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The CFPB Determines "Buy Now, Pay Later" Providers Are Card Issuers under Regulation Z

Yesterday, the Consumer Financial Protection Bureau (CFPB) released an interpretive rule stating that “Buy Now, Pay Later” (BNPL) providers are “card issuers” and “creditors” under the federal Truth in Lending Act (TILA) and Regulation Z and must follow Subpart B (open-end credit provisions) and other provisions of Regulation Z.

The CFPB made this determination by interpreting the term “credit card” under Regulation Z to include a digital user account that a consumer can use through a website, mobile app, browser extension, or integration with a merchant platform to access BNPL loans from time to time to make purchases. According to the CFPB, digital user accounts provided by BNPL providers fit within the definition of “credit card” because they are “credit devices” issued “as part of a business model designed for repeated use” to access credit for purchases.

Regulation Z sets forth a multi-part definition of “creditor” that includes “for purposes of subpart B, any card issuer that extends either open-end credit or credit that is not subject to a finance charge and is not payable by written agreement in more than four installments.” (12 C.F.R. § 1026.2(a)(17)(iii).) Because BNPL providers issue “credit cards” (per the CFPB), a BNPL provider falls within this definition of “creditor” and therefore must follow Subpart B of Regulation Z. Subpart B of Regulation Z includes account opening disclosures, periodic statement requirements, a change in terms notice requirement, billing dispute rights, limitations on liability for unauthorized transactions, and other requirements. In a footnote, the CFPB also shared that Section 1026.60 regarding credit card solicitations and applications in Subpart G of Regulation Z may apply to BNPL providers. The CFPB took the position that other parts of

Subpart G (e.g., ability-to-repay requirement, penalty fee limits) do not apply to BNPL providers.

Since it began studying the BNPL market in 2021, the CFPB has analogized BNPL products to credit cards. While it is not all that surprising to see the CFPB apply credit card-like protections to BNPL products, the CFPB's interpretive rule leaves a lot to chew on. Below are some initial thoughts on the potential impact of the CFPB's interpretive rule.

- 1. This is a new interpretation of “credit card” under Regulation Z.** The TILA, Regulation Z, and the Official Staff Interpretations give no indication that a user account on a digital platform through which separate loans may be obtained would be viewed as a “credit card” under Regulation Z. The interpretive rule arrives at this position by emphasizing that Congress intended the term “or other single credit device” to be broad and flexible. However, as a basic textual interpretation matter, the phrase “other single credit device” follows “card” and “plate” in Regulation Z's definition of “credit card.” This order suggests that “credit device” was not intended to be a broad catchall but was intended to be similar in meaning to the terms listed before it. The broadest interpretation of “credit card” that is captured in Regulation Z is the Official Staff Interpretation originally enacted by the Federal Reserve Board that provides that a “credit card” could include an account number that accesses an open-end line of credit to purchase goods or services. However, that interpretation applies only to open-end credit. The CFPB dismissed this key limitation in a footnote by asserting that “the logic applies similarly to closed-end credit.”
- 2. BNPL does not naturally fit within Subpart B.** The interpretive rule appears to be an example of trying to fit a more innovative product into an existing regulatory structure that may not have been intended to regulate the product. Subpart B primarily regulates open-end credit, where a single credit account allows for multiple extensions of credit under the account. A BNPL loan is a single installment loan to finance a single purchase. Section 1602 of TILA indicates that the open-end requirements of Subpart B should be applied to card issuers of closed-end credit with no finance charge and four or fewer installments “to the extent appropriate.” The interpretive rule does not clearly indicate which Subpart B provisions **do not** apply to BNPL providers because they extend closed-end credit. Thus, it is not clear if the CFPB expects BNPL providers to follow all of Subpart B's open-end credit provisions. If the interpretive rule is not clarified, BNPL providers may have challenges adapting their programs to follow Subpart B of Regulation Z, which again is designed to regulate open-end credit.
- 3. The interpretive rule may affect state law compliance.** The CFPB's broad interpretation of “credit card” under Regulation Z could impact the interpretation of the definition of “credit card” under various states' laws to the extent that the state law definition contains terms and elements that are similar to Regulation Z's definition. Some state credit

card laws could be interpreted to apply to BNPL providers and other POS installment lenders using the same logic set forth in the interpretive rule.

4. **The interpretive rule could have negative spillover effects for other point-of-sale (POS) installment lenders.** As highlighted by the CFPB in several footnotes, lenders offering interest-bearing installment loans to finance purchases could be subject to additional provisions of Regulation Z if the loans are offered through a digital user account and if certain other facts exist. In other words, the CFPB's interpretation that certain digital user accounts are "credit cards" under Regulation Z may not affect only BNPL providers, but could also affect some POS installment lenders.

The CFPB noted that, as an interpretive rule, it is not required to seek and respond to comments under the federal Administrative Procedure Act. Nonetheless, the CFPB has decided to solicit comments on this interpretive rule and reserved the right to make revisions at a later time "as appropriate in light of feedback received." Comments are due by August 1, 2024. The interpretive rule will take effect 60 days following publication in the Federal Register. Compliance with the interpretive rule will provide safe harbor protection to parties under TILA section 130(f).

Contact us

We have advised many programs on the scope of credit card regulations under Regulation Z and state law. If you want to discuss the implications of the CFPB's BNPL interpretive rule, please contact Susan Seaman, Mike G. Silver, or your Husch Blackwell attorney.