

Banking and Finance Law Daily Wrap Up, CONSUMER CREDIT—FinTech group brings challenge to CFPB Buy Now Pay Later Rule, (Oct. 21, 2024)

Banking and Finance Law Daily Wrap Up

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By Donielle Tigay Stutland, J.D.

The Financial Technology Association filed a complaint in federal court challenging the CFPB's Buy Now Pay Later Rule under the Administrative Procedure Act.

The Financial Technology Association (FTA), a trade organization that represents the interests of the financial technology industry, filed a [complaint](#) in the federal district court for the District of Columbia, arguing that the Consumer Financial Protection Bureau's Buy Now Pay Later Rule (New Rule) violates the Administrative Procedure Act (the APA). Further, the FTA asks the court to vacate the New Rule because it "violates procedural requirements mandated by the APA and the Truth in Lending Act (TILA); it defies the statutory constraints that TILA imposes on the CFPB's actions in this sphere; and it is arbitrary and capricious, and an abuse of discretion."

[Said](#) FTA President and CEO Penny Lee: "Unfortunately, the CFPB's rushed interpretive rule falls short on multiple counts, oversteps legal bounds, and risks creating confusion for consumers. The CFPB is seeking to fundamentally change the regulatory treatment of pay-in-four BNPL products without adhering to required rulemaking procedures, in excess of its statutory authority, and in an unreasonable manner. We believe the CFPB's attempt to impose regulations designed for credit cards on the pay-in-four products offered by many of our members shows an underlying misunderstanding of BNPL. Consumers are having positive experiences with pay-in-four products and benefit from strong consumer protections such as zero interest on outstanding balances, no compounding interest, and pausing accounts if consumers fall behind on payments to avoid an excessive debt burden."

Background. In May 2024, the Bureau issued an interpretive rule to address the applicability of Subpart B of Regulation Z of the Truth in Lending Act to lenders that issue digital user accounts that allow to access credit, including lenders that market loans as "Buy Now, Pay Later" (BNPL). The rule emphasizes that these lenders are also "creditors" subject to Subpart B of Regulation Z, including provisions governing periodic statements and billing disputes. This interpretive rule also describes how lenders meet the criteria for being "card issuers" for purposes of Regulation Z. (see [Banking and Finance Law Daily](#), May 22, 2024). The new BNPL Rule was applicable as of July 30, 2024.

Notice and Comment. The complaint first alleges that the New Rule must be set aside because it was issued "without observance of procedure required by law." The FTA asserts that the New Rule violates the APA's notice-and-comment requirements; and as such, an agency action must be set aside when it is done "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). The complaint also argues that the New Rule violates TILA's requirement that the CFPB proceed through notice-and-comment rulemaking before extending obligations to card issuers who do not impose a finance charge or require repayment in more than four installments. In addition, the complaint indicates that not only did the CFPB not go through a notice and comment period, FTA offers that it did not comply with the Small Business Regulatory Enforcement Fairness Act, "which requires it to convene a Small Business Review Panel so that it can consult with representatives of small entities likely to be affected by regulations it is considering proposing and obtain feedback on the likely impact the rule would have on these small entities."

CFPB Statutory Authority. FTA next avers that the New Rule violates the APA's requirements that agencies act within the statutory authority that Congress has granted them. The complaint highlights that the APA makes

it unlawful to issue rules that are “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”

Here, the complaint argues that the New Rule violates TILA to the extent it interprets the term “credit card” as including FTA members’ BNPL products, which FTA argues, “they are not.”

FTA avers that Congress did not intend “to treat [all] account numbers that access a credit account as credit cards for purposes of TILA.” FTA concludes that The New Rule “exceeds the CFPB’s statutory authority by seeking to define the term ‘credit card’ in a manner that eviscerates the distinction Congress has drawn between credit cards and other credit products.”

FTA also argues the New Rule violates TILA because TILA directs that any new disclosure obligation “shall have an effective date of that October 1 which follows by at least six months the date of promulgation,” 15 U.S.C. § 1604(d), yet the New Rule’s stated “effective date” was July 30, 2024, two months after it was promulgated. Truth in Lending (Regulation Z). Finally, FTA asserts that even if FTA’s members who offer BNPL products could qualify as “card issuers” under TILA, the New Rule violates TILA “because it purports to impose obligations beyond the limited set of obligations TILA contemplates for ‘card issuers’ that provide credit that does not impose a finance charge and is not repayable in more than four installments.”

Abuse of Discretion. FTA’s final argument in the complaint is that the New Rule is arbitrary and capricious and an abuse of discretion. The complaint laid out that an agency action is arbitrary and capricious when the agency does not engage in “reasoned decision making,” and courts must “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The FTA argues that New Rule is arbitrary and capricious because “it fails to consider how its new disclosure obligations are ill-fitted for BNPL products, demonstrating that the CFPB fails to consider and address important aspects of how BNPL products function on the ground.”

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Companies: Financial Technology Association

RegulatoryActivity: CFPB ConsumerCredit FinancialStability Loans TruthInLending