

# Buy-Now-Pay-Later regulatory approach confirmed

## AT A GLANCE

February 2023

### What's new?

- On 14 February 2023 HM Treasury [consulted](#) on draft legislation that will bring Buy-Now-Pay-Later (BNPL) products into the FCA perimeter.
- HMT confirms the Government's position on the scope of BNPL regulation and seeks stakeholder views on the legislative approach taken and how regulatory controls will be implemented.
- Notably, the consultation confirms that third party lenders of BNPL products must be authorised and regulated by the FCA, and will be subject to regulatory controls under the regime.

### What does this mean?

- The Government committed, in February 2021, to regulate interest-free BNPL products. Following HMT's consultation response issued in June 2022, the latest consultation paper proposes draft legislation that will bring BNPL products into FCA regulation.
- HMT confirms that the rules will capture agreements currently exempt under Article 60F(2) of the Regulated Activities Order, namely, interest-free agreements repayable under 12 months or in 12 or fewer instalments, where these are provided by a third party lender.
- This targets currently exempt products where there is potential for consumer detriment. This will capture both BNPL agreements and certain short-term interest-free credit agreements.
- HMT seeks to exempt certain agreements where it perceives reduced risk of harm. The legislation will exempt agreements for financing contracts of insurance, agreements offered by registered social landlords to tenants and leaseholders, and employer-employee lending agreements. Trade credit and invoicing will also remain exempt, as will agreements of more than £25,000 and wholly or predominantly for business purposes.
- HMT confirms that it will be disproportionate to bring merchant-offered credit into regulation, thereby confirming the scope of regulation will be limited to agreements provided by third party lenders.
- But it will also introduce an anti-avoidance mechanism whereby third party BNPL lenders remain in-scope of regulation if they structure agreements in a way so as to become the merchant in a transaction they are financing.
- Regarding credit broking, HMT confirms that merchants introducing customers to BNPL agreements as a payment option will be exempt from credit broking regulation.
- HMT believes the risk of consumer detriment from unregulated merchants will be mitigated by applying the financial promotions regime to unregulated merchants that offer BNPL agreements as a payment option.
- Under the new regime, unauthorised merchants will be required to have financial promotions approved by an authorised person. In practice, the government believes that this will result in third party lenders providing pre-approved materials to merchants as part of the overarching commercial arrangements between the lender and merchant.

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- The Government also confirms that domestic premises suppliers (those who offer or agree to sell goods, or contracts to supply services while physically present in the customer's home) will require FCA authorisation if they wish to offer BNPL agreements from a third party lender as a payment option.
- Legislation will also be introduced to reflect the overlap with provisions in the Consumer Credit Act. In particular, legislation will disapply the pre-contractual information provisions for BNPL agreements, with HMT confirming that an FCA rules-based regime for pre-contractual disclosure would be more proportionate and provide greater flexibility. Legislation will also disapply the 'small agreements' provision in the CCA for BNPL agreements, ensuring BNPL agreements below £50 will not be exempt from regulation.
- HMT also states that a tailored application of the FCA's current rules on creditworthiness assessments will be applied, and that FOS jurisdiction will be extended to cover BNPL agreements. The detail of these rules will be set out in further FCA consultation.
- Following HMT confirming final legislation, the FCA plans to consult on proposed rules for third party lenders providing BNPL agreements. The Government has confirmed a temporary permissions regime (TPR) will be introduced to enable firms to

transition into the new regulatory regime before seeking full authorisation. Firms in-scope of the new regulations who do not currently have authorisation for lending activities and/or credit broking permission will be required to register with the FCA for entry into the TPR.

- Further FCA consultation will likely set out proposed the TPR application window and landing slots.

## What do firms need to do?

- Firms providing BNPL agreements that will be brought in-scope of FCA regulation must assess the impact on their business model and their relationship with merchants.
- Although FCA rules are yet to be proposed, firms should proactive apply approaches such as the FCA's Consumer Duty rules on their business. Given the Duty's application to existing forms of regulated consumer credit agreements, the Duty is likely to apply to firms providing BNPL agreements.
- Unauthorised merchants should be alert to requirements for financial promotions offering BNPL as a payment option to be approved by authorised persons. Merchants should ensure they are engaging with relevant third party lenders to ensure they remains compliant with the new regulation.

## Next steps

The consultation closes on 11 April 2023. HMT will publish its response and aims to lay final legislation when parliamentary time allows during 2023. Ahead of legislation being laid, the FCA plans to consult on rules for third party lenders providing BNPL agreements.



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