Cooley

CFPB Doubles Down on Buy Now, Pay Later Interpretive Rule in New FAQs

October 1, 2024

On September 18, 2024, the Consumer Financial Protection Bureau (CFPB) published a compliance aid to its May 2024 interpretive rule, which classifies certain providers of buy now, pay later (BNPL) products as card issuers under Regulation Z. The compliance aid, in the form of FAQs, makes clarifications and addresses ambiguities in the interpretive rule.

Though the CFPB claimed that a public comment period was not required for an interpretive rule under the Administrative Procedure Act, the agency accepted comments through August 1, 2024. Commenters generally expressed confusion about the amorphous definition of "digital user accounts" and the types of loans that were covered by the rule. Commenters also raised questions as to how Regulation Z provisions intended for open-end credit cards would apply to closed-end BNPL loans and expressed concern that compliance with Regulation Z credit card rules would require making disclosures that are not applicable to BNPL products.

Clarifications in the FAQs

Covered BNPL products

In the FAQs, the CFPB draws a distinction between "Pay-in-Four BNPL Loans" accessed through digital user accounts – which, according to the FAQs, are subject to the interpretive rule – and other forms of BNPL products that are not subject to the interpretive rule.

In setting the groundwork for the Pay-in-Four BNPL Loan designation, the FAQs lay out the CFPB's general understanding of BNPL products as installment loans, in which consumers incur debt and have the right to defer payments, made to consumers for the purchase of personal, family, or household goods and services, that may or may not apply finance charges and late, missed, or returned payment fees, and that often are repaid in four installments or less (but noting that the number of installment and repayment periods can vary).

Through the FAQs, the CFPB clarifies that the interpretive rule only applies to "Pay-in-Four BNPL Loans," a subset of BNPL loans defined as closed-end BNPL installment loans containing the following features:

- The consumer incurs debt and has the right to defer debt in connection with a transaction for the purchase of goods and services for the consumer's personal, family, or household use.
- The loan is payable in four or fewer installments.
- The loan does not incur interest or other finance charges.
- The loan is accessed through a covered "digital user account" issued by a BNPL provider or its agent.

The CFPB notes within the FAQs that there may be BNPL loans that are not accessed through covered digital user accounts, BNPL loans that apply a finance charge or BNPL loans that are more than four installments. While aspects of Regulation Z may still apply to these other BNPL products, the CFPB does **not** consider these products to be Pay-in-Four BNPL Loans and therefore these BNPL products are not subject to the interpretive rule.

Covered digital user accounts

As part of the FAQs, the CFPB describes a "digital user account" as "a secure, personal profile that the BNPL loan provider activates for a consumer, enabling the consumer to access and use BNPL credit" "as a form of payment for purchasing goods or services." Specifically, a covered digital user account is an account that can be used by a consumer from time to time to obtain credit in the course of completing transactions in connection with a Pay-in-Four BNPL Loan. Moreover, the CFPB considers such covered digital user accounts charge cards as that term is used under Regulation Z.

The CFPB provides clarification that a digital user account used only to store traditional credit card information in connection with purchases is not considered a covered digital user account or a credit card under the interpretive rule. This is because the underlying stored credit card is the device used to draw credit, not the digital user account. However, a digital user account that permits the accountholder to access Pay-in-Four BNPL Loans **and** a stored credit card is considered a covered digital user account and a credit card subject to the interpretive rule.

Periodic statements

The CFPB emphasizes that it expects BNPL loan providers to deliver periodic statements to any consumer with a debit or credit balance of more than $1 in connection with a Pay-in-Four BNPL Loan. The provider may choose whether to treat each Pay-in-Four BNPL Loan as a separate closed-end credit account with its own billing statement cycle, or to aggregate all of a user's Pay-in-Four BNPL Loans into one multifeatured credit account and send one combined statement for that account.

Applicable Regulation Z provisions

The CFPB clarified that Pay-in-Four BNPL Loans accessed through a covered digital user account are closed-end charge card transactions, as opposed to open-end credit card transactions. Because Pay-in-Four BNPL Loans do not include finance charges calculated using a periodic rate (e.g., interest) and in most cases do not replenish, the digital user account would be a "charge card" under Regulation Z. Consequently, providers of Pay-in-Four BNPL Loans are only subject to certain Regulation Z provisions for card issuers, including charge card issuers, and are not subject to creditor provisions that **apply specifically to open-end products**.

The table below lists the Regulation Z provisions that the CFPB has highlighted as applicable to Pay-in-Four BNPL Loans.

<table>
<tr><th colspan="2">Applicable Regulation Z provisions</th></tr>
<tr><td colspan="2">Based on the FAQs, Regulation Z provisions not included in this chart, or provisions that are expressly excepted in this chart, do not appear to be required of Pay-in-Four BNPL Loans, including provisions of the Credit Card Accountability Responsibility and Disclosure (CARD) Act, such as ability to pay and limitations on pricing. Note, however, that such other requirements may apply to BNPL products that are not Pay-in-Four BNPL Loans.

In addition, these provisions must be carefully analyzed as the particular facts and circumstances of a Pay-in-Four BNPL Loan can impact how these provisions are applied. In addition, these provisions may identify certain exceptions or provide instructions for applying the requirements that are triggered by Pay-in-Four BNPL Loans.</td></tr>
<tr><td colspan="2">Subpart A</td></tr>
<tr><td>§ 1026.1 – Authority, purpose, coverage, organization, enforcement and liability</td><td>§ 1026.3 – Exempt transactions</td></tr>
<tr><td>§ 1026.2 – Definitions and rules of construction</td><td>§ 1026.4 – Finance charge</td></tr>
<tr><td colspan="2">Subpart B</td></tr>
<tr><td>§ 1026.5 – General disclosure requirements</td><td>§ 1026.10 – Payments</td></tr>
</table>

§ 1026.5 – General disclosure requirements Except for 1026.5(b)(2)(ii)(A)	§ 1026.10 – Payments Except for § 1026.10(b)(3)
§ 1026.6(b) – Account-opening disclosures Except for § 1026.6(b)(2)(i)(F)	§ 1026.11 – Treatment of credit balances; account termination Except for § 1026.11(c)
§ 1026.7(b) – Periodic statement Except for § § 1026.7(b)(11) and (12)	§ 1026.12 – Special credit card provisions
§ 1026.8 – Identifying transactions on periodic statement Except for § § 1026.7(b)(11) and (12)	§ 1026.13 – Billing error resolution
§ 1026.9 – Subsequent disclosure requirements Except for § § 1026.9(c)(2)(iv)(B) and (9)(f)	§ 1026.16 – Advertising
Subpart D	
§ 1026.25 – Record retention Except for § 1026.25(c)	§ 1026.28 – Effect on state laws
§ 1026.27 – Language of disclosures	§ 1026.29 – State exemptions
Subpart G	
§ 1026.60 – Credit and charge card applications and solicitations	

How this affects your business

It is clear that the regulatory landscape for BNPL product providers has shifted greatly and will likely remain dynamic for the near future at the federal and state levels. The FAQs serve as a reminder of the CFPB's focus on BNPL products from both a regulatory and an enforcement perspective. Providers of BNPL products should closely examine their business products and operations in order to assess the applicability of Regulation Z – and carefully consider whether such practices should be updated in light of the CFPB's recent interpretive rule and FAQs.

This alert provides a high-level overview of the FAQs released by the CFPB. If you require a more in-depth analysis of how your business is impacted by these issues, please reach out to one of the lawyers below.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or

any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our legal notices.

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.