UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

COMMONWEALTH OF VIRGINIA ex rel. JAY JONES, Attorney General, Plaintiff, v. WILLIAM JAYSON WALLER; KEVIN ANTHONY KLINK; CROSS RIVER BANK, a New Jersey-chartered Bank; GOODLEAP, LLC, a California limited liability company; SOLAR MOSAIC LLC, by and through the Plan Administrator, Olive Advisors LLC; SUNLIGHT FINANCIAL LLC, a Delaware limited liability company; and TECHNOLOGY CREDIT UNION, a California-chartered Credit Union, Defendants.	Case No.: 3:26-cv-00039-REP

AMICUS CURIAE BRIEF OF AMERICAN FINTECH COUNCIL
IN SUPPORT OF MOTION TO DISMISS COUNT II (TILA/REGULATION Z CLAIM)

This amicus curiae brief is submitted to assist the Court in its consideration of the motion to dismiss Count II of the Amended Complaint. *See* Doc.82; Doc.83.

INTEREST OF THE AMICUS

American Fintech Council ("AFC") is the premier industry association representing both responsible fintech companies and innovative banks.[1] AFC members foster competition in consumer finance and pioneer products for underserved consumer segments and geographies.[2]

[1] *See* Our Mission, https://www.fintechcouncil.org/our-mission (last visited on May 1, 2025).
[2] *Id.*

A standards-based organization, AFC is the largest and most diverse trade association representing financial technology (fintech) companies and innovative banks. On behalf of over 150 member companies and partners, AFC promotes a transparent, inclusive, and customer-centric financial system by supporting responsible innovation in financial services and encouraging sound public policy.[3]

AFC advocates for the industry in the legislative and executive branches of government and before regulatory agencies at the federal and state level. From time to time, AFC files amicus curiae briefs in courts to share its experience and assist courts in considering issues that affect the industry and consumers.

AFC brings a unique perspective to this case and the issues raised by the parties that would benefit the Court and it should be granted leave to file this amicus curiae brief as a result. AFC supports full and accurate disclosures to consumers pursuant to the Truth-in-Lending Act ("TILA") and its implementing regulation, Regulation Z, and its members and other financial institutions have complied with the statute, regulations, and official interpretations for more than 50 years in providing disclosures to consumers. AFC's members rely upon TILA and Regulation Z in making disclosures to consumers. They rely upon agency commentary and interpretations in providing those disclosures.

This case represents an effort by a state attorney general to change the settled expectations of creditors by imposing liability on creditors whose disclosures comply in good faith with Regulation Z. The Virginia Attorney General seeks to impose liability under TILA upon creditors who charge seller's points to sellers of products for offering financing programs to consumers for purchases of such products, asserting that such points are "finance charges" that

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[3] *Id.*

must be included in the finance charge disclosed to consumers pursuant to TILA. However, Regulation Z, adopted pursuant to TILA, provides that seller's points are excluded from finance charges, and the Regulation Z official interpretation provides that seller's points are excluded from the finance charge in all cases.

To assist the Court, this amicus brief provides a brief history and purpose of TILA and Regulation Z, the treatment of sellers' points under Regulation Z and official agency interpretations, creditors' reliance upon TILA and Regulation Z, and the effect of determining sellers' points as included or excluded from finance charge on a case-by-case basis.

No party's counsel authored this brief in whole or in part, and no one other than AFC contributed money intended to fund preparing or submitting this amicus brief.

ARGUMENT

I. History and Purpose of TILA and Regulation Z.

The Truth in Lending Act ("TILA") was first enacted in 1968 as part of the Consumer Credit Protection Act. It requires creditors to provide standardized information for various consumer credit products.[4] TILA requires creditors to disclose terms and costs of consumer credit.[5] As TILA provides:

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

[4] Congressional Research Service, "Overview of the Truth in Lending Act" (9/19/2024), https://www.congress.gov/crs-product/IF12769.
[5] *Id.*

15 U.S.C. § 1601(a) (emphasis added).

TILA requires creditors to provide different disclosures to borrowers, including disclosures at origination, periodic statements, and application disclosures for some products.[6] TILA disclosures at the origination of debt are offered to borrowers to compare lending options.[7] Every credit transaction is different. To allow consumers to compare the credit options, these disclosures require standardized information to be provided by all creditors subject to TILA including disclosures of the total finance charges and annual percentage rate. In Regulation Z, the implementing regulations under TILA, the Federal Reserve Board ("FRB")[8] created standardized definitions, calculations, and disclosure forms to provide consumers meaningful credit disclosures that they may use to compare credit products offered by different creditors.[9]

TILA defines "finance charge" as follows:

> Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. The finance charge does not include charges of a type payable in a comparable cash transaction. The finance charge shall not include fees and amounts imposed by third party closing agents (including settlement agents, attorneys, and escrow and title companies) if the creditor does not require the imposition of the charges or the services provided and does not retain the charges.

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[6] *See* CRS, footnote 4, above.
[7] *Id.*
[8] As part of the Dodd-Frank Act, Regulation Z rulemaking transferred from the FRB to the Consumer Financial Protection Bureau ("CFPB") in July 2011. Since 2011, the CFPB has rulemaking authority over TILA and its implementing regulation, Regulation Z. The CFPB shares supervisory and enforcement authorities with the Federal Trade Commission ("FTC").
[9] *See Jones v. Saxon Mortg., Inc.*, 980 F. Supp. 842, 847 (E.D. Va. 1997) ("The TILA is a remedial statute enacted to provide consumers with a greater ability to shop for fair credit, and its rescission provisions are a significant component of that objective."), *aff'd*, 537 F.3d 320 (4th Cir. 1998); *see also Tripp v. Charlie Falk's Auto Wholesale Inc.*, 290 F. App'x 622, 626, 2008 WL 3992464, at *3 (4th Cir. 2008) ("TILA was passed by Congress to assure meaningful disclosure and to enable consumers to compare the various credit terms available to him.")

15 U.S.C. § 1605(a). Similarly, Regulation Z defines "finance charge" as "the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction." 12 C.F.R. § 1026.4(a).

Congress conferred upon the FRB (and later, the CFPB) authority to issue regulations under TILA:

> The Bureau shall prescribe regulations to carry out the purposes of this subchapter. Except with respect to the provisions of section 1639 of this title that apply to a mortgage referred to in section 1602(aa) of this title, such regulations may contain such additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

15 U.S.C. § 1604(a).

Additionally, the FRB (now, the CFPB) adopted official interpretations of Regulation Z. Those interpretations were provided to clarify TILA and Regulation Z and provide guidance for particular situations, to assist creditors and others to comply with TILA and Regulation Z. Title 12, Ch. X, Part 1026, Supplement I to Part 1026, point 1 ("This commentary is the vehicle by which the Bureau of Consumer Financial Protection issues official interpretations of Regulation Z.") Compliance with the official interpretation protects creditors from civil liability for any act done or omitted in good faith in conformity with such interpretations. *See id.*

TILA's regulatory scheme sets up Regulation Z and the official interpretation for creditors to rely upon in conforming their business and disclosures to comply with the law.[10]

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[10] Indeed, Congress has established a safe harbor from liability for creditors who act in "good faith in conformity with any rule, regulation, or interpretation" of the FRB/CFPB under TILA. 15 U.S.C.

II. Under Regulation Z, Sellers' Points are Excluded From "Finance Charge" in "All Cases."

In this case, plaintiff argues that fees charged to sellers of products by creditors providing financing for the consumer's purchase of the products ("seller's points") should be included in the definition of "finance charge" under TILA and disclosed as such to consumers.

Regulation Z contains a list of fees that are finance charges, except for charges specifically excluded by Section 1026.4(c) through (e). That list of fees that are finance charges includes "[p]oints, loan fees, assumption fees, finder's fees, and similar charges." 12 C.F.R. § 1026.4(b)(3).

The inquiry does not stop there. Regulation Z also identifies "charges" that "are not finance charges." Regulation Z includes "seller's points" as an item on a list of charges that are explicitly excluded from the definition of "finance charge" (12 C.F.R. § 1026.4(c)(5)), along with other fees such as application fees, late fees, overdraft fees, real-estate related fees, and discounts ((c)(1), (2), (3), (7), (8)).

Each of these categories of "not finance charges" under Section 1026.4(c) are accompanied by an "official interpretation." Seller's points are excluded from "finance charges" under TILA/Regulation Z, as the official interpretation to Section 1026.4(c)(5) provides:

> 1. **Seller's points.** The seller's points mentioned in § 1026.4(c)(5) include any charges imposed by the creditor upon the noncreditor seller of property for providing credit to the buyer or for providing credit on certain terms. These charges are excluded from the finance charge even if they are passed on to the buyer, for example, in the form of a higher sales price. Seller's points are frequently involved in real estate transactions guaranteed or insured by governmental agencies. A commitment fee paid by a noncreditor seller (such as a real estate developer) to the creditor should be treated as seller's points. Buyer's points (that is, points charged to the buyer by the creditor), however, are finance charges.

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§ 1640(f). Section 1640(f) provides that liability under Section 1640 shall not apply to any act done or omitted in good faith in conformance with rules, regulations, or official interpretations. *See id.*

> 2. **Other seller-paid amounts.** Mortgage insurance premiums and other finance charges are sometimes paid at or before consummation or settlement on the borrower's behalf by a noncreditor seller. The creditor should treat the payment made by the seller as seller's points and exclude it from the finance charge if, based on the seller's payment, the consumer is not legally bound to the creditor for the charge. A creditor who gives disclosures before the payment has been made should base them on the best information reasonably available.

12 C.F.R. § Pt. 1026, Supp. I, Part 1, Official Interpretation of Paragraph 4(c)(5) (emphasis added).

Thus, under 12 C.F.R. § 1026.4(c)(5), seller's points are excluded from "finance charges" under TILA. Seller's points "include any charges imposed by the creditor upon the noncreditor seller of property for providing credit to the buyer or for providing credit on certain terms." These are fees paid by a non-creditor (typically a dealer or developer) to a creditor to offer financing to a customer. Seller's points are not finance charges.[11] The "seller's points" exclusion applies to any consumer credit transactions subject to Regulation Z. Although seller's points are commonly found in real estate transactions, Regulation Z's "seller's points" exclusion is not limited to real estate transactions. Further, seller's points are excluded from the definition of "finance charge" "even if they are passed on to the buyer, for example, in the form of a higher sales price." 12 C.F.R. § Pt. 1026, Supp. I, Part 1, Official Interpretation of Paragraph 4(c)(5).

Regulation Z's seller's points exclusion was promulgated in 1981, along with the Official Interpretation, and thus has been in place for 45 years. 46 Fed. Reg. 20848-01, 1981 WL 105014 (Apr. 7, 1981) (final rule); 46 Fed. Reg. 50288-01, 1981 WL 122369 (Oct. 9, 1981) (adding the Official Interpretation to Reg. Z). The exclusion was included in updates and reorganization of Regulation Z. The FRB's commentary to the proposed rule regarding seller's points explained: "Seller's points would be excluded from the finance charge in all cases." Proposed Rule, 45 Fed.

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[11] This is different than "buyer's points," which are paid by a customer to a creditor typically to lower the overall interest rate on financing. Buyer's points are finance charges. *See* 12 C.F.R. § 1026.4(b)(3).

Reg. 80648, 80650 (Dec. 5, 1980) (emphasis added). The commentary to the final regulation regarding seller's points explained that it is a "new position by the Board."[12] Truth in Lending; Revised Regulation Z, 46 Fed. Reg. 20848-01, 20855 (April 7, 1981). The FRB explained:

> Although seller's points may have an indirect effect on the cost of credit to the borrower (if they are passed on indirectly in the form of a higher sales price), a uniform rule regarding these charges is desirable. As a result, the Board has concluded that seller's points should be excluded from the finance charge in all cases.

Id. (emphasis added).

The commentary to the proposed new rule adopted in 1981 explained that: "Because it is extremely difficult to determine whether [seller's points] have actually been imposed on the buyer in an individual case, the current Board interpretation allows creditors to include seller's points in the finance charge as a matter of course in all cases, even if the points were not actually passed on. For purposes of comparison among various credit sources, a uniform rule regarding these charges is desirable and the Board proposes to exclude such charges from the finance charge in all cases." Proposed Rule, 45 Fed. Reg. 80648, 80657 (Dec. 5, 1980) (emphasis added).

The seller's points exclusion from finance charges has remained consistent since 1981. This exclusion has not been changed by the FRB or the CFPB for 45 years. The FRB chose to

[12] This is a reversal from the prior position, which was far more difficult to apply in context. Previously, seller's points had to be included in the finance charge to the extent that they were passed on to the buyer through an increase in the selling price. FRB Interpretation 226.406 (Oct. 23, 1970), in FRB Minutes, Item No. 9 (PDF at 38-39), https://files.crisesnotes.com/NT50684.pdf. Under the old interpretation, seller's points were not presumed to be passed along to the purchaser. *Id.* at 39. Rather, it had to be determined whether the points were passed on to the buyer and were an indirect fee. *Id.* at 38. The FRB observed: "as a practical matter, it may be difficult to determine whether or not a discount paid by the seller in connection with a real estate transaction has been, in fact, passed along to the customer as a part of the purchase price of the property." *Id.* The current rule adopted a "flat exclusion of seller's points from the finance charge," which reversed the prior rule. NCLC, Truth in Lending treatise, Section 3.7.5.2.

implement an absolute, black-or-white rule that seller's points are excluded from finance charges. Although seller's points potentially could have an indirect effect on the cost of credit to the borrower if they are passed on indirectly in the form of a higher sales price, "a uniform rule regarding these charges is desirable. As a result, the Board has concluded that seller's points should be excluded from the finance charge in all cases." Truth in Lending; Revised Regulation Z, 46 Fed. Reg. 20848-01, 20855 (April 7, 1981) (emphasis added).

As noted in part I, TILA disclosures provide consumers meaningful disclosure of credit terms so the consumer can compare the various credit terms available to him or her. To create apples-to-apples comparisons of credit disclosures and help fulfill the purpose of TILA, the FRB and CFPB have made policy choices of what fees are – and are not – included in the finance charge definition, other definitions, and in the model disclosures. As pertinent here, the FRB made the policy choice to treat seller's points as excluded from finance charges **in all cases**, regardless of whether some of the costs of those points are indirectly passed to a consumer. Thus, the standardized disclosures under TILA must exclude seller's points from finance charges, under the regulation and official interpretation.

In this case, plaintiff asks the Court to disregard or rewrite the plain language of TILA, Regulation Z, and the long-standing interpretation in a manner that holds that seller's points should not be excluded from finance charges in all cases, effectively adopting a case-by-case treatment of seller's points. However, this would prevent consumers from conducting an apples-to-apples comparison of the cost of credit when considering different financing options, because in some cases seller's points would be included in the finance charge, and in other cases, they would not. This would upend the ability of consumers to conduct an apples-to-apples

comparison, which is assured under the existing blanket exclusion of seller's points from finance charges.

The current rule excludes seller's points from finance charges in "all cases." This rule is not limited to real estate transactions. Seller's points may be and are charged in various transactions where consumers finance the purchase of products for family, household, and personal purposes (*e.g.*, large furniture purchases, HVAC equipment, home improvement projects, automobiles, or plastic surgery). AFC's members are largely not real estate lenders and, as shown in part III, would be substantially impacted if the Court were to adopt the change in the law advocated by the Virginia Attorney General in this case.

III. Creditors Rely Upon the Blanket Seller's Points Exclusion.

The exclusion of seller's points from finance charges is clear and long-standing. For 45 years, creditors have relied upon this long-standing exclusion of seller's points from finance charges under TILA. In this case, the Virginia Attorney General is essentially asking the Court to revoke the long-standing exclusion and impose liability on defendants for following clear disclosure rules. Yet, creditors rely upon Regulation Z and the official interpretation to exclude seller's points from finance charges. This reliance falls within the safe-harbor statute, and creditors are not subject to liability for excluding seller's points from the finance charge. 15 U.S.C. § 1640(f) (no liability shall apply to "any act done or omitted in good faith in conformity with any rule, regulation, or interpretation").

Congress has made the choice to delegate authority to adopt regulations and official interpretations of TILA to an agency, and to shield creditors from liability who in good faith conform their conduct to those regulations and interpretations promulgated by the agency. Here, the seller's points exclusion is a clear blanket rule. The FRB and the CFPB expressly state that

seller's points are excluded from finance charges even if they have an indirect effect on the cost of credit to borrowers (if they are passed on indirectly in the form of a higher sales price). *See* pages 7-9, above. The official interpretation is clear and unmistakable. The assertions in this case ask the Court to make different policy choices and re-write longstanding regulations and official interpretation.

Congress's purpose in enacting TILA is to provide meaningful and comparable disclosures to consumers through standardized definitions, calculations, and disclosures that are uniformly applicable to credit transactions across the country. Congress and the CFPB (and previously the FRB) set the standards for TILA disclosures, through the laws and regulations and official interpretation, respectively. If Congress or the regulator wished to change the rules regarding seller's points, it would do so only after hearings and the legislative process (if by Congress), or notice and comments from stakeholders (if by the regulator). These processes provide protections to assure uniformity across the board to all creditors, to follow the same finance charge standard and thus TILA disclosures will continue to show apples-to apples comparisons of similar credit products. By these actions, Congress has chosen not to put these matters in the hands of the courts to apply a varying case-by-case rule for seller's points to sometimes include them in the finance charge and sometimes not. The FRB rejected the more impracticable case-by-case standard, which stood in the way of uniformity of disclosure.

Additionally, for the Court to step in and rewrite policy would ultimately harm consumers because it would eliminate standardized disclosures and substitute them for court-made determinations of proper disclosures. This would impede an apples-to-applies comparison, and make the assessment of credit options less transparent, as the disclosures would vary depending upon court rulings and where the parties are located. And, if finance charge

disclosures vary case-by-case depending upon the court and jurisdiction, creditors would lose their long-held expectations to be shielded from liability for good faith reliance on Regulation Z and the official interpretation, and the effect of the safe harbor created by Congress would be defeated. This would create uncertainty for creditors from a lack of clear disclosure guidance, which ultimately would harm consumers because it would likely increase the cost of credit and eliminate the financing offerings for purchasing certain products if creditors decide to stop charging sellers or modify seller's points in response to the uncertainty. In contrast, the status quo benefits the industry and consumers by providing clear guidance and standardized disclosures.

Moreover, the new standard for the finance charge disclosure proposed by the plaintiff, which depends upon whether seller's points are traceable to a payment made by a consumer, would be unworkable. It is common for sellers to charge fees to creditors to offer financing to buyers. That is part of the economics of many financing programs. Sellers can offer or accept multiple financing options from various sources, each of which has different costs. Also, creditors extending purchase financing may offer credit through multiple programs and each program may have hundreds of sellers. Obtaining information from each seller on its specific cost allocation and pricing practice and, if a creditor receives good information, determining whether those practices warrant treating seller's points as finance charges for the financing transactions would be an oppressive oversight obligation and expose creditors to TILA liability if a court or regulator disagrees with a creditor's determination for a specific seller.

If the Court were to reconsider settled law and hold that sellers' points will be considered finance charges in certain circumstances, it would disrupt other types of lending beyond solar energy projects. Directly, other industries, such as HVAC, home improvement, large furniture

sales, and plastic surgery use sellers' points in their financing activities. Also, indirectly, if the Court were to reconsider what constitutes a finance charge, it could open the door to upset settled law/regulation with respect to consumer credit disclosures under TILA. Individual plaintiffs and attorneys general could argue that charges not historically deemed finance charges under Regulation Z and the official interpretations should be finance charges, calculated as part of the APR. This could have major ramifications on lenders, including AFC's members, who offer term loans that may have fees that do not constitute a finance charge in the current regime. This would cause an avalanche of uncertainty and potential liability, changing the ground rules and confusing the settled requirements for disclosures, which would have a substantial effect on AFC members.

In any event, these are issues for the policymakers in Congress and the CFPB, not the courts. As TILA's safe-harbor section plainly provides, creditors who in good faith comport their disclosures and conduct to Regulation Z and official interpretations are shielded from liability.

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