

# CFPB applies credit card rules to ‘buy now, pay later’ lenders

By Mark Chorazak, Esq., Adam Cohen, Esq., and Darren M. Welch, Esq., Skadden, Arps, Slate, Meagher & Flom LLP\*

JUNE 10, 2024

Following its recent win before the Supreme Court,<sup>1</sup> the Consumer Financial Protection Bureau (CFPB or Bureau) on May 22, 2024, issued an interpretive rule concluding that “Buy Now, Pay Later” (BNPL) loans accessed through a digital user account are “credit cards” subject to Regulation Z dispute and refund requirements (the Interpretive Rule).<sup>2</sup>

Given that traditional BNPL products do not involve a finance charge and are repayable in four or fewer installments, many provisions of Regulation Z do not apply to BNPL loans, as the CFPB has recognized. The Interpretive Rule is significant because it is the CFPB’s first definitive statement that certain Regulation Z provisions do apply to BNPL products.

Notably, the Interpretive Rule does not address other issues raised by the Bureau previously, which may be the subject of future regulatory activity, including ability to repay requirements, fees, and so-called “data harvesting” by BNPL providers. The Interpretive Rule includes a request for comment, and industry participants that may be affected may wish to express their views.

The CFPB’s conclusion that some BNPL products are credit cards is framed as an “interpretive rule” that is not subject to normal notice-and-comment procedures in the Administrative Procedure Act (APA). As such, and given the timing of its issuance, the Interpretive Rule would not be subject to repeal under the Congressional Review Act after the election in the event of a change in the administration.

This article summarizes the Interpretive Rule, describes other consumer protection issues raised by the CFPB and in state legislation with respect to BNPL products and concludes by discussing key takeaways and implications of the Interpretive Rule.

## The Interpretive Rule

The Interpretive Rule concludes that “lenders that issue BNPL digital user accounts are ‘card issuers’ under Regulation Z because the digital user accounts they issue constitute ‘credit cards’ under Regulation Z.”<sup>3</sup>

The Interpretive Rule focuses on digital user accounts used to access BNPL credit that is repayable in four or fewer payments and is not subject to a finance charge. For most products, the Truth in

Lending Act (TILA) applies only to credit that is subject to a finance charge or payable in more than four payments.

The Interpretive Rule, however, focuses on certain provisions in Subpart B of Regulation Z, titled “Open-End Credit,” that the CFPB asserts are applicable to a “card issuer” regardless of whether the credit is an open-end credit plan.<sup>4</sup> Those provisions include the right of a consumer to dispute charges and obtain refunds as well as disclosure and periodic statement requirements.

---

*The Interpretive Rule is significant because it is the CFPB’s first definitive statement that certain Regulation Z provisions do apply to BNPL products.*

---

The core of the legal analysis in the Interpretive Rule is the CFPB’s determination that digital user accounts used to access BNPL credit “mimic conventional credit cards.”<sup>5</sup> For instance, the Bureau stated that BNPL lenders “allow[] the consumer to access credit with their BNPL digital user account to make purchases either through the merchant’s website or through the issuance of a single-use virtual card.”<sup>6</sup>

Also, the Interpretive Rule states that “BNPL providers typically inform consumers of their ‘amount available to spend,’ similar to a credit limit for conventional credit cards, and offer a frictionless borrowing process allowing consumers to rapidly access the BNPL credit.”<sup>7</sup>

The definition of a “credit card” under Regulation Z is “any card, plate, or other single credit device that may be used from time to time to obtain credit.”<sup>8</sup>

The Interpretive Rule states that, under this definition, “other single credit device ... encompasses digital user accounts that consumers can use through websites, mobile apps, browser extensions, or integrations with merchant websites or mobile apps to access BNPL credit for the purchase of goods and services.”<sup>9</sup>

Thus, the CFPB concluded that a digital user account used to access BNPL credit is a “credit card” under Regulation Z, and BNPL

providers who offer such accounts are “card issuers” and “creditors” subject to certain Regulation Z requirements, including those regarding credit card disputes and refunds.<sup>10</sup>

This conclusion, however, does not mean that all Regulation Z requirements are applicable. The Interpretive Rule stated that BNPL loans are not open-end credit, and thus certain provisions — such as credit card ability-to-repay requirements and late fee restrictions — do not apply to BNPL loans.<sup>11</sup>

### Other BNPL issues

A brief recap of the CFPB’s activity in the BNPL space provides context for the Interpretive Rule and insights as to potential future areas of focus by the Bureau.

*Those provisions include the right of a consumer to dispute charges and obtain refunds as well as disclosure and periodic statement requirements.*

In December 2021, the CFPB issued mandatory data collection orders to five large BNPL lenders. Based on the data collected in those orders, the Bureau issued a report in September 2022 titled “Buy Now Pay Later: Market Trends and Consumer Impacts” (the 2022 BNPL Report),<sup>12</sup> in which it identified a number of potential risks to consumers.

In March 2023, the Bureau issued another report examining the typical credit profile of BNPL borrowers titled “Consumer Use of Buy Now, Pay Later: Insights From the CFPB Making Ends Meet Survey”<sup>13</sup> (the 2023 BNPL Report).

Besides the specific Regulation Z issues addressed in the Interpretive Rule, the CFPB has identified the following other potential risks of BNPL:

- **Ability-to-repay and overextension.** The Bureau has expressed concern about “overextension” of credit in the form of “loan stacking (the risk of overconsumption from BNPL usage at multiple concurrent lenders) and sustained usage (the risk of long-term BNPL usage causing stress on borrowers’ ability to meet other, non-BNPL financial obligations).”<sup>14</sup> In the 2023 BNPL Report, the Bureau found that “BNPL borrowers were, on average, much more likely to be highly indebted, revolve on their credit cards, have delinquencies in traditional credit products and use high-interest financial services such as payday, pawn, and overdraft compared to non-BNPL borrowers.”<sup>15</sup> However, the CFPB did not clearly determine that BNPL usage exacerbated consumers’ financial distress.<sup>16</sup> As noted above, the Interpretive Rule states that the Regulation Z ability-to-repay requirement applicable to credit cards does not apply to BNPL loans. However, the CFPB and some state agencies have used a different authority — the prohibition against unfair, deceptive or abusive acts and practices — in an effort to extend ability-to-repay requirements to other

products, and could potentially attempt to do so with BNPL loans as well.

- **Fees.** Across a variety of loan and banking products, the CFPB has been critical of many consumer fees, often characterizing them as “junk fees.” In the BNPL context, the CFPB has raised concerns regarding “multiple late fees on the same missed payment,” as well as the potential for “more aggressive late fee strategies” in light of industry and macroeconomic factors.<sup>17</sup>
- **Borrower characteristics.** The CFPB has found that “Black, Hispanic, and female consumers, as well as consumers with an annual household income between \$20,001-\$50,000 and consumers under the age of 35” have a “significantly higher likelihood of using BNPL.”<sup>18</sup> These findings suggest that the CFPB may view BNPL lending as presenting elevated fair lending risk in some circumstances.
- **Autopay.** In various contexts, the CFPB has raised concerns regarding lender efforts to encourage or require automatic payment of loans. Furthermore, the Electronic Fund Transfer Act and Regulation E prohibit compulsory payment of loans by preauthorized electronic fund transfers.<sup>19</sup> In the 2022 BNPL Report, the CFPB stated that “a policy of requiring autopay may adversely limit consumer choice and flexibility to elect or change payment methods, or to skip a BNPL payment to satisfy other financial obligations.”<sup>20</sup>
- **“Data harvesting.”** The Bureau has raised concerns regarding the “practice of harvesting and monetizing consumer data across the payments and lending ecosystems,” which the CFPB stated “may threaten consumers’ privacy, security, and autonomy” and lead to consolidation and reduced pricing competition.<sup>21</sup>

Pending state efforts may also result in additional requirements on BNPL lenders. For example, a bill introduced in New York on March 22, 2024, titled the Buy Now Pay Later Act,<sup>22</sup> would impose a number of requirements, including: (i) requiring BNPL lenders to obtain a license; (ii) prohibiting late fees, interest and certain other charges; and (iii) requiring BNPL lenders to make “a reasonable determination that [the] consumer has the ability to repay” the BNPL loan.<sup>23</sup>

This bill, if finalized, would follow California’s example, where the California Department of Financial Protection and Innovation has required BNPL providers to obtain licenses under the California Financing Law and has levied fines and entered into public settlements with major BNPL providers operating in California without a license.

Recent action by the U.S. Treasury Department’s Financial Crimes Enforcement Network (FinCEN) may also portend future changes that impact BNPL lenders.

As discussed in a recent Skadden client alert,<sup>24</sup> on March 29, 2024, FinCEN published a request for information and comment<sup>25</sup> seeking information and comments to help it evaluate the risks, benefits and safeguards if banks, as part of customer identification programs (CIP), were permitted to collect a partial social security number

(SSN) from a customer and subsequently use reliable third-party sources to obtain the customer's full SSN prior to account opening.

BNPL lenders, through their partnerships with banks, represent one of the primary providers of digital products that are impacted by the full nine-digit SSN collection requirement.

### *Pending state efforts may also result in additional requirements on BNPL lenders.*

The request for information and comment signals an openness by FinCEN to reconsidering current requirements under the CIP Rule with respect to the collection of full nine-digit SSNs from customers. An update to the rule would provide helpful relief to BNPL and other fintech companies who partner with banks and have developed innovative ways to form a reasonable belief that they know the true identity of their customers.

### Looking ahead

The Interpretive Rule represents a major development, with the CFPB for the first time taking formal action to extend some obligations applicable to traditional credit card lenders to the BNPL industry. BNPL lenders would be well-advised to closely analyze the Interpretive Rule and how it may apply to their business, with a particular focus on dispute and refund procedures.

The issuance of interpretive guidance, such as the Interpretive Rule, is often followed by other activity, including investigations, enforcement and further guidance and regulatory changes. Moreover, as discussed above, the Interpretive Rule only addresses a handful of the concerns that the CFPB has raised with BNPL products.

Accordingly, BNPL lenders (as well as non-BNPL lenders in the context of other credit products) may also wish to assess potential risks associated with other issues raised by the CFPB as described above.

Given the recent boost by the Supreme Court decision in *CFPB v. Community Financial Services Association of America* affirming the constitutionality of the CFPB's funding, we expect (and are seeing) increased CFPB activity across industries. Skadden will continue to monitor developments at the federal and state level closely.

The Interpretive Rule invites comments from stakeholders, and the CFPB has stated that it "may make revisions as appropriate after reviewing feedback received."<sup>26</sup> Industry participants and other stakeholders affected by the Interpretive Rule may wish to provide their input. Comments are due by August 1, 2024.

Although the timing of the Interpretive Rule's issuance may immunize it from repeal under the Congressional Review Act after the election (absent a recharacterization of its status as an "interpretive rule"), the Interpretive Rule could be revised or reversed through future agency action, particularly if there is a change in CFPB leadership. As a result, the outcome of the upcoming election may affect the Interpretive Rule's long-term impact on the BNPL industry.

### Notes:

<sup>1</sup> In *Consumer Financial Protection Bureau v. Community Financial Services Association of America, Ltd.*, No. 22-448 (May 16, 2024), the Supreme Court held that "Congress' statutory authorization allowing the Bureau to draw money from the earnings of the Federal Reserve System to carry out the Bureau's duties satisfies the Appropriations Clause."

<sup>2</sup> CFPB, Interpretive rule; request for comment, Truth in Lending (Regulation Z); Use of Digital User Accounts to Access Buy Now, Pay Later Loans, 89 Fed. Reg. 47068 (May 31, 2024), <https://bit.ly/3yQ9jNg>.

<sup>3</sup> Interpretive Rule at 47070.

<sup>4</sup> *Id.* at 47071 (citing 12 C.F.R. § 1026.12).

<sup>5</sup> *Id.* at 47069.

<sup>6</sup> *Id.* at 47069-47070.

<sup>7</sup> *Id.* at 47070.

<sup>8</sup> 12 C.F.R. § 1026.2(a)(15)(i) (emphasis added).

<sup>9</sup> Interpretive Rule at 47070.

<sup>10</sup> *Id.* at 47069, 47072.

<sup>11</sup> *Id.* at 47069 ("Lenders that issue digital user accounts to access BNPL credit are generally not subject to the credit card regulations appearing in subpart G of Regulation Z (e.g., penalty fee limits and ability-to-repay requirements).")

<sup>12</sup> <https://bit.ly/3KxrAl3>.

<sup>13</sup> <https://bit.ly/3Vx7fm8>.

<sup>14</sup> 12 2022 BNPL Report at 10.

<sup>15</sup> 13 2023 BNPL Report at 22.

<sup>16</sup> 14 *Id.*

<sup>17</sup> 15 2022 BNPL Report at 74.

<sup>18</sup> 16 Interpretive Rule at 47070; 2023 BNPL Report at 22.

<sup>19</sup> 17 15 U.S.C. § 1693k; 12 C.F.R. § 1005.10(e).

<sup>20</sup> 18 2022 BNPL Report at 74.

<sup>21</sup> 19 *Id.* at 75.

<sup>22</sup> <https://bit.ly/4caEhOd>

<sup>23</sup> 20 Assemb. B. A9588A, 2023-2024 Reg. Sess. (N.Y. 2024).

<sup>24</sup> <https://bit.ly/3yVC5fp>

<sup>25</sup> <https://bit.ly/4eiFTaz>

<sup>26</sup> 21 Interpretive Rule at 47068.

## About the authors



**Mark Chorazak (L)**, co-head of **Skadden, Arps, Slate, Meagher & Flom LLP**'s financial institutions regulatory group, has extensive experience advising on the full spectrum of banking law matters, including traditional and cutting-edge bank regulatory and legislative issues. He is based in New York and can be reached at [mark.chorazak@skadden.com](mailto:mark.chorazak@skadden.com).

**Adam Cohen (C)**, co-head of the firm's financial institutions regulatory group, is a highly experienced financial services attorney who advises on a broad range of bank regulatory and fintech-related matters,

including mergers and acquisitions, minority investments, strategic initiatives, banking charters, banking-as-a-service arrangements, anti-money laundering, and other governance, compliance and enforcement issues. He is based in Washington, D.C., and can be reached at [adam.cohen@skadden.com](mailto:adam.cohen@skadden.com). **Darren M. Welch (R)**, a consumer financial services partner, represents and advises a broad range of companies and individuals in regulatory investigations, enforcement proceedings and examinations, and civil litigation on all types of consumer financial services issues. He is based in Washington, D.C., and can be reached at [darren.welch@skadden.com](mailto:darren.welch@skadden.com). This article was originally published June 5, 2024, on the firm's website. Republished with permission.

This article was published on Westlaw Today on June 10, 2024.

\* © 2024 Mark Chorazak, Esq., Adam Cohen, Esq., and Darren M. Welch, Esq., Skadden, Arps, Slate, Meagher & Flom LLP

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. For subscription information, please visit [legalsolutions.thomsonreuters.com](https://legalsolutions.thomsonreuters.com).