

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

REVENUE BASED FINANCE
COALITION,

Plaintiff,

v.

CONSUMER FINANCIAL PROTECTION
BUREAU; and RUSSELL VOUGHT in his
official capacity as Acting Director of the
Consumer Financial Protection Bureau,¹

Defendants.

Civil Action No. 1:23-cv-24882-DSL

**PLAINTIFF'S OBJECTIONS TO
REPORT AND RECOMMENDATION**

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¹ On February 7, 2025, Russell Vought became the Acting Director of the CFPB. Accordingly, Acting Director Vought should replace Director Chopra on the Court's docket as reflected in the caption of this motion. *See* Fed. R. Civ. P. 25(d).

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INTRODUCTION

Plaintiff Revenue Based Finance Coalition (“RBFC”) respectfully submits these Objections to the Report & Recommendation (“R&R”) issued on February 17, 2025, in this matter. *See* ECF No. 68.

RBFC challenges a Consumer Financial Protection Bureau (“CFPB”) rule that unlawfully regulates sales-based financing, a method of business funding that is distinct from traditional bank loans and credit. Using sales-based financing, a small business receives a lump-sum payment in exchange for the right to receive a percentage of the business’s future sales, up to a specified amount. Sales-based financing resembles equity because the provider of the funds bears the risk of business failure; a business that receives sales-based financing but does not generate revenue in the normal course has no payment obligations. Those characteristics distinguish sales-based financing from credit, which involves deferral of an obligation to repay a specific sum. Consistent with that understanding, for decades, neither the Bureau nor its predecessors regulated sales-based financing as a form of credit under the Equal Credit Opportunity Act (“ECOA”). And because sales-based financing lacks core characteristics of credit and loans, courts across the country have repeatedly held that sales-based financing is not subject to state lending laws.

The CFPB abandoned that longstanding consensus when it adopted the rule at issue here. *See Small Business Lending Under the Equal Credit Opportunity Act (Regulation B)*, 88 Fed. Reg. 35,150 (May 31, 2023) (“Rule” or “Section 1071 Rule”) (reproduced at JA 172–593). The Rule regulates sales-based financing as “credit” under Section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), which amends ECOA to require financial institutions to collect and report data regarding “application[s] ... for credit” from “women-owned, minority-owned, or small business[es].” 15 U.S.C. § 1691c-2(b). When the Bureau first announced this plan in 2021—after initially taking the opposite position in earlier stages of the rulemaking—RBFC submitted a detailed comment letter challenging the Bureau’s proposal. RBFC explained that the Bureau lacks statutory authority to regulate sales-based financing as “credit” and that the Bureau’s proposal was based on impermissible considerations and inadequate analysis. But the Bureau largely ignored RBFC’s comments and finalized the rule in May 2023 without material change.

RBFC then brought this suit, challenging the Rule on three grounds. *First*, RBFC argued that the Bureau exceeded its statutory authority by classifying sales-based financing as “credit.”

Sales-based financing is not “credit” under Section 1071 because it involves the purchase of a property interest; it involves a contemporaneous exchange of value (not the deferral of a repayment obligation); and courts have repeatedly determined that sales-based financing is not a “loan,” a term that informs that meaning of “credit.” *Second*, RBFC argued that the Bureau improperly decided to regulate sales-based financing to “create a more level playing field” for companies that *compete with* sales-based financing by offering other forms of small-business financing. That rationale is impermissible under Section 1071, and the Bureau applied it selectively (in violation of the Administrative Procedure Act (“APA”)) by regulating sales-based financing but not other, similarly situated types of financing. *Third*, RBFC argued that the Bureau violated the APA by ignoring its comments on the proposed rule. Specifically, the Bureau failed to respond to RBFC’s comments regarding the ways the Rule would harm small businesses; the Bureau’s failure to evaluate the Rule’s costs; and providers’ reliance on the existing regulatory framework, in which sales-based financing had for decades not been treated as a form of “credit.”

After the parties filed cross-motions for summary judgment, Magistrate Judge Sanchez issued the R&R, which recommends that the Court reject RBFC’s claims. But the R&R reaches that conclusion by ignoring several of RBFC’s core arguments, leaving sections of RBFC’s briefing unaddressed. The R&R also commits several legal errors that undermine its analysis.

The R&R’s treatment of RBFC’s first claim—that the CFPB lacks statutory authority to regulate sales-based financing as “credit”—is illustrative. The R&R begins by addressing threshold points that RBFC has not disputed. The R&R then disregards settled principles of property law and significant record evidence by concluding that sales-based financing does not involve the purchase of a property interest. Precedent establishes that businesses have a property interest in their future revenues and can sell a portion of that interest to third parties, for example when company A licenses its intellectual property to company B in return for a portion of company B’s future sales revenues. The R&R further errs in concluding that sales-based financing constitutes credit because it involves deferral of debt obligations. The record shows that a business’s payment obligations depend entirely on the extent of its future revenues: If the business does not generate sales, it owes nothing; and when it does generate sales, the business does not repay the provider, but instead tenders funds that the provider has already purchased the right to receive. Last, the R&R fails to address RBFC’s argument that the Section 1071 statute’s repeated

use of the term “loan” informs the meaning of the term “credit”—and that sales-based financing is not a “loan,” as many courts have held.

Turning to RBFC’s second claim—regarding the Bureau’s “level playing field” rationale—the R&R addresses only one of RBFC’s three separate arguments regarding why that rationale is arbitrary and capricious. For example, the R&R fails to address RBFC’s argument that the Bureau applied the rationale selectively, relying on it to justify regulation of sales-based financing but without applying that justification to other forms of funding, such as trade credit. While the R&R does analyze one other part of RBFC’s argument, the R&R applies the wrong standard to that argument, asking whether the Bureau was motivated by “animus” towards RBFC rather than evaluating whether the rationale stated in the Rule is permissible under the statutory scheme.

The R&R’s discussion of RBFC’s third set of claims—based on the Bureau’s failure to respond to several of RBFC’s rulemaking comments—is also incomplete and flawed. The APA requires agencies to provide a reasoned response to significant comments—those that, if credited, would warrant a change in the proposed rule or its reasoning. RBFC’s complaint alleges that the Bureau violated that obligation regarding three parts of RBFC’s comment letter, each concerning a separate, and significant, flaw in the Bureau’s proposal. The R&R errs by addressing two of those claims under the wrong legal standard, analyzing the underlying substantive issues rather than the Bureau’s failure to address RBFC’s comments on those issues. As for the third, the R&R bypasses the Supreme Court’s recent decision in *Ohio v. EPA*, 603 U.S. 279 (2024), which holds that agencies do not satisfy the APA merely by acknowledging a party’s comments. Instead, agencies must “grapple[] with” and “address the [commenter’s] concern,” *id.* at 294–95, 297—steps the Bureau failed to take here. RBFC cited *Ohio* in a supplemental authorities letter, but the R&R does not mention it once.

For the reasons stated here and in RBFC’s prior briefing, this Court should reject the R&R; grant RBFC’s motion for summary judgment and deny the Bureau’s cross-motion; and vacate the Section 1071 Rule to the extent it applies to sales-based financing.

BACKGROUND

A detailed overview of the statutory, regulatory, and factual background relevant to this case is set forth in RBFC’s prior briefing, which is incorporated here by reference.²

This case concerns sales-based financing, a financing option for small businesses that involves an upfront, lump-sum payment to the business in exchange for the right to receive a portion of the business’s future sales up to a specified amount. *See* RBFC MSJ Br. 3–4.³ Sales-based financing offers unique benefits to small businesses—including quick processing times, flexible payment timelines, and higher approval rates—making it an attractive funding option. *Id.* Due to its equity-like structure, federal and state regulators had not classified sales-based financing as a loan or “credit,” and thus for decades did not subject it to regulation under ECOA or Section 1071 of Dodd-Frank. *See id.* at 5. Indeed, in 1975, the Federal Reserve Board specifically determined that the “purchase of accounts receivable” was not “credit” and thus “not subject to” ECOA, *see id.* (citing 55 Fed. Reg. 12,472 (Apr. 4, 1990) (codified at 12 C.F.R. pt. 202, supp. I, § 202.9(a)(3)-3 (1990))), and it was against that backdrop that the sales-based financing industry developed, *see* RBFC MSJ Br. 17–18, 27–28.

Consistent with this longstanding approach, the Bureau during the initial phases of the Section 1071 rulemaking at issue here twice affirmed that sales-based financing would “not be a covered [credit] product” in the forthcoming Section 1071 proposed rule. Joint Appendix (“JA”) 12; *see also* RBFC MSJ Br. 6. In October 2021, however, the agency abruptly departed from this established approach. For the first time, the Bureau proposed a rule including sales-based financing under Section 1071’s definition of “credit,” subjecting providers to extensive data collection and reporting requirements. *See Small Business Lending Data Collection Under the Equal Credit Opportunity Act (Regulation B)*, 86 Fed. Reg. 56,356 (Oct. 8, 2021) (“Proposed Rule”) (relevant excerpts at JA 42–57). Given the effect on many of its members, RBFC submitted

² “RBFC MSJ Br.” refers to RBFC’s memorandum of law in support of its Motion for Summary Judgment. ECF No. 23-1. “CFPB Opp’n Br.” refers to the Bureau’s Combined Cross-Motion for Summary Judgment and Opposition to RBFC’s Motion for Summary Judgment. ECF Nos. 24, 25. “RBFC Reply Br.” refers to RBFC’s Combined Opposition to the Bureau’s Cross-Motion for Summary Judgment and Reply in Support of its own Motion for Summary Judgment. ECF No. 33.

³ While the Bureau generally referred to “merchant cash advances” in the Section 1071 Rule, RBFC uses the term “sales-based financing” in its papers to describe the same funding instruments because that term is more common. *See* RBFC MSJ Br. 4 n.1.

detailed comments in response—22 single-spaced pages plus exhibits—raising numerous concerns with the Proposed Rule. *See* RBFC MSJ Br. 7–8. Yet the Bureau largely ignored those comments. On May 31, 2023, the Bureau published a final rule that mirrored the proposed rule and did not engage with most of RBFC’s concerns. *See* JA 172–593.

RBFC brought this lawsuit in December 2023, challenging the Section 1071 Rule as arbitrary, capricious, and contrary to law under the APA and asking the Court to set it aside. *See* ECF No. 1. Specifically, RBFC argued that the Bureau had exceeded its statutory authority by regulating sales-based financing as “credit,” relied on an impermissible justification, and failed to respond to several of RBFC’s significant comments (*e.g.*, identifying harms the Rule would impose on small and minority-owned businesses). *See* RBFC MSJ Br. 11–29. In March 2024, RBFC moved for summary judgment, and the Bureau then cross-moved for summary judgment. ECF Nos. 23, 25. Briefing was completed in May 2024, and the Court referred the cross-motions to Magistrate Judge Sanchez in June 2024. *See* ECF No. 59.

Several *amici* also filed briefs supporting RBFC’s claims. Members of Congress serving on the House Financial Services Committee filed a brief urging the Court to uphold Congress’s decision to limit the Bureau’s Section 1071 authority to actual “credit” transactions and prevent the Bureau from rewriting ECOA’s terms. *See* ECF No. 38-1. These *amici* also warned that because the Rule ignores fundamental characteristics of debt like recourse or risk of loss, its “expansive view of ‘credit’ ... could potentially extend ... to almost any form of routine business,” *id.* at 3–4, 8–9, and they highlighted the ways in which the Bureau’s regulations have repeatedly reached beyond the agency’s statutory authority, *see id.* at 10–12. Separately, the Hispanic Business Alliance (“HBA”) emphasized the ways in which sales-based financing benefits minority-owned businesses, *i.e.*, “the primary populations that ECOA and Section 1071 were enacted to protect.” ECF No. 35 at 4–9. HBA warned that the Rule’s increased regulatory costs would likely be passed on to small businesses, making this critical funding source even harder to access. *Id.* at 10–11.

On February 17, 2025, Magistrate Judge Sanchez issued the R&R, which recommended denying RBFC’s motion for summary judgment and granting the Bureau’s cross-motion. ECF No. 68.

STANDARDS OF REVIEW

Following issuance of a R&R on cross-motions for summary judgment, the Court “shall make a de novo determination of those portions of the [R&R] to which objection is made.” 28 U.S.C. § 636(b)(1). This “require[s] independent consideration” of the issues, *Jeffrey S. by Ernest S. v. State Bd. of Educ.*, 896 F.2d 507, 512–13 (11th Cir. 1990), “not merely ... reviewing” and relying on the magistrate judge’s assessment, *Stokes v. Singletary*, 952 F.2d 1567, 1576 (11th Cir. 1992). Following this independent review, the Court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1).

RBFC “seeks review of agency action under the APA,” and thus the Court “sits as an appellate tribunal,” to determine whether the challenged action complies with the APA’s standards of review. *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001); *see also Preserve Endangered Areas of Cobb’s History, Inc. v. U.S. Army Corps of Eng’rs*, 87 F.3d 1242, 1246–47 (11th Cir. 1996) (similar). Under that standard, the Court must “set aside agency action” that is “in excess of statutory jurisdiction,” “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A), (C). Arbitrary-and-capricious review is “not [a] rubber stamp.” *Hewitt v. Comm’r*, 21 F.4th 1336, 1342 (11th Cir. 2021) (cleaned up). An action will be set aside as arbitrary and capricious if “not reasonably explained”—for example, because the agency failed to provide a “reasoned response” to material comments. *Ohio v. EPA*, 603 U.S. 279, 292–93 (2024). And when determining whether an agency exceeded its statutory authority, the Court “may *not* defer to [the] agency interpretation of law” but instead must “independently interpret the statute” to determine its “single, best meaning.” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400, 413 (2024) (emphasis added).

OBJECTIONS TO REPORT AND RECOMMENDATION

I. The Bureau Exceeded Its Authority By Treating Sales-Based Financing as “Credit”

The Bureau may impose data collection and reporting requirements under Section 1071 only for “application[s] ... for *credit*.” 15 U.S.C. § 1691c-2(b) (emphasis added); *see also Florida v. HHS*, 19 F.4th 1271, 1302 (11th Cir. 2021) (agency “must derive its regulatory powers from Congress”). As relevant here, “credit” is defined as a transaction that (1) creates “debt” and (2) confers a right “to defer payment” of that debt. 15 U.S.C. § 1691a(d). Further, because Section 1071 makes frequent reference to “loan” applications, the term “loan” informs the meaning of “credit” under the statute.

Applying that framework, as RBFC has explained, sales-based financing is not “credit” under Section 1071 because it is neither *debt*, nor the *deferral* of a repayment obligation, nor a *loan*. Sales-based financing does not create “debt” because the small business has no payment obligations if it fails to generate sales in the ordinary course; and even when it does generate sales, the business does not repay the sales-based financing provider, but rather tenders that portion of its revenues that the provider purchased the right to receive. *See* RBFC MSJ Br. 12–13, 16; RBFC Reply Br. 9–11. Similarly, sales-based financing does not involve a right “to defer payment.” These transactions involve a contemporaneous exchange of value wherein the provider purchases the right to receive a portion of the business’s revenues up to an agreed-upon amount, and the business receives the discounted value of that agreed-upon amount in return. Further, once sales arise and the obligation to tender funds to the provider arises, the business has no right to defer the transfer of funds. *See* RBFC MSJ Br. 14–15; RBFC Reply Br. 12–15. And sales-based financing is not a “loan,” as countless courts across multiple jurisdictions have held. *See* RBFC MSJ Br. 16–17 & n.10; RBFC Reply Br. 17 & nn.27–28.

As discussed further below, the R&R incorrectly analyzes these statutory issues by disregarding settled principles of property law, overlooking record evidence illustrating how sales-based financing actually works, and ignoring case law holding that sales-based financing is not a “loan,” which confirms that it is not “credit.”

A. The R&R Misapprehends Two Threshold Issues

The R&R begins by addressing two points that have no bearing on the outcome and that RBFC has never disputed.

First, the R&R concludes (at 9–10) that “both [the Section 1071 statute] and the Final Rule use the same definition of ‘credit’ to define the scope of the applications and transactions that are the subject of those respective provisions.” In other words, the Rule’s “credit” definition “[t]racks” that of the statute. *Id.* at 9. But RBFC never challenged the Rule’s definition of “credit.” Rather, RBFC has consistently argued that the Bureau *applied* that term in a way that exceeded its authority by regulating sales-based financing as “credit.” *See* RBFC MSJ Br. 11–12; JA 245 (determining “credit” includes “sales-based financing products”). In other words, the Bureau correctly defined “credit” but incorrectly concluded that sales-based financing falls within that definition.

Second, the R&R addresses (at 10–11) whether the Bureau should have “exclude[d]” sales-based financing “from the scope of covered credit transactions.” In doing so, the R&R focuses on

a statutory provision that authorizes the Bureau to “exempt any financial institution or class of financial institutions from the requirements of this section, as the Bureau deems necessary or appropriate to carry out the purposes of [Section 1071].” 15 U.S.C. § 1691c-2(g)(2). That approach begs the question at the heart of this case. RBFC’s statutory claim is not that the Bureau should have exempted sales-based financing from the scope of “covered credit transactions” under Section 1071. Rather, RBFC has consistently argued that sales-based financing transactions are not “credit” in the first place (and therefore have no need for a special exemption).

B. Sales-Based Financing Is Not Debt Because It Involves the Purchase of a Property Interest

Sales-based financing is not “debt” because it involves the purchase of a property interest: specifically, the right to receive some portion of a business’s future revenues. *See* RBFC MSJ Br. 13–14; RBFC Reply Br. 13–14. The R&R rejects that argument based on the view that “[a] merchant cannot sell—and another cannot buy” the rights to “something which does not yet exist,” *i.e.*, “future sales revenues.” R&R 13. But under a sales-based financing arrangement, a business is not selling future *sales*; it is selling its *interest* in receiving a portion of those sales. That right belongs to the business at the time the sales-based financing arrangement is executed. Indeed, the R&R “does not explain who—if not the business itself—has the right to receive the revenues from the business’s own sales.” RBFC Reply Br. 13–14. And the R&R dismisses—without justification—the significant record evidence showing that sales-based financing transactions are established to facilitate such a sale. *See* RBFC Reply Br. 2–3 & nn.2–3.⁴

More broadly, the R&R concludes that a business “holds no present property interest” in its future sales revenues. R&R 13. But that is not correct. *See* RBFC MSJ Br. 14 & n.7; RBFC Reply Br. 14. A business generally holds an assignable property interest in its future receipts. *See, e.g., SDI, Inc. v. Pivotal Parker Commerce, LLC*, 339 P.3d 672, 677 (Colo. 2014) (holding “[t]he right to receive revenue in the future is a form of intangible personal property,” and thus the “right

⁴ RBFC did not “effectively conced[e]” that the CFPB correctly subjected some sales-based financing arrangements to the Section 1071 Rule. *Contra* R&R 13 n.7. RBFC simply clarified that it challenged the Rule’s application to *genuine* sales-based financing arrangements, *i.e.*, “agreements that involve purchasing the right, title, and interest in future sales revenues, with obligations to tender funds only if those sales arise.” RBFC Reply Br. 17. Put differently, genuine sales-based financing should not be regulated as “credit” under Section 1071 just because other types of transactions have been incorrectly labeled as “sales-based financing.”

to receive development fees” could be assigned); *Mapco Inc. v. United States*, 556 F.2d 1107, 1109–10 (Ct. Cl. 1977) (recognizing that a business “may sell a property right to future income”); *D.S. v. D.S.*, 289 A.3d 236, 540–41 (Conn. App. 2023) (recognizing “that a present right to the future receipt of funds” will “constitute a presently existing property interest” if “sufficiently concrete, reasonable and justifiable”); *In re Kedrowski*, 284 B.R. 439, 447 (Bankr. W.D. Wis. 2002) (recognizing that “those who hold a ‘right’ to receive payment from the operation of a business hold some sort of intangible property right under [state] law”). Indeed, many noncredit transactions involve the sale and purchase of rights to future revenues or streams of income. For example, in a royalty licensing agreement, Company A licenses the use of its intellectual property to Company B, which then uses that intellectual property in its products and tenders an agreed-upon percentage of *future* sales revenues to Company A. *See, e.g., Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1326 (Fed. Cir. 2009) (explaining that “[i]n a standard running royalty license, the amount of money payable by the licensee to the patentee is ... dependent on the level of sales or usage by the licensee, which the licensee can often control.”); *see also* Black’s Law Dictionary (12th ed. 2024) (defining “royalty interest” as receiving “[a] share of production—or the value or proceeds of production—when and if there is production”; and “royalty” as a “share of [a] product or profit ... in exchange” for a license to use real or intellectual property).

The R&R ignores this authority and instead invokes the principle that “a mere unilateral expectation or an abstract need is not a property interest.” R&R 14 (quoting *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)). But that general rule has no application to sales-based financing arrangements, which are purchase transactions involving small businesses with demonstrated value and concrete expectations of future revenue. Indeed, the businesses receiving sales-based financing are those who demonstrate “steady credit card/debit card business” and thus a “reasonable expectation [of] steady business income,” not merely an abstract need. JA 102. Besides, the R&R’s focus on the likelihood of future sales missed the critical distinction just discussed—*i.e.*, that under a sales-based financing arrangement, a business sells its right to *receive* sales proceeds as they arise, not a right to particular sales that have not yet occurred.

The R&R also suggests that providers do not receive any rights at the time the sales-based financing agreement is executed because the business “promise[s] to undertake a variety of obligations in the future” to tender funds to the provider. R&R 13 n.7. But that ignores the character and purpose of those obligations, which serve to ensure that a provider can access the

portion of the business's sales it has purchased the rights to receive. *See* RBFC Reply Br. 3 & n.3. For example, a business may make a portion of its sales accessible and collectible in a dedicated bank account. *See* JA 596, 620, 633, 769.

C. The R&R Incorrectly Determines that Sales-Based Financing Does Not Involve the Deferral of a Debt or Payment Obligation

The R&R (at 16) also errs in determining that sales-based financing arrangements confer a right to *defer* payment of a debt. The R&R posits that “[t]he deferral of the repayment ... arises when money is advanced to a merchant and the merchant is allowed to delay payment of the resulting contractual debt until a future time.” *Id.* But that misunderstands how sales-based financing arrangements are structured. A business operating under such an arrangement has *no* payment obligations “when money is advanced” upfront, and indeed, will *never* have a payment obligation if revenues do not materialize in the ordinary course of business. *See, e.g.,* RBFC MSJ Br. 13. Because no payment obligation exists at the time of the initial transaction, there can be no *deferral* of an obligation. In this respect, sales-based financing arrangements resemble certain indemnity agreements and leasing agreements, which have been determined not to qualify as “credit.” *See, e.g., SureTec Ins. Co. v. Nat’l Concrete Structures*, No. 12-cv-60051, 2012 WL 12860161, at *3 (S.D. Fla. July 3, 2012) (indemnity agreement not “credit” because the obligation to pay arises only *after* covered payments are made to a third party, at which point the indemnifying party is “immediately liable” for any payments made); *Ulico Cas. Co. v. Super. Mgmt. Servs., Inc.*, 89 F. App’x 278, 279 (D.C. Cir. 2004) (similar); *Liberty Leasing Co. v. Machamer*, 6 F. Supp. 2d 714, 717 (S.D. Ohio 1998) (leasing agreement was not “debt” where the lessees’ financial obligation “would have been extinguished” in “at least one ... scenari[o] set forth in [the agreement],” and therefore “the lessees were not obligated to pay the total lease amount in all circumstances”).

The R&R also concludes that sales-based financing agreements create enforceable debt obligations because sales-based financing agreements can be enforced “through the courts in the event that a merchant breaches the ... agreement and does not pay the ... provider in accordance with the terms of the ... agreement.” R&R 14–15. That misses the point. RBFC never maintained that sales-based financing arrangements were *wholly* unenforceable; they can obviously be enforced just like any other contract. Rather, RBFC argued that businesses do not have *debt*

obligations in sales-based financing arrangements because there is no requirement to transfer funds when revenues do not materialize in the ordinary course. *See* RBFC MSJ Br. 16.⁵

D. The R&R Ignores Precedent Confirming that Sales-Based Financing Is Not a “Loan”

The meaning of “debt” under Section 1071 is informed by the meaning of “loan,” given Congress’s usage of both terms to describe the applicable scope of the statute. *See* RBFC MSJ Br. 15–17. For example, Section 1071’s title is “Small business *loan* data collection.” 15 U.S.C. § 1691c-2 (emphasis added); the statute obligates financial institutions to “maintain ... record[s]” only for “information provided by a *loan* applicant,” *id.* § 1691c-2(e) (emphasis added); and when describing what information must (and must not) be compiled, the statute refers to data provided by “*loan* applicants,” *see id.* § 1691c-2(e)(2)–(3) (emphasis added). In other words, the statute repeatedly uses the term “loan” to define the scope of Section 1071 and inform the meaning of covered “credit” transactions.

Yet courts across multiple jurisdictions have repeatedly held that sales-based financing is not a loan. *See* RBFC MSJ Br. 16 n.10; RBFC Reply Br. 17 n.28 (collecting cases). And indeed, those few states that have imposed disclosure requirements on sales-based financing providers have done so through *new* legislation that specifically addresses sales-based financing—not by attempting to shoehorn the transactions into existing lending laws. *See* RBFC MSJ Br. 17 (citing JA 242 nn.359–60). The CFPB did not meaningfully dispute these points, instead insisting that the term “loan” is irrelevant when interpreting the proper scope of Section 1071. *See* CFPB Opp. Br. 18–20.

The R&R does not address or even acknowledge RBFC’s arguments that the meaning of “loan” should inform the proper scope of Section 1071, and that sales-based financing is not a type of “loan.” Nor did the R&R address the litany of cases, cited in RBFC’s papers, holding that sales-based financing is not a loan. That was error. “[O]ne of the most basic canons of statutory interpretation [is] that a statute should be construed so that effect is given to all its provisions.” *EEOC v. STME, LLC*, 938 F.3d 1305, 1318 (11th Cir. 2019) (cleaned up). Indeed, “the words of

⁵ The R&R’s attempt (at 15) to distinguish between “being able to successfully *collect* on a debt” and “being able to *enforce* one’s rights under a contract” is also inapposite. If the relevant revenues do not materialize in the ordinary course of business, there are no payment obligations for a sales-based financing provider to enforce *or* collect on.

a statute must be read in their context and with a view to their place in the overall statutory scheme” to “fit, if possible, all parts into an harmonious whole.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (cleaned up). The failure to address the statute’s repeated use of the term “loan”—a term that does not include sales-based financing—contributed to the R&R’s incorrect conclusion regarding Section 1071’s proper scope.⁶

II. The R&R Incorrectly Endorses the Bureau’s “Level Playing Field” Rationale

The Bureau opted to regulate sales-based financing under Section 1071 in part because doing so would “create a more level playing field across financial institutions that provide cash flow financing to small businesses.” JA 246. RBFC explained that that rationale was arbitrary and capricious for *three* separate reasons. *First*, in deciding to regulate sales-based financing in order to benefit the industry *competitors* of sales-based financing, the Bureau “relied on factors which Congress [did] not inten[d] it to consider.” *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). *See* RBFC MSJ Br. 21–22. *Second*, by adopting verbatim a rationale that had been advanced by sales-based financing competitors—while ignoring RBFC’s comments flagging that the rationale was impermissible—the Bureau “abdicate[d] its role as a rational decision-maker” and substituted an industry consensus for “its own judgment.” *Tex. Off. of Pub. Util. Couns. v. FCC*, 265 F.3d 313, 328 (5th Cir. 2001). *See* RBFC MSJ Br. 22–23. *Third*, the Bureau applied its “level playing field” rationale selectively, relying on that rationale to justify regulation of sales-based financing, but not of other market participants. *See id.* 23–24.

The CFPB’s briefing addressed only the first of these three arguments, meaning that the Bureau has forfeited any response to the second and third arguments. *See* RBFC Reply Br. 18 (highlighting this point). Rather than acknowledging the Bureau’s omissions, the R&R repeats them. For example, the R&R fails to address RBFC’s argument that the rationale was applied selectively, given that the Bureau invoked it to justify regulating sales-based financing, but ignored that justification when it decided not to cover much larger sectors of the small business financing market (including trade credit, factoring, and equipment and vehicle leasing). *See* RBFC MSJ Br. 23–24.

⁶ If the Court holds that the Bureau exceeded its authority in regulating sales-based financing as “credit,” it need not reach the remaining issues.

As to RBFC’s first argument (that the “level playing field” rationale is not a permissible factor under the statute), the R&R applies the wrong standard. The R&R initially acknowledges—correctly—that “the reasonableness of [an] agency’s action is judged in accordance with its stated reasons.” R&R 17 (quoting *In re Subpoena Duces Tecum Served on Off. of Comptroller of Currency*, 156 F.3d 1279, 1279 (D.C. Cir. 1998)). But then the R&R proceeds to evaluate whether the Rule was motivated by “any animus” or any “intent to impose a regulatory burden on” sales-based financing providers. R&R 18. By focusing on what the Bureau may have meant rather than on what the Bureau actually said, the R&R fails to limit its analysis to whether the Bureau’s “stated reasons” were permissible. See *In re Subpoena*, 156 F.3d at 1279; see also *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (“[A] reviewing court ... must judge the propriety of [agency] action solely by the grounds invoked by the agency[.]”). The R&R’s focus on whether RBFC had demonstrated “animus” is also misguided. That stringent standard applies to equal protection claims, and it requires a plaintiff to show “that an ‘invidious discriminatory purpose was a motivating factor’ in the relevant decision.” *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 34 (2020) (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). RBFC never alleged that the Bureau’s “level playing field” approach violated the Constitution, only that it was arbitrary and capricious under the APA.

The Bureau’s rationale—as stated in the Rule—conflicts with the governing statute. The R&R recast the Bureau’s rationale, asserting that the Bureau was simply trying to “collect data across *credit* providers” to “shed light on *credit* transactions.” R&R 18 (emphases added). But what the Bureau actually said was that the Rule was designed to create a “level playing field” across all “financial institutions that provide cash flow financing to small businesses.” That is a far more expansive category than “credit,” both because the statute defines “financial institution” broadly, 15 U.S.C. § 1691c-2(h)(1) (defined as an “entity that engages in *any financial activity*” (emphasis added)), and because not all “cash flow financing” is credit, see RBFC MSJ Br. 21–22. The R&R misses that the “level playing field” rationale, as stated, broadened the Rule beyond the statute’s bounds.

III. The Bureau Failed to Adequately Respond to RBFC’s Material Comments

During a rulemaking process, “[a]n agency must consider and respond to significant comments received during the period for public comment,” *Perez v. Mort. Bankers Ass’n*, 575 U.S. 92, 96 (2015), and its explanation “must enable the reviewing court to see the objections [to

the final rule] and why the agency reacted to them as it did,” *Lloyd Noland Hosp. Clinic v. Heckler*, 762 F.2d 1561, 1566–67 (11th Cir. 1985). Agencies must provide a “reasoned response” to significant comments; mere “consideration” or “awareness” of commenters’ concerns is insufficient. *Ohio v. EPA*, 603 U.S. 279, 294–95 (2024). The failure to adequately respond to significant comments renders the agency’s decision arbitrary and capricious. See *Lilliputian Sys., Inc. v. Pipeline & Hazardous, Materials Safety Admin.*, 741 F.3d 1309, 1312 (D.C. Cir. 2014).

RBFC brought three distinct failure-to-respond claims, but the R&R analyzes only one of them *as* a failure-to-respond claim. And for all three claims, the R&R’s analysis rests on legal and factual errors.

A. The R&R Incorrectly Analyzes RBFC’s Three Failure-to-Respond Claims

The R&R failed to recognize that RBFC brought *three separate claims* based on the Bureau’s failure to respond to comments. Specifically, RBFC argued that the Bureau failed to acknowledge and adequately respond to comments regarding: (1) the unique benefits of sales-based financing and the significant policy downsides of regulating it; (2) the major deficiencies in the Bureau’s cost analysis regarding regulation of sales-based financing; and (3) the reliance interests of RBFC members, given the longstanding policy and practice of not regulating sales-based financing as “credit.” See RBFC MSJ Br. 24–28; RBFC Reply Br. 19–25.

Yet the R&R analyzes only one of those failure-to-respond claims—(1) above, regarding the Bureau’s failure to address the significant policy downsides of regulating sales-based financing—*as* a failure-to-respond claim. See R&R 19–20. For the other two claims, (2) and (3) above, the R&R addresses only the merits of the issues, as if RBFC challenged only the Bureau’s substantive justifications under a standard arbitrary-and-capricious framework. For example, regarding claim (2), the R&R simply asks whether “the Bureau’s cost analysis was sufficient,” *id.* at 21, and regarding claim (3), the R&R examines directly whether RBFC had shown “legitimate reliance on [a] prior Bureau interpretation,” *id.* at 23. That was error because a failure-to-respond claim is a distinct type of claim under the APA that must be analyzed according to a distinct legal framework.

Under that framework, the question is not whether the agency offered a reasonable explanation for the challenged action, as in a typical arbitrary-and-capricious claim. Instead, the question is whether the agency actually *engaged* with the relevant concerns by “consider[ing] *and* respond[ing]” to the particular comments at issue. *Mort. Bankers Ass’n*, 575 U.S. at 96 (emphasis

added). As the Supreme Court recently emphasized in *Ohio*, mere “consider[ation]” or “awareness” of a comment does not constitute a “reasoned response,” nor may an agency “sidestep” comments. *Ohio*, 603 U.S. at 294–96. Rather, the agency must actually “grapple[] with” and “address the [commenter’s] concern,” and the response must “appear in the final rule” itself. *Id.* at 294–95, 297.⁷ That obligation is a critical part of the APA’s design: Rather than regulating the substantive wisdom of agencies’ action, the APA seeks to ensure good government by imposing procedural requirements that force agencies to engage with the evidence in a meaningful way. *See Batterton v. Marshall*, 648 F.2d 694, 703 n.47 (D.C. Cir. 1980) (APA’s legislative history “explicitly states that due to the unrepresentative nature of an administrative agency, ‘public participation ... in the rulemaking process is essential in order to permit administrative agencies to inform themselves, and to afford safeguards to private interests.’” (quoting S. Doc. No. 248, 79th Cong., 2d Sess. 19–20 (1946))). Excusing an agency from compliance with those procedural requirements merely because a final rule appears to be substantively reasonable (as the R&R does here) cuts a core element out of APA review. By skipping over the *Ohio* test for two of RBFC’s claims—and applying a diluted version of that test for the other, *see infra* section III.B—the R&R reviews RBFC’s failure-to-respond claims according to an unduly lenient framework that yields incorrect conclusions.

B. The R&R’s Substantive Analysis of RBFC’s Three Failure-to-Respond Claims Is Flawed

1. The Bureau Failed to Grapple with Policy Downsides to Sales-Based Financing

The R&R addresses RBFC’s first failure-to-respond claim, based on RBFC’s comments regarding the unique benefits of sales-based financing and the policy downsides of regulating it. But even for that claim, the R&R makes a series of legal errors and factual misstatements that undermine its analysis.

The R&R first determines that the Bureau had *no obligation* to respond to RBFC’s comments on this issue because, according to the R&R, those comments did “not undercut the reasonableness of the Final Rule *by challenging its internal integrity, structure, or lawfulness.*” R&R 20 (emphasis added). But that is not the correct legal standard for identifying a material

⁷ RBFC flagged the Supreme Court’s *Ohio* decision in a notice of supplemental authorities filed on July 18, 2024, ECF No. 60, but the R&R does not mention that binding precedent.

comment that requires a response. Although an “agency need not respond ... to comments that are ‘purely speculative and do not disclose the factual or policy basis on which they rest,’” an agency *must* respond to all “‘relevant’ and ‘significant’ public comments.” *Public Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 & n. 58 (D.C. Cir. 1977)). And a comment meets that standard if it “raise[s] points relevant to the agency’s decision ... which, if adopted, would [have] require[d] a change in [the] agency’s proposed rule.” *Home Box Office*, 567 F.2d at 35 n.58. RBFC’s comments about the downsides of regulating sales-based financing satisfy that standard because, if the Bureau had adequately considered them, it may have retained the decades-long practice of not treating sales-based financing as “credit.” Likely for that reason, the Bureau has never argued that any of RBFC’s comments were irrelevant or insignificant such that they did not warrant a response—and instead has rested on the argument that all comments *were* adequately addressed. *See* CFPB Opp’n Br. 25–35. That forfeiture is reason enough to reject the R&R’s conclusion on this point. *See, e.g., Ohio*, 603 U.S. at 298 (rejecting dissent’s suggestion that comments were not “important” enough to warrant a response because government itself never made the argument).

The R&R then concludes that, “[i]n any event,” the CFPB *did* “adequately consider[] and respond[] to RBFC’s comments” because the Bureau “considered and discussed the benefits provided by [sales-based financing] and whether the Rule might negatively impact the availability of such benefits.” R&R 20. But the Bureau did no such thing. Regarding the benefits, the Bureau briefly mentioned that sales-based financing is “faster” and “simpler to obtain” than traditional financing, JA 90, but those are just two of the many benefits that RBFC raised in its comments, which also highlighted that—compared to other forms of small business financing—sales-based financing has greater flexibility, no requirement of posting collateral, higher approval rates, and benefits to small businesses with smaller amounts of capital. *See* JA 90–97. Even more importantly, RBFC explained that the benefits are not mere abstractions and would in fact be disproportionately undermined by regulation under the Section 1071 regime. For example, RBFC’s comments flagged that regulating sales-based financing as “credit” would slow down the approval rate, increase compliance costs (which would be passed onto customers in the form of increased fees), and disproportionately affect small businesses. *See* JA 81–84. The Bureau entirely failed to address these issues in the Section 1071 Rule. Instead, after the Bureau acknowledged only *some* of the benefits of sales-based financing, it proceeded to discuss unrelated

issues that are not responsive to RBFC’s comments about the adverse effects of the Rule on those benefits. *See* JA 242–43. In doing so, the Bureau failed to “grapple[] with” and “address [RBFC’s] concern,” effectively “sidestep[ping]” the precise comments RBFC submitted. *Ohio*, 603 U.S. at 295, 297. The R&R, however, focuses its analysis of this argument almost entirely on “problematic provider practices,” R&R 20, but does not address the Bureau’s failure to respond to RBFC’s specific comments. Thus, the Court should reject the R&R’s recommendation on this issue.

2. The Bureau Failed to Respond to RBFC’s Concerns About Inadequate Cost Data for Sales-Based Financing

The Bureau also failed to address several deficiencies in its cost analysis for sales-based financing. *See* RBFC MSJ Br. 26–27; RBFC Reply Br. 21–23. RBFC noted these deficiencies in its comment letter, expressing concern that the Bureau had based its one-time cost estimates on the results from a single survey that included *zero* cost data for sales-based financing (and only yielded usable cost data from seven nondepository institutions). *See* RBFC MSJ Br. 26; RBFC Reply Br. 21–22. RBFC’s comment also flagged that the Bureau had failed to consider potential costs related to compliance with other aspects of ECOA, and had relied on analogizing to costs related to implementing the Home Mortgage Disclosure Act, notwithstanding the major differences between the two statutes’ requirements. *See* RBFC MSJ Br. 27; RBFC Reply Br. 22.

As discussed, the R&R does not analyze this failure-to-respond claim under the correct legal framework: It never addressed whether the Bureau had adequately responded to RBFC’s comments regarding the Rule’s cost analysis deficiencies. *See supra* section III.A.

Instead, the R&R summarily determines that the Bureau “addressed the costs and benefits” of the Rule and that—as a general matter—the Bureau “acknowledged the data shortfalls, explained its efforts to acquire more data, explained its methodology, and explained that it had ‘relied on the data it had’ to make its best analysis.” R&R 21 (quoting JA 520–22). For support, the R&R cites a district court decision that rejected a broad challenge to the Bureau’s cost methodology for the Section 1071 Rule *as a whole*. *See id.* at 21–22 (citing *Tex. Bankers Ass’n v. CFPB*, No. 7:23-CV-144, 2024 WL 3939598, at *14 (S.D. Tex. Aug. 26, 2024)). But RBFC’s comments and its corresponding failure-to-respond claim were far more targeted. They were based on the deficiencies in the cost data and methodology that the Bureau applied for sales-based financing *specifically*—including the fact that the Bureau decided to regulate the sales-based

financing industry despite having *no data* on the one-time costs of that regulatory choice. The R&R, like the Bureau, fails to grapple with those particular deficiencies.

A recent district court ruling, which RBFC discussed in its reply brief (at 23), addressed a similarly narrow claim based on *specific* cost deficiencies. In *PayPal, Inc. v. CFPB*, 728 F. Supp. 3d 31 (D.D.C. 2024), the court held that a CFPB disclosure requirement was unlawful because the Bureau had failed to adequately assess the costs and benefits of that mandate as applied to a particular sector (digital wallets). *See id.* at 43–44. As in this case, where the Bureau lacked *any* one-time cost data for sales-based financing, the Bureau in *PayPal* had failed to include any cost data for digital wallets in its analysis. *See id.* The court rebuffed the Bureau’s claim that it was entitled to rely on a “general” cost-benefit analysis, finding that its omission of data for digital wallets did not amount to “the kind of rigorous assessment that Congress contemplated for Dodd-Frank rulemakings,” *id.* at 44, the same cost-benefit framework that governs the Section 1071 Rule in this case. The R&R attempts to distinguish *PayPal* on paper-thin grounds—*i.e.*, that the cost analysis there did not “mention” digital wallets, whereas here the Bureau (briefly) alluded to sales-based financing. R&R 21. But the key question is whether the cost analysis was adequate—and based on sufficient data—not whether the agency paid lip service to that analysis.

3. The Bureau Failed to Account for RBFC’s Reliance Interests

RBFC also identified the reliance interests that sales-based financing providers had developed and that the Bureau failed to address or even acknowledge during the rulemaking process. *See* JA99–100; RBFC MSJ Br. 27–28; RBFC Reply Br. 23–25. Specifically, RBFC commented that sales-based financing developed in reliance on a longstanding regulatory backdrop in which those products were not considered “credit” and accordingly developed in significant part because those products were not subject to burdensome regulatory restrictions under ECOA and other credit statutes. *See* JA99–100.

Again, the R&R does not address this argument as a failure-to-respond claim, and instead addresses the argument as if RBFC had presented it for the first time in court (rather than in its comment letter to the Bureau). *See supra* section III.A. The R&R should have considered the Bureau’s *failure to respond* to the reliance interests raised in RBFC’s comments, which on its own renders this aspect of the rule arbitrary and capricious. *See Ohio*, 603 U.S. at 294–96.

But the R&R also errs in addressing the substantive merits of RBFC’s reliance interests argument. The R&R rejects the claim based on the view that RBFC had never “in its comments

during the rulemaking process or in its briefing” identified “any prior agency policy on which [sales-based financing] providers have relied.” R&R 23. But that is incorrect. As RBFC has consistently argued, *see* RBFC MSJ Br. 27–28; JA 99–100, there are two distinct reliance interests here. First, sales-based financing providers relied on the long-standing regulatory *practice*—under both the Federal Reserve Board and the CFPB—of *not* regulating sales-based financing as credit. Indeed, sales-based financing developed as an innovative funding solution for small businesses in large part because it was not subject to the burdensome and unnecessary regulations that typically apply to “credit.” The Section 1071 Rule reversed that practice, for the first time in ECOA’s 50-year history. *See, e.g., Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 924, 927–28 (D.C. Cir. 2017) (agency action reversing “two decades of agency practice” without adequate explanation was arbitrary and capricious); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (given “decades of industry reliance on the [agency’s] prior policy,” the agency’s “explanation fell short of the agency’s duty to explain why it deemed it necessary to overrule its previous position”); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 153 (2012) (following a “very lengthy period” and “longstanding practice” of “conspicuous inaction, the potential for unfair surprise is acute”). Second, sales-based financing providers also relied on Regulation B’s comment, which advised that “the purchase of accounts receivable”—a phrase that describes sales-based financing—would *not* be regulated as “credit.” JA 84–85; *see also* 55 Fed. Reg. 12,472 (Apr. 4, 1990). The R&R attempts (at 22–23) to distinguish factoring from sales-based financing because factoring involves the sale of accounts receivable based on goods or services already provided, whereas sales-based financing involves accounts receivable for sales in the future. However, Regulation B nowhere makes that distinction. *See* RBFC MSJ Br. 5, 17–18; RBFC Reply Br. 14.

Because the CFPB failed to consider the reliance interests of sales-based financing providers before subjecting them to new regulation in accordance with a new interpretation of ECOA—even when those reliance interests were placed squarely before the Bureau—the Section 1071 Rule is arbitrary and capricious and must be set aside. *See Ohio*, 603 U.S. at 294–96.

CONCLUSION

For the reasons above and those set forth in its prior briefing in this matter, RBFC respectfully asks the Court to sustain its objections and reject the R&R; grant RBFC's motion for summary judgment and deny the Bureau's cross-motion; and set aside the Section 1071 Rule with respect to sales-based financing.

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April 2, 2025

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CERTIFICATE OF SERVICE

I hereby certify that, on April 2, 2025, I caused the foregoing motion to be filed with the Clerk of the Court of the United States District Court for the Southern District of Florida using the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

April 2, 2025

/s/ Paul F. Hancock
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