CBA | CONSUMER BANKERS ASSOCIATION

March 25, 2022

Via Electronic Mail

Director Rohit Chopra
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Buy Now Pay Later, Docket No. CFPB-2022-0002

Dear Director Chopra:

The Consumer Bankers Association (CBA)[1] appreciates the opportunity to comment on the Consumer Financial Protection Bureau's (CFPB or Bureau) request for comments on Buy-Now-Pay-Later (BNPL) in the United States. Not only are BNPL products very popular with consumers, but they can also play a positive role in consumers' lives by making a purchase possible and extending credit for something the customer may not have the ability to pay for in its entirety all at once. BNPL has the added benefit to consumers of providing another choice in how they finance certain purchases. Regulated financial institutions such as banks approach BNPL products the same as any other debt product, which means making very clear disclosures to the customer about the product: What it is, how it works and what the customer's obligations are to receive the full benefits of the product.

As the CFPB conducts its inquiry into the BNPL market, we urge the agency to consider appropriate measures to ensure BNPL products continue to be accessible to consumers to meet their financial needs. However, we believe the CFPB should focus its attention on critical issues facing BNPL, including:

- <u>Disclosures</u> - Although "pay-in-four" products fall outside the Truth in Lending Act, disclosures should be standardized as an important consumer protection for BNPL.

[1] The Consumer Bankers Association is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

- Autopay - Some BNPL lenders' autopay and re-presentment practices can place consumers into a fee spiral that quickly accelerates through loan stacking. Transparency and consumer choice are important to provide protection against autopay and re-presentment practices that raise the risk of further debt accumulation in the form of mounting fees.
- Dispute Resolution – Non-bank BNPL lenders generally provide little to no fraud and merchant dispute procedures, which is a problem the Bureau should remedy given that BNPL is most often used to purchase personal, family, and household goods.
- Credit Reporting - Credit reporting at this time is more likely to negatively harm consumers' credit scores than help, especially while the credit bureaus lack reporting mechanisms that incentivize use by BNPL Lenders and allow "pay-in-four" loans to be reported accurately.

As BNPL products continue to grow in popularity and the industry continues to add products and services to meet consumer need, a measured approach to regulation will be necessary to preserve market options and to protect consumers' interests.

Background

Consumer Utilization/Market Growth

Point-of-sale (POS) financing is a proposition that has been around for some time, but its pace of growth has accelerated due to enhanced integration of POS financing among leading merchants, easier application experiences, and newer business models. BNPLs is the new POS. Millions of shoppers now use BNPL to finance their purchases and the market is expected to grow exponentially. In 2019, the $60B BNPL market represented 2.6% of global e-commerce (excluding China); *Worldpay* estimates that it could grow at a compound average growth rate (CAGR) of 28% to reach $166B by 2023. Digital wallet, the next most popular e-commerce type, is expected to grow at a CAGR of 18%.[2]

According to a recent survey, 44% of Americans have used BNPL to acquire an item they needed and 75% of those who have used BNPL have used them at least twice, indicating most consumers were satisfied enough with their first experience to do it again.[3] Younger Americans appear to be driving the growth of BNPL adoption, according to a CNBC survey conducted, which found the 18-34 years old demographic was nearly twice as likely to use BNPL for holiday purchases this year.[4] Overall, consumers made nearly $100 billion in retail purchases using

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[2] Is buy now, pay later (BNPL) right for your business? (September 28, 2021). https://www.fisglobal.com/en/insights/merchant-solutions-worldpay/article/is-buy-now-pay-later-bnpl-right-for-your-business#:~:text=Worldpay%20from%20FIS'%202021%20Global,of%20a%20classic%20win%2Dwin.

[3] Buy now pay later surges throughout pandemic, consumers' credit takes a hit (September 9 2021) - https://www.creditkarma.com/about/commentary/buy-now-pay-later-surges-throughout-pandemic-consumers-credit-takes-a-hit.

[4] CNBC|Momentive Poll: Small Business Saturday 2021- https://www.surveymonkey.com/curiosity/cnbc-study-small-business-saturday-2021/.

BNPL programs in 2021—up from $24 billion in 2020, and $20 billion in 2019. Millennials' use of BNPL has more than doubled since 2019 and Gen Xers' adoption more than tripled.[5]

Many of the nation's largest merchants have partnered with fintechs to provide millions of Americans the ability to choose an installment financing plan at checkout. For example, PayPal, which launched its "Buy in 4" platform in August 2020, has already seen more than 9 million Americans use the service. While these firms may offer added flexibility, some users of these platforms lack the high level of protections they have come to expect from their bank, which — unlike a fintech provider — is subject to stringent federal oversight requirements.

<u>Current Regulatory Environment</u>

A growing share of financial services activity today is occurring outside the purview of federal regulators. Driven primarily by "big-tech" and fintechs, these firms increasingly are offering financial products and services but do not abide by the same federal oversight requirements as America's leading banks.

As Mike Calhoun, President of the Center for Responsible Lending recently explained in an American Banker op-ed entitled *Regulate Buy Now/Pay Later*:

> *"BNPL products do not offer the standard consumer protections required of credit card providers or other regulated lenders, and their opacity regarding fees and repayment terms could easily place unwitting consumers into harmful, unaffordable debt." "Unaffordable credit may provide a quick inflow of cash, but over the longer term — which, in the case of BNPL, can be just a few weeks or months down the road — unregulated fintech products can add to the debt burden of consumers already overextended by debt […] the time for regulators to rein in BNPL is now."* [6]

These concerns, coupled with the CFPB's recent inquiry[7] into the business practices of five leading non-bank fintech providers make it clear that momentum is building for policymakers to institute a level regulatory playing field and ensure all consumers are protected in the BNPL marketplace, whether they choose a fintech or bank to meet their financial needs.

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[5] Buy Now, Pay Later: The "New" Payments Trend Generating $100 Billion In Sales (September 7, 2021) - https://www.forbes.com/sites/ronshevlin/2021/09/07/buy-now-pay-later-the-new-payments-trend-generating-100-billion-in-sales/?sh=3d2809702ffe.

[6] American Banker, *Regulate buy now/pay later. Now (*January 24, 2022).

[7] Consumer Financial Protection Bureau Opens Inquiry into "Buy Now, Pay Later" Credit, https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-opens-inquiry-into-buy-now-pay-later-credit/.

Even though BNPL transactions are consumer credit (as the CFPB recently emphasized[8]), non-bank providers have so far enjoyed a lighter regulatory burden than traditional consumer installment lenders and bank providers. BNPL products that have four or less installments and a zero-percent interest repayment structure are exempt from some key federal and state consumer protection laws. For example, the Truth-in-Lending Act (TILA) does not apply to companies whose loan products are repayable in four or fewer installments and on which no interest is charged.[9] BNPL providers are often exempt from state licensure and regulatory requirements based on these features.[10] Accordingly, our comments here focus on a definition of BNPL as a point-of-sale product that is paid in four installments with no finance charge.

CFPB Considerations

As referenced above, CBA believes there are several considerations that can be made by the CFPB to ensure proper consumer protections in the BNPL market.

Disclosures - Although "pay-in-four" products may fall outside the Truth in Lending Act, disclosures should be standardized as an important consumer protection for BNPL.

There are highly valuable outcomes for customers and the marketplace when all the key pricing/economic terms are provided upfront as part of the consumer credit shopping experience to facilitate informed decision-making. Non-bank BNPL lenders frequently advertise their products as a way for consumers to make purchases on low or no-cost repayment terms. And their marketing frequently omits any mention of fees. While these claims can be true for consumers capable of timely repayment, the lack of minimum underwriting standards means that many non-bank BNPL lenders may be extending credit to consumers without the appropriate assessment of creditworthiness, which can result in quickly accumulating fees.

TILA promotes the informed use of consumer credit, in part, by mandating understandable, standardized disclosures and common terminology to simplify consumer comparisons of credit terms and rates. TILA's disclosures and protections do not extend to BNPL consumers using "pay-in-four" products because BNPL lenders are not "creditor[s]," which is defined as"[a] person who regularly extends consumer credit that is subject to a finance charge or is payable

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[8] Should you buy now and pay later? CFPB Blog Post, July 6, 2021: https://www.consumerfinance.gov/about-us/blog/should-you-buy-now-and-pay-later/.

[9] 12 C.F.R. § 1026.2(a)(17).

[10] The scope of state consumer financial protection statutes varies widely; however, licensure requirements often apply only to consumer loans on which the lender imposes interest (and other finance charges) above the state usury limit. Late fees are generally not considered finance charges and so usually do not count towards the cap. BNPL providers have also made the argument that their products are not loans but credit sales and so are not subject to state licensure requirements. However, the California Department of Financial Products and Innovation rejected this argument in a 2020 enforcement action against Afterpay, Sezzle, and Quadpay, finding that the providers were required to have consumer lending licenses.

by a written agreement in more than four installments."[11] Because TILA does not cover the "pay-in-four" product, BNPL lenders are not required to provide consumers with the clear, standardized disclosures required by TILA and Regulation Z that consumers have come to expect and can use to compare products.

Though the basics of the "pay-in-four" product may be generally understood (e.g., pay in four equal installments over approximately six weeks), the lack of clear, easily accessible terms and conditions raise concerns. Important terms and conditions (like payment practices and fees) may be absent in disclosures, difficult to find, or described in ways that consumers are unlikely to understand. "Loan stacking" – utilizing multiple BNPL providers at the same time - increases consumer confusion caused by non-standardized disclosures because BNPL lenders differ in what they disclose, how they disclose, and where they disclose. Moreover, many BNPL lenders optimize for a "frictionless" application flow at the expense of clear disclosures or affirmative acknowledgements. In doing so, lenders encourage consumers to "run through" the application process without reading the fine print that governs the terms of the product.

While we believe there is good reason *not* to include "pay-in-four" BNPL products under TILA and Regulation Z, BNPL providers should provide a standardized, simple disclosure to ensure consumers are adequately informed of the terms of the products they are using. The CFPB should reaffirm that non-bank BNPL lenders, like banks, must engage in responsible lending practices, including providing clear and conspicuous upfront disclosures on all the key economic/pricing terms associated with a BNPL product.

Pay-in-four non-bank BNPL lenders are also not required to determine a consumer's creditworthiness, which can lead to the overextension of credit and the accumulation of debt. These BNPL lenders typically obtain authorization from consumers to pull their credit reports, leading consumers to believe that the lenders are checking their creditworthiness. When consumers are approved for the loan, they may have a false sense of confidence that they can afford it given that these BNPL lenders may not be clearly disclosing the purpose for the credit report. Disclosure of the lender's practices in assessing borrowers' creditworthiness is vital to avoid confusion and protect consumers.[12]

Autopay - Many non-bank BNPL lenders' autopay and re-presentment practices can place consumers into a spiral of debt and fee accumulation.

The vast majority of non-bank BNPL lenders require consumers to enroll in autopay as a condition of credit. And while lenders typically allow consumers to change the payment method tied to autopay, the many non-bank BNPL lenders do not allow consumers to cancel autopay. Because these lenders allow credit cards as a method of payment, their autopay

[11] *See* 15 U.S.C. § 1602(g); 12 C.F.R. § 1026.2(a)(17)(i).

[12] While we believe all lenders should consider borrower creditworthiness as part of their responsible lending practices, we would caution the Bureau not to require any permutation of an ability to repay (ATR) requirement for BNPL products. By doing so, the CFPB may discourage prudent consumer products and reduce availability of credit.

practices likely do not violate the Electronic Fund Transfer Act and Regulation E, which prohibits conditioning the extension of consumer credit on mandatory autopay that debits a consumer's deposit (usually checking) account. While these common autopay practices might not result in any regulatory violation, forcing consumers to enroll in autopay and then preventing them from canceling, in and of itself, raises substantial threat of harm to consumers, including a spiral of debt and fee accumulation.

When BNPL consumers cannot cancel autopay—even when they know they don't have sufficient funds in their account to cover the payment—and they do not have another viable payment method, they may be forced to incur NSF fees from their bank, late fees from other BNPL lenders, and returned payment fees from at least one BNPL lender.

Further compounding concerns is the aforementioned practice of "loan stacking." Because most consumers only have one checking account, if they use that account as their payment method, they are likely using it for multiple loans. Thus, if the consumer has incurred NSF and returned payment fees on one loan, they are probably incurring those fees on other loans as well. Having transparent mechanisms to cancel autopay is vital for consumers to manage their finances and avoid a spiral of fee and debt accumulation.

Dispute Resolution - Non-bank BNPL products have inadequate dispute procedures.

Many non-bank BNPL providers do not provide any merchant or fraud dispute provisions and expressly state that consumers must resolve returns or problems with their order directly with the merchant. Consumers are therefore at the mercy of the return/refund policies of any given merchant. Unlike credit and debit cards, this leaves consumers on the hook for payments to the BNPL lender who provides the consumer with no meaningful recourse should a merchant refuse to honor its policies, fail to fulfill an order, ship faulty or damaged goods, defraud the consumer, etc.

BNPL lenders have partnered with tens of thousands of merchants. While non-bank BNPL lenders have been fervent in rapidly growing and marketing their respective merchant networks, it's unclear what, if any, vetting process and due diligence non-bank BNPL lenders have used in onboarding their merchant partners. The potential lack of due diligence is not an issue for credit card users because credit cards provide the benefit of merchant dispute protections in Regulation Z and through the credit card networks (e.g., Visa and Mastercard). But it could be a concern for non-bank BNPL consumers who lack the benefit of those dispute protections. And the lack of merchant dispute protections from non-bank BNPL lenders may come as a surprise for BNPL consumers who are used to the protections offered by credit cards.

Accordingly, we urge the CFPB to require transparency on *whether* the BNPL product offering includes fraud and merchant dispute protections and *how* the dispute resolution process works. Requiring non-bank BNPL providers to clearly and conspicuously disclose whether these types of rights are a term/condition of the product would facilitate consumer choice and access to relief and potentially could drive the market towards providing these rights.

Credit Reporting - Credit reporting at this time is more likely to harm consumers than help, especially given the credit bureaus' lack of reporting mechanisms that incentivize use by BNPL lenders and allow "pay-in-four" loans to be reported accurately.

Currently, the credit reporting bureaus lack the framework to accommodate "pay-in-four" reporting. Reporting under the bureaus' current framework could harm consumers' credit scores by lowering the average age of their tradelines and by increasing the percentage of credit utilization. This would be true even for consumers who pay on time.

The bureaus are actively developing capabilities to handle "pay-in-four" reporting and address potential adverse impacts to credit scores. The bureaus are also developing "give to get" policies, which will require reporting and potentially the use of hard inquiries to receive certain consumer credit data. These proposals are not yet final, though the bureaus hope to make this functionality available sometime in 2022.

Accordingly, CBA encourages the CFPB to promote but not require credit bureau reporting once the credit bureaus develop reporting mechanisms that incentivize use by BNPL lenders and allow "pay-in-four" loans to be reported accurately. The Bureau should also call for transparency and disclosure about whether and what a BNPL provider reports to the credit reporting agencies.

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CBA greatly appreciates the opportunity to share our suggestions and to work with the CFPB as it considers appropriate policy positions on BNPL products. Should you need further information, please do not hesitate to contact the undersigned directly at 202-552-6368 or dpommerehn@consumerbankers.com.

Sincerely,

David Pommerehn
SVP, General Counsel
Consumer Bankers Association