New York Buy-Now-Pay-Later Rules Overly Broad?

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In late February, in the midst of an historic East Coast Blizzard, the New York Department of Financial Services ("DFS") issued its pre-proposed regulations to implement the state's 2025 statute regulating buy-now-pay-later (BNPL) lenders (the "BNPL Act"). The BNPL Act was enacted as a component of the state's budget legislation, but it remains in suspended animation as its effective date is tied to the DFS promulgation of rules to fully implement its requirements. The issuance of a pre-proposed version of this regulation (the "BNPL Regulation") is the first step on the path to fuller regulation of the BNPL market in New York.

A fundamental question raised by both the BNPL Act and the BNPL Regulation is precisely what product DFS is trying to regulate. For consumers who are unable to pay in full for a purchase at the point of sale, there have long been numerous options to finance – such as via an installment loan, a credit card, or credit sale financing. However, starting in roughly 2019 a new delayed payment option arose that permitted consumers to break a large payment into several smaller, interest-free ones that could be made over time. The new payment option, with its more manageable payment amounts, was a success and enjoyed significant growth.

Due to the success of this new point-of-sale payment alternative, and the fact that its structure (no more than four, finance-charge-free payments) generally avoided the disclosure requirements of the Truth in Lending Act, it drew the interest of the Consumer Financial Protection Bureau and other regulators. Since 2022 the CFPB has issued several reports analyzing what would eventually become known as a "buy-now-pay-later loan." Throughout its analysis, the CFPB analysis has consistently defined the product subject to its scrutiny as a zero-interest, pay-in-four (or fewer) installments product, while acknowledging that such "BNPL Loans" are a component of a larger point-of-sale financing universe.

The New York BNPL Act and BNPL Regulation take a different, broader approach. Both define a "BNPL Loan" to mean closed-end credit provided to a consumer to purchase a good (other than a motor vehicle) or a service. And while both exclude most credit sale transactions (a transaction where the seller of the good or service is also the initial creditor in its financing), the definition is agnostic as to the number of payments involved. The BNPL Act and BNPL Regulation then parse BNPL Loans into zero-interest loans and installment loan categories (the latter of which may have interest or other finance charges, or both).

As structured, this definition will cover "pay-in-four" zero-interest transactions that initially drew the attention of regulators. That is not all, however. The definition will also arguably draw into its orbit traditional installment loans, regardless of repayment term, the proceeds of which will be used to purchase a good (other than a motor vehicle) and/or a service. Lenders have offered this

type of purchase-money financing for many years.

Interlocked with this definition is the definition of the term “BNPL Lender” in the act and the regulation, and what those parties must do to be authorized to make BNPL Loans. Both the BNPL Act and BNPL Regulation define a BNPL Lender as the party offering the BNPL Loan. The regulation would expand this definition to include a person who later acquires a BNPL Loan. The act and regulation would require non-depository institutions acting as a BNPL Lender to obtain a license from the DFS. However, it would also require a number of already heavily regulated institutions – including state-chartered banks, state-chartered credit unions and New York licensed lenders – to obtain a “category permission” from the DFS authorizing it to make interest-free or interest-bearing (or both) BNPL Loans. Interestingly, federally-chartered banks and credit unions would be exempt from these requirements.

So, if a state-chartered bank or licensed lender is required obtain the permission of the DFS prior to offering a BNPL Loan, does this mean that it must do so prior to offering any type of purchase-money financing – or just the “pay-in-four” variety that appears to have been the genesis of regulatory concern? The current drafting suggests the former. And if all purchase-money financing is covered what does this mean?

Under the BNPL Act and BNPL Regulation, the product would be subject to a number of pricing limitations, such as limits on interest or penalty fees. While that may seem logical, it is unclear if these limits are intended to override separate authority a BNPL Lender may have to charge rates and/or fees on its current purchase money loans.

Moreover, BNPL Loans would be subject to a series of new disclosure requirements and consumer protections. Some of them (for example: maintenance of prudent underwriting standards, and requirements that lenders have processes to handle consumer complaints) are likely already sorted by well-run credit providers. However, some of the new disclosure requirements may be foreign to providers of closed-end, purchase money financing. For example: the BNPL Act specifically states that BNPL Lenders must adhere to the dispute rights and limitations on unauthorized charges applicable to credit card transactions under the federal Truth-in-Lending Act even if TILA doesn’t apply to the BNPL Loan and even if the BNPL Lender doesn’t offer a credit card in connection with the product. Many lenders making traditional purchase money installment loans may be caught off guard with requirements such as these.

Given the breadth of their definitions, and what the BNPL Act and BNPL Regulation would require, any party other than federally-chartered banks and credit unions union (who, as “exempt organizations” are not covered) who extend purchase money financing for any good other than a motor vehicle should be wary of what this scheme would cover. They may be surprised to learn that these rules appear to apply to them. While the BNPL Act has already passed, the BNPL Regulation remains in the recipe stage – meaning that such lenders still (until March 5th) have a chance to comment. It may be prudent for such creditors to do so while there is an opportunity for the scheme being developed by the New York DFS is appropriately tailored.