



March 25, 2022

Via Electronic Mail

Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
Attn: Comment Intake

Re: Notice and Request for Comment Regarding the CFPB's Inquiry Into Buy-Now-Pay-Later (BNPL) Providers (Docket No.: CFPB-2022-0002)

Ladies and Gentlemen:

The Bank Policy Institute¹ appreciates the opportunity to comment on the Notice and Request for Comment Regarding the Inquiry into Buy-Now-Pay-Later (BNPL) Providers ("Notice")² issued by the Consumer Financial Protection Bureau.

In recent years, increasing consumer demand for digital and interactive financial products and services has dramatically changed the marketplace, accelerating banks' efforts to leverage market-developed technological solutions to help meet the rising demand. At the same time, an increasing number of fintechs and other nonbank companies providing financial products and services have entered the marketplace. BPI supports innovation and welcomes competition, provided that consumers are protected through consistent regulation and oversight of all market participants. Both consumers and the U.S. financial system are put at risk when nonbanks offering banking products and services are not required to adhere to the same consumer regulatory and other protections as banks and when they are able to offer banking products and services with far more limited – if any – onsite supervision to determine compliance with those regulations.

The increasing shift to digital financial products and services has been accelerated even further by the COVID-19 pandemic, which moved a significant volume of commerce online. Innovations in products arising out of this trend, coupled with different financial product preferences of different generations, has spawned the development of financial products. One such product is Buy Now, Pay Later, or BNPL.

¹ The Bank Policy Institute is a nonpartisan public policy, research, and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

² Notice and Request for Comment Regarding the CFPB's Inquiry Buy-Now-Pay-Later (BNPL) Providers, 87 Fed. Reg. 3511 (January 24, 2022).

We agree with the Bureau's definition of BNPL as a consumer financial product used at the point of sale to pay for a purchase in 4 or fewer payments with no finance charges. This definition is consistent with common understanding.³ It also appropriately identifies the type of products about which the CFPB has expressed interest in gathering information as these products have grown in use exponentially in recent years and yet may not be subject to key consumer protection regulations. In contrast to this category of credit offerings, other types of consumer finance products, such as those that are repayable in five or more installments, those that have interest rates, and those that are "on-card" (i.e., a credit card feature and tied to the credit line), are expressly covered by the Truth in Lending Act ("TILA") and other consumer protection laws.⁴ These products should be excluded from the definition of BNPL, as many consumer protection requirements already apply to them and such application is well understood in the marketplace. For the purpose of this comment letter, we use BNPL to refer to a consumer financial product used at the point of sale to pay for a purchase in 4 or fewer payments with no finance charges.

While broader consumer protections within the CFPB's statutory and regulatory authority, such as those focused on transparency, like the prohibition on unfair, deceptive or abusive acts or practices ("UDAAP"), already apply to BNPL providers and products, it is important for the CFPB to take additional steps to ensure that consumers are duly protected when using a BNPL product, whether offered by a bank or a nonbank.⁵ Nonbank companies providing BNPL products are not subject to the same level of direct, consistent oversight as banks for compliance with consumer protection regulations. In addition, banks are subject to general expectations of safety and soundness and responsible banking and to regular, direct supervision by their primary federal regulators for compliance with prudential and many other regulations to ensure the banks' safety and soundness and consumer data protection.

Therefore, it is important that the CFPB clarify that nonbank BNPL providers are held to the same standards as banks with regard to consumer protections, responsible lending, and consumer data privacy requirements. Thus, we recommend that the CFPB clarify the expectations regarding all BNPL products, regardless of whether provided by a bank or nonbank, including by:

- Requiring BNPL providers to disclose all relevant product information in a clear, transparent, and truthful manner in their marketing and product-related materials, consistent with the prohibition on UDAAP;
- Reiterating to BNPL providers the expectations pertaining to (i) truthful disclosure of credit reporting practices, and (ii) accurate reporting inherent in the FCRA and Regulation V.
- Emphasizing the importance of conducting creditworthiness assessments and maintaining reasonable merchant and fraud dispute processes for nonbank BNPL providers;

³ See [Hidden Risks of Buy-Now, Pay-Later Plans | BNPL - Consumer Reports](#).

⁴ 15 U.S.C. § 1601 *et seq.*

⁵ 12 U.S.C. § 5531 *et seq.*

- Requiring BNPL providers to ensure that their customers enrolled in automatic payments also have the ability to revoke authorization for automatic payments without unnecessary obstacles; and
- Coordinating with other regulators to reaffirm that nonbank BNPL providers are subject to the same privacy and cybersecurity requirements and oversight for protecting consumer data as banks and other holders of consumer financial data.

Finally, pursuant to Section 1024 of the Dodd-Frank Act, the CFPB has authority over “any covered person who . . . is a larger participant of a market for other consumer financial products or services, as defined by rule.”⁶ To date, the CFPB has defined “larger participants” to include those in the consumer reporting, consumer debt collection, student loan servicing, international money transfer, and automobile financing markets, which has allowed the agency to examine the activities of these larger participants in a similar manner to those covered persons routinely supervised by the CFPB pursuant to Section 1025.⁷ BPI recommends that the CFPB consider using its authority under Section 1024 to engage in a larger participant rulemaking in order to supervise the activities of nonbank BNPL providers. Engaging in such a rulemaking would subject larger BNPL providers to the same level of direct, consistent oversight as banks for compliance with consumer protection regulations.

I. The CFPB should require BNPL providers to disclose all relevant product information in a clear, transparent, and truthful manner in their marketing and product-related materials.

As discussed previously, BNPL programs allow consumers to purchase and receive an item up front and then make additional payments of equal amounts. The “pay in four” model generally allows the consumer to pay for their purchase in four interest-free payments over 6 or 8 weeks. The first payment may be due at checkout or shortly thereafter. A consumer can choose to link their debit card, bank account, or even a credit card, depending on the BNPL provider, to make the payments to the BNPL provider.⁸ This model generally is used for financing smaller-ticket purchases (typically less than \$250).⁹ The option is generally offered when shopping online or through a mobile app, though it is also available in stores.¹⁰ Most BNPL providers charge a minimum late fee and at least one large provider charges returned payments fees, although terms and conditions vary.¹¹

⁶ 12 U.S.C. § 5514 (a)(1)(B).

⁷ 12 C.F.R. part 1090.

⁸ [Hidden Risks of Buy-Now, Pay-Later Plans | BNPL - Consumer Reports](#)

⁹ [Buy now, pay later: Five business models to compete | McKinsey](#)

¹⁰ *Id.*

¹¹ [‘Buy now, pay later’ companies face growing calls for regulation - Protocol — The people, power and politics of tech.](#)

As noted, although some consumer protection laws apply to BNPL products, TILA does not apply.¹² 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 by a written agreement in more than four installments."¹³

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 its implementing regulation, Regulation Z, that consumers may expect generally when using consumer finance products.¹⁴ Though the basics of the "pay-in-four" product may be generally understood, important terms and conditions (like payment obligations and fees) may be absent in disclosures, difficult to find, or described in ways that consumers may not understand. Further, consumers may be further confused because BNPL providers differ in what they disclose, how they disclose, and where they disclose important information.

The differences in how BNPL products work and in what information is disclosed – both in comparison to other consumer finance products and as compared to other BNPL products – highlight the importance of ensuring that all terms of the BNPL product are clearly and truthfully represented in advertising and disclosed to the consumer in product-related materials so that consumers can make informed choices about what consumer financial products and services best meet their needs.¹⁵

Thus, we recommend that the CFPB reiterate the requirement and expectation, consistent with the prohibition on UDAAP, that BNPL providers disclose all relevant product information in a clear, transparent, and truthful manner in marketing and other product-related materials, which includes ensuring adequate disclosure of:¹⁶

- How the BNPL product works, including when payments are due and the amount of each payment;

¹² [IN11784 \(congress.gov\)](#); [What's wrong with buy now, pay later? The risks of the newest tool to pull you into debt | Frontier Group.](#)

¹³ 15 U.S.C. § 1602(g); 12 C.F.R. § 1026.2(a)(17)(i).

¹⁴ 15 U.S.C. § 1601 *et seq.* and 12 C.F.R. part 1026.

¹⁵ Section 1021(b)(1) of the Dodd-Frank Act provides that the CFPB is authorized to use its authorities to, among other things, ensure that, with respect to consumer financial products and services, "consumers are provided with timely and understandable information to make responsible decisions about their financial transactions." 12 U.S.C. § 5511(b)(1). Under Section 1032 of the Dodd-Frank Act, the CFPB can "prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances." 12 U.S.C. § 5532.

- Whether autopay is mandatory in connection with the BNPL product and whether and how autopay can be cancelled by the customer;
- What types of fees are charged by the BNPL provider and when; and
- How the BNPL provider will handle insufficient funds (“NSF”) notices from the customer’s bank (e.g., whether the BNPL provider will seek funds from bank on receipt of NSF notice, and if so, how many times).

II. The CFPB should reiterate to BNPL providers the expectations pertaining to (i) truthful disclosure of credit reporting practices, and (ii) accurate reporting to the credit reporting agencies inherent in the FCRA and Regulation V.

BNPL providers generally do not report their “pay-in-four” loans to the credit reporting agencies and only some report longer-term installment loans on a monthly payment schedule. The credit reporting bureaus lack the framework to accommodate “pay-in-four” reporting.¹⁷ Reporting under the bureaus’ current framework could harm consumers’ credit scores by lowering the average age of their credit accounts and by increasing the percentage of credit utilization. This would be true even for consumers who pay on time. And, in light of the expectations inherent in the Fair Credit Reporting Act (“FCRA”) and Regulation V relating to furnishing accurate information, BNPL providers could face a significant risk of civil liability by reporting now given the bureaus’ lack of a defined “pay-in-four” reporting framework.¹⁸

While the furnishing of information to the Credit Reporting Agencies is done on a voluntary basis, some BNPL providers use credit reporting as a marketing tool to attract customers and advertise that use of their products would help improve credit scores. However, consumers may not understand that timely payments might not be reported and thus might not help a consumer improve their credit score. Furthermore, they may not understand that late or missed payments might be reported and thus their credit reports might be negatively affected.

As described in section I above, it is important that consumers have transparency about the terms and mechanics of BNPL products so that they can make informed decisions about what consumer financial products are appropriate for their circumstances. Thus, the CFPB should reiterate the expectation that BNPL providers accurately disclose their credit reporting practices to protect consumers from the harmful practices of those BNPL providers that falsely advertise that use of their products would improve customers’ credit scores and those that report only borrowers’ missed payments, thus creating negative credit history, without accurately disclosing these practices. Furthermore, the CFPB should reiterate the expectations pertaining to accurate

¹⁷ We note that to the extent BNPL information is provided to the credit reporting agencies, it is important that a consistent methodology is developed for reporting across all of the CRAs. Absent consistency across the CRAs, data from any one bureau may differ from that of another bureau and may cause complexities for lenders that want to use the information.

¹⁸ 15 U.S.C. § 1681s–2(a); 12 C.F.R. § 1022.42.

reporting to the credit reporting agencies inherent in the FCRA and Regulation V.¹⁹

III. The CFPB should emphasize the importance of conducting creditworthiness assessments and maintaining reasonable merchant and fraud dispute processes for nonbank BNPL providers.

As noted previously, banks are subject to general expectations of safety and soundness and responsible banking and to regular, direct supervision by their primary federal regulators for compliance with prudential and many other regulations to ensure the banks' safety and soundness. Consistent with these expectations and responsible banking practices, banks generally provide merchant and fraud dispute protections to their customers in connection with many consumer financial products. However, many nonbank BNPL providers do not have robust or well-defined dispute procedures. Rather, many nonbank BNPL providers expressly state that consumers must resolve returns or problems with their order directly with the merchant. Nonbank BNPL customers may find that returning merchandise and settling merchant disputes can be time-consuming and complicated. This may leave consumers on the hook for payments to the nonbank BNPL provider that 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, or defraud the consumer, for example.²⁰ Further, the lack of merchant dispute protections from nonbank BNPL providers may come as a surprise for BNPL consumers who may be used to the protections offered in connection with other consumer credit products. Thus, the CFPB should clarify that nonbank BNPL providers are expected to maintain reasonable merchant and fraud dispute processes for consumers and, consistent with the first recommendation, to clearly disclose the terms of those protections.

Additionally, consistent with responsible banking practices and safety and soundness principles, banks extend credit based on their customers' creditworthiness rather than mere verification of their identity. In order to avoid the overextension of credit and the accumulation of debt by consumers, the CFPB should emphasize the critical importance of a creditworthiness assessment by nonbank BNPL providers before approving a consumer for a BNPL product, including by reviewing their borrowing history with the BNPL provider and its affiliates.

IV. The CFPB should require BNPL providers to ensure that their customers enrolled in automatic payments can revoke authorization for automatic payments without unnecessary obstacles.

The majority of BNPL providers require consumers to enroll in autopay as a condition of obtaining the desired product. While BNPL providers typically allow consumers to change the payment method tied to autopay, many do not allow consumers to cancel their autopay enrollment. While using autopay may help ensure consumers do not miss a BNPL payment, consumers should be permitted to revoke authorization for automatic payments in connection with a BNPL product through a straightforward

¹⁹ The FCRA states that "a person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate," although there is an exception to this prohibition if a dispute address is provided. 15 U.S.C. § 1681s-2(a)(1)(A), 1681s-2(a). Regulation V requires furnishers to "establish and implement reasonable written policies and procedures regarding the accuracy and integrity of the information relating to consumers that it furnishes to a consumer reporting agency." 12 C.F.R. § 1022.42.

²⁰ [Hidden Risks of Buy-Now, Pay-Later Plans | BNPL - Consumer Reports](#)

process. Consumers have the best view of all of their payment obligations and may determine that using an autopay function for a particular BNPL product is not appropriate. Thus, consumers should be able to cancel their enrollment in autopay through a straightforward process without unnecessary obstacles.²¹

V. The CFPB and other relevant federal regulators should reaffirm that nonbank BNPL providers are subject to the same privacy and cybersecurity requirements and oversight for protecting consumer data as banks and other holders of consumer financial data.

The CFPB highlighted the fact that in some cases, BNPL providers may have access to certain consumer financial information as well as personally identifiable information about consumers, which is used to conduct the “soft credit checks” BNPL providers often initiate in order to approve a consumer for a BNPL product.

However, it is not clear how nonbank BNPL providers are protecting that sensitive data. There are significant differences in oversight between banks and nonbanks regarding consumer data privacy and protection. Banks that are subject to federal bank supervision and regulation are subject to numerous laws and regulations that govern how consumer data must be protected and secured. Indeed, over many years, banks have developed sophisticated systems to protect consumer data and to detect, prevent, and respond to cyber threats. Further, banks and other financial institutions are subject to the Gramm-Leach-Bliley Act and its implementing regulations that require maintaining consumer data privacy, extensive guidelines from the Federal Financial Institutions Examination Council (FFIEC) Information Technology handbooks,²² and the federal banking agencies’ third-party risk management guidelines.²³ Banks are subject to regular, direct federal supervision for compliance with these requirements, providing consumers an additional layer of protection, while nonbanks are not.

To protect consumers and ensure that privacy and cyber risks are managed appropriately, all entities with access to sensitive consumer data should be subject to the same requirements and oversight for their privacy and security practices. Without these protections, U.S. consumers’ information and financial health could be put at risk. In short, consumer financial information should be safe and secure regardless of who holds it. The CFPB thus should coordinate with the federal banking agencies and the FTC to clarify that BNPL providers are subject to the same privacy and cybersecurity requirements and oversight for protecting consumer data as banks and other holders of consumer financial data.

²¹ Regulation E prohibits offers of extensions of credit conditioned on automatic repayments that are preauthorized electronic funds transfers. 12 C.F.R. § 1005.10(e)(1). While this prohibition may not be applicable to BNPL products, requiring consumers to be able to revoke autopay authorization in connection with these products is consistent with the spirit of the restriction in Regulation E.

²² FFIEC IT handbooks are used in the supervision of financial institutions and cover topics such as information security, management, technology architecture and operations, and retail payment systems.

²³ The federal banking agencies also have issued “Third Party Risk Management Guidelines” that outline the expectations for banks to manage the risks of counterparties with whom they have business relationships.

VI. Conclusion

BPI supports innovation and a competitive marketplace for consumer financial products and services as well as robust consumer protections in these markets. While banks are subject to general expectations of safety and soundness and responsible banking and to regular, direct supervision by their primary federal regulators for compliance with prudential and other safety and soundness regulations, consumer compliance, and consumer data protection, nonbanks are not subject to these same expectations or level of oversight. To ensure that consumers are protected when using a BNPL product, whether offered by a bank or a nonbank, the CFPB should clarify that nonbank BNPL providers are held to the same standards as banks with regard to consumer protections, responsible lending, and consumer data privacy requirements, as we have outlined above.

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If you have any questions, please contact the undersigned by phone at 703-887-5229 or by email at paige.paridon@bpi.com.

Sincerely,



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