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

BRIEF FOR AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLEE AND AFFIRMANCE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
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No. 22-1943 Caption: William T. Lyons v. PNC Bank, N.A.

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Bankers Association
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Mark W. Mosier Date: February 3, 2023

Counsel for: American Bankers Association

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INTEREST OF AMICUS CURIAE

The American Bankers Association ("ABA") is the principal national trade association for the financial services industry in the United States. Founded in 1875, ABA is the voice for the nation's $23.7 trillion banking industry and its more than two million employees. ABA members provide banking services in each of the fifty States and the District of Columbia. Among them are banks, savings associations, and non-depository trust companies of all sizes.[1]

ABA often submits amicus curiae briefs in state and federal courts in matters that significantly affect its members and the business of banking. ABA submits this brief to address the novel and unprecedented interpretation of the Truth in Lending Act ("TILA")[2] that the Consumer Financial Protection Bureau ("CFPB") has advanced in its amicus brief in this case. CFPB's brief sets forth a new interpretation

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[1] Amicus files this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and states that all parties to the appeal have consented to its filing. Plaintiff consented to this brief "as proposed to him provided it complies with the rules and does not seek to expand issues not before the Court." No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than amicus curiae and their counsel contributed money that was intended to fund the preparation or submission of this brief.

[2] Truth in Lending Act of 1968, Pub. L. No. 90-321, 82 Stat. 146 (codified as amended at 15 U.S.C. §§ 1601 et seq.).

of "credit card plan" in Section 1666h that departs from the agency's (and its predecessor's) longstanding recognition that credit cards and home equity lines of credit ("HELOCs") are different consumer credit products.[3]

INTRODUCTION AND SUMMARY OF ARGUMENT

TILA prohibits credit card issuers from offsetting 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 (emphasis added). Stated more simply, a bank may not take money from a customer's checking or savings account to pay a debt that the customer owes on his or her credit card account with that bank.

The issue in this appeal is whether a bank may take money from a customer's deposit account to pay a debt that the customer owes on his or her HELOC. Appellant argues that his HELOC is a "credit card plan" and thus PNC Bank violated the relevant TILA provision, 15 U.S.C. § 1666h, by offsetting his debt. The district court correctly rejected that argument, holding that a HELOC is not a "credit card plan" within the meaning of the statute. The district court's interpretation is correct and should be affirmed.

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[3] This brief does not address plaintiff's claim under the Real Estate Settlement Procedures Act. PNC Bank and the CFPB have fully explained why the district court correctly dismissed that claim.

I. The CFPB has issued a publication to educate consumers about HELOCs that describes how they compare to other consumer credit products, including credit cards. The publication explains that HELOCs are a form of secured credit using what is often a consumer's most valuable asset—her home—as security. In the same publication, the CFPB describes a "credit card" as an alternative "source" of credit that permits a consumer to "borrow money from the credit card company and repay" it later. Consumers who open a credit card account instead of a HELOC account do not risk home foreclosure because credit cards do not use consumers' homes as security. But as a result, they typically pay higher interest rates on the money they borrow. Due to these critical differences, the CFPB and banks instruct consumers that HELOCs and credit cards are not the same product and should not be confused.

II. Based on its text, structure, and history, the phrase "credit card plan" used in TILA is best interpreted to refer to the terms governing the use of the "credit card" product described in the CFPB's informational publication. It should not be interpreted to refer to any open-end credit plan accessible by a credit card. Interpreting "credit card plan" to refer to the terms of the credit card product is consistent with how Congress used the phrase elsewhere in the statute, makes sense of the statute's structure, and avoids rendering any word in the statute superfluous. This interpretation draws further support from subsequent legislation that specifically regulates HELOCs and treats them differently from credit cards.

III. The CFPB's contrary interpretation, advanced for the first time in an amicus brief, is not entitled to deference and should not be followed. Agencies have repeatedly adopted regulations through notice-and-comment rulemaking that acknowledge the differences between HELOCs and credit cards and regulate them differently based on those differences. The CFPB's unexplained departure from that longstanding approach, taken without advance notice or opportunity for comment by interested parties, should be rejected. The CFPB asserts, without explanation, that its interpretation protects consumers, but the opposite is likely to be true. If lenders cannot offset amounts owed on HELOCs, they may be compelled to foreclose on borrowers' homes. Borrowers will often be better off having funds transferred from their deposit accounts when it means avoiding the risk of foreclosure.

ARGUMENT

I. HELOCs and Credit Cards Are Different Forms of Consumer Credit.

When consumers need to borrow money, they can choose from a variety of consumer credit products to obtain financing. Consumer credit products—including mortgages, auto loans, student loans, home equity loans, revolving check credit, charge cards, credit cards, personal lines of credit, and HELOCs—allow consumers to borrow money and pay it back later. HELOCs and credit cards are two distinct types of consumer credit product. Consumers borrow money for various reasons and, as one might expect, different consumer credit financial products are suitable for different needs. These different products each have their advantages and disadvantages, and consumers have access to extensive resources to help them choose the product that best serves their needs.

When a consumer applies for a HELOC, the creditor must provide the consumer with an educational pamphlet from the CFPB or a similar pamphlet from another source. 15 U.S.C. § 1637a(e). Under this statutory requirement, the CFPB has published a pamphlet describing what a HELOC is, explaining the risks and benefits associated with HELOCs, and comparing and contrasting HELOCs with other consumer credit products, including credit cards. *See* Consumer Financial Protection Bureau, *What You Should Know About Home Equity Lines of Credit (HELOC): Borrowing from the Value of Your Home* 2–7 (2022), https://bit.ly/3Rx2hSU.[4]

As the CFPB explains, a HELOC is a line of credit secured by the consumer's home. A lender, usually a bank, approves a consumer to borrow up to a certain sum of money on credit based on the amount of equity the consumer has in her home. *Id.*

[4] The Federal Trade Commission has likewise explained to consumers that HELOCs are different from credit cards, even if they share some similarities. *See* Federal Trade Commission, *Home Equity Loans and Home Equity Lines of Credit*, https://consumer.ftc.gov/articles/home-equity-loans-and-home-equity-lines-credit#HELOC (last visited Jan. 31, 2023) (explaining that a HELOC is "much like a credit card except it is secured by your home").

The consumer may have to pay "up-front costs for a HELOC," including "a fee for a property appraisal," "an application fee," and "closing costs, including fees for attorneys, title search, mortgage preparation and filing, property and title insurance, and taxes." *Id*. (cleaned up).

A HELOC often includes a "draw" period and a "repayment" period. During the "draw" period, the consumer "can generally spend up to [the] credit limit" whenever she wants. *Id.* at 6. The consumer typically uses "special checks or a credit card to draw on" the line of credit. *Id.* During the draw period, some plans "may allow payment of the interest only," while other plans "set a minimum monthly payment that includes a portion of the principal … plus accrued interest." *Id.* During the "repayment period," the "lender may set a schedule so that [the consumer] repay[s] the full amount, often over ten or 15 years." *Id.* Alternatively, the customer "may have to pay the entire balance owed, at all once," in what is known as a "balloon payment." *Id.* If the consumer cannot repay the loan, the bank may decide to foreclose on her home to recover the funds owed. *Id.* Additionally, if the consumer sells her home, she must repay the amount owed on the HELOC at that time. *Id.* at 2.

In contrast, the CFPB describes a "credit card" as a "money source" that permits a consumer to "borrow money from the credit card company and repay as you go." *Id.* at 5. The consumer is allowed to borrow up to her "credit limit, as determined by the credit card company." *Id.* Unlike a HELOC (where the credit limit is determined by the consumer's home equity), the credit limit on a credit card is usually determined based on the consumer's credit score and annual income. Importantly, because a "credit card" product is typically not secured by the consumer's home, it will usually have a "higher interest rate than a loan that uses [the customer's] home as collateral." *Id.* (cleaned up).[5]

Along with the CFPB's informational brochure, many banks also provide similar information to their customers. For example, PNC Bank has a section on its website explaining the "pros and cons of using your home's equity for a line of credit." *See* PNC Bank, *HELOCs: The Pros and Cons of Using Your Home's Equity for a Line of Credit* (Jan. 20, 2022), https://pnc.co/3HrrvgL. PNC Bank notes that "HELOCs come with lower interest rates than credit cards" and may have "higher credit limits" than credit cards, but it also lists the "[d]rawbacks of HELOCs," including that "[y]ou risk losing your home." *Id.*; *accord id.* ("You're using your

[5] Consistent with common usage, the CFPB uses the term "credit card" to refer to a physical item—usually a small plastic or metal card—that customers use to access consumer credit, and also to an unsecured consumer credit product that allows customers to borrow money from a card issuer up to a certain credit limit. The physical card is not necessary to use the consumer credit product: for instance, a person can make a credit card purchase simply by providing her card number and security code.

home as collateral for a HELOC. Yes, this might lower your interest rate, but if you fail to make the repayments, you risk your home being foreclosed.").

In short, the consumer credit market includes several financial products that consumers can use to borrow money. Despite having some similar features, HELOCs and credit cards are distinct products that consumers are instructed not to confuse.

II. A HELOC Is Not a "Credit Card Plan" under TILA.

The TILA provision at issue generally prohibits a creditor from "tak[ing] 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). The phrase "credit card plan" is not defined by the statute, but that phrase is properly interpreted to refer to the terms governing use of the credit card product discussed above.

A. Congress Used the Phrase "Credit Card Plan" to Refer to the Terms Governing the Use of a Credit Card Product.

The CFPB proposes a divide-and-conquer approach to interpreting "credit card plan": The CFPB first interprets "credit card" according to its statutory definition, and then uses that interpretation to modify "plan" (which the agency does not define). The result of the CFPB's proposed interpretation is that a "credit card plan" includes any form of credit that can be accessed using a physical credit card. *See* CFPB Amicus Br. 14. That interpretation conflicts with the statutory text, structure, and history. Those interpretive sources demonstrate that "credit card plan" is a single term with a specific meaning: It refers to the terms governing the use of the product colloquially called a "credit card" in the consumer credit market, which the CFPB has described as distinct from a HELOC.

The term "credit card plan" should be given the same meaning throughout the Fair Credit Billing Act—the legislation that amended TILA to include the offset provision at issue. *See IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) ("[I]dentical words used in different parts of the same statute are generally presumed to have the same meaning."). Congress used the same term in another provision of the Act, which states that "a card issuer may not require a seller, *as a condition to participating in a credit card plan*, to open an account with or procure any other service from the card issuer or its subsidiary or agent." 15 U.S.C. § 1666g (emphasis added). This provision demonstrates that merchants (i.e., "seller[s]") who agree to accept credit card transactions are treated as participants in the "credit card plan."

The CFPB's interpretation of "credit card plan" makes no sense in this context because the contractual arrangement between the card issuer and merchants—which is included in the phrase—cannot be described as a credit plan that it accessed by a credit card. The phrase "credit card plan" is thus not focused on whether a credit card is used to access a line a credit, but rather the term refers to the entire plan governing use of the credit card product, which includes not only the consumer and card issuer, but also the merchants participating in the plan.

The term "credit card plan" should also be interpreted to give meaning to every term in § 1666h. *Nero v. Mosby*, 890 F.3d 106, 124 (4th Cir. 2018) (when interpreting statutes, courts "construe all parts to have meaning and avoid interpretations that would turn some statutory terms into nothing more than surplusage" (cleaned up)). Section 1666h(a) provides an exception to the offset prohibition when the cardholder has provided written authorization for the offset. *Id.* For written authorization to be effective, the card issuer must notify "the cardholder that the use of his *credit card account* will subject any funds" in his or her deposit accounts "to offset against any amounts due and payable on his *credit card account* which have not been paid in accordance with the terms of the agreement between the card issuer and the cardholder." *Id.* (emphasis added). The statute also provides an exception to the offset prohibition, "[i]n the case of any *credit card account* in existence on the effective date of this section . . . until the date (after such effective date) when such account is renewed. . . ." *Id.* (emphasis added).

Section 1666h thus contemplates that a "credit card plan" includes an "agreement between the card issuer and the cardholder" establishing the "credit card account." Congress's use of "credit card plan" and "credit card account" in the same provision demonstrates that Congress intended those terms to have different meanings. The term "credit card plan" is best interpreted to refer generally to the terms governing the use of the credit card product, and the term "credit card account" refers to the account that a card issuer establishes when a consumer agrees to participate in the "credit card plan."[6] In contrast, the CFPB's interpretation treats "credit card plan" and "credit card account" as interchangeable and considers the consumer's specific agreement with the creditor to be the "credit card plan" itself, creating superfluity. *See Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013) (The "canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").[7]

The statutory structure also supports interpreting "credit card plan" to refer to the terms governing a credit card product with its attendant credit card account. *See West Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2607 (2022) ("It is a fundamental canon of statutory construction that the words of a statute must be read in

[6] When a consumer obtains a HELOC, the lender does not establish a "credit card account"; it establishes a "home equity account"—a term that Congress uses specifically in the context of open end consumer credit plans secured by the consumer's principal dwelling. *Compare* 15 U.S.C. § 1666h(a)(2) ("credit card account"), *with* 15 U.S.C. § 1665b(c) ("home equity account").

[7] The CFPB recognizes that the phrases "credit card plan" and "credit card account under an open-end (not home-secured) consumer credit plan" are different, CFPB Amicus Br. 12, but fails to recognize that the phrases "credit card plan" and "credit card account" are also different and must each be interpreted differently, if possible.

their context and with a view to their place in the overall statutory scheme." (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)). The Fair Credit Billing Act's initial five sections are broadly applicable to "open end credit plans," *see* 15 U.S.C. §§ 1666–1666d, while the next five sections are targeted more narrowly to credit cards, credit card plans, and card issuers, *see* 15 U.S.C. §§ 1666e–1666i. The offset prohibition, § 1666h, appears among the latter five sections. This structure demonstrates that when Congress wanted to regulate all forms of open-ended consumer credit, it imposed regulations applicable to "open end credit plans," but when it wanted to regulate the credit card market specifically, it did so using other terms like "credit card plan." The CFPB's interpretation ignores this structure, which reveals that Congress intended to treat credit card plans differently from other types of open-end credit—like HELOCs.

Although the statutory text and structure resolve the interpretive question in this case, the legislative history confirms that Congress used the term "credit card plan" to refer to the terms governing a credit card product, and not to terms governing any type of consumer credit product that could be accessed using a card. *See United States v. Rast*, 293 F.3d 735, 737 (4th Cir. 2002) (explaining that the Court may consult legislative history when the statutory language is ambiguous). The Senate Report describes the "typical" "credit card plan" as a "three-party" arrangement, which includes "the merchant honoring a credit card." S. Rep. No. 93-278, at 8

(1973). The Report also describes a purpose of the legislation as "prohibit[ing] certain anti-competitive practices between credit card issuers and retail merchants who participate in the credit card plan." *Id.* at 2.

The legislative history also demonstrates that Congress's focus on "credit cards" was not strictly limited to the plastic device used to access credit, but was more broadly focused on the need for regulation of "[c]redit cards," as "one of the fastest growing forms of consumer credit." *Id.* at 4. As the Senate Report explains, "Bank *credit card plans* have grown sharply in the last few years and are expected to grow rapidly in the years ahead," and transactions made under these plans have "replaced transactions formerly handled by cash or check." *Id.* at 10.

The legislative history contains no reference to HELOCs, and for good reason: They did not yet exist in 1974 when the legislation was enacted. HELOCs only came into prominence as a financial tool starting in the 1980s. It is unsurprising, therefore, that the legislative history of the Fair Credit Billing Act makes no mention of HELOCs or home equity lines of credit, either in the discussion of the offset prohibition or elsewhere. Because HELOCs did not exist, Congress could not have had them in mind when it enacted the offset prohibition.

Home equity loans (unlike HELOCs) existed in 1974, but there is no reason to think that Congress expected them to be included in the term "credit card plan." As discussed above, Congress used the term "open end credit plan" to refer to all types of open-ended consumer credit products. Congress had used that term in 1968 in TILA, Pub. L. No. 90-31, and the Federal Reserve Board promptly adopted regulations that specifically excluded "open end real estate mortgage[s] or [letters] of credit" from the definition of open end credit. *See* Truth in Lending, 34 Fed. Reg. 2002, 2003 (Feb. 11, 1969) (Open end credit "does not include negotiated advances under an open end real estate mortgage or a letter of credit."). Thus, when Congress enacted the Fair Credit Billing Act, which amended TILA, it understood that TILA's provisions regulating open-ended credit did not apply to home equity loans, and therefore could not have expected the credit-card specific provisions to apply to them. *See* Truth in Lending, 40 Fed. Reg. 43200, 43202 (Sept. 19, 1975) (regulations implementing Fair Credit Billing Act and specifying that "negotiated advances under an open end real estate mortgage or a letter of credit" were categorically excluded from the offset prohibition); *see also Fed. Deposit Ins. Corp. v. Phila. Gear Corp.*, 476 U.S. 426, 427 (1986) (interpreting statutory language to accord with "the longstanding interpretation" given by agency before the statute's enactment).

B. Subsequent Legislation Addressing HELOCs Confirms That They Are Not "Credit Card Plans."

In 1988, Congress enacted a statute specifically addressing HELOCs, a relatively new product at that time. *See* Home Equity Loan Consumer Protection Act of 1988, Pub. L. No. 100-709, 102 Stat. 4725. The Act added new disclosure requirements for HELOCs, codified in 15 U.S.C. § 1647, which is titled "Home equity plans." The Act and its legislative history dispel any suggestion that Congress drew no distinction between a "credit card plan" and a "home equity plan."

Although credit cards were already subject to a range of requirements, Congress established different requirements for HELOCs. *Compare, e.g.*, 15 U.S.C. § 1637(h) and 15 U.S.C. § 1637(i), *with* 15 U.S.C. § 1647(b) and 15 U.S.C. § 1647(c). Congress could have stated that HELOCs were subject to the existing offset prohibition, but it did not do so or reference the offset prohibition at all. The fact that Congress enacted distinct standards for HELOCs and credit cards demonstrates that it (1) did not consider HELOCs subject to the credit card requirements, and (2) believed that the unique features of HELOCs merited distinct regulation.

The legislative history bears this out. It makes clear that Congress understood that credit card devices are often used to access credit under a HELOC. *See Home Equity Loan Consumer Protection Act of 1987: Hearing on H.R. 3011 Before the Subcomm. on Consumer Affairs & Coinage of the H. Banking, Fin. & Urban Affairs*, 100th Cong. 27 (1987) (statement of Rep. Chalmers P. Wylie) (describing a "home equity [loan] with a credit card attached to it"). But some members of Congress expressed concern that, despite the use of a credit card with a HELOC, HELOCs were not subject to the credit-card regulations, which created a "loophole" that the HELOC-specific legislation was intended to address. *Id.*

The legislative history also demonstrates that Congress viewed HELOCs as meaningfully different from credit card products. Congress understood that HELOCs had some features that made them "comparable to a credit card situation," but no one understood HELOCs to be the same as a credit card. *See Home Equity Loans: Hearing Before the Subcomm. on Consumer Affairs of the S. Banking, Housing, and Urban Affairs on Home Equity Loans*, 100th Cong. 54 (1987) (statement of Sen. Lincoln Chafee). Indeed, part of the reason for HELOC-specific legislation appears to have been a concern that consumers may not understand the critical difference between a HELOC and a credit card—that the consumer's home is used as security for the line of credit. *Id.* at 32 (statement of Sen. Chafee) ("Do you think everybody that gets involved with one of these loans realizes that it's just like a mortgage, their house can be sold if they don't pay?"); *see also id.* at 55 (statement of Sen. Chafee) ("[HELOCs are] different from most loans. Your home is tied up. It's a second mortgage or a first mortgage.").

Following the 1988 amendments, TILA includes provisions applicable to three distinct types of open-ended consumer credit plans: "open ended credit plans"; "credit card plans"; and "home equity plans." The terms "credit card plan" and "home equity plan" are properly interpreted to refer to distinct consumer credit products: credit cards and HELOCs, respectively. The term "credit card plan" should not be interpreted so broadly, as the CFPB proposes, to include virtually all "open ended credit plans" and "home equity plans." Congress would not have created different requirements for these different plans if it intended for the term "credit card plan" to include them all.

III. The CFPB's Interpretation of "Credit Card Plan," Advanced for the First Time in an Amicus Brief, Is Not Entitled to Deference.

The CFPB contends that the phrase "credit card plan" should be interpreted to include HELOCs when a HELOC is accessible by credit card. CFPB Amicus Br. 4, 16. The CFPB has not argued that its interpretation is entitled to deference, and it is not.

Under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), non-binding "agency interpretations are only given a level of respect commensurate with their persuasiveness." *Perez v. Cuccinelli*, 949 F.3d 865, 877 (4th Cir. 2020); *Gonzales v. Oregon*, 546 U.S. 243, 256 (2006) (agency's non-binding interpretation is "entitled to respect only to the extent it has the power to persuade" (cleaned up)).[8] The CFPB's interpretation is unpersuasive—and thus deserves no deference—because it

[8] Because the CFPB "offers this view in an amicus brief, which does not have the 'force of law,' its interpretation here is not entitled to *Chevron* deference." *DeMasters v. Carilion Clinic*, 796 F.3d 409, 422 n.7 (4th Cir. 2015) (internal quotation marks omitted).; *see also Edwards v. First Am. Corp.*, 798 F.3d 1172, 1180 (9th Cir. 2015) (CFPB's interpretation of a "statute—when presented in an amicus brief—is not promulgated in the exercise of its formal rule-making authority, so no Chevron deference is warranted."). And when, as here, the CFPB purports to interpret a statute—as opposed to an ambiguous regulation—it does not receive *Auer/Kisor* deference. *Edwards*, 798 F.3d at 1180; *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019).

departs from the longstanding view that credit cards and HELOCs should be regulated differently, and because it purports to benefit consumers without explaining how it would do so.

A. The CFPB's Interpretation Departs from the Longstanding View That HELOCs and Credit Cards Are Different Products That Should Be Regulated Differently.

In holding that Plaintiff's HELOC is a "home equity plan" under 15 U.S.C. § 1647, and not a "credit card plan" under § 1666h, the district court noted that "Regulation Z clearly provides that those two types of accounts are distinct." JA203-204. To demonstrate how the CFPB has treated those accounts differently, the court observed that Regulation Z "expressly defines 'credit card account under an open-end (not home-secured) consumer credit plan' to <u>exclude</u> 'a home equity plan . . . that is accessed by a credit card.'" JA203 (quoting 12 C.F.R. § 1026.2(a)(15)(ii)) (alteration in original).

The CFPB argues that the district court erred in citing Regulation Z because that regulation does not define "credit card plan"—the relevant statutory term here—but rather introduced a new term ("credit card account under an open-end (not home-secured) consumer credit plan") following Congress's enactment of the Credit Card Accountability Responsibility and Disclosure Act (CARD) Act, Pub. L. No. 111-24, 123 Stat. 1734 (2009). CFPB Amicus Br. 16–19. That argument is unpersuasive for three reasons. *First*, it ignores the reason why the CFPB defined a new term to exclude HELOCs from the new regulations imposed on credit transactions under the CARD Act: because doing so was consistent with the longstanding practice of regulating credit cards and HELOCs separately. *Second*, it ignores the agency's recognition that HELOCs are not "credit card accounts," which necessarily means that they are not part of a "credit card plan." *Third*, it ignores the fact that, even when the CARD Act used the specific phrase "credit card plan," the CFPB has not previously construed it to include HELOCs.

1. As the name suggests, Congress enacted the Credit Card Accountability Responsibility and Disclosure Act to impose additional regulations and disclosure requirements on credit card accounts. *See* Pub. L. No. 111-24, 123 Stat. 1734 (2009). The CARD Act imposed new obligations on "credit card account[s] under an open-end consumer credit plan," raising the question whether that phrase could be interpreted to impose the CARD Act's new requirements on HELOCs. *Id.*

In regulations later adopted by the CFPB, the Federal Reserve Board avoided this result by defining the statutory phase to exclude HELOCs. Specifically, the Federal Reserve Board "interpret[ed] the term 'credit card account under an open-end consumer credit plan,' as that term is used in new TILA Section 127(i), not to include accounts that are home-equity lines of credit (HELOCs) subject to § 226.5b, even if those accounts may be accessed by a credit card device." Truth in Lending, 74 Fed. Reg. 36077, 36083 (July 12, 2009). The Federal Reserve Board justified this approach by explaining that it was consistent with the agency's longstanding approach of regulating credit cards and HELOCs differently—even when the HELOC is accessible by a credit card. *Id.* ("This is consistent with the Board's historical treatment of HELOC accounts accessible by a credit card under TILA[.]").

This historical treatment of HELOC accounts is apparent from the Federal Reserve Board's comprehensive review of Regulation Z. In 2004, the Board issued an advanced notice of proposed rulemaking to explain that it intended to conduct a comprehensive review of Regulation Z because "the regulation ha[d] not been reviewed in its entirety" in decades. *See* Truth in Lending, 69 Fed. Reg. 70925, 70926 (Dec. 8, 2004). Rather than reviewing all of Regulation Z at once, the Board decided to proceed in stages and "focus[ed] the first stage of the review on Regulation Z's rules for open-end (revolving) credit accounts *that are not home-secured*, chiefly general-purpose credit cards." *Id.* (emphasis added). The Board made clear that it planned a separate review of certain rules applicable to HELOCs. *Id.* at 70936 ("Staff plans to initiate a separate review, in 2005, of Regulation Z's rules requiring brochures and generic disclosures when consumers obtain applications for . . . open-end home-equity lines of credit (HELOCs).").

In 2007, the Board issued a notice of proposed rulemaking that reiterated the agency's decision to regulate general-purpose credit cards and HELOCs separately.

In proposing new regulations for credit cards, the Board explained that "[t]hese revisions are not intended to impact [HELOCs], which may have a fixed draw period (during which time a consumer may continue to take advances to the extent that he or she repays the outstanding balance) followed by a repayment period where the consumer may no longer draw against the line." Truth in Lending, 72 Fed. Reg. 32948, 32962 (June 14, 2007).

The Board finalized the amendments to Regulation Z and again explained its reasons for the staged approach that treated credit cards and HELOCs differently. In the Board's view, "HELOCs and closed-end credit are largely separate product lines from credit card and other open-end (not home-secured) plans." Truth in Lending, 74 Fed. Reg. 5244, 5267 (Jan. 29, 2009). Accordingly, "[t]he Board believes a clear delineation of rules for HELOCs and other forms of open-end credit pending the review of HELOC rules provides a clear compliance benefit to creditors." *Id.* at 5249.

2. As discussed above, the Fair Credit Billing Act contemplates an agreement between a cardholder and card issuer to establish a "credit card account" that is part of the broader "credit card plan." *See supra* p.10. In amending Regulation Z to implement the CARD Act, the Federal Reserve Board made clear its understanding that a HELOC account is not a "credit card account," and thus by extension not part of a credit card plan.

In addressing the disclosure requirements of open-ended credit plans, the Board separately addressed "notice requirements for home-equity plans and other open-end plans *that are not credit card accounts*." 74 Fed. Reg. at 36083 (emphasis added). The Board emphasized the difference between HELOCs and credit card plans in other ways as well. Consider the Board's rule about minimum payment disclosures:

> [T]he final rule requires the minimum payment disclosures only for credit card accounts. Thus, creditors would not need to provide the minimum payment disclosures for HELOCs (including open-end reverse mortgages), overdraft lines of credit or other general purpose personal lines of credit. For the same reasons as discussed above, the final rule exempts these products even if they can be accessed by a credit card device.

74 Fed. Reg. at 5249.

3. In its amicus brief, the CFPB focuses on the purported distinction between a "credit card plan" and "credit card account under an open-ended credit plan," but it ignores the fact that the agency has not previously interpreted the former phrase to include HELOCs. The CARD Act requires the CFPB to "conduct a [biennial] review . . . of the consumer credit card market, including— . . . the effectiveness of disclosure of terms, fees, and other expenses of *credit card plans*." 15 U.S.C. § 1616(a)(2) (emphasis added).

If the CFPB considered HELOCs to be "credit card plans," as it now claims in its amicus brief, the agency would need to assess "the effectiveness of disclosure of terms, fees, and other expenses" of HELOCs in its biennial credit card reports. But the agency has never done so. The CFPB's reports either do not mention HELOCs at all or reference HELOCs only as a contrast to the credit card market. *See* Consumer Financial Protection Bureau, *The Consumer Credit Card Market* 1–178 (2021), https://bit.ly/3wPG1Kr (failing to mention HELOCs); Consumer Financial Protection Bureau, *The Consumer Credit Card Market* 1–193 (2019), https://bit.ly/3wUyMRs (failing to mention HELOCs); Consumer Financial Protection Bureau, *The Consumer Credit Card Market* 1–352 (2017), https://bit.ly/3JCb184 (failing to mention HELOCs); Consumer Financial Protection Bureau, *The Consumer Credit Card Market* 1–297 (2015), https://bit.ly/3WUHiKE (failing to mention HELOCs); Consumer Financial Protection Bureau, *CARD Act Report* 6, 45 (2013), https://bit.ly/3wGZCMN (contrasting the credit card market with the HELOC market—e.g., "The post-2009 recovery in the credit card market has been more robust than that of some markets (such as home equity lines of credit), while lagging behind that of others (such as auto lending).").

This Court has declined to give any deference under *Skidmore* to an agency interpretation that "represented an 'inconsistent' and 'stark departure' from 'long-used practice.'" *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 982 F.3d 258, 264 (4th Cir. 2020) (quoting *Romero v. Barr*, 937 F.3d 282, 297 (4th Cir. 2019)). It should do so again here.

B. The CFPB's Interpretation Could Harm Consumers by Increasing the Risk of Foreclosure.

The CFPB contends that the Court should construe the phrase "credit card plan" "broadly, consistent with TILA's remedial purpose." CFPB Amicus Br. 16. Even accepting that TILA should generally be "read liberally to achieve [its] goals of protecting consumers," *Id.* (quoting *Curtis v. Propel Prop. Tax Funding, LLC*, 915 F.3d 234, 239 (4th Cir. 2019) (alteration in original)), the CFPB does not even attempt to explain how that principle supports its interpretation. Far from protecting consumers, the CFPB's interpretation may well harm them. Because the agency's bald assertion to the contrary is unpersuasive, it is not entitled to any deference. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 643–44 (4th Cir. 2018) (agency interpretation entitled to "modest *Skidmore* deference, to the extent the agency's reasoning gives it power to persuade, or, in the absence of such reasoning, no deference at all" (cleaned up)).

The offset provision arguably protects credit card customers because of the unsecured nature of that credit product. If a credit card issuer could unilaterally offset a credit card debt by transferring funds from a deposit account, the card issuer would be effectively transforming the unsecured debt into a secured one. The practical consequences for cardholders could be significant: The money held in deposit accounts that the cardholder planned to use to pay, for example, a mortgage or car payment, could be transferred by the card issuer to cover incidental expenses charged to the credit card account. The result could be missed mortgage or car payments, resulting in foreclosure or repossession.

The offset provision would have a fundamentally different effect on secured credit products, like HELOCs. If applied to HELOCs, rather than decreasing the risk of home foreclosure, the offset provision may increase it. If a borrower falls behind in her payments on her HELOC, she puts herself at risk of foreclosure because the lender has a contractual right to foreclose on the home to obtain the funds owed on the HELOC account. *See supra* Part I. A lender is less likely to undertake the costly and time-consuming process of home foreclosure when it could obtain the funds it is owed through the simpler offset process of transferring funds from a deposit account to the HELOC. But under the CFPB's interpretation of "credit card plan" that option may be off the table, thus making foreclosure the only option available for lenders to recover the funds they are owed. The CFPB does not even acknowledge this risk, much less explain how consumers are better protected under an interpretation that increases the risk of foreclosure.

Moreover, the CFPB asserts that its interpretation of the offset provision would protect consumers without acknowledging the significant protections already provided to consumers obtaining HELOCs, much less explaining why those protections are insufficient. For instance, lenders cannot unilaterally terminate a HELOC account and require immediate payment. 15 U.S.C. § 1647(b). That protection ensures that consumers have time to prepare themselves to pay off their debts before their homes are put at risk. Similarly, HELOC lenders cannot arbitrarily increase HELOC interest rates or otherwise unilaterally change a HELOC's terms to the consumers detriment. *See id.* § 1647(a) & (b). Lenders must also fully inform and not mislead consumers interested in utilizing a HELOC. 15 U.S.C. § 1665b. Thus, Congress ensured that lenders would not unfairly change a HELOC plan's terms counter to consumers' expectations and ensured that consumers were well informed of the risks of using a HELOC. Both forms of protection are in service of protecting consumers' homes from foreclosure. The CFPB's interpretation of § 1666h, by contrast, puts consumers' homes at risk.

CONCLUSION

For the foregoing reasons, and the reasons set forth in PNC Bank's brief, the judgment of the district court should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,419 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2016 in Times New Roman and 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on February 3, 2023.

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