off his HELOC account. JA 18–20 ¶¶ 48–55. He pled the TILA count as a putative class claim on behalf of himself and other PNC clients subjected to the same offset treatment. JA 15–18 ¶¶ 32–47. Mr. Lyons further alleged, on behalf of himself only, that PNC violated RESPA with an untimely and inadequate response to his October 2019 letter. JA 20–21 ¶¶ 56–61.

PNC eventually moved for judgment on the pleadings on all claims. *See* JA 122–138. Over the plaintiff's objection, the district court agreed with PNC and dismissed both the TILA and RESPA claims in their entirety. *See* JA 199. As to the TILA claim, the district court held that Mr. Lyons's HELOC was not a covered "credit card plan" under Regulation Z's offset provision, 12 C.F.R. § 1026.12(d)(1), because Regulation Z exempts HELOCs from the definition of a different term—"credit card account under an open-end (not home-secured) consumer credit plan," 12 C.F.R. § 1026.2(a)(15)(ii). *See* JA 203–204. The court did not explain why that latter term was relevant to Regulation Z's and TILA's offset provisions, where it does not appear. And as to the RESPA claim, the district court concluded that the Bureau had exempted HELOCs from the requirements that mortgage servicers respond to borrowers' written requests. *See* JA 204–206 (citing 12 C.F.R. § 1024.31). The Court held that, under 12 U.S.C. § 2617(a), "Congress . . . expressly intended to allow the CFPB to carve out exceptions to [RESPA's] broad application," and that Regulation X's exemption of HELOCs was consistent with the statute. JA 206. Mr. Lyons appealed.

SUMMARY OF ARGUMENT

The district court's analysis of TILA's offset prohibition is atextual and inconsistent with regulatory history and context. Most plainly, "credit card plan"—which appears in the offset provision—and "credit card account under an open-end (not home-secured) consumer credit plan"—which is a term the regulation defines to exclude HELOCs—are different phrases. Basic principles of textual interpretation preclude applying a definition to a provision where the relevant term does not appear. The history of these terms also underscores their independence from one another. While the offset provision has applied to "credit card plan[s]" since the 1970s, the term "credit card account under an open-end (not home-secured) consumer credit plan" only entered Regulation Z in an unrelated 2010 amendment. This later definition did not alter the decades-old offset prohibition. Finally, the district court's analysis is inconsistent with other portions of Regulation Z. The Court should therefore hold that TILA's and Regulation Z's offset provisions apply to HELOCs.

The district court, however, correctly analyzed the relevant provisions of RESPA and Regulation X. RESPA grants the Bureau the authority to exempt classes of transactions from the statute's requirements, and the Bureau exercised that authority to exempt HELOCs from the provisions at

issue here. The district court gave proper effect to the Bureau's exercise of its statutory exemption power, so this Court should affirm that portion of the district court's opinion.

ARGUMENT

I. TILA's offset provision applies to credit card plans that allow cardholders to access a home-equity line of credit.

A. By its plain language, TILA's offset provision covers any "credit card plan," not just a "credit card account under an open-end (not home-secured) consumer credit plan."

Both TILA and Regulation Z preclude "card issuer[s]" from using deposit account funds to offset "indebtedness arising" out of any "consumer credit transaction under the relevant credit card plan." 15 U.S.C. § 1666h(a); 12 C.F.R. § 1026.12(d)(1). The district court concluded that HELOCs accessible by a credit card were not "credit card plans" covered by those provisions because Regulation Z exempts HELOCs from the definition of a differently phrased term—"credit card account under an open-end (not home-secured) consumer credit plan"—in 12 C.F.R. § 1026.2(a)(15)(ii). JA 203. The district court's analysis disregards the relevant regulatory text and runs afoul of basic principles of interpretation.

To begin, while neither TILA nor its implementing regulation expressly defines "credit card plan," they define several relevant terms in the offset provision broadly enough to include HELOCs accessible by a

credit card. For instance, TILA states that a "credit card" is "any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit." 15 U.S.C. § 1602(*l*); *see also* 12 C.F.R. § 1026.2(a)(15)(i) (similarly defining credit card as "any card, plate, or other single credit device that may be used from time to time to obtain credit"). Credit, in turn, refers generally to the right "to defer payment of debt or to incur debt and defer its payment." 15 U.S.C. § 1602(f); 12 C.F.R. § 1026.2(a)(14). In those definitions, neither TILA nor Regulation Z distinguishes between the type of credit accessed—whether open or closed, secured by real property or not. The statutory and regulatory offset provisions therefore on their face apply to HELOC accounts accessible via a credit card.

The district court ignored that plain text when it held that the phrase "credit card plan" in § 1026.12(d)(1) bears the same meaning as "credit card account under an open-end (not home-secured) consumer credit plan" as defined in § 1026.2(a)(15)(ii). To put it simply, the two terms are not the same. One refers broadly to a credit card plan, while the other refers to credit card accounts under a subset of credit plans—open-end, not home-secured ones.

The district court's conflation of these two terms violated basic principles of textual interpretation. The familiar "rules applicable to statutory construction" govern where, as here, a court interprets regulatory text. *United States v. Moriello*, 980 F.3d 924, 934 (4th Cir. 2020). Among those rules is a "presum[ption]" that "differences in language . . . convey differences in meaning." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2071 (2018); *see also* 2A Norman Singer, Sutherland Statutory Construction § 46:6 (7th ed. Nov. 2021 update) ("Different words used in the same, or a similar, statute are assigned different meanings whenever possible."). The district court's conflation of "credit card plan" with "credit card account under an open-end (not home-secured) consumer credit plan" failed to "give[] full effect to" the "decision to use different words in the" same regulation. *Lynch v. Jackson*, 853 F.3d 116, 121 (4th Cir. 2017).

Before the district court, PNC argued that another principle of interpretation—that the court's reading must not render any portion of the regulation superfluous—supports a narrow reading of the phrase "credit card plan." *See* JA 188 (citing *In re Bateman*, 515 F.3d 272, 278 (4th Cir. 2008)). In PNC's view, porting in the definition of "credit card account under an open-end (not home-secured) consumer credit plan" is necessary to give the term "credit card *plan*" some meaning beyond the defined term

"credit card." JA 188. That is not the case. Rather, the reference to "credit card plan" in TILA's offset provision can and should be given an obvious, natural meaning: a plan under which a consumer may access credit—of whatever type—via a credit card.

Should the Court have any difficulty determining the meaning of the term "credit card plan," it should construe the phrase broadly, consistent with TILA's remedial purpose. *See Curtis v. Propel Prop. Tax Funding, LLC*, 915 F.3d 234, 239 (4th Cir. 2019) (noting that TILA is a "remedial consumer protection statute[]" that is "read liberally to achieve [its] goals of protecting consumers" (internal quotation marks omitted)); *Rowe v. U.S. Fid. & Guar. Co.*, 375 F.2d 215, 219 (4th Cir. 1967) (construing regulations implementing remedial statute liberally); *Patel v. Thompson*, 319 F.3d 1317, 1319 (11th Cir. 2003) (same).

B. The distinct regulatory histories of the relevant Regulation Z provisions demonstrate why the two terms should not be conflated.

The district court's analysis also ignored the way the two relevant phrases—"credit card plan" and "credit card account under an open-end (not home-secured) consumer credit plan"—made their way into Regulation Z. While the former dates to the introduction of TILA's offset provision in the 1970s, the latter was only added a decade ago to implement

an unrelated amendment to TILA. At that later date, the Federal Reserve Board clarified that this new term of art did not alter unrelated portions of Regulation Z. This missing context clarifies why the district court erred in porting an unrelated definition from one part of Regulation Z into another.

As used here, the phrase "credit card plan" entered Regulation Z shortly after the passage of the Fair Credit Billing Act, which introduced the prohibition on offsets at issue in this case. *See* Pub. L. No. 93-495, 88 Stat. at 1515; Fair Credit Billing, Description of Transactions, 40 Fed. Reg. at 43,209 (codified at 12 C.F.R. § 226.12(d)). Following the transfer of authority over TILA in Dodd-Frank, the Bureau repromulgated the relevant provision in part 1026. *See* Truth in Lending (Regulation Z), 76 Fed. Reg. at 79,791. The relevant regulatory language—including the reference to "credit card plan"—remains unchanged. *See* 12 C.F.R. § 1026.12(d)(1).

The narrower term that the district court applied, by contrast, is of much more recent vintage. In May 2009, Congress amended TILA via the CARD Act, which included several new requirements for "credit card account[s] under . . . open-end consumer credit plan[s]." *See* Pub. L. No. 111-24, 123 Stat. at 1735; *see, e.g.*, 15 U.S.C. §§ 1637(i), 1665d, 1666i-1(a), 1666i-2. The Federal Reserve Board, at the time in charge of TILA, grappled with these new provisions in a February 2010 rule implementing the CARD

Act. *See* Truth in Lending, 75 Fed. Reg. at 7658. In that rule, the Board decided to exclude HELOCs accessible by a credit card from the new requirements imposed on any "credit card account under an open-end consumer credit plan." *Id.* at 7663–65. To implement that exemption, the Board introduced a new defined term—"credit card account under an open-end (not home-secured) consumer credit plan"—from which it expressly excluded HELOCs. *Id.* It then wrote the new provisions of Regulation Z to apply only to accounts meeting that definition. *Id.* When the Bureau took over administration of TILA under Dodd-Frank, it repromulgated these regulations, including this defined term, without substantive change. *See* Truth in Lending (Regulation Z), 76 Fed. Reg. at 79,774.

The district court's conflation of the two regulatory terms runs counter to the Board's own understanding of how broadly this new HELOC exclusion reached. In the preamble to its 2010 rule, the Board included a table "summariz[ing] the applicability of each of the major revisions to Regulation Z"—outlining whether a given provision applied to all open-end consumer credit plans, only to "not home-secured" plans, and so on. Truth in Lending, 75 Fed. Reg. at 7663. Regulation Z's offset provision was not even listed among those sections the new revisions potentially affected. *Id.* Instead, the Board explained its "belie[f] that, as a general matter, Congress

intended the [CARD] Act to apply broadly to products that meet the definition of a credit card"—which included "HELOCs . . . accessed by cards." *Id.* at 7664. And looking beyond these new CARD Act provisions, the Board specifically emphasized that "the revisions to [1026].2(a)(15) [we]re not intended to alter the scope or coverage of provisions of Regulation Z that refer generally to credit cards or open-end credit rather than the new defined term 'credit card account under an open-end (not home-secured) consumer credit plan.'" *Id.* at 7665. The district court ignored this admonition when it applied the revised defined term to an older and unrelated portion of Regulation Z.

C. Other provisions of Regulation Z confirm that a "credit card plan" is not the same as a "credit card account under an open-end (not home-secured) consumer credit plan."

Applying the defined term in 12 C.F.R. § 1026.2(a)(15)(ii) to TILA's offset provision is also inconsistent with other aspects of Regulation Z—in particular, two sections of Supplement I to Regulation Z, which contains the Bureau's official interpretations of that regulation and was promulgated through notice-and-comment rulemaking. *See* Truth in Lending (Regulation Z), 76 Fed. Reg. at 79,959 (including official interpretation in Bureau's repromulgation of Regulation Z following Dodd-Frank); Truth in

Lending, 74 Fed. Reg. 5244, 5489 (Jan. 29, 2009) (promulgating official interpretation following Board review).

First, the district court's narrowing of TILA's offset prohibition runs into direct conflict with the Bureau's commentary on that same provision, which shows that it applies to accounts excluded from the definition the district court used. Comment 12(d)(1)-3 explains that the offset prohibition "applies to balances arising from transactions not using the credit card itself but taking place under plans that involve credit cards." 12 C.F.R. pt. 1026, Supp. I ¶ 12(d)(1)-3. By way of example, the commentary considers the case of a consumer who accesses an overdraft line of credit via check, rather than "an associated check guarantee or debit card." *Id.* While a check guarantee or debit card that accesses a line of credit falls under Regulation Z's definition of "credit card," a check does not. *See id.* ¶¶ 2(a)(15)-1–2. Still, Comment 12(d)(1)-3 provides that "the resulting indebtedness" from the transaction using a check to draw on an overdraft line of credit "is subject to the offset prohibition since it is incurred through a credit card plan, even though the consumer did not use an associated" credit card. *Id.* ¶ 12(d)(1)-3. Based on the commentary, then, any indebtedness incurred by accessing an overdraft line of credit is covered by the offset provision, so long as there is some sort of credit card associated with the account.

This example would not make sense if the offset provision was, as the district court would have it, limited by the definition in § 1026.2(a)(15)(ii). Under the Comment's example, "indebtedness arising from transactions under a credit card plan"—to which the offset provision applies—includes debts incurred by accessing an overdraft line of credit with a debit card. 12 C.F.R. pt. 1026, Supp. I ¶ 12(d)(1)-3. But as noted above, the term "credit card account under an open-end (not home-secured) consumer credit plan" expressly excludes exactly those "overdraft line[s] of credit" that are "accessed by a debit card." *See* 12 C.F.R. § 1026.2(a)(15)(ii)(B).

Notably, this official interpretation of the offset provision is longstanding. Comment 12(d)(1)-3 has offered this example both before and after the passage of the CARD Act and the introduction of the defined term "credit card account under an open-end (not home-secured) consumer credit plan." *See, e.g.*, 12 C.F.R. pt. 226, Supp. I ¶ 12(d)(1)-3 (1984) (including identical discussion of offset prohibition); Truth in Lending (Regulation Z), 76 Fed. Reg. at 79,959 (republishing identical commentary even after promulgating rules to implement the CARD Act). This continuity demonstrates that § 1026.2(a)(15)(ii) did not somehow affect the scope of Regulation Z's offset prohibition.

Second, the use of the phrase "credit card plan" elsewhere in the official interpretations of Regulation Z confirms that it cannot bear the meaning the district court gave it. Consider its inclusion in the comment to 12 C.F.R. § 1026.9(c)(1)—which governs whether and in what form creditors that change the terms of a home-equity plan must provide disclosures to consumers. The comment uses the term "credit card plan" to refer to a HELOC: It states that no notice is required for home-equity plans when there is, among other things, "[a] change in the name of the credit card or credit card plan." 12 C.F.R. pt. 1026, Supp. I ¶ 9(c)(1)(ii)-1. If the term "credit card plan" definitionally excluded HELOCs—as the district court held—it would have no place in commentary to a provision that *only* applies to home-equity loans.

Taken together, this commentary confirms that the district court's application of the defined term in § 1026.2(a)(15)(ii) was novel and inconsistent with the rest of Regulation Z. Given that regulatory context—as well as the text and history of the relevant provisions—the Court should hold that TILA's and Regulation Z's offset provisions apply to credit card plans involving HELOCs.

II. Regulation X properly exempts home-equity lines of credit from RESPA's requirements to respond to notices of error and information requests.

The district court held that, in Regulation X, the Bureau properly exempted HELOCs from RESPA's requirements for how mortgage loan servicers must respond to requests for information and error correction. Because that holding correctly recognized the Bureau's statutory exemption authority, the Court should affirm the district court on this point.

RESPA requires "any servicer of a federally related mortgage loan" to respond to qualifying correspondence from borrowers seeking information about the servicing of a mortgage loan or requesting that an error with the loan be corrected. 12 U.S.C. § 2605(e). Congress also gave the administering agency—initially HUD, now the Bureau—the express authority "to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of this chapter." 12 U.S.C. § 2617(a). Exercising that authority, HUD and then the Bureau have exempted "open-end lines of credit"—in other words, "home equity plans"—from the provisions governing servicers' obligation to respond to borrowers' notices of error and requests for information. 12 C.F.R. § 1024.31 (exempting HELOCs from the "mortgage loans" subject to Subpart C); *id.* § 1024.35 (Subpart C provision requiring servicers to

respond to notices of error regarding "mortgage loan[s]"); *id.* § 1024.36 (Subpart C provision requiring servicers to respond to requests for information relating to "mortgage loan[s]"). That exemption extends to both Regulation X and the servicing rules in the statute itself. In a 2013 regulation, the Bureau explained that it was "necessary and appropriate . . . not to apply" Regulation X's mortgage servicing rules to HELOCs because, among other reasons, Regulation Z already provided HELOC borrowers with comparable protections. Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. at 10,721–22. Other provisions of RESPA still apply to HELOCs, including the statute's prohibition on kickbacks and unearned fees. *See* 12 U.S.C. § 2607; 12 C.F.R. § 1024.14.

As the district court correctly found, 12 C.F.R. § 1024.31 is an exercise of the Bureau's statutory exemption authority under RESPA. The handful of contrary district court opinions the district court here acknowledged, *see* JA 205 (discussing cases), are mistaken because they miss an important aspect of the statutory scheme: its express grant of authority to the Bureau "to grant such reasonable exemptions" as necessary to further the Act's purposes, 12 U.S.C. § 2617(a). *See, e.g.*, *Hawkins-El v. First Am. Funding, LLC*, 891 F. Supp. 2d 402, 408 (E.D.N.Y. 2012), *aff'd*, 529 F. App'x 45 (2d

Cir. 2013); *Herrmann v. Wells Fargo Bank, N.A.*, 529 F. Supp. 3d 549, 558–59 (W.D. Va. 2021). Indeed, those cases did not acknowledge that authority, let alone explain how the Bureau exceeded it by crafting the limited exemption at issue. This Court should, therefore, affirm the district court's application of § 1024.31 here.

CONCLUSION

For the foregoing reasons, the Court should hold that § 1026.12(d)(1) of Regulation Z covers indebtedness incurred on home-equity lines of credit accessible by a credit card. The Court should further hold that Regulation X properly excludes home-equity loans from the mortgage servicing rules at issue here.

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Respectfully submitted,

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Certificate of Compliance

This brief complies with the length limits permitted by Federal Rule of Appellate Procedure 29(a)(5) because it contains 5,349 words, excluding the portions exempted by Rule 32(f). This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared using Microsoft Word in 14-point Georgia font, a proportionally spaced typeface.

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