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The OCC Issues Bulletin Addressing Buy Now, Pay Later Lending

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What seems to have become a perennial topic for regulators, the Office of the Comptroller of the Currency (OCC) recently released OCC Bulletin 2023-37 to assist national banks and federal savings banks with effectively managing the risks posed by "Buy Now, Pay Later" (BNPL) lending. This guidance adds to a growing body of regulatory commentary on BNPL loans including the Consumer Financial Protection Bureau's September 2022 Buy Now, Pay Later: Market Trends and Consumer Impacts report and March 2023 Market Report on Consumer Use of Buy Now, Pay Later. The OCC bulletin hones in on the consumer and bank risks associated with BNPL lending and sets some regulatory expectations for banks engaging in BNPL lending.

Risks with BNPL lending

While BNPL can describe a number of different products, the OCC bulletin focuses on BNPL offerings that are payable in four or fewer installments and have no finance charges. At the outset, the bulletin acknowledges that when offered in a responsible manner, BNPL loans have consumer benefits. Then, the bulletin goes on to outline a number of consumer and bank risks associated with engaging in BNPL lending, including, but not limited to: consumers accumulating too much debt, underwriting challenges associated with the potential limited credit histories of BNPL applicants, lack of standardized disclosure language (presenting UDAP/UDAAP risks), complications associated with merchandise returns and disputes, borrower default risk (including fraud), the automated instantaneous nature of credit decisions, heavy reliance on third parties, and a lack of lender visibility into applicant's borrowing activity on BNPL platforms. Given these potential risks, the OCC bulletin provides certain guidance on managing credit risk, credit bureau reporting, operational risk, third-party risk, and compliance risk.

Credit risk management

The bulletin highlights that BNPL loans create unique considerations with credit underwriting and repayment assessment methodologies. The bulletin warns that "repayment assessment methodologies that are poorly implemented or not well-designed could result in elevated delinquencies and losses for the bank, as well as late fees, negative credit bureau reporting, or other consequences for the borrower." Loan repayment methods that require a consumer to take on more debt, such as making loan payments with a credit card, could be viewed as an imprudent practice by the OCC. The bulletin emphasizes that the charge-off policies of banks should be tailored for the short-term nature of BNPL loans and that banks should not hesitate to apply their charge-off policies as soon as information that a loan will not be repaid becomes available. Regarding the accounting treatment for credit losses, the bulletin provides that for BNPL loans, banks should consider the same factors used for estimating credit losses for longer-term loans, but may employ different methods.

Credit bureau reporting

The bulletin touts the benefits of industry-wide credit reporting of BNPL loans. In a footnote, the OCC states "banks should report BNPL loan information to credit bureaus when the credit bureaus have begun accepting information for reporting."

Operational risk management

The bulletin highlights that because BNPL lending is often automated, with rapid credit decisions, and relies on third parties, such elements could result in increased operational risks for banks. The bulletin discusses challenges with merchant returns and disputes. Given the online nature of and the demographic that uses BNPL loans, the bulletin emphasizes the importance of fraud risk management. Finally, the bulletin discusses first payment default risk with BNPL loans related to the timing of the first payment and delays with payment processing.

Third-party risk management

Banks that partner with third parties (including merchants) to offer BNPL loans should incorporate such relationships into the lender's third-party risk management processes (see the Interagency Guidance on Third-Party Relationships: Risk Management). Third-party risk management has been a huge point of emphasis for federal bank regulators lately.

Compliance risk management

In connection with BNPL products, the OCC expects banks to pay close attention to the delivery, timing, and appropriateness of marketing, advertising, and consumer disclosures. The OCC also encourages banks to consider billing dispute and error resolution on BNPL loans. The OCC identifies some federal consumer protection laws that may be triggered by BNPL loans. Ultimately, the OCC expects banks to integrate BNPL lending into the bank's compliance management system with appropriate and sufficient processes and policies designed to manage consumer compliance risk and prevent consumer harm.

What this means to you

The bulletin sets forth the OCC's regulatory expectations for national banks and federal savings banks engaging in BNPL lending. On one hand, the OCC's guidance encourages banks to integrate BNPL lending into existing installment lending practices and policies as much as feasible, including credit reporting and disclosures practices. On the other hand, the OCC recognizes that existing practices and policies may be insufficient or incompatible to monitor and manage the unique risks created by BNPL lending. The OCC suggests approaches divergent from traditional practices may be warranted to effectively manage risks with BNPL lending.

In addition to national banks and federal savings banks, the OCC bulletin could be of interest to other types of banks, credit unions, and nonbank BNPL providers insofar as the bulletin identifies consumer and creditor risks posed by BNPL loans.

Contact us

We have advised clients on a variety of point-of-sale financing products and understand the unique regulatory considerations with BNPL loans. If you have any questions regarding your potential or existing BNPL loan program or about the impact of potential future changes to related laws or regulatory expectations, please contact Susan Seaman, Jacob Huston, or your Husch Blackwell attorney.