

Insights

CHANGING “BUY NOW PAY LATER” REGULATIONS & CONSIDERATIONS FOR RETAILERS

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SUMMARY

On 2 February 2021, the FCA published its Review of the Unsecured Credit Market in the UK. The full title of the review is “The Woolard Review - A review of change and innovation in the unsecured credit market” (“**the Review**”). Critically, the Review recommended that all Buy Now Pay Later (“**BNPL**”) credit arrangements should be brought within the scope of the UK’s regulatory regime for consumer credit “as a matter of urgency”. Key amongst the various motivating factors for this recommendation is the idea that proper affordability assessments should be carried out on those being offered these credit products so as to prevent, or at least mitigate, potential consumer detriment.

You will note that currently many BNPL arrangements, when structured in particular ways, fall outside the scope of regulation. Conversely some BNPL arrangements already fall within the scope of regulation. The key recommendation in the Review is to bring into the scope of regulation those arrangements which currently fall outside it.

Timing

The Review called for urgent action to be taken. To bring these currently unregulated BNPL arrangements within the regulatory regime requires the UK Parliament to pass amendments to the UK’s Regulated Activities Order, which sets out the basis for which activities are licensable in the UK from a financial services perspective. While the UK Treasury indicated it supported urgent action to be taken to introduce legislation to support the Review’s findings on BNPL, it is likely that any new rules would not come into force for at least 12 months (and potentially longer). Moreover, it is likely that the FCA would also want to introduce guidance to support any legislative changes in this area and any such guidance would be the subject of public consultation at least several months before the new rules took effect.

Retailer as Credit Broker

The key implication of this new proposed regime for retailers would be the credit broking regime. In summary, if the providers of BNPL credit become regulated consumer credit providers under the proposals, then the point of sale merchants for those credit products are likely to be treated as regulated consumer credit brokers. Whether this would in fact be the case will need to be assessed based on all of the relevant facts. It would, however, be a similar situation to which many other merchants are subject when they indirectly offer credit products (offered and issued by third party providers) to their own customers. While the regime for credit brokers is relatively light touch as compared to be the person who is the actual provider of credit itself, there are nevertheless obligations to which the credit broker is subject and procedural implications which may impact the customer experience.

The key obligations for credit brokers relate to transparency on fees and charges and ensuring communications with customers relating to the credit they are broking are “clear, fair and not misleading”. Credit brokers will also be required contractually by the credit provider to follow certain processes and procedures to enable the credit provider to comply with their own obligations.

As a point of comparison, BNPL plans offered in the U.S. follow much the same pattern, with the third party credit option being offered to the customer at the physical point of sale or on the online checkout page as an alternative to immediate payment of the full amount by cash or card, etc. The third party credit provider is identified along with the terms of the BNPL offer. These schemes are generally regulated by federal and state law under consumer lending regimes, depending on the various definitions of lending within the coverage of the respective laws. Some states have specific licensing and/or behavioural requirements applicable to retail instalment loans and may consider loan arranging or brokering, including as a BNPL lender, as an activity subject to the licensing or regulatory regime. Non-bank lenders are also subject to regulation by the U.S. Federal Trade Commission and the U.S. Consumer Financial Protection Bureau, who will scrutinize lending practices for what are called Unfair, Deceptive or Abusive Acts or Practices (“UDAAP”), which are largely defined through prosecutorial actions that have resulted in published judgments or settlement agreements. (One of our associates in the Fintech Practice Group describes these practices as “things you would not want someone to do to your grandmother.”) The established credit reporting system in the U.S. is also leveraged for BNPL. Lenders often consult credit reporting bureaus to check the credit standing of the purchaser, which credit checks are subject to regulation under the U.S.’s Fair Credit Reporting Act. A minority of states require repayment on certain loans be limited to a percentage of the borrower’s income. More generally, credit checks, as an indication of ability to repay, may serve as a proxy for an assessment of affordability, but they have not been recognized as such per se.

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