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# CFPB's Reading Of Lending Act May Affect Home Equity Plans

By **Ralph Mazzeo and Edward Southgate** (March 7, 2023, 4:18 PM EST)

On Nov. 30, 2022, the Consumer Financial Protection Bureau **filed** an amicus brief in the U.S. Court of Appeals for the Fourth Circuit, arguing that the U.S. District Court for the District of Maryland erred in *Lyons v. PNC Bank NA* when it "narrowed" the application of Regulation Z.

At issue was whether the Truth in Lending Act's Section 1666h(a) precluded PNC Bank NA from unilaterally withdrawing funds from one of its customer's deposit accounts to satisfy an outstanding payment on their home equity line of credit account.

If adopted by the Fourth Circuit in the appeal, the CFPB's position that the *Lyons* court erred and its interpretation of Regulation Z could affect the collectability of HELOCs. This article reviews the CFPB's arguments and what this could mean for entities that acquire or securitize HELOC loans.



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## Background

TILA was enacted in 1968 and was designed to protect consumers and promote "the informed use of credit." [1] The rules that govern implementation of TILA are referred to as Regulation Z. The Real Estate Settlement Procedures Act was enacted in 1974 and applies to loans for residential property. [2] The rules that govern its implementation are referred to as Regulation X.



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In *Lyons*, among other issues, the plaintiff William Lyons Jr. argued that PNC's HELOC product, which included a card through which his line of credit could be accessed, was a credit card secured by real property and therefore the bank had violated TILA and RESPA. [3]

The *Lyons* court rejected both claims, finding that a HELOC loan, or home equity plan, which can be accessed by a credit card, does not constitute a credit card plan. [4]

In its analysis of *Lyons*' TILA claim, the district court explained that other sections of TILA and Regulation Z specifically account for distinct rules that apply to "home equity plans." [5] Moreover, the *Lyons* court highlighted that under 1026.2(a)(15)(ii) in Regulation Z, the term "credit card account under an open-end (not home-secured) consumer credit plan" explicitly excludes a home equity plan that can be accessed via a credit card.

Although *Lyons* could use a credit card to access funds from his HELOC loan, the *Lyons* court held that Section 1666h(a) did not apply to his account. [6] Therefore, the court reasoned that "[h]ome equity plans, which are secured by real property, are simply different from credit card plans, which are not."

The *Lyons* court further recognized Congress' express delegation of authority to the CFPB, which has exempted certain products, like HELOCs, from RESPA, notwithstanding that Congress may have intended RESPA to apply to "any loan ... which is secured by a first or subordinate lien on residential real property." [7] *Lyons* appealed the decision to the Fourth Circuit on Nov. 23, 2022.

## The CFPB's Amicus Brief

Although the CFPB agreed with the district court's analysis of Lyons' RESPA claim under Regulation X, it took issue with several of the district court's conclusions in its amicus brief.

The CFPB principally argued the district court "narrowed" Regulation Z's offset provision when it held that the undefined term "credit card plan" does not include a home equity plan, or HELOC, that can be accessed by a credit card.

The pertinent Regulation Z provision states that "[a] card issuer may not take any action ... 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."

The CFPB contended that the term credit card plan encompasses a home equity plan that can be accessed by a credit card, and therefore, the district court had erroneously relied on 1026.2(a)(15)(ii)[8] when it "narrowed" the offset provision by excluding HELOCs from the definition of credit card plan.

First, the CFPB disagreed with how the district court gave meaning to the term credit card plan under Regulation Z. Specifically, the CFPB argued the district court erred when it conflated the meaning of the terms "credit card plan" in 1026.12(d)(1) with "credit card account under an open-end (not home-secured) consumer credit plan" under 1026.2(a)(15)(ii).

Although the phrase "credit card plan" is not defined under TILA or Regulation Z, the CFPB asserted the plain text of each phrase renders them different terms. The CFPB argued that while the first term "refers broadly to a credit card plan." and the second term refers to a smaller subset of open-end credit plans that are not secured by a home, the term credit card plan should nevertheless be construed broadly to comport with TILA's remedial purpose to protect consumers.

Second, the CFPB argued the district court erred when it ignored the historical context of how the two terms became part of TILA and Regulation Z. The CFPB emphasized that the term credit card plan has been in use since the 1970s, while the term "credit card account under an open-end (not home-secured) consumer credit plan" in 1026.2(a)(15)(ii) was recently added in 2010 to an unrelated amendment to TILA.

Therefore, the CFPB contended, it would be inconsistent to use the newer unrelated defined term in 1026.2(a)(15)(ii) to discern the meaning of the older term credit card plan.

Lastly, the CFPB asserted the district court's application of the term "credit card account under an open-end (not home-secured) consumer credit plan" in Section 1026.2(a)(15)(ii) to TILA's offset provision runs contrary to the CFPB's long-standing official interpretations of Regulation Z.

To support its position, the CFPB pointed out that Regulation Z's offset provision applies to accounts that are excluded from Section 1026.2(a)(15)(ii). Specifically, the CFPB argued that the offset provision "includes debts incurred by accessing an overdraft line of credit with a debit card."

The phrase "credit card account under an open-end (not home-secured) consumer credit plan" explicitly excludes overdraft lines of credit that are accessed by a debit card,[9] though, so the district court's application of the term in Section 1026.2(a)(15)(ii) to the offset provision would not make sense.

In sum, the CFPB has asked the Fourth Circuit to broadly construe the meaning of the undefined term credit card plan in TILA and Regulation Z to include HELOC loans.

## What's Next

Additional arguments on the Lyons appeal are tentatively scheduled for early May this.

If the Fourth Circuit adopts the CFPB's arguments in its ruling, it would remove one tool issuers of HELOC loans currently have to ensure repayment of outstanding debt on their customers' legacy HELOC accounts. These issuers may wish to consider adding RESPA compliant provisions to their

agreements with customers in order to continue current market practice.

Further, until we have further clarification from the court, issuers of securities backed by HELOC loans might also want to consider adding a risk factor to their transactions stating that amounts owed under a HELOC may no longer be collectible from the deposit accounts of their customers, and any such inability to collect may have a material adverse effect on the timing of payments on their securities if alternative means are not as effective.

Moreover, if adopted, the CFPB's broad interpretation of Regulation Z's offset provision could expand the scope of protection to transactions utilizing an overdraft line of credit to more than just HELOCs. Specifically, the CFPB's argument included "any indebtedness incurred by accessing an overdraft line of credit." as being covered by the offset provision "so long as there is some sort of credit card associated with the account."

Notably, Regulation Z broadly defines "credit card" as "any card, plate, or other single credit device that may be used from time to time to obtain credit." [10] and "credit" as "the right to defer payment of debt or to incur debt and defer its payment." [11]

Accordingly, given these two broad definitions, borrowers could have more leeway in arguing that arrangements similar to HELOCs, irrespective of a card component, are nevertheless accorded protection under Regulation Z.

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[1] See 15 U.S.C. § 1601; see also Truth in Lending, Federal Register, <https://www.federalregister.gov/truth-in-lending-regulation-z->.

[2] See Real Estate Settlement Procedures Act, <https://www.federalreserve.gov/boarddocs/supmanual/cch/respa.pdf>.

[3] See *Lyons v. PNC Bank, N.A.*, 1:20-cv-02234-SAG, 5–8 (D. Md. 2022); see also 15 U.S.C. § 1602(1) (noting that the term "credit card" refers to "any card, plate, coupon book or other credit device existing for the purpose of obtaining money . . . on credit.") (citation omitted).

[4] See *Lyons v. PNC Bank, N.A.*, 1:20-cv-02234-SAG, 6 (D. Md. 2022).

[5] *Id.* See 15 U.S.C. § 1647; 12 C.F.R. § 1026.6(a).

[6] See *Lyons v. PNC Bank, N.A.*, 1:20-cv-02234-SAG, 6 (D. Md. 2022). Notably, the Lyons court acknowledged the underlying policy implications making it "understandable why Congress might give financial institutions more leeway to allow withdrawals from depository accounts when there is outstanding debt on a HELOC if such action might preserve a customer's home." *Id.* In the alternative, "[n]o such loss of a basic necessity is associated with collections efforts on an unpaid credit card account." *Id.*

[7] *Lyons v. PNC Bank, N.A.*, 1:20-cv-02234-SAG, 7 (D. Md. 2022) (citation omitted); see 12 U.S.C. § 2602(1)(A).

[8] See § 1026.2(a)(15)(ii) ("Credit card account under an open-end (not home-secured) consumer credit plan means any open-end credit account that is accessed by a credit card, except: (A) A home-equity plan . . . that is accessed by a credit card."); see also § 1026.2(a)(15)(ii)(B) ("An overdraft line of credit that is accessed by a debit card. . .").

[9] See § 1026.2(a)(15)(ii)(B).

[10] § 1026.2(a)(15)(i).

[11] § 1026.2(a)(14).

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