July 31, 2024

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

Electronically submitted via http://www.regulations.gov

Re: Request for public comment on interpretive rule entitled Truth in Lending (Regulation Z); Use of Digital User Accounts to Access Buy Now, Pay Later Loans, Docket No. CFPB-2024-0017

Dear Dr. Chopra:

PayPal, Inc. ("PayPal") submits this letter in response to the CFPB's request for comment on its interpretive rule entitled Truth in Lending (Regulation Z); Use of Digital User Accounts to Access Buy Now, Pay Later Loans ("Interpretive Rule"), published by the Bureau of Consumer Financial Protection ("Bureau" or "CFPB") in the Federal Register on May 31, 2024.[1]

As an initial matter, PayPal emphasizes that it supports the Bureau's stated purpose in issuing the Interpretive Rule: ensuring adequate disclosures to promote the informed use of credit and protections against inaccurate and unfair billing practices. In fact, PayPal already provides disclosures, billing error protections, and purchase protections to users who fund transactions through its own buy now, pay later ("BNPL") product—Pay in 4. While PayPal understands that it does not offer a "BNPL digital user account" as described in the Interpretive Rule and therefore is not subject to Regulation Z when offering its Pay in 4 product, the Bureau's decision to publish the Interpretive Rule creates unnecessary risk and uncertainty for PayPal and other BNPL providers.

In particular, PayPal has significant concerns that the Bureau's Interpretive Rule: does not account for the unique and varied structure of BNPL loans; does not account for the different ways BNPL loans are provided to consumers; does not provide appropriate guidance regarding providers' new regulatory obligations; and does not provide BNPL lenders an adequate amount of time to come into compliance with the new obligations the Bureau's Interpretive Rule purports to impose.

The significant flaws in the Interpretive Rule could have been avoided if the Bureau had proceeded through notice-and-comment rulemaking, as PayPal believes the law requires. To address these procedural and substantive shortcomings and to ensure that the

[1] 89 Fed. Reg. 47068 (May 31, 2024).

Interpretive Rule conforms to the Truth in Lending Act ("TILA") and other applicable laws, PayPal respectfully requests that the Bureau withdraw the Interpretive Rule and, to the extent appropriate, proceed with an orderly notice-and-comment rulemaking process to assess the extent to which Regulation Z should apply to all or certain BNPL products, and if so, which provisions of Regulation Z should apply to those products.

I. Background on PayPal and Its Pay in 4 Product

PayPal is a leading technology platform that enables digital payments and simplifies commerce experiences for merchants and consumers worldwide. Globally, PayPal helps over 427 million active accounts to securely connect, transact, and send and receive payments, whether online or in person. Consumers who use their PayPal account to purchase goods and services from merchants can choose from a variety of different funding sources linked to their PayPal account, including, but not limited to, credit cards, debit cards, bank accounts, a PayPal Balance Account, or a PayPal branded credit product, such as the Pay in 4 product.

PayPal's Pay in 4 product is a consumer-friendly means for consumers to spread the cost of a purchase over four equal installments, without interest or fees, and without any "hard" credit inquiry that could adversely impact a consumer's credit score. Pay in 4 is available for eligible purchases ranging from $30 to $1,500, but the average loan size in 2024 is less than $150. Each time consumers finance a purchase through Pay in 4, they enter into individual loan agreements with PayPal setting forth the payment schedule, the total payment amount, and other loan terms. Consumers receive reminders from PayPal related to purchase details and the amounts of upcoming payments a week in advance of each of the three scheduled installments. In addition, consumers can review all outstanding Pay in 4 loans, including associated payment schedules and loan agreements, manage their payment methods, and, if they choose to do so, make early payments without penalty, through their PayPal account online or through the PayPal mobile application.

PayPal's Pay in 4 product is meaningfully different than the BNPL products the CFPB describes in its Interpretive Rule. While Pay in 4 is repayable in four interest-free installments and does not impose a finance charge (or any other fees), PayPal does not issue any "BNPL digital user account" that allows consumers to access credit on an ongoing basis, nor does it provide consumers with a credit limit or an "amount available to spend."[2] Further, in contrast to credit card issuers, who engage in an underwriting process at account opening and typically provide the consumer with a credit limit that the consumer can draw upon to make purchases "from time to time,"[3] PayPal underwrites each Pay in 4 loan independently.

Finally, the policy concerns underpinning the Interpretive Rule do not apply to PayPal's Pay in 4 product. For example, the Interpretive Rule discusses challenges consumers may face when taking out BNPL loans, including "challenges in resolving disputes," and consumers'

[2] 89 Fed. Reg. at 47,069-47,070.
[3] 89 Fed. Reg. at 47,072 (quoting 12 CFR pt. 1026, comment 2(a)(15)-1).

lack of recourse for the "non-receipt of items" purchased with BNPL credit.[4] The Interpretive Rule suggests that extending Regulation Z's error resolution and other consumer protections are necessary to address these concerns.[5] But, to the extent consumers purchase goods and services with their PayPal account and choose to finance those transactions with a Pay in 4 loan (or any other funding instrument linked to their PayPal account), they are entitled to assert disputes through PayPal's Resolution Center (as well as through customer service representatives and other means). PayPal provides consumers who make purchases through their PayPal account the billing error protections applicable to electronic fund transfers under Regulation E, which are comparable to the billing error protections available under Regulation Z when consumers use a credit card to make a purchase.[6] In addition, PayPal provides consumers who purchase goods or services through their PayPal account with a contractual right to "Purchase Protection," in the event the consumer does not receive an item from a seller or the item is materially different from the seller's description of it.[7]

II. PayPal Maintains a Good Faith Belief That Its Pay in 4 Product is Not a "Credit Card" Subject to Regulation Z

TILA provides a safe harbor from liability "for any act done or omitted in good faith conformity with any rule, regulation, or interpretation thereof by the Bureau . . . ."[8] The Bureau's regulations implementing TILA, Regulation Z, are codified at 12 CFR part 1026. The CFPB issued these regulations after most of the rulemaking authority over TILA was transferred to the Bureau from the Federal Reserve Board of Governors ("FRB") pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act.[9] The Bureau's restatement of Regulation Z did not "impose any new substantive obligations,"[10] but the Bureau has subsequently amended Regulation Z multiple times to impose new substantive obligations, always employing notice-and-comment rulemaking procedures.[11]

In addition, beginning in the early 1980s, the FRB abandoned its practice of issuing interpretive letters to individual creditors and consolidated its existing interpretations in the

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[4] 89 Fed. Reg. at 47,070 (citing *CFPB, Buy Now, Pay Later: Market trends and consumer impacts*, at 72-73 (Sept. 2022), https://files.consumerfinance.gov/f/documents/cfpb_buy-now-pay-later-market-trends-consumerimpacts_report_2022-09.pdf ("Market Trends Report") and *CFPB, Consumer Response Annual Report*, at 64 (Mar. 2024), https://files.consumerfinance.gov/f/documents/cfpb_cr-annual-report_2023-03.pdf).

[5] *Id.* at 47,072.

[6] *Compare* 12 CFR 1005.11 *with* 12 CFR 1026.13

[7] These contractual rights are more fully described in PayPal's User Agreement (https://www.paypal.com/us/legalhub/useragreement-full?locale.x=en_US) and PayPal's Purchase Protection Program page (https://www.paypal.com/us/legalhub/buyer-protection). Moreover, for goods that are returned, or services that are cancelled that were purchased with a Pay in 4 loan, PayPal credits the refund to the customer's Pay in 4 loan balance.

[8] 15 U.S.C. § 1640(f).

[9] *See* 12 U.S.C. § 5581(b)(1).

[10] *See* Truth in Lending (Regulation Z), 76 Fed. Reg. 76,768 (Dec. 22, 2011).

[11] *See, e.g.,* 89 Fed. Reg. 19,128 (May 14, 2024) (amending credit card penalty fees provisions); 85 Fed. Reg. 86,402 (Dec. 29, 2020) (creating a new category of qualified mortgages); 81 Fed. Reg. 83,934 (Nov. 22, 2016) (imposing obligations on prepaid accounts); 78 Fed. Reg. 79,730 (Dec. 31, 2013) (requiring integrated mortgage disclosures); 78 Fed. Reg. 25,818 (May 3, 2013) (amending ability to repay requirements applicable to certain credit cards); 78 Fed. Reg. 11,280 (Feb. 15, 2013) (imposing obligations on mortgage loan originators).

Official Commentary to Regulation Z.[12] The original Official Commentary was adopted pursuant to notice-and-comment rulemaking procedures.[13]

The process governing the issuance of official interpretations of TILA and Regulation Z is set forth in Appendix C to Regulation Z. Appendix C has long provided that "interpretations of [Regulation Z] provided by officials of the Bureau provide the protection afforded under [the safe harbor of 15 U.S.C. § 1640]," and that, "[e]xcept in unusual circumstances, such interpretations will not be issued separately but will be incorporated in an official commentary to the regulation which will be amended periodically."[14]

The Official Interpretations themselves, codified at Supplement I to Regulation Z, provide—unequivocally—that "[t]his commentary is the vehicle by which the Bureau of Consumer Financial Protection issues official interpretation of Regulation Z," and that "[n]o official interpretations are expected to be issued other than by means of this commentary."[15]

Based on its good faith interpretation of TILA, the relevant provisions of Regulation Z, and the Official Commentary, PayPal understands that it does not act as a "creditor" subject to Regulation Z when it issues Pay in 4 loans to consumers.

A. PayPal Does Not Act as a "Card Issuer," as Defined by TILA and Regulation Z, When it Issues Pay in 4 Loans

As a threshold matter, while PayPal understands that Pay in 4 loans are "credit" as defined by TILA and Regulation Z,[16] PayPal is not a "creditor" with respect to such loans under the primary definition of that term under TILA because Pay in 4 loans are not "payable by agreement in more than four installments," nor do they ever impose a "finance charge."[17] The Interpretive Rule instead relies on the third sentence of TILA's definition of "creditor," which provides that—

> [f]or the purpose of the requirements imposed under part D of this subchapter and sections 1637(a)(5), 1637(a)(6), 1637(a)(7), 1637(b)(1), 1637(b)(2), 1637(b)(3), 1637(b)(8), and 1637(b)(10) of this title, the term "creditor" shall also include **card issuers** whether or not the amount due is payable by agreement in more than four installments or the payment of a finance charge is or may be required, and the Bureau shall, by regulation, apply these requirements to such card issuers, to the extent appropriate, even though the requirements

[12] *See* Truth in Lending; Official Staff Commentary, 46 Fed. Reg. 50,288 (Oct. 9, 1981).
[13] *Id.*
[14] *Id.*
[15] 12 CFR part 1026; Supplement I, Introduction comments 1 & 2.
[16] 15 U.S.C. § 1602(f); 12 CFR 1026.2(a)(14).
[17] 15 U.S.C. § 1602(g); *see also* 12 CFR 1026.2(a)(17)(i) ("Creditor means … [a] person who regularly extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments (not including a downpayment), and to whom the obligation is initially payable, either on the face of the note or contract, or by agreement when there is no note or contract.")

> are by their terms applicable only to creditors offering open-end credit plans.[18]

PayPal has never understood this provision to be applicable because, with respect to its Pay in 4 loans, PayPal is not a "card issuer." That term is defined as "a person who issues a *credit card*, or the agent of such person with respect to such card."[19] "Credit card" is defined, in turn, as "any card, plate, coupon book *or other credit device* existing for the purpose of obtaining money, property, labor, or services on credit."[20] PayPal does not issue any "card, plate, or coupon book" and the existing Official Commentary to Regulation Z makes clear that it also does not issue a "credit device" to consumers when making Pay in 4 loans.

In 1970, when Congress amended TILA to add the definitions of "credit card" and "card issuer," it had in mind physical objects, such as embossed, plastic credit cards similar in appearance to today's credit cards that could be used to purchase a variety of goods and services.[21] Indeed, when it amended TILA in 1974 to extend certain specific provisions of TILA to loans made by "card issuers" that are not "repayable by agreement in more than four installments" and do not impose a "finance charge,"[22] it did so "with the intent . . . to bring under coverage of the truth-in-lending law, the issuers of travel and entertainment cards such as American Express, Diners Club, and so forth."[23]

When the FRB issued its initial Official Commentary in 1981, it adopted Congress's understanding of what "credit cards" are subject to TILA in light of this amendment.[24] Indeed, to this *very day* the only "card issuers" mentioned in the Official Commentary as being subject to TILA despite not imposing a finance charge or requiring repayment in more than four installments are "the issuers of so-called travel and entertainment cards that expect repayment at the first billing and do not impose a finance charge."[25]

Further, while the Official Commentary initially did not address whether information such as an "account number" that was not associated with a physical card could nonetheless constitute a "credit card,"[26] the FRB ultimately considered that issue in a 2011 notice-and-

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[18] 15 U.S.C. § 1602(g) (emphasis added); *see also* 12 CFR 1026.2(a)(17)(iii) ("Creditor means . . . [f]or purposes of subpart B, any card issuer that extends either open-end credit or credit that is not subject to a finance charge and is not payable by written agreement in more than four installments.")

[19] 15 U.S.C. § 1602(o) (emphasis added); *see also* 12 CFR 1026.2(a)(7) ("Card issuer means a person that issues a credit card or that person's agent with respect to the card.")

[20] 15 U.S.C. § 1602(*l*) (emphasis added); *see also* 12 CFR 1026.2(a)(15)(i) ("Credit card means any card, plate, or other single credit device that may be used from time to time to obtain credit. The term credit card includes a hybrid prepaid-credit card as defined in § 1026.61.")

[21] *See* Pub. L. No. 91-508, § 501 (1970). Indeed, the primary concern motivating that legislation was the mass mailing of unsolicited credit cards by issuing banks. *See generally* John C. Weistart, *Consumer Protection in the Credit Card Industry: Federal Legislative Controls*, 70 Mich. L. Rev. 1475 (1972).

[22] *See* Fair Credit Billing Act, Pub. L. No. 93-495, § 303 (1974) (codified as amended at 15 U.S.C. § 1602(g)).

[23] 118 Cong. Rec. S6882, S6892 (daily ed. Apr. 27, 1972).

[24] 46 Fed. Reg. 50,288, 50,294 (Oct. 9, 1981) ("Section 226.2(a)(17)(iv) makes certain card issuers creditors for purposes of the open-end credit provisions of the regulation. This includes, for example, the issuers of so-called travel and entertainment cards that expect repayment at the first billing and do not impose a finance charge.")

[25] 12 CFR part 1026, Comment 2(a)(17)(iii)-1.

[26] 46 Fed. Reg. at 50,293.

comment rulemaking implementing amendments made to TILA by the Credit CARD Act of 2009. In the preamble to that final rule, the FRB addressed "uncertainty about whether all credit products accessed by an account number are subject to TILA's credit card provisions."[27] It observed that "[b]ecause most if not all credit accounts can be accessed in some fashion by an account number, the Board does *not* believe that Congress generally intended to treat account numbers that access a credit account as credit cards for purposes of TILA."[28]

It expressed concern, however, that if "an account number can be used to access *an open-end line of credit* to purchase goods and services, it would be inconsistent with the purposes of the Credit Card Act to exempt the line of credit from the protections provided for credit card accounts."[29] Accordingly, it adopted an Official Comment stating that "a credit card does not include . . . [a]n account number that accesses a credit account, *unless* the account number can access an *open-end line of credit* to purchase goods or services."[30] This Official Comment remains codified in Regulation Z, and the CFPB has not proposed to amend it nor purported to amend it.[31] Significantly, when PayPal issues a Pay in 4 loan, it does not provide consumers an "account number [that] can access an open-end line of credit." Pay in 4 loans are "closed-end credit" as defined by Regulation Z.[32] Accordingly, the only reasonable interpretation of the Official Commentary confirms that PayPal does not issue "credit cards" and is, therefore, not a "card issuer" or a "creditor" under TILA with respect to its Pay in 4 loans.

Consistent with this reasonable interpretation of the Official Commentary, the CFPB has issued multiple statements and reports regarding BNPL products in the past several years reinforcing PayPal's view that providing consumers access to its Pay in 4 loans does not render PayPal a "card issuer." In fact, the CFPB has consistently described BNPL loans as something distinct from a "credit card." For example—

- The CFPB's September 2021 Credit Card Report compared BNPL products to "other payments like credit cards," and discussed "key differences between BNPL loans and credit cards."[33]

- Similarly, a December 2021 CFPB blog post stated that BNPL loans are not subject to the consumer protections applicable to credit cards, including the "dispute protections" of the Fair Credit Billing Act that the CFPB now claims are applicable.[34]

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[27] Truth in Lending, 76 Fed. Reg. 22,948, 22,949 (Apr. 25, 2011).
[28] *Id.* (emphasis added).
[29] *Id.* (emphasis added).
[30] *Id.* at 23,005 (emphasis added).
[31] 12 CFR part 1026, comment 2(a)(15)-2(ii)(C) ("In contrast, credit card does not include, for example . . . [a]n account number that accesses a credit account, unless the account number *can access an open-end line of credit* to purchase goods and services . . ."") (emphasis added).
[32] 12 CFR 1026.2(a)(10).
[33] *See* The Consumer Credit Card Market at 166 (Sept. 2021) (available at https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf).
[34] Andrew Braden, *Know before you buy (now, pay later) this holiday season* (Dec. 16, 2021) (available at https://www.consumerfinance.gov/about-us/blog/know-before-you-buy-now-pay-later-this-holiday-season/).

- The press release accompanying the launch of the CFPB's inquiry into "Buy Now, Pay Later" products in December 2021 compared BNPL products to "*other* forms of credit, like credit cards."[35]

- An August 2022 report on "The Convergence of Payments and Commerce" described BNPL products as "a popular alternative to credit cards."[36]

- The CFPB's September 2022 Report entitled "Buy Now, Pay Later: Market Trends and Consumer Impacts" observed that most BNPL providers did not comply with Regulation Z, but it never once suggested that such providers had an obligation to do so.[37]

Accordingly, both Regulation Z (including the Official Commentary) and the Bureau's past publications clearly state that those who issue BNPL loans are not "creditors" subject to TILA. PayPal has relied on that guidance to structure its products and to ensure it is meeting its compliance obligations.

B. Even If the Interpretive Rule Could Validly Amend the Official Commentary, PayPal Does Not Interpret the Rule as Applying to Its Pay in 4 Product

The Bureau's recent Interpretive Rule is inconsistent with the Official Commentary (and the agency's previous public statements), as it suggests that a BNPL "digital user account" that allows a consumer to access *closed-end* "credit from time to time in the course of completing transactions to purchase goods or services" is a "credit card."[38] As discussed at length below, the Bureau cannot amend the Official Commentary through the issuance of an interpretive rule that did not comply with notice-and-comment procedures. But, even assuming the Bureau's Interpretive Rule did validly amend the Official Commentary, PayPal's Pay in 4 product would still not be a "credit card" because PayPal does not issue a "BNPL digital user account" that can be used from "time to time" to obtain closed-end credit.[39] Rather, PayPal users have a PayPal account that is used to make purchases, each of which may (if eligible) be funded through a Pay in 4 loan that is separately underwritten and governed by an independent loan agreement.

Significantly, the Bureau has not purported to amend the longstanding Official Comment that mandates that "[a] credit card must be usable from time to time."[40] To be "usable from time to time . . . requires the possibility of repeated use of a single device," and, therefore, "instruments that can be used *only once* to obtain a single credit extension are not credit

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[35] *See Consumer Financial Protection Bureau Opens Inquiry into "Buy Now, Pay Later" Credit* (Dec. 16, 2021) (emphasis added) (available at https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-opens-inquiry-into-buy-now-pay-later-credit/).
[36] *See The Convergence of Payments and Commerce: Implications for Consumers* at 12 (Aug. 2022) (available at https://files.consumerfinance.gov/f/documents/cfpb_convergence-payments-commerce-implications-consumers_report_2022-08.pdf).
[37] Market Trends Report at 73.
[38] 89 Fed. Reg. at 47,072.
[39] *Id.*
[40] 46 Fed. Reg. at 50,293; *see also* 12 CFR part 1026, comment 2(a)(15)-1 ("A credit card must be usable from time to time.")

cards."[41] PayPal's Pay in 4 loans can be used only once to obtain a single credit extension. PayPal does not provide a "BNPL digital user account" that can be used "on an ongoing basis," nor does it provide consumers with "an amount available to spend."[42] The Bureau itself acknowledges that "[n]ot all digital user accounts are credit cards,"[43] which PayPal interprets as a concession that BNPL products that are not tied to a "BNPL digital user account" are not subject to the Interpretive Rule. Accordingly, PayPal believes, in good faith, that the Bureau's Interpretive Rule does not render Regulation Z's requirements applicable to PayPal's Pay in 4 product.

III. The Bureau Must Proceed Through Notice-and-Comment Rulemaking Before Extending TILA to Buy Now, Pay Later Providers

If the Bureau did intend to extend TILA's provisions applicable to "credit cards" to PayPal's Pay in 4 product (which we do not believe it did), it could only do so through the normal notice-and-comment rulemaking process that the Bureau and the FRB before it have used to impose substantive obligations under TILA and—at least since 1981—to adopt official interpretations. This process includes agency consultation, consideration of costs and benefits, consideration of the impact of the rule on small entities, adequate notice and consideration of public comments *in advance* of the adoption of any final rule, and a delayed effective date.[44] The Bureau promulgated the Interpretive Rule without adhering to these procedures and therefore the Interpretive Rule is invalid for having been adopted "without observance of procedure required by law."[45]

The Bureau's obligation to proceed through notice-and-comment rulemaking arises from two independent sources. First, as explained above, the Bureau has purported to amend the Official Commentary, which currently provides that a "credit card does not include . . . an account number that access a credit account, *unless* the account number can access an open-end line of credit to purchase goods or services."[46] The Bureau's Interpretive Rule clearly conflicts with the Official Commentary as it suggests that "BNPL digital account numbers" are "credit cards" even though they can only be used to access closed-end credit.[47] The Interpretive Rule would, therefore, effectively amend the Official Commentary, but the Official Commentary was adopted through notice-and-comment rulemaking, and it is black letter administrative law that a rule adopted through notice-and-comment procedures cannot be amended through an interpretive rule that fails to follow those procedures.[48] Accordingly, for this reason alone, the Interpretive Rule can only be issued after a full notice-and-comment rulemaking process.

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[41] 12 CFR part 1026, comment 2(a)(15)-1 (emphasis added).
[42] 89 Fed. Reg. at 47,070.
[43] *Id.* at 47,072.
[44] *See* 12 U.S.C. § 5512(b)(1); 5 U.S.C. §§ 553, 609.
[45] 5 U.S.C. § 706(2)(D).
[46] 12 CFR part 1026, comment 2(a)(15)-2.ii.C (emphasis added).
[47] *See* 89 Fed. Reg. at 47,071 n. 27 (defining BNPL credit "as a closed-end consumer loan for a retail transaction that is repaid in four (or fewer) interest-free installments and does not otherwise impose a finance charge.")
[48] *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015) ("[T]he D.C. Circuit correctly read § 2 of the APA to mandate that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.") (citing *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)); *see also Flight Training Int'l, Inc. v. Fed. Aviation Admin.*, 58 F.4th 234, 241 (5th Cir. 2023) ("If a second rule repudiates or is irreconcilable with a prior legislative rule, the second rule must be an

Second, TILA itself requires the CFPB to proceed through notice-and-comment rulemaking before extending obligations under the statute to card issuers who do not impose a finance charge or require repayment in more than four installments. While TILA defines "creditor" to include "card issuers whether or not the amount due is payable by agreement in more than four installments or the payment of a finance charge is or may be required," it only subjects these "card issuers" to certain provisions of TILA if the CFPB proceeds "*by regulation*" that applies these requirements to "such card issuers, *to the extent appropriate*."[49]

TILA uses the term "by regulation" frequently and it always means a legislative rule, as opposed to a non-binding "interpretation"—a term it often uses alongside the phrase "by regulation."[50] Indeed, the authority the CFPB relies upon to issue the Interpretive Rule, section 1022(b)(1) of the Consumer Financial Protection Act, also distinguishes between "rules" and "guidance,"[51] and the Interpretive Rule clearly states that it is "guidance" and not a "rule."[52]

TILA's legislative history further supports the proposition that the obligation to proceed "by regulation" and "to the extent appropriate" was intended to ensure that the FRB—and now the Bureau—would follow notice-and-comment procedures before applying the rule to creditors who did not assess finance charges or require repayment in more than four installments. An earlier version of the bill that would become the Fair Credit Billing Act ("FCBA") omitted these requirements and would have made creditors who offered credit without a finance charge in no more than four installments automatically subject to TILA.[53] During a colloquy in the Senate, Senator Proxmire (the FCBA's sponsor) suggested that the FRB could use its exemption authority to carve out those creditors who it determined should not be covered,[54] but the Conference Committee ultimately reversed this presumption, requiring the FRB to proceed "by regulation" before any obligations arose, and then only "to the extent appropriate."[55] This is the version of TILA enacted into law,[56] which has not been substantively amended and, therefore, still requires the Bureau to proceed "by regulation . . . to the extent appropriate."[57]

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amendment to the first; and, of course, an amendment to a legislative rule must itself be legislative.") (quoting *Clean Water Action v. E.P.A.*, 936 F.3d 308, 314 n.11 (5th Cir. 2019)); *Sierra Club v. Env't Prot. Agency*, 873 F.3d 946, 952 (D.C. Cir. 2017) ("[A]n amendment to a legislative rule must itself be legislative.")

[49] 15 U.S.C. § 1602(g) (emphasis added).

[50] *See, e.g.,* 15 U.S.C. § 1604(d) ("[T]he Bureau may at its discretion take interim action by regulation, amendment, or interpretation to lengthen the period of time permitted for creditors or lessors to adjust their forms to accommodate new requirements."); 15 U.S.C. § 1640(f) ("No provision of this section . . . imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Bureau.")

[51] 12 U.S.C. § 5512(b)(1) ("The Director may prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.")

[52] 89 Fed. Reg. at 47072 ("This is an interpretive rule issued under the Bureau's authority to interpret TILA and Regulation Z, including under section 1022(b)(1) of the [CFPA], which authorizes guidance as may be necessary or appropriate to enable the CFPB to administer and carry out the purposes and objectives of Federal consumer financial law.")

[53] 118 Cong. Rec. S6882 (daily ed. Apr. 27, 1972).

[54] *Id.* at S6892.

[55] H.R. Rep. No. 93-1429, at 13 (1974) (Conf. Rep.)

[56] Fair Credit Billing Act, Pub. L. No. 93-495, § 303 (1974) (codified as amended at 15 U.S.C. § 1602(g)).

[57] 15 U.S.C. § 1602(g).

Further, while the FRB did promulgate a regulation in September 1975, it obviously did not find that it was "appropriate" to apply provisions of TILA and Regulation Z to providers of BNPL products—products that would not be introduced for decades. As discussed above, when the FRB extended very specific provisions of Regulation Z to card issuers who do not impose a finance charge or seek repayment in more than four installments, it had in mind "the issuers of so-called travel and entertainment cards that expect repayment at the first billing and do not impose a finance charge," i.e., the same creditors who are solely identified in the Official Commentary today.[58]

Accordingly, TILA itself requires the CFPB to proceed through notice-and-comment rulemaking before applying its provisions to providers of BNPL loans, and then only "to the extent appropriate."

IV. TILA Does Not Permit the CFPB To Apply All of Subpart B To Providers of Buy Now, Pay Later Loans, Even if Those Providers Are Properly Considered "Card Issuers."

To the extent the Interpretive Rule suggests that BNPL providers must comply with all of subpart B of Regulation Z, it exceeds the narrow grant of authority provided in the third sentence of TILA's definition of "creditor." TILA only permits the Bureau to extend certain provisions to "card issuers" who provide credit that does not impose a finance charge and is not repayable in more than four installments, specifically: Chapter 4 of TILA (the FCBA), and very specific provisions of section 127 of TILA.[59] The provisions of section 127 that could be applicable, "to the extent appropriate," include—

- A provision that requires disclosure, at account opening, of "other charges" (i.e., not included in the "finance charge") that can be imposed by the card issuer;[60]
- A provision that requires the disclosure, at account opening, of any security interest that will be taken as part of the credit transaction;[61]
- A provision that requires the disclosure, at account opening and at intervals no longer than every six months, of the borrower's rights under provisions of the FCBA;[62]
- Provisions that require the disclosure, in periodic statements, of the outstanding balance at the beginning and end of the statement period;[63]

[58] 12 CFR Part 1026 Cmt. 2(a)(17)(iii)-1.
[59] *See* 15 U.S.C. § 1602(g) (permitting the CFPB to subject certain "card issuers" to "the requirements imposed under part D of this subchapter [15 U.S.C. §§ 1666-1666j] and sections 1637(a)(5), 1637(a)(6), 1637(a)(7), 1637(b)(1), 1637(b)(2), 1637(b)(3), 1637(b)(8), and 1637(b)(10) of this title").
[60] 15 U.S.C. § 1637(a)(5).
[61] 15 U.S.C. § 1637(a)(6).
[62] 15 U.S.C. § 1637(a)(7).
[63] 15 U.S.C. § 1637(b)(1), (8).

- A provision requiring a description, in periodic statements, of "each extension of credit" during the billing period, including the amount and date of each extension of credit;[64]

- A provision requiring the disclosure, in periodic statements, of the total amount credited during the period;[65] and

- A provision requiring the disclosure, in periodic statements, of the address to be used by the creditor for the purpose of receiving billing inquiries.[66]

In short, Congress only applied the provisions of TILA that would make sense to apply to issuers of travel and entertainment cards that the amended definition of "creditor" was designed to address. It noticeably did not impose obligations that would only make sense when applied to issuers of open-end credit cards that *do* impose finance charges, including disclosures regarding the calculation of the finance charge,[67] minimum payment warnings,[68] and numerous other provisions of TILA that apply to open-end credit cards but do not apply to credit cards that do not impose a finance charge and are not repayable in more than four installments.[69]

Consistent with the limited scope of TILA obligations for card issuers (such as issuers of travel and entertainment cards) who do not impose a finance charge, when the FRB first promulgated a regulation to implement the FCBA, it applied only very specific provisions of Regulation Z to the travel and entertainment card issuers the amendment to the definition of creditor was designed to cover:

> For purposes of the requirements of §§ 226.7(a) (6), (7), (8), and (9); 226.7(b)(1) (i), (ii), (iii), (ix), and (x); 226.7(b)(2); 226.7 (c), (d), (f), (g), (h), and (i); 226.13; and 226.14, the term 'creditor' shall also include card issuers, whether or not the payment of a finance charge is or may be required.[70]

Accordingly, the obligations imposed upon these card issuers did not include the totality of obligations under subpart B, but only those obligations that would be "appropriate" to apply to cards issued by American Express or Diners Club, including, for example, a disclosure regarding charges (other than finance charges) that could be imposed,[71] a notice regarding billing dispute rights,[72] the outstanding balance,[73] an address to be used for receiving billing inquiries,[74] and provisions implementing the protections of the FCBA.[75]

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[64] 15 U.S.C. § 1637(b)(2).
[65] 15 U.S.C. § 1637(b)(3).
[66] 15 U.S.C. § 1637(b)(10).
[67] 15 U.S.C. § 1637(a)(1)-(4), (b)(4)-(7), (9).
[68] 15 U.S.C. § 1637(a)(11).
[69] *See, e.g.,* 15 U.S.C. §§ 1642, 1643, 1661-1665e.
[70] 40 Fed. Reg. 43200, 43202 (Sept. 19, 1975).
[71] 12 CFR 12 CFR 226.7(a)(6) (1975) (corresponding to 15 U.S.C. § 1637(a)(5)).
[72] 12 CFR 226.7(a)(9) (1975) (corresponding to 15 U.S.C. § 1637(a)(7)).
[73] 12 CFR 226.7(b)(1)(i) (1975) (corresponding to 15 U.S.C. § 1637(b)(1), (8)).
[74] 12 CFR 226.7(b)(1)(x) (1975) (corresponding to 15 U.S.C. § 127(b)(10)).
[75] 12 CFR 1026.7(g), (h), (i), 1026.13, 1026.14 (1975) (corresponding to 15 U.S.C. §§ 1666, 1666c, 1666d, 1666i).

A few years later, in the wake of the TILA Simplification Act, the FRB amended Regulation Z and adopted the regulatory definition of "creditor" that, in relevant part, exists to this day: "'Creditor' means . . . [f]or purposes of subpart B, any card issuer that extends either open-end credit or credit that is not subject to a finance charge and is not payable by written agreement in in more than four installments."[76] In adopting the definition, the FRB made clear, however, that "[a]lthough the provision has been reorganized from the current regulation, the Board intends no substantive difference in coverage between the current and the revised regulations."[77] This history shows that, in addition to its procedural flaws, the CFPB's Interpretive Rule is invalid to the extent it seeks to impose obligations implementing sections of TILA other than those specifically set forth in the second sentence of TILA's definition of "creditor."

V. The Interpretive Rule is Otherwise Arbitrary and Capricious

In addition to the Bureau's failure to comply with its procedural obligations or to observe statutory limitations when issuing the Interpretive Rule, the Interpretive Rule is also "arbitrary and capricious."[78] Importantly, it fails to recognize distinctions between the ways different BNPL providers offer the loans or explain whether (as PayPal believes is the case) these distinctions are meaningful for determining which BNPL providers issue a "BNPL digital user account" that the CFPB considers to be a "credit card."

To the extent it is applicable, the Interpretive Rule provides insufficient guidance to BNPL providers regarding their actual obligations under subpart B of Regulation Z, or how the existing provisions of Regulation Z could be applied to closed-end BNPL loans that are structured fundamentally differently than either open-end credit cards or charge cards. For example, the Interpretive Rule states that "BNPL lenders that issue credit cards are 'creditors' for purposes of subpart B and must comply with its requirements, including the provisions related to disclosures and billing dispute resolution."[79] Notwithstanding this broad statement, many provisions of subpart B either cannot be applied to BNPL loans or would not make sense to apply to BNPL loans. For example, obligations under Regulation B related to the disclosure of finance charges should not be required (though the CFPB never says so) given that BNPL loans, as defined by the Interpretive Rule itself, do not impose a finance charge.[80] Likewise, provisions regarding minimum payment warning would be affirmatively confusing and potentially misleading if provided to obligors of BNPL loans.[81]

Finally, the Interpretive Rule provides no guidance regarding whether and how BNPL providers should comply with the timing requirements for periodic statements set forth in

[76] 46 Fed. Reg. 20848, 20893 (Apr. 7, 1981); *see also* 12 CFR 1026.2(17)(iii) ("For purposes of subpart B, any card issuer that extends either open-end credit or credit that is not subject to a finance charge and is not payable by written agreement in more than four installments.")
[77] 46 Fed. Reg. at 20852.
[78] 5 U.S.C. § 706(2)(A).
[79] 89 Fed. Reg. at 47,072.
[80] 89 Fed. Reg. at 47,071 & n. 27.
[81] *See* 12 CFR 1026.7(b)(12).

subpart B of Regulation Z.[82] Those requirements state that periodic statements must be "mailed or delivered at least 14 days prior to the date on which the required minimum periodic payment must be received in order to avoid being treated as late for any purpose."[83] This may make sense for traditional credit card accounts, which typically require repayment of all credit extensions made during a billing cycle (or a minimum payment calculated based on that figure) on the same day, but it is practically impossible to apply this to a group of BNPL loans issued during a billing cycle, which are repaid in equal installments that are typically 14 days apart, beginning with the first payment on the date of the transaction.

In addition to its deficiencies as an actual guidance document, the Interpretive Rule is unreasonable because it fails to adequately consider the reliance interests that BNPL providers have developed based on contrary guidance in the Official Commentary and the Bureau's past statements, as well as its course of conduct indicating that BNPL providers are not, as the Interpretive Rule now suggests, credit card issuers subject to any portion of Regulation Z. When agency guidance departs from preexisting agency guidance (as opposed to preexisting agency regulations, as is the case here), "the APA requires an agency to provide more substantial justification . . . 'when its prior policy has engendered serious reliance interests that must be taken into account.'"[84] As the Supreme Court has cautioned, "[i]t would be arbitrary and capricious to ignore such matters."[85]

Relatedly, the Interpretive Rule's 60-day "applicability date" both reveals that the CFPB understands that it is not really issuing an interpretive rule and, at the same time, seriously underestimates the amount of time BNPL providers would actually need to come into compliance with subpart B of Regulation Z. Unlike legislative rules, which are understood to change the law and are therefore subject to the procedural requirements the Bureau has declined to follow here, actual interpretive rules "merely interpret[] a prior statute or regulation."[86] Because interpretive rules simply set forth the law as it exists, they are not subject to the APA's requirement of publication at least 30 days prior to an effective date.[87] Although the CFPB never explains the reason for the 60-day applicability date, it appears to be a concession that the Interpretive Rule is not actually an interpretation of existing law, but a change to existing law—which of course an actual interpretive rule cannot do. In any event, the sixty-day delay between publication in the Federal Register and "applicability" of the interpretive guidance is still far too little time for providers to come into compliance with subpart B, particularly given the ambiguity of their obligations and the difficulty in applying those provisions—designed for actual credit cards—to differently structured closed-end installment loans.

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[82] *See* 12 CFR 1026.5(b)(2).
[83] *See* 12 CFR 1026.5(b)(2)(i).
[84] *Perez*, 575 U.S. at 106 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).
[85] *Id.*; *see also Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 742 (1996) ("Sudden and unexplained change [of agency position] or change that does not take account of legitimate reliance on prior interpretation may be arbitrary, capricious or an abuse of discretion.") (cleaned up).
[86] *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014).
[87] 5 U.S.C. § 553(d)(2).

For all of these reasons, even if the Interpretive Rule had complied with applicable procedural and other statutory requirements, it would remain "arbitrary and capricious" given its failure to provide sufficient guidance, its failure to consider providers' reasonable reliance on past agency statements, and its failure to provide adequate time to come into compliance with the *new* obligations that it purports to impose.

VI. The Bureau Cannot Require Compliance with the Interpretive Rule, Even if Otherwise Valid, Until October 1, 2025, at the Earliest

Relatedly, the CFPB cannot adopt a rule—or even an interpretation of a rule—requiring disclosures not previously required unless it delays the obligation to provide those disclosures to October 1, 2025. Section 105(d) of TILA provides 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."[88]

There is no question that the Interpretive Rule seeks to impose new obligations. The CFPB has recognized that most BNPL providers do not provide Regulation Z disclosures,[89] but it now maintains that BNPL providers must comply with Regulation Z's requirements, including the provisions relating to disclosures.[90] Congress has reasonably required that any new disclosure obligation not be imposed until the October 1 that is at least six months later than issuance of the rule, or interpretation thereof, that imposed the new obligations.

Significantly, this delayed effective date provision applies not just to new requirements imposed by "regulation" but also obligations imposed pursuant to "any amendment or interpretation thereof."[91] As discussed, in PayPal's view, the Bureau has attempted to amend Regulation Z without observance of the required procedure, but even if the Interpretive Rule was a valid "interpretation" of the existing regulation, it would still be subject to section 105(d).

Further, although section 105(d), by its terms, applies only to disclosures, the substantive provisions of the FCBA (Chapter 4 of TILA) only work as intended when the required disclosures are provided. For example, it would make little sense to provide consumers with substantive rights regarding the correction of billing rights without requiring prominent disclosure of those rights, as Congress clearly understood when it enacted the FCBA. Accordingly, Section 105(d) of TILA effectively requires the CFPB to delay the entire rule (even if it were otherwise valid, which it is not) until October 1, 2025.

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[88] 15 U.S.C. § 1604(d).
[89] Market Trends Report at 72 ("[M]ost BNPL lenders do not currently provide the standard cost-of-credit disclosures required by Regulation Z or periodic statements.")
[90] 89 Fed. Reg. at 47,072.
[91] 15 U.S.C. § 1604(d).

VII. The CFPB Should Withdraw the Interpretive Rule

In summary, for the numerous reasons explained above, PayPal respectfully requests that the CFPB withdraw the Interpretive Rule and proceed through notice-and-comment rulemaking if it seeks to expand the scope of Regulation Z to include BNPL providers, or some subset of them, as "card issuers" subject to certain provisions of Regulation Z. It is imperative that the CFPB fully understand the implications of its rule and the potential confusion and other negative impacts on individuals and families who rely on PayPal's Pay in 4 product in order to have an affordable option to pay for essential purchases over time, without incurring interest or fees. A notice-and-comment rulemaking, including a fulsome analysis of the costs and benefits of the CFPB's interpretation, is therefore sound policy, as well as legally required.

Sincerely,

Jeffrey Levine
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PayPal, Inc.