IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Jose Lopez Plaintiff, v. Bank of Orrick, et al., Defendant.	Case No. 1:23-CV-02063

AMICUS BRIEF OF THE CONSUMER FINANCIAL PROTECTION BUREAU

INTRODUCTION

This Court invited the Consumer Financial Protection Bureau to submit an amicus brief addressing issues under the Truth in Lending Act (TILA) and its implementing Regulation Z. *See* Doc. 27. As the Court has noted, this case presents the question of whether the repayment disclosure requirements contained in 15 U.S.C. § 1637(b)(11) apply to open-end consumer credit plans generally, or whether Regulation Z, as promulgated and administered by the Bureau, has narrowed the applicability of those requirements to only credit card accounts under an open-end (not home secured) consumer credit plan. The Bureau respectfully submits this brief in response to the Court's invitation. Since 2010, the repayment disclosure obligations in § 1637(b)(11) have applied only to credit card accounts under an open-end (not home secured) consumer credit plan. That's because the Federal Reserve Board exempted open-end credit plans that are not credit card accounts from these statutory repayment disclosure obligations when it amended Regulation Z to implement the Credit Card Accountability Responsibility and Disclosure Act (the CARD Act).

BACKGROUND

Congress passed TILA in 1968 to promote the "informed use of credit" by requiring "meaningful disclosure of credit terms." 15 U.S.C. § 1601(a). Congress conferred authority on the Federal Reserve Board to issue implementing regulations, and Congress amended that authority several times. *See* 15 U.S.C. § 1604 note. In early 2010, the Board was authorized to "prescribe regulations to carry out the purposes of [TILA]," including by providing "such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of [TILA]," as well as to "exempt, by regulation, from all or part of [TILA] any class of transactions … for which, in the determination of the Board, coverage under all or part of [TILA] does not provide a meaningful benefit to consumers

in the form of useful information or protection." *Id.* § 1604(a), (f)(1) (2006 ed.). In exercising its exemption authority, Congress required the Board to consider several factors and publish its rationale when proposing an exemption from TILA's requirements. *Id.* § 1604(f)(2). The Federal Reserve Board implemented TILA in its Regulation Z. 12 C.F.R. pt. 226.

In 2009, Congress passed the CARD Act "[t]o amend the Truth in Lending Act to establish fair and transparent practices relating to the extension of credit under an open end consumer credit plan[.]" Pub. L. 111-24, 123 Stat. 1734 (May 22, 2009). The Act amended TILA by, among other things, imposing new disclosure requirements under § 1637(b)(11) pertaining to "any account under an open end consumer credit plan[.]" 15 U.S.C. § 1637(b).

Following the CARD Act's enactment, the Board proposed amendments to Regulation Z to implement the Act. Among other things, the Board sought "to revise § 226.7(b)(12) to implement Section 201 of the Credit Card Act," which added the relevant repayment disclosure requirements to TILA. 74 Fed. Reg. 54124, 54135-36 (Oct. 21, 2009). Though the Board acknowledged that under the terms of the Act, "the repayment disclosure requirements apply to all open-end accounts (such as credit card accounts, HELOCs, and general purpose credit lines)," the Board proposed "limit[ing] the repayment disclosures in the Credit Card Act to credit card accounts under open-end (not home-secured) consumer credit plans." *Id.* Accordingly, the repayment disclosures required in 15 U.S.C § 1637(b)(11), as amended by the CARD Act, would not apply to "(1) HELOC accounts … even if they are accessed by a credit card device; (2) overdraft lines of credit even if they are accessed by a debit card; and (2) open-end credit plans that are not credit card accounts, such as general purpose lines of credit that are not accessed by a credit card." *Id*. at 54136.

The Board proposed this limitation "pursuant to its exception and exemption authorities under [15 U.S.C. § 1604]," which, as noted above, "authorize[d] the Board to exempt any class of transactions from coverage under any part of TILA if the Board determines that coverage under that part does not provide a meaningful benefit to consumers in the form of useful information or protection." *Id*. (citing 15 U.S.C. § 1604(f)(1)). For each of the three types of open-end credit that the Board's proposed rule would exempt from 15 U.S.C § 1637(b)(11)'s requirements, the Board considered the required factors laid out in 15 U.S.C. § 1604(f)(2). For example, with respect to general purpose credit lines (along with overdraft lines of credit), the Board noted that such products were "not in wide use[;]" that they were "neither promoted, nor used, as long-term credit options of the kind for which the repayment disclosures were intended[;]" and that the Board was "concerned that the operational costs of requiring creditors to comply with the repayment disclosure requirements … may cause some institutions to no longer provide these products" to consumers. *Id*. at 54137. Accordingly, the Board believed that 15 U.S.C. § 1637(b)(11)'s disclosures were not necessary to effectuate TILA's purposes. *Id*.

In February 2010, the Board issued its final rule amending Regulation Z. *See* 75 Fed. Reg. 7658 (Feb. 22, 2010). As it had proposed to do, after considering the applicable statutory factors, the Board explicitly exercised its authority under § 1604(a) and (f) "to exempt overdraft lines of credit and other general purpose credit lines from the repayment disclosure requirements, because in this context the Board believes the repayment disclosures are not necessary to effectuate the purposes of TILA." *Id.* at 7678. Accordingly, Regulation Z's § 226.7(b)(12) as promulgated by the Board reflects the Board's judgment that 15 U.S.C. § 1637(b)(11) should apply only to "a card issuer" of a "credit card account under an open-end (not home-secured)

consumer credit plan," and not with respect to all forms of open-end consumer credit. 12 C.F.R. § 226.7(b)(12).

Effective in 2011, Congress transferred rulemaking authority for TILA to the Bureau. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 §§ 1061(b)(1), 1100A, 124 Stat. 1376, 2036, 2107-08 (2010). The Bureau then issued an interim final rule to restate Regulation Z "with technical and conforming changes to reflect the transfer of authority[,]" and "[did] not impose any new substantive obligations on persons subject to the existing Regulation Z, previously published by the Board." 76 Fed. Reg. 79768 (Dec. 22, 2011). The repayment disclosure requirements, republished as 12 C.F.R. § 1026.7(b)(12), remained unchanged in substance. *Compare* 12 C.F.R. § 226.7(b)(12) *with id.* § 1026.7(b)(12). The Bureau subsequently finalized the interim final rule without change after an opportunity for public comment. 81 Fed. Reg. 25323 (Apr. 28, 2016).[1]

ARGUMENT

As most relevant here, TILA provides that "[t]he Bureau [or previously, the Board] may exempt, by regulation, from all or part of this subchapter all or any class of transactions . . . for which, in the determination of the Bureau, coverage under all or part of this subchapter does not provide a meaningful benefit to consumers in the form of useful information or protection." 15 U.S.C. § 1604(f)(1). The Board exercised that authority in its 2010 Final Rule. After notice and comment, the Board considered the statutory factors and concluded that it was appropriate to exempt a class of transactions from the repayment disclosure requirements in 15 U.S.C. § 1637(b)(11), including open-end credit plans that are not credit card accounts.

[1] The Bureau has proposed to remove the exception and apply the repayment disclosure requirements to overdraft offered by certain larger financial institutions. *See* 89 Fed. Reg. 13852, 13874-76 (Feb. 23, 2024).

The parties in this case correctly recognize that Congress delegated to the Board (and now the Bureau) the power to create such exemptions. ECF No. 7 at 3-4; ECF No. 16 at 2. Likewise, the parties do not dispute that in the preamble to the 2010 Final Rule, the Board expressly stated that the Final Rule created an exemption from the statutory obligation to provide the disclosures otherwise required by 15 U.S.C. § 1637(b)(11). ECF No. 7 at 4-6; ECF No. 16 at 3. The parties' disagreement concerns plaintiff's contention that the Board's attempt to create this exemption had no effect because the exemption is not reflected in Regulation Z or its Official Commentary. *See* ECF No. 16 at 3-4. The Bureau respectfully submits that the exemption is effective and is reflected in Regulation Z.

The Board created an exemption from the statutory obligation to provide the disclosures otherwise required by 15 U.S.C. § 1637(b)(11) in what is now 12 C.F.R. § 1026.7(b)(12). As discussed above, in the section-by-section analysis of the Federal Register notice creating the predecessor to § 1026.7(b)(12), the Board expressly described why it believed it was appropriate create an exemption from § 1637(b)(11)'s disclosure requirements for specific products after considering the applicable statutory factors for issuing exemptions. Then in 12 C.F.R. § 1026.7(b)(12)(i), the Board implemented 15 U.S.C. § 1637(b)(11)'s requirements and specified that those disclosure obligations apply to "a credit card account under an open-end (not home-secured) consumer credit plan." By contrast, the majority of the other disclosure requirements imposed under subparagraph (b) pertain to any non-home-equity open-end credit plan: (b)(1) through (10) contain no language narrowing the applicability of the requirements laid out in those provisions—and thus apply to any open-end plan other than home-equity plans subject to

the requirements of § 1026.40. *See* 12 C.F.R. §§ 1026.7(b)(1)-(10).[2] Given the express exemption discussion in the preamble of the 2010 Final Rule, the Bureau interprets 12 C.F.R. § 1026.7(b)(12)'s deliberately narrowed scope to create an exemption from the statutory obligation to provide repayment disclosures imposed by 15 U.S.C. § 1637(b)(11) for open-end credit aside from credit cards.

To be sure, a regulation can only narrow a self-implementing statutory obligation pursuant to an appropriate exercise of rulemaking authority. Accordingly, the Bureau does not lightly assume that the regulations it administers narrow regulated entities' statutory obligations. Here, of course, the Board clearly exercised its exemption authority to limit the application of 15 U.S.C. § 1637(b)(11).

CONCLUSION

For the foregoing reasons, the repayment disclosure obligations in 15 U.S.C. § 1637(b)(11) apply only to credit card accounts under an open-end (not home secured) consumer credit plan.

[2] A credit device need not be a physical card in order to be a "credit card" under Regulation Z. *See, e.g.*, Consumer Financial Protection Bureau, *Use of Digital User Accounts to Access Buy Now, Pay Later Loans*, 89 Fed. Reg. 47068, 47071-72 (May 31, 2024). For example, the term "credit card" includes an account number that can access an open-end line of credit to purchase goods or services. 12 C.F.R. Part 1026, Supp. I, cmt. 2(a)(15)-2.ii.c. The Bureau has not considered and takes no position on whether the credit offered to Plaintiff qualifies as a credit card under Regulation Z.

Dated: July 1, 2024

Respectfully submitted,

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