



**America's  
Credit Unions**

August 1, 2024

Interpretive Rule, c/o Legal Division Docket Manager  
Consumer Financial Protection Bureau  
1700 G Street NW  
Washington, DC 20552

**RE: Truth in Lending (Regulation Z); Use of Digital User Accounts To Access Buy Now, Pay Later Loans (Docket No. CFPB-2024-0017)**

Dear Sir or Madam:

On behalf of America's Credit Unions, I am writing in response to the Consumer Financial Protection Bureau (CFPB or Bureau) Interpretive Rule to address the applicability of subpart B of Regulation Z to lenders that issue digital user accounts used to access credit, including to those lenders that market loans as "Buy Now, Pay Later" (BNPL). America's Credit Unions is the voice of consumers' best option for financial services: credit unions. We advocate for policies that allow the industry to effectively meet the needs of their over 140 million members nationwide. America's Credit Unions and its member credit unions appreciate the opportunity to provide input on the Interpretive Rule. While we appreciate the Bureau's efforts to bring regulatory consistency to BNPL lending and provide much needed consumer protections to a largely unregulated market, these products would benefit from additional protections not covered in the Interpretive Rule, such as ability to repay requirements and data protections. Although America's Credit Unions agrees with the intent of the rule, we strongly object to the use of an Interpretive Rule rather than a proposed rulemaking with a standard notice and comment period. Expansive and novel interpretations with broad implications such as those found in the rule require transparency and stakeholder feedback. Therefore, America's Credit Unions urges the CFPB to reissue the rule as a proposed rulemaking.

**General Comments**

BNPL is a modern adaptation of traditional installment loans, tailored to meet the demands of the burgeoning online commerce landscape. BNPL has proven to be a lucrative tool for increasing purchase prices in online shopping, which has significantly attracted merchants. These merchants are willing to incur higher fees to BNPL providers compared to traditional credit and debit fees because BNPL not only boosts conversion rates by 20-30% but also raises average purchase prices by 30-50%.<sup>1</sup> Despite accepting a 3-6% transaction fee loss to BNPL companies, retailers benefit from the increased sales volume. However, this enthusiasm for

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<sup>1</sup> See The Straw Group, "Buy Now, Pay Later – Boom or Bust?" available at <https://thestravgroupp.com/buy-now-pay-later-boom-or-bust/>; See CNBC "Retailers bid farewell to layaway, as shoppers embrace buy now, pay later options" available at <https://www.cnbc.com/2021/09/25/why-retailers-are-embracing-buy-now-pay-later-financing-services.html>.

BNPL overlooks critical issues related to consumer affordability. Both retailers and BNPL providers appear largely indifferent to whether consumers can afford the payments. America's Credit Unions, while supporting broader access to credit, stresses the need for responsible lending practices that consider borrowers' financial health and repayment capabilities. We are particularly concerned about BNPL providers targeting low-income consumers and the insufficient underwriting processes that accompany these loans. As noted in the Bureau's March 2023 report on *Consumer Use of Buy Now, Pay Later*, "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>2</sup> Moreover, the lack of a level playing field in the BNPL market, where providers often design their products to sidestep regulation and adequate consumer protections is of real concern. Robust safeguards are urgently needed to protect consumer data from unauthorized access, use, and disclosure, underscoring the need for comprehensive regulatory oversight in this rapidly growing sector.

## Consumer Protection

The CFPB's decision to apply subpart B of Regulation Z to lenders issuing digital user accounts for credit access, including BNPL providers, represents a potentially significant step towards addressing pressing consumer protection concerns in this rapidly evolving sector of financial services. While the approach via Interpretive Rule rather than formal rulemaking raises significant procedural questions, the underlying intent to extend established consumer safeguards to these new financial products is commendable and timely.

The current regulatory landscape for BNPL products has been characterized by an uneven playing field, where some providers have crafted their products specifically to avoid regulation and sidestep consumer protections. This situation not only puts consumers at risk but also creates unfair competition among financial service providers. The CFPB's Interpretive Rule, by bringing BNPL products under the umbrella of Regulation Z, could help level this playing field. It would ensure that all providers, regardless of how they structure their products, are subject to consistent regulatory standards. This uniformity could foster fairer competition based on product quality and consumer value rather than regulatory arbitrage, ultimately benefiting both consumers and responsible industry players.

One of the most pressing issues surrounding BNPL products has been their apparent targeting of low-income or paycheck-to-paycheck consumers, coupled with concerns about insufficient underwriting practices. While applying Subpart B of Regulation Z to these lenders through the Interpretive Rule does not directly impose ability-to-repay assessments, it could still help address some of these concerns. The enhanced disclosure requirements under Regulation Z could provide consumers with clearer information about the terms and potential costs of BNPL products, enabling more informed decision-making, particularly among vulnerable populations.

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<sup>2</sup> CFPB, "Consumer Use of Buy Now, Pay Later" (Mar. 2023) available at [https://files.consumerfinance.gov/f/documents/cfpb\\_consumer-use-of-buy-now-pay-later\\_2023-03.pdf](https://files.consumerfinance.gov/f/documents/cfpb_consumer-use-of-buy-now-pay-later_2023-03.pdf).

However, America's Credit Unions remains concerned about the impact of multiple BNPL loans being "stacked" one after another, potentially putting consumers in a position where they are unable to repay and could face high penalty fees. There are limited controls on the number of BNPL loans a consumer can take out, a state of affairs exacerbated by the patchwork approach to credit reporting implemented by the various BNPL lenders. While all three major consumer reporting agencies (CRAs) include BNPL loans on credit reports, many of the BNPL lenders do not report BNPL loans to the CRAs, or only report some of them.<sup>3</sup> When combined with the population of consumers that stack multiple BNPL loans, the absence of a uniform approach and consistent information regarding ability to repay becomes dangerous for consumers. The Bureau's 2023 report found that, "[a]pproximately 23 percent of BNPL borrowers (4 percent of all respondents) said they used the product three to six times and approximately 17 percent of BNPL borrowers (3 percent of all respondents) used BNPL six or more times in the previous year."<sup>4</sup>

While the Interpretive Rule may not directly address underwriting standards, the increased transparency and consumer protections under Regulation Z could help consumers better understand the risks associated with taking on multiple BNPL obligations. Nevertheless, without specific ability-to-repay requirements, there is still a risk that some consumers may take on more debt than they can manage, especially given the ease and speed with which BNPL loans can be obtained. This underscores the ongoing need for careful consideration of how to best protect consumers in the rapidly evolving BNPL market, potentially through additional regulatory measures or industry best practices that go beyond the scope of the current Interpretive Rule.

Additionally, while the application of Subpart B of Regulation Z to BNPL lenders through this Interpretive Rule does not address data protection or information usage concerns, these remain significant issues in the BNPL market. While depository institutions have had a national standard on data protection since the passage of the Gramm-Leach-Bliley Act (GLBA) over two decades ago, other entities that handle consumer financial data are not held to the same standards. BNPL providers often collect extensive data on consumer purchasing habits and financial behaviors, raising privacy concerns and the risk of unauthorized access, use, or disclosure of sensitive information. Our member credit unions have serious and justifiable concerns with the data security practices of BNPL lenders that transact with their members, which directly impact the prevalence of payments fraud. These important data protection and privacy issues would likely need to be addressed through other regulatory measures or legislation specifically focused on data privacy and security in financial services.

Although the Interpretive Rule fails to address ability to repay or data protections, the application of Subpart B of Regulation Z to BNPL lenders could offer several important protections to consumers. This includes protections regarding liability for unauthorized use, where Subpart B limits consumer liability for unauthorized transactions to \$50, provided the

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<sup>3</sup> Bankrate, "How does 'buy now, pay later' affect your credit score?" (Jun. 11, 2024) available at <https://www.bankrate.com/credit-cards/advice/buy-now-pay-later-credit-score/>.

<sup>4</sup> CFPB, "Consumer Use of Buy Now, Pay Later" (Mar. 2023) available at [https://files.consumerfinance.gov/f/documents/cfpb\\_consumer-use-of-buy-now-pay-later\\_2023-03.pdf](https://files.consumerfinance.gov/f/documents/cfpb_consumer-use-of-buy-now-pay-later_2023-03.pdf).

card issuer is promptly notified. Extending this protection to BNPL products could significantly reduce consumer risk, especially given the digital nature of these transactions and the potential for fraud or account breaches. This protection could give consumers greater confidence in using BNPL services, knowing their financial exposure is limited in case of unauthorized use.

The provisions related to merchant disputes and billing error resolution procedures could also be particularly beneficial for BNPL users. These rules require creditors to promptly investigate and resolve billing errors, including instances where goods or services were not delivered as agreed. Given that BNPL is often used for online purchases where consumers might not immediately receive or be able to inspect goods, having a clear, regulated process for disputing charges and seeking resolution could provide crucial protection against potential merchant misconduct or errors. Subpart B's rules on crediting returns could also prove valuable in the BNPL context. These provisions require prompt crediting of returns and refunds to a consumer's account. In the BNPL model, where payments are often split into multiple installments, clear rules on how returns and refunds are handled could prevent confusion and ensure that consumers are not left making payments on returned items.

Finally, the advertising requirements under Subpart B could bring much-needed transparency to BNPL marketing practices. These rules mandate clear and conspicuous disclosure of key terms in credit advertising. Applied to BNPL, this could result in more straightforward presentation of payment terms, potential fees, and the true cost of using these services. Given concerns about BNPL products potentially encouraging overspending, especially among younger or financially vulnerable consumers, clearer advertising disclosures could help consumers make more informed decisions about using these products.

While the Interpretive Rule's approach may present implementation challenges, particularly given the unique characteristics of BNPL products, it represents a necessary first step in addressing the regulatory gap in this rapidly growing market. The CFPB's action signals a recognition of the changing landscape of consumer credit and the need for regulatory frameworks to evolve accordingly. As the industry adapts to these new requirements, there may be opportunities for further refinement and tailoring of the regulations to better fit the specific nature of BNPL products while maintaining robust consumer protections.

Although America's Credit Unions objects to the method of implementation of protections via Interpretive Rule, the extension of Regulation Z's consumer protections to BNPL products and similar digital credit offerings is a prudent move. It has the potential to address significant concerns about consumer targeting, regulatory consistency, and dispute resolution in the BNPL market.

## **Use of Interpretive Rule**

The CFPB's decision to issue an Interpretive Rule applying subpart B of Regulation Z to lenders that issue digital user accounts for credit access, including BNPL providers, raises significant concerns about regulatory process and fairness. This approach bypasses crucial steps that ensure

balanced, effective, and legally sound rulemaking. The CFPB should have pursued a notice-and-comment period through a proposed rule rather than an Interpretive Rule. The Administrative Procedure Act (APA) generally requires agencies to engage in notice-and-comment rulemaking when promulgating substantive rules that create new rights or obligations. The APA mandates this process in 5 U.S.C. § 553, which outlines the general rulemaking procedures for federal agencies.<sup>5</sup> Specifically, 5 U.S.C. § 553(b) requires agencies to provide a general notice of proposed rulemaking by publishing it in the Federal Register. Furthermore, 5 U.S.C. § 553(c) states that agencies must give interested persons an opportunity to participate in the rulemaking process through the submission of written data, views, or arguments.

By interpreting digital user accounts as "credit cards," their issuers as "card issuers," and BNPL lenders as "creditors" subject to subpart B of Regulation Z, the CFPB is not simply clarifying existing regulations but is instead making a substantive reinterpretation. This reinterpretation imposes new obligations on a rapidly evolving sector of the financial industry. These new obligations include compliance with credit card regulations that were not previously applicable to digital user accounts and BNPL providers. This reinterpretation effectively creates new rights for consumers, such as the right to dispute transactions and protections against unauthorized charges, which were not explicitly provided under the previous regulatory framework.

The importance of stakeholder feedback, openness, and transparency in the rulemaking process cannot be overstated. A notice and comment period would have allowed BNPL providers, traditional lenders, consumer advocacy groups, and other interested parties to offer valuable insights into the practical implications of applying Regulation Z to these new financial products. This feedback could have helped the CFPB refine its approach, identify potential unintended consequences, and craft a more nuanced and effective regulatory framework. The absence of this collaborative process risks implementing rules that may be ill-suited to the unique characteristics of BNPL products and the digital lending landscape. This precedent underscores the significance of the regulatory change and suggests that a more deliberative process would have been appropriate. The CFPB's departure from this expected approach raises questions about regulatory consistency and whether the Bureau has circumvented established procedural norms due to considerations surrounding an impending election and potential for a new Administration.

The CFPB's decision to give the industry only 60 days from publication in the *Federal Register* to comply with Regulation Z's open-end credit provisions is particularly problematic. This timeframe is woefully inadequate for the significant operational and product changes required. Compliance with open-end credit regulations involves complex adjustments to disclosure practices, credit reporting procedures, and overall business models. Such a short compliance window not only places an undue burden on BNPL providers and similar lenders but also increases the risk of hasty, potentially flawed implementations that could ultimately harm consumers rather than protect them. Furthermore, the use of an Interpretive Rule in this instance may be seen as an attempt to circumvent the more rigorous scrutiny and potential legal

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<sup>5</sup> 5 U.S.C. § 553.

challenges associated with APA informal rulemaking. This approach undermines the principles of administrative law and good governance, which prioritize transparency, accountability, and stakeholder engagement in the regulatory process.

The rapid evolution of financial technology and digital lending models demands a more flexible and adaptive regulatory approach. A standard APA rulemaking process would have allowed for a more thorough examination of how traditional credit regulations can be effectively applied to or modified for innovative financial products. This could have resulted in a more forward-looking regulatory framework that balances consumer protection with the need for financial innovation. While the CFPB's goal of extending consumer protections to users of digital credit products is commendable, its choice of regulatory mechanism is flawed. The use of an Interpretive Rule for such a significant change in regulatory interpretation and application falls short of the standards of good governance and effective rulemaking. A proposed rule with a notice and comment period would have been more appropriate, ensuring a more balanced, informed, and legally robust regulatory outcome.

### **Regulatory Misalignment**

The Interpretive Rule's application of subpart B of Regulation Z to digital user accounts and BNPL raises complex issues by attempting to fit these innovative financial products into a regulatory framework designed for traditional credit cards and open-end credit products. Congress did not intend for the CFPB to expand the applicability of Regulation Z to innovative financial products like BNPL without explicit congressional action. By bypassing the legislative process and using an Interpretive Rule, the CFPB circumvents the role of Congress, which is essential in ensuring that significant regulatory changes reflect the will of elected representatives. The CFPB should seek clear congressional authorization before applying existing regulations to new financial products and services.

Beyond the intent of Congress, this approach overlooks crucial differences between these products and creates significant challenges for compliance and consumer protection. A key example of this mismatch is the timing requirements for periodic statements. Regulation Z, designed with traditional credit cards in mind, requires creditors to provide periodic statements for each billing cycle, typically monthly. However, BNPL products operate on a fundamentally different timescale, often with repayment periods as short as six weeks or less. Applying the standard periodic statement requirements to BNPL products would create an awkward and potentially confusing situation where consumers might receive statements after they have already completed their repayments. The Interpretive Rule lacks clarity on how these requirements would apply or be modified to apply to BNPL, further hampering the ability of stakeholders to understand their obligations under the rule.

This misalignment between the regulation's requirements and the BNPL product structure could lead to several issues. Consumers may receive statements containing outdated or irrelevant information, as the BNPL transaction might be completed before the statement is even generated. This could lead to consumer confusion about their current obligations or the status

of their accounts. Additionally, BNPL providers would need to implement systems to generate and send statements that may have little practical value, increasing operational costs that could be passed on to consumers. The short-term nature of BNPL products also makes it difficult to comply with the timing requirements for delivering statements before the payment due date, as required by Regulation Z.

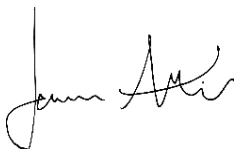
Furthermore, other aspects of Regulation Z's open-end credit requirements may be similarly ill-suited for BNPL products. For instance, BNPL products often don't have traditional credit limits, instead offering transaction-specific credit amounts. The requirement to disclose credit limits may not align with this model. The rapid, often single-use nature of BNPL transactions may make the standard requirements for notifying consumers of changes in terms impractical or irrelevant. Moreover, the timelines for resolving billing errors under Regulation Z may be longer than the entire duration of a typical BNPL transaction, rendering these protections less effective.

These misalignments highlight the need for a more nuanced approach to regulating BNPL and similar innovative financial products. By using an Interpretive Rule to apply existing regulations wholesale, the CFPB risks creating a regulatory environment that is not only burdensome for providers but also potentially confusing or unhelpful for consumers. A standard APA rulemaking process would have allowed for a thorough examination of these issues, potentially resulting in tailored regulations that maintain consumer protections while acknowledging the unique characteristics of BNPL products. It could have explored alternatives such as modified disclosure requirements, adjusted timing provisions, or even a separate regulatory framework specifically designed for short-term, digital credit products.

## Conclusion

America's Credit Unions appreciates the opportunity to comment on the Interpretive Rule. If you have any questions, please do not hesitate to contact me at 703-842-2268 or [jakin@americascreditunions.org](mailto:jakin@americascreditunions.org).

Sincerely,



James C. Akin  
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