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Consumer Track

FinTech Trends and Issues

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Consumer Fintech Trends and Issues

An Introduction for Consumer Bankruptcy Practitioners

ABI Southeast Bankruptcy Workshop 2022

This presentation will provide an overview of the consumer fintech industry, discussing topics such as how consumers are using fintech in banking, lending and investing; the growth of nonbank financial companies in the consumer market; how nonbank lenders are regulated; and what risks consumers face. Specific programs and services to be discussed include buy-now-pay-later financing arrangements; income-share student loans; advance wage products; shared equity home financing; alternative scoring models for determining creditworthiness; and other trending financial products and services.

The purpose of this presentation is to provide an introduction to the growing consumer fintech industry; to raise awareness of the difficulty in identifying consumer fintech assets and liabilities; and to consider potential issues that may arise particularly with consumer fintech loan products.

The growth of fintech products and services will eventually (perhaps sooner than later) present challenges to consumer bankruptcy professionals. Here are some things to think about:

- What questions should debtors' attorneys and trustees be asking in order to identify new types of savings and investment products consumers are using more frequently? Debtors might be using an app (like Chime, Acorns, Qapital, Digit, and many others) from a non-bank entity to create or accumulate "savings." Asking about bank accounts, checking accounts, savings accounts, brokerage accounts, and other traditional terms we associate with banking and investments may not be adequate.
- Similarly, what about products that allow the consumer to acquire funds now with a promise of repayment in the future but that may not be loans? These may be wage advance products, income share agreements, or home equity investments where funds are to be repaid not based on a defined interest rate or term but instead based on a percentage of future wages, or a percentage of future equity in a house. What inquiries need to be made to figure out just what it is that the debtor "owes" and how the funds advanced to the debtor are to be repaid?
- For creditors' attorneys and trustees, what non-bank products and services are competing with traditional banks and financial institutions? What are the relative priorities of a traditional loan or collection action vis-à-vis an advance wage product or a home equity investment agreement? How might a trustee's strong-arm powers come into play?

We don't have the answers, but with this introductory presentation we can begin to identify some of the issues.

Consumer Fintech Trends and Issues

ABI Southeast Bankruptcy Workshop

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July 21-24, 2022

Agenda

- What is Consumer Fintech?
- How are Consumers Using FinTech in Banking, Lending and Investing
- Growth of Nonbank FinTech Financial Companies in the Consumer Market
- How Nonbank FinTech Lenders are Regulated
- What Risks Consumers Might Face with the Rise of FinTech
- Alternative Scoring Models for Determining Creditworthiness

What is Consumer FinTech?

- Defining FinTech is not clear including FinTech v. Fintech
- FinTech is disrupting traditional banking through the growth of new entities who are leveraging technology to give consumers new and different financial solutions
- Some say FinTech is different than digital banking which includes executing banking transactions available at traditional brick and mortar banks via websites, mobile devices or other technologies.
- All generally agree FinTech involves use of the Internet, software and other technology to delivery financial services to consumers via desktop and mobile technology solutions

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Scope of Our Discussion Today

- While a large part of FinTech, we will not be discussing Blockchain or Cryptocurrency which was covered in the Plenary Session – Crypto Is Coming: Is Bankruptcy Ready?
- We will also not be covering InsurTech and other “Tech” due to time constraints

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How are Consumers Using FinTech in Banking, Lending and Investing

- Examples include:
 - Banking
 - PayTech
 - LendTech
 - WealthTech
 - InvestTech
 - Intelligent “banking” assistants

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Why Are Consumer Turning To FinTech?

- Speed and instant gratification
- Nimbleness
- Access to the potentially unbanked by traditional brick and mortar banks
- Promise of lower or fewer fees and more transparency
- Reduces human error through technology
- Access to better data and projections

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Growth of Nonbank FinTech Financial Companies In the Consumer Market

- According to Fortune*, nearly 90% of Americans in 2021 used FinTech with Baby Boomers being the fastest growing demographic - Fintech use among those age 56 and older doubled year on year to 79%
- Citing a Plaid survey**, Fortune reported that in 2021 88% of Americans used FinTech compared to just 58% of Americans in 2020
- Many cite the growth of FinTech and Nonbank Financial Companies
- FinTech is widely adopted by Americans and growth is expected to continue

*<https://fortune.com/2021/10/12/plaid-fintech-use-adoption-us-consumers-baby-boomers/>

**<https://plaid.com/blog/report-the-fintech-effect-2021/>

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FinTechs Are Still Largely Dependent on Banks

- The OCC has authority under the National Bank Act to charter national banks which are legal entities that engage in one or more of the following activities:
 - They receive deposits;
 - They pay checks;
 - They lend money; or
 - They provide fiduciary services
- Card networks and traditional payment systems are also generally exclusively within banks
- Banks are in the business of banking, not commerce
- Bank partnership agreements with FinTechs

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Why Banks Are Unique

- Banks have four attributes that other legal entities lack:
 - Banks take deposits that are payable on demand (withdrawals) and readily transferrable to third-parties (checks, debit cards)
 - Banks transform deposits (short-term liabilities) into loans (long-term assets)
 - Banks have access to a comprehensive “public safety net” to maintain solvency and protect retail depositors
 - Banks are subject to unique resolution and insolvency proceedings

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Entity Types

- Banks typically are **organized** under a specific banking law (e.g., NY Banking Law)
 - Differs from corporations that are organized under general laws (e.g., NY Business Corporation Law)
 - May be organized under federal or state law
- Banks typically are chartered (i.e., authorized) on a **case-by-case basis** by a banking regulator (e.g., NYDFS)
 - Requires tailored application and extensive engagement with regulators
 - Differs from corporations that are almost automatically authorized by a secretary of state through the filing of forms
- Banks must separately apply to the Federal Deposit Insurance Corporation to obtain **deposit insurance**
 - All insured banks have at least one federal regulator, even if state chartered

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Entity Types (cont.)

- Banks engage in one or more core banking activities: deposit-taking, payments, lending, fiduciary services
 - **Deposit-taking** is often viewed as the most important activity and US law generally imposes extensive regulation on deposit-taking institutions
 - Glass-Steagall Act prohibits nonbanks from taking deposits
- Some institutions limit their activities and are known as “nonbank banks”
 - Diversity of **banks** exists in the US because of arbitrary distinctions in law
 - Include savings associations, credit card banks, trust companies, and industrial loan companies
 - Many FinTechs are nonbanks

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How Nonbank FinTech Lenders Are Regulated

- There is not a single regulator for FinTechs and regulation is bespoke
- Can be local, state or federal and/or a combination of all three in the US depending on the underlying charter
 - Limited purpose charters or quasi-bank entities such as industrial loan companies, industrial banks, trust companies and others
 - Recently some FinTech have applied for OCC charters or acquired their own banks
 - Any FinTech with a national bank charter will be subject to the regulatory and supervisory environment that comes with it including regulations, examinations, reporting requirements and supervisions including
 - For example - Bank Secrecy Act, Anti-Money Laundering Act, Unfair Deceptive or Abusive Acts or Practices, other consumer protection and other relevant laws
 - FDIC Resolution and Recovery
 - Bank partnerships
 - Often Fintechs that have bank partnership arrangements have to follow the same rules as their bank partners

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Nature of Regulation

- **Prudential Regulation:** Focused on maintaining the safety and soundness of an institution
- **Functional Regulation:** Focused on ensuring certain products and services are offered in compliance with applicable law
- **Consumer Protection:** Focused on protecting consumers from being harmed by an institution
- **Financial Crime:** Focused on preventing institutions from being used to commit or facilitate criminal activities
- **Insolvency and Resolution Proceedings:** Focused on managing and adjudicating claims to an institution's estate

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Regulators and Who They Regulate

- **Office of the Comptroller of the Currency (OCC):** Independent component of the Department of the Treasury
 - Charters and regulates national banks (including some nonbank banks) and federal savings associations; licenses and regulates federal branches and agencies of foreign banks
- **State Bank Regulators:** Typically independent state agencies
 - Charter and regulate state banks (including some nonbank banks) and state savings associations; license and regulate state branches and agencies of foreign banks
- **Federal Deposit Insurance Corporation (FDIC):** Independent federal agency
 - Grants deposit insurance to banks and administers all insured bank receiverships
 - Regulates state banks that are not members of the Federal Reserve System, state savings associations, and insured branches and agencies of foreign banks; no chartering authority
- **Board of Governors of the Federal Reserve System (FRB):** Independent federal agency
 - Authorizes the formation of BHCs and membership of state banks in the Federal Reserve System
 - Regulates BHCs, savings and loan holding companies, state banks that are members of the Federal Reserve System, Edge Corporations and agreement companies, uninsured state branches and agencies of foreign banks, and their nonbank subsidiaries; very limited chartering authority

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Regulators (cont.)

- **Consumer Financial Protection Bureau:** Focused on financial consumer protection
- **Financial Crimes Enforcement Network:** Focused on anti-money laundering compliance
- **Office of Foreign Assets Control:** Focused on economic sanctions
- **Federal Housing Finance Agency:** Focused on regulating government support for residential mortgage lending
 - Federal Home Loan Banks: Government sponsored enterprises that facilitate residential mortgage lending
- **Federal Financial Institution Examination Council:** Interagency function that coordinates reporting and examination activities
- **Federal Trade Commission:** Focused on general consumer protection
- **Securities and Exchange Commission:** Focused on regulating securities activities of nonbank affiliates
- **Commodity Futures Trading Commission:** Focused on regulating derivatives activities of nonbank affiliates and some parts of banks

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What Risks Consumers Might Face with the Rise of FinTech

McKinsey & Company's website always has a wealth of great information including the article "How US customers' attitudes to fintech are shifting during the pandemic" which includes this chart

Exhibit 9

Customers trust traditional banks and fintechs roughly equally—which might be good news for fintechs.

Motivations for using financial technology firms and traditional companies¹

Percent of respondents considering opening an account with a financial technology and traditional company over the next 12 months



¹ Why would you consider using a financial technology company and why would you consider using a traditional financial services company?
Source: McKinsey Financial Insights Pulse Survey

McKinsey & Company

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<https://www.mckinsey.com/industries/financial-services/our-insights/how-us-customers-attitudes-to-fintech-are-shifting-during-the-pandemic>

What Risks Consumers Might Face with the Rise of FinTech (cont.)

- What some see as a risk others see as a benefit – ease of use and access to credit, services or other FinTech offerings
- Potential for issues including:
 - Privacy including cybersecurity and consumer data rights issues
 - Fraud and crime
 - Unfair, deceptive or abusive products, services or practices
 - Discrimination
 - Availability of multiple choices and inability to easily keep track of assets or debts
 - Decrease in financial literacy

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Alternative Scoring Models for Determining Creditworthiness

- Models are evolving at most traditional and FinTech creditors
- Increase in the use of big data and AI
- Information availability
- Same regulatory and legal framework applies

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Questions?

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The opinions expressed in this presentations are the personal opinions of the presenters only.

Income Share Agreements

What are they?

- Income Share Agreements, or ISAs, provide college financing in exchange for a percentage of income post-graduation. In some limited circumstances, ISAs are offered to small business owners and professional athletes.
- The monthly payment will be a percentage of monthly income, generally ranging from 2% to 10% for a predetermined length of time.
- Most, but not all, ISAs will limit how much you will pay in total. If you reach that limit before the term is over, the ISA will be satisfied.
- Most, but not all, ISAs will have a minimum income threshold so until you meet that income threshold, no payments will be required.
- Many ISAs also have a payment cap. Beware that some payment caps are more than 2x the amount borrowed. Example: If you borrow \$5,000 and the payment cap is 1.8x the max you will ever pay is \$9,000.
- Some colleges offer their own ISAs but many come from third-party providers. Many colleges who offer ISAs require their students to max out their federal student loans before being eligible for ISAs.

Why would you want one?

- You have a clear idea of what you will be doing post-graduation and a clear idea of how much you will be making. In this scenario, you can do the math to determine whether an ISA might be a better option than certain other types of student loans.
- You are in a high-income major. Often ISA terms will be more favorable if you are in a high-income industry.
- You don't qualify for other types of student loans either due to poor credit or a lack of a co-signer – or both. Example: Certain colleges offer ISAs for Deferred Action for Childhood, or DACA, students. (Note: Some, but not all ISA lenders will still disqualify you based on poor credit.)
- You won't have a fixed payment hanging over your head.
- No payments if you lose your job.
- (Often) No payments if you make below a certain income threshold.
- ISAs *may* be eligible for bankruptcy discharge.

Why would you not want one?

- You may end up paying significantly more than you received for your ISA.

- You may end up paying more for an ISA than you would have for an equivalent student loan. This is especially true if you are a high-income earner.
- There are generally no deferment or forbearance options.
- There are no refinance options available.
- There is no tax deduction equivalent to tax deductible interest paid on student loans.
- You plan to work for a non-profit or the government and Public Service Loan Forgiveness will be available to you. PSLF will most likely be less expensive than an ISA.
- You're worried about total debt. ISAs can take 10% or more of your salary post-graduation so if you have other debt this may quickly make your overall debt unaffordable.
- Unlike student loans, you cannot pay ISAs off early.
- Unlike student loans, ISAs are not regulated and do not have explicit consumer protection laws.

What does the Consumer Financial Protection Bureau (CFPB) have to say?

- On September 7, 2021, the CFPB announced it had entered into a consent order with a non-profit provider of ISAs. In the Consent Order, the CFPB asserted:
 - ISAs are extensions of credit covered by the CFPB and the Truth in Lending Act (TILA) as well as TILA's requirements with respect to "private education loans".
 - ISAs are also subject to numerous other financial protection laws that impose requirements on student loans.
- As a party of the Consent Order, the CFPB required, and the non-profit agreed, that the non-profit cannot object to the discharge of a student's ISA in bankruptcy.

Quote from Acting CFPB Director Dave Uejio: *"The ISA industry has tried to evade oversight by claiming that its products are not loans. But regardless of the name on the label, these products are credit and have to comply with federal consumer protections. The ISA industry cannot pretend that core consumer protection laws do not apply to their products."*

Things that make you go hmm?

- The CFPB seems to have staked out its position that 1) ISAs are student loans and are subject to all the same consumer protections as student loans, but also that 2) ISAs are dischargeable in bankruptcy. (Note: While the CFPB did not explicitly state that ISAs are dischargeable in bankruptcy, a provision of the Consent Order with the non-profit requires the non-profit to not object to the discharge of any ISAs. So in effect, at least with respect to this Consent Order, this equates to the CFPB stating that ISAs are dischargeable in bankruptcy.)
- As of the preparation of these materials (early July 2022) there are zero reported bankruptcy cases involving ISAs. When (if?) consumer filings pick up over the next couple of quarters/years, it will be very interesting to see how judges approach ISAs given the *almost* complete lack of guidance and regulation.

Advance Wage Products

What are they?

- Advance Wage Products (or wages on demand, advance wage payment, earned income access, wage based advances, work based advances) allow consumers immediate – or close to immediate – access to earned wages that otherwise are not due to be paid for a week or more.
- Advance Wage Products fall into one of two categories
 - Direct to Consumer
 - In this model, the worker interacts with a third party provider who collects the consumer’s work history information, funds the advance, and then recoups the advance by debiting the consumer’s bank account on the next payday.
 - Employer Integrated
 - In this model, the employer markets the program to its workers and then shares information on hours worked with the third party provider or funds the advance itself. Typically the employer then assists with collecting (if a third party) or collects (if the employer funds) through a payroll deduction.
- Often in either scenario, a monthly participation fee or a per transaction fee is charged. Some products do not charge fees but request “tips.”
- Some products will lower or eliminate the fee if the advance is slower to reach the consumer.

Why would you want one?

- Advance Wage Products are popular for consumers living paycheck to paycheck and who would not otherwise be able to cover unanticipated expenses.
- Advance Wage Products are also popular with consumers who otherwise lack access to credit.
- These types of products are also popular with gig workers who drive for rideshare companies, deliver food and groceries or perform other similar tasks and who want to be paid immediately at the end of their shift.

Why would you not want one?

- Very limited consumer/regulatory protection.
- Automatic debits from the consumer's bank account may cause the account to be overdrawn and may result in additional charges from the consumer's bank.

Looming Questions

- Are Advance Wage Products subject to the Truth in Lending Act (TILA) or state lending laws?
 - Some say no because they don't charge formal interest.
 - Some say no because with some products, there is no recourse against the consumer except for the wage deduction. The theory is that a payroll deduction instead of debiting a consumer's bank account stops the provider from being a "creditor" under TILA regulations.
 - Some say yes and see them as an updated form of payday lending.
 - Opponents are especially concerned about products that authorize the provider to debit a bank account as these automatic drafts may result in additional fees and penalties if the account is overdrawn as a result.
- What about State Wage and Hour Laws?
 - A key question is whether a payment for hours worked, but for which wages are not yet due, should be categorized as a payment of wages earned or as an advance of wages.
 - If it is a payment of wages earned, then the employer has to withhold taxes and other deductions and ensure the funds are transferred via a permissible method of wage payment.
 - If it is an advance of wages, then the employer must comply with wage advance and payroll deduction regulations.
 - Example: In New York, an advance payment that assesses interest or charges does not qualify as a "wage advance" and may not be reclaimed through a payroll deduction.
 - To circumvent this issue, some products have the employee assign some or all of their wages to the provider (a practice that may not be valid in all jurisdictions as wage assignments are prohibited in some states).
 - A provider may also categorize the transaction as a sale of an asset in order to avoid wage assignment issues. In some states, this type of transaction is deemed to be a loan, secured by an assignment of wages.

- FYI: There are many parallels here to Merchant Cash Advances in the small business context.
- Given the uncertainty, some states are considering legislation to regulate wage advance products.
 - In 2019, California introduced a bill which would authorize wage advances by qualified providers who register with the state and meet certain bonding and insurance requirements (in addition to other requirements).
 - FYI: It looks like this bill passed the Senate in May 2019 and has not gone any further.
- What does the Consumer Financial Protection Bureau (CFPB) have to say?
 - In 2020, the CFPB suggested in an advisory opinion that some wage advance services may not be loans or extensions of credit and therefore may not be subject to TILA or state regulation. In order to be exempt, the CFPB advised a program must meet all of the following:
 - The provider must contract with an employer.
 - The funds advanced may not exceed the employee's accrued cash value of wages (i.e. no advance on unearned wages).
 - The employee cannot be charged any fees with the possible exception of "nominal processing fees."
 - The provider may be repaid only through an employer-facilitated payroll deduction and the provider may not have any other recourse.
 - The provider may not assess creditworthiness.
 - In early 2022, after certain proponents of Advance Wage Products attempted to rely on the 2020 limited guidance from the CFPB to argue that the CFPB took the position that Advance Wage Products were not subject to state and federal regulation, the CFPB (through Acting General Counsel Seth Frotman) issued a letter to consumer advocates admitting that its 2020 guidance had led to significant confusion and further explaining that Advance Wage Products may in fact be credit under state and federal laws, especially if the products charge fees or ask for "tips."

HOME EQUITY INVESTMENT ARRANGEMENTS

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For the ABI Southeast Bankruptcy Workshop
July 21-24, 2022

DISCLAIMER:

Reference to particular companies or websites herein does not constitute an endorsement or recommendation by the author, any panelist on this program, or the ABI. The information is included to illustrate how home equity investments work and to demonstrate the variety of models that are presently on the market.

A new trend enabling consumers to purchase a new home or to access equity in an existing home is a home equity investment or sharing arrangement. These may be known as a:

- Home equity investment (“HEI”)
- Home equity share (or sharing) agreement
- Home equity co-investment
- Home equity access
- Home appreciation sharing
- Home equity agreement

The terms are often used interchangeably.

How a home equity sharing agreement works

- You want to tap the equity in your home.
- If you qualify, a home equity sharing company advances you that money.
- Instead of borrowing at a particular interest rate, you agree to give the investment company a percentage of the future appreciation of your home.
- You make no monthly payments to the company.
- The company has no occupancy rights, but there is a lien against your property, just as with a typical loan.
- You pay back the equity value the company gave you, plus its share of the home’s appreciation when you sell the house, or at the end of the term of the agreement, often 10 years. Unison’s agreements are for 30 years.
- Typically, you also have the option to pay back earlier.

For all practical purposes, a home equity sharing agreement is a lot like a balloon-payment loan. The end of the term looms large. You’re facing a

deadline to pay back the entire investment and a percentage of your home's appreciation. That is no small consideration. For that reason, these agreements are not for the risk-averse or the faint of heart.

...
These products primarily target homeowners who are home-equity-rich but cash poor, or with credit challenges.

What Is a Home Equity Sharing Agreement? Nerdwallet, <https://www.nerdwallet.com/article/mortgages/shared-appreciation-home-equity> (May 2, 2022) (last visited July 13, 2022).

The share amount is unique to each agreement. It's determined by factors like the size of the upfront payment you are seeking, your credit score, the amount of equity you have in your home, and the real estate market in your area. The split is set before you sign the HomePace contract and does not change.

How It Works, HomePace, <https://homepace.com/our-process/> (last visited July 14, 2022).

Popular selling points include:

- Consumer retains full ownership and use of house
- No debt
- No monthly payment
- No interest
- No income requirements
- Easier to qualify for than a second mortgage or HELOC
- Get cash to use for any purpose such as
 - Home repair or remodel
 - College
 - Paying off other debt
 - Starting a new business
 - Increase savings

Phrases that are commonly used include:

- Tap into a new alternative to loans and credit
- Unlock your home equity
- Access your equity
- Trade equity for cash
- Gain early access to your home equity
- Access value from your home today, not just when you sell
- Upfront funding in exchange for a portion of your home's value
- Cash for an option to share in home's future change in value
- An affordable and flexible way to own a home without a mortgage
- Company invests or co-invests in your home

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- We give you a lump sum upfront and become a shareholder in your home
- We are a “silent shareholder” in the background.
- We partner with you
- We share in your home’s value
- We share in the gains or losses in your home’s value when you choose to sell
- Repay when it’s convenient.
- You will “buy out” or “settle with” the investing company at a later date

For homebuyers, marketing phrases might include:

- Double your down payment
- We match your down payment and become a shareholder in your home.
- Enhance your down payment with a down payment investment.

Traditional notions of property interests and business associations are difficult to apply to these new models of funding. *See* Shelby Green, *Non-Debt and Non-Bank Financing for Home Purchase: Promises and Risks*, 10 Am. U. Bus. L. Rev. 437, 479-80 (2022) (distinguishing home equity investment denominations of “partnership” and “shareholder” from existing laws of business associations).

Home equity investment companies are not named on the deeds as joint owners. Presumably, though, the investment company needs to protect its interest by recording something that will appear in the chain of title for the property. Some companies state that a “record” or a “lien” or a “memorandum of agreement” will be filed in the land records:

“We’ll file a record of the transaction with your county recorder’s office.”

How It Works, Point, https://point.com/how_it_works (last visited July 13, 2022).

“We place a lien on your property. If you currently have a mortgage, our lien will be in second position.. The document we use for this lien is very similar to what a mortgage lender would use to secure its investment in your home. We also record what’s called a Memorandum of Agreement which gives public notice of our interest in the property.”

FAQ’s, Unison, <https://www.unison.com/faq/#faqAdvanced> (last visited July 13, 2022).

“[A]s the owner, your name will be the only one on title. Haus maintains a deed of trust on the property.”

FAQ’s, Haus, <https://haus.com/faq> (last visited July 13, 2022).

“After you sign your contract, HomePace will record a deed of trust (or equivalent document for your state) on title. HomePace becomes a secondary lien holder on your home until you sell or buy out your contract. You and any other homeowners will be recorded as the homeowner.”

....

“If you sell your home, HomePace will be paid from the proceeds of the sale, directly from escrow. We are listed on title as a lien holder, so the title company will pay HomePace directly per the terms of our contract.”

FAQ's, HomePace, <https://homepace.com/faqs/> (last visited July 13, 2022).

“We are not added to the title at origination of your Unlock investment, but we do file documents with the county recorder which put a lien on the property to protect our investment.”

FAQ's, Unlock, <https://www.unlock.com/faq> (last visited July 13, 2022).

What constitutes a default is not always clearly defined in reviewing the companies' websites. However, one company described the default remedies as follows:

The EFI [EquiFi Funding Instrument (EFI™)] does not require any monthly payments unlike a loan. So long as you take care of your home maintenance, pay your property taxes and your homeowner insurance you will not likely default. However, if you default on your mortgage, default on your property taxes, or fail to fulfill any obligations concerning your home, you will be in default on the EFI.

EquiFi legally has the right to foreclose on your property to protect its investment, similar to a lender. However, our objective is for you to stay in your home and fix any default. As an investor in your property, we want to help protect your equity and our investment. In certain circumstances, if you are facing foreclosure by your lender, we might work with you by adding to the additional co-investment amount you received initially to help you get on track with missed payments, or help you sell your home in a way that would maximize the sale price, protect the existing equity in the home, and preserve your credit.

FAQ's, EquiFi, <https://www.equifi.com/faq/> (last visited July 14, 2022).

There are transaction costs involved in getting a home equity investment agreement. In addition to ordinary closing costs, the consumer must pay for the appraisal and a transaction or disbursement fee, usually 3 to 5% of the investment amount. Sometimes the costs are deducted from the investment amount; other companies require the homeowner to pay the costs out-of-pocket.

Since home equity investments are not traditional loans, there are risks to consumers that may not be readily apparent. For example, although some companies advertise that there is no “prepayment” penalty, the homeowner may still be responsible for repaying the investor in full if the home sells or the consumer refinances within the first few years of the agreement, even if the

property has depreciated. . Mehmetaj and Reiss, *The Promise and Perils of Shared Equity Financing*, 35-APR Prob. & Prop. 46 (Am. Bar Assoc., March/April 2021).

In some rare cases, the proceeds of your home sale might not be enough to pay the sum of the selling costs plus the remaining balance on your mortgage and the amount you owe Unison. Usually, this only happens when your home has lost value and you haven't yet built up very much equity through monthly mortgage payments. If this happens, you are still responsible for paying the amount you owe Unison.

FAQ's, Unison, <https://www.unison.com/faq/#faqAdvanced> (last visited July 13, 2022).

Furthermore, the homeowner's ability to refinance may be limited due to the reluctance of some lenders to loan to a homeowner who is a party to a home equity share agreement. *The Promise and Perils of Shared Equity Financing*, supra.

The lack of standards for disclosure makes it difficult for a consumer to determine whether a home equity investment agreement is preferable to a HELOC or refinance, and if so, which company offers the best deal for the consumer. Some comparison tools may be available on the internet. See, e.g., *Best Shared Equity Agreements*, SuperMoney, <https://www.supermoney.com/best/shared-equity/> (July 2022) (last visited July 14, 2022); Jeff Gitlen, *Best Home Equity Sharing Companies to Invest in Your Home*, LendEDU, <https://lendedu.com/blog/home-equity-sharing-agreements/> (July 6, 2022) (last visited July 14, 2022).

To make the comparison even more difficult, there are different models of home equity investment products, the names of which are somewhat self-explanatory:

- Share of Home Value Model
- Share of Appreciation Model

Most companies use the Share of Appreciation Model. Hometap, which uses the Share of Home Value Model, describes the difference as follows:

SHARE OF HOME VALUE MODEL

The investor provides the homeowner a lump sum of cash in exchange for a minority stake in the future value of the home. At the end of the effective period, the homeowner pays an agreed-upon percentage of the home value to the investor. Hometap follows the home value model.

SHARE OF APPRECIATION MODEL

The investor provides the homeowner a lump sum of cash in

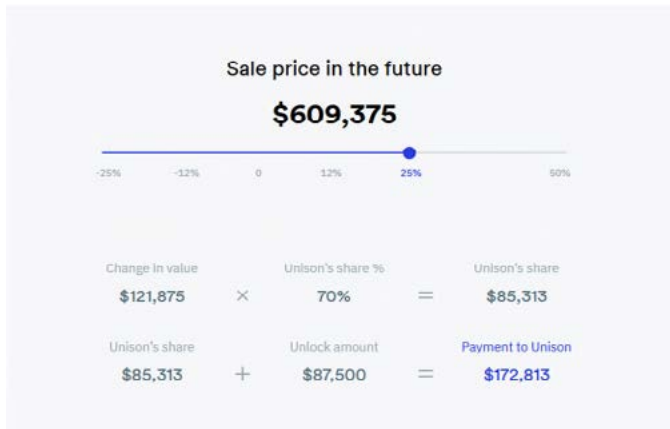
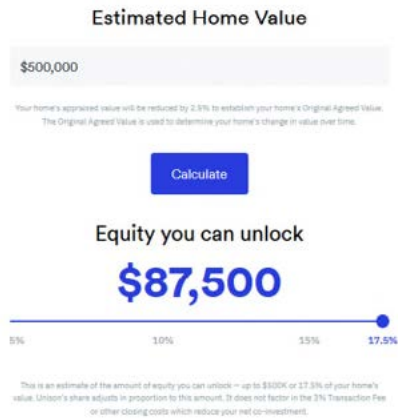
exchange for a percent of the home's future appreciation. At the end of the effective period, the homeowner pays the full investment amount plus a variable percent of the appreciation.

Home Equity Investments 101, Hometap, <https://www.hometap.com/homeowner-resources/home-equity-investments-101> (last visited July 13, 2022).

EXAMPLES.

Unison.com

See how much equity you can unlock from your home



How It Works, Unison <https://www.unison.com/how-it-works/> (last visited July 13, 2022).

Point.com

Repayment in 5 years

Home Value

− \$500,000 +

Risk-Adjusted Home Value

\$420,000

Because Point shares in downside, Point applies a Risk Adjustment of 15% to 20% to offset small declines in home value and protect its initial investment.

Point Invests Today

\$50,000

This estimate is for illustrative purposes only and assumes a well-qualified homeowner with substantial equity.

How much could Point cost?

Time to sale or buy back

Point is repaid at sale or when the homeowner chooses to refinance.



Point's Share of Appreciation



In exchange for Point's investment today, Point receives a share in the home's appreciation above the Risk-Adjusted Home Value. The share is determined during underwriting.

Average Appreciation Future Home Value	No Change Future Home Value	Large Decline Future Home Value	High Appreciation Future Home Value
\$593,800	\$500,000	\$375,000	\$653,500
Homeowner Share \$492,000	Homeowner Share \$426,200	Homeowner Share \$338,400	Homeowner Share \$537,200
Point Share \$101,800	Point Share \$73,800	Point Share \$36,600	Point Share \$116,300
Equivalent APR [†] : 15.4%	Equivalent APR [†] : 8.9%	Equivalent APR [†] : -5.2%	Equivalent APR [†] : 18.1% (Capped)

In this scenario, you'll repay Point less than Point paid you because we share in losses.

Point.com – repayment in 20 years

Home Value

– \$500,000 +

Risk-Adjusted Home Value

\$420,000

Because Point shares in downside, Point applies a Risk Adjustment of 15% to 20% to offset small declines in home value and protect its initial investment.

Point Invests Today

\$50,000

This estimate is for illustrative purposes only and assumes a well-qualified homeowner with substantial equity.

How much could Point cost?

Time to sale or buy back

Point is repaid at sale or when the homeowner chooses to refinance.

1 year ————— **20 years** ————— 30 years

Point's Share of Appreciation

30%

70% to Homeowner

In exchange for Point's investment today, Point receives a share in the home's appreciation above the Risk-Adjusted Home Value. The share is determined during underwriting.

Average Appreciation
Future Home Value
\$994,900
Homeowner Share
\$773,600
Point Share
\$221,300
Equivalent APR [†] : 7.7%

No Change
Future Home Value
\$500,000
Homeowner Share
\$426,200
Point Share
\$73,800
Equivalent APR [†] : 2.2%

Large Decline
Future Home Value
\$375,000
Homeowner Share
\$338,400
Point Share
\$36,600
Equivalent APR [†] : -1.3%

High Appreciation
Future Home Value
\$1,458,900
Homeowner Share
\$1,099,300
Point Share
\$359,600
Equivalent APR [†] : 10.2%

In this scenario, you'll repay Point less than Point paid you because we share in losses.

Calculator, Point, <https://point.com/calculator> (last visited July 13, 2022)

Hometap.com

Unlock your home equity today

See how much equity you can access from your home.

Enter your estimated home value:



Our typical investment amount for a home like yours is

\$99,000

with no monthly payments

Hometap invests alongside homeowners, providing cash today and participating in the proceeds at the time of a sale or settlement.

Choose your ideal Investment amount: **\$99,000**



		Future home value (after 10 years)	Hometap Share [?]	Your total returns (including funds from initial investment)
	Avg. appreciation 3% annual appreciation	\$671,958	\$221,746	\$450,212
	High appreciation 5% annual appreciation	\$814,447	\$268,768	\$545,680
	Large decline 10% total depreciation	\$450,000	\$123,750	\$326,250

Calculator, Hometap, <https://www.hometap.com/homeowner-resources/home-equity-investment-calculator> (last visited July 13, 2022).

Unlock.com

Unlock uses the Share of Home Value Model.

The image shows a screenshot of the Unlock.com calculator interface. At the top, there is a text input field labeled "Enter your address". Below this, there are two sliders. The first slider is labeled "Home Value" and is set to "\$500,000". The second slider is labeled "Debt on Property" and is set to "\$0". Below these sliders, the calculator displays a result of "\$218,750" in large blue text, with the text "In cash for 70% of your homes future value." underneath it.

How It Works, Unlock, <https://www.unlock.com/how-it-works> (last visited July 13, 2022).

Equifi.com

The term of our EquiFi co-investment is not expressed in years. While our competitors and lenders have terms in years ranging from 10 years to 30 years, EquiFi's co-investment term is event driven. These events are typically when you sell your home or choose to prepay the EFI at any time. Other terminating events are the death of homeowner(s) or a default that hasn't been cured like not paying your mortgage, property taxes or homeowner's insurance. We are the only home financing product that does not have a term in years.

FAQ's, EquiFi, <https://www.equifi.com/faq/> (last visited July 14, 2022).

Noah.co (not noah.com)

Noah is discussed in the two law journal articles cited earlier in this handout and is mentioned in various websites offering comparisons or descriptions of home equity investments. However, according to its own website, effective March 1, 2022, Noah has paused accepting new applications for Home Equity Access and Down Payment Assistance.

See <https://noah.co> for more information about Noah.

Fraction.com

At least one company, Fraction, offers a hybrid mortgage loan with repayment terms tied to the appreciated value of the home.

The Fraction Mortgage is a first-lien open line of credit that offers many of the benefits of traditional HELOCs with added flexibility. Monthly payments are no[t] required, and our interest rates adjust to the appreciation of your home.

Fraction offers [two term options](#), a 5 and 10 year term with optional monthly payments*. Our rates are variable and when you are ready to repay your loan, the amount you pay back – with interest, is based on the appreciated value of your home, based on the [Zillow Home Value Index](#) (ZHVI) by zip code.

The rates for a Fraction Mortgage are as follows:

Minimum

5 year: 3.74% APR*

10 year: 4.44% APR*

Maximum

5 year: 9.38% APR*

10 year: 11.57% APR*

Anita Chauhan, *Understanding Home Equity Investments and How They Impact Your Homeownership*, Fraction, <https://www.fraction.com/blog/hei-breakdown> (May 20, 2022) (last visited July 13, 2022).

BUYING A NEW HOME:

Point.com

Point illustrates the availability of equity sharing in order to come up with a higher down payment on the purchase of a home.

You can get up to 15% towards your home down payment. More money down can reduce your monthly mortgage payment by hundreds of dollars, giving you more for anything else.

Avoid private mortgage insurance (PMI), which can add thousands to a mortgage that doesn't go toward your equity. By meeting or exceeding a 20% down payment with a SEED investment, you can eliminate the need for PMI altogether.

.....
No monthly payments. No payoff penalty. 30 year term. Sell your home or buy back equity anytime you want. Whether you're a first-time buyer or looking for a second home, we want to help you reach your goals. Unlock all the benefits of a 20% down payment. Begin your homeownership journey and start building home equity wealth.

Together, we share in the ups, and even the downs, of your home's value. And if your home appreciates past a certain threshold, you are protected.

How Can Point's SEED Help?, Point, <https://point.com/seed> (last visited July 13, 2022).

The screenshot shows a grey header box with the text "If you're buying a home:". Below this is a blue circular icon with the word "SEED" in white. To the right of the icon, the text reads "SFED Down Payment Investment 3" followed by "Become a homeowner with as little as 5% down – and no PMI. When you enhance your down payment with a SEED investment, you'll spend less on your mortgage every month – and you may qualify for a better rate." Below this text is a horizontal line, and then a list of three bullet points: "✓ 680+ credit score", "✓ No income requirements", and "✓ No monthly payments".

Home Page, Point, <https://point.com/> (last visited July 13, 2022).


Fleq.com

Fleq.com illustrates another type of equity sharing program that is geared toward the purchase of a home.




ELIMINATING THE BARRIERS

Meet the Alliance.

Because the Alliance is a partnership between you and Fleq, what is good for you is good for us! So we eliminated many traditional barriers to homeownership, combined the best features of owning and renting and sprinkled in some completely new benefits.



Let's break it down for you...

	+		+	
BEST FEATURES OF OWNING		BEST FEATURES OF RENTING		ADDED FEATURES
<ul style="list-style-type: none"> • Build equity • Security and stability • Home price appreciation 		<ul style="list-style-type: none"> • Low cost of entry • Short-term commitment • Owner pays for repairs & taxes • Ease of relocation • No mortgage debt 		<ul style="list-style-type: none"> • Equity portability • Shared cost of improvements • Buy & sell equity as you choose
= The Fleq Alliance				

How It Works, Fleq, <https://fleq.com/#how-it-works> (last visited July 13, 2022).

Fleq describes the process as follows:

At Fleq, we believe home ownership is attainable without a large down payment. Without difficult credit standards. Without taking on massive amounts of debt. And without long-term commitments.

. . . .

Once you've found your dream home, you'll be teamed up with an Alliance representative. You will receive a quote for your monthly payment, your initial equity contribution to the Alliance, the starting ownership percentage for both parties and the current cost to acquire additional units of equity.

Once approved, Fleq can help with the closing process —giving you ample time to focus on your big move. Best of all, you now have the power of being an all-cash buyer, which can make all the difference when buying your dream home.

When it comes to equity contributions, pay whatever you want, whenever you want—or nothing at all. Though not required, any equity contributions will increase your ownership in the Alliance.

Investing in home improvements will enhance your daily living experience and may increase your home's value. As your partner in homeownership, for any approved home improvements, Fleq will either reimburse you for its pro-rata share of the costs or issue you new equity in the partnership equivalent to the increase in value of the home.

Home Page, Fleq, <https://fleq.com>, (last visited July 13, 2022) (illustrations, images, and headings omitted).

Haus.com

Haus offers what appears to be a unique way to finance the purchase of a home or a refinance of an existing mortgage.

Haus has an entirely new approach to home finance. Leveraging blockchain, Haus has created a way to significantly lower the monthly payments of homeownership while giving consumers the ability to purchase and sell equity when it works for them.

It works by turning each home into an equity NFT. The customer owns a portion of the NFT tokens and Haus owns the rest. Customers have a much lower monthly payment, and have the flexibility to purchase and sell equity interest in their home, when they choose.

.....
The relationship between the individual homeowner and Haus are recorded as a 1:1 NFT. As Haus compiles equity contracts across homes and locations, those equity interests (all which are recorded as deeds of trust and memorandums of agreement on title) are assigned to a new entity called HausCoin.

HausCoin Brief, HausCoin, https://cdn.hauscoin.com/hauscoin_brief_2022.pdf (last accessed July 13, 2022).

Unlike other home equity investment programs, the homeowner does make monthly payments but has the flexibility to buy and sell equity through the Haus app or website.

First things first: Haus isn't a lender, so you're not getting a loan or taking on debt [when you partner with us](#). Instead, Haus is a co-investor. That means we invest in your home with you and share the cost of ownership. Because we benefit if your home goes up in value, we can offer some perks the bank can't.

You get access to your equity when you want it, plus low monthly payments, and in exchange, we share some of your home's equity if you decide to sell. You're the only one on title when you own with Haus—and any equity you already own is yours to keep.

Every month, Haus makes a payment to your bank on your behalf (that means you keep your interest deduction). Then you make a deeply discounted payment to Haus, replacing your old monthly payment. If you currently pay your taxes and/or insurance along with your mortgage payment, you'll pay those separately now.

With Haus, you're free to purchase equity anytime you want. You can increase your stake to accelerate your ownership straight from your Haus dashboard. Your dashboard also allows you to track your home's value, take cash out, and modify your monthly payments, making home management easier than ever.

Tapping your equity with Haus is simple. When you need cash, you can sell some back to us at the current price without resetting your term. Your monthly payment adjusts based on the amount you withdraw, so you decide how much is right for you. . . .

After our 10-year term is up, if Haus still owns equity, you can choose to partner again, purchase your home outright, refi, or sell. When you sell, sale proceeds are split proportionally based on the equity split at time of sale—so, for example, if you own 60 percent equity, you get 60 percent of the proceeds. Because we're in this together, we want to create a long-term partnership and watch your home go up in value, just like you do. But if your home value goes down, we share in any loss of equity along with you. You're not in it alone.

Partnering with Haus: How It Works, Haus, <https://haus.com/resources/restructuring-with-haus-how-it-works> (last visited July 13, 2022) (Illustrations, images, and headings omitted).

“BUY NOW PAY LATER” PRODUCTS

Articles Included:

CFPB Notice and Request for Comment Regarding the CFPB’s Inquiry Into Buy-Now-Pay-Later (BNPL) Providers, Docket No. 2022-0002, 87 Fed. Reg. 3511 (Jan. 24, 2022).

Comment of 77 Consumer, Housing, Civil Rights, Legal Services, Faith, Community, Small Business, Student Borrower, and Public Interest Organizations to CFPB’s Inquiry Into Buy-Now-Pay-Later Products (Mar. 25, 2022).

Comment of Several States’ Attorneys General to CFPB’s Inquiry into Buy-Now-Pay-Later Products (Mar. 25, 2022).

Comment of Credit Union National Association to CFPB’s Inquiry Into Buy-Now-Pay-Later Products (Mar. 25, 2022).

Online or Other Resources:

View all comments to CFPB’s Inquiry Into Buy-Now-Pay-Later Providers at <https://www.regulations.gov/docket/CFPB-2022-0002/comments>.

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No.: CFPB-2022-0002]

Notice and Request for Comment Regarding the CFPB's Inquiry into Buy-Now-Pay-Later (BNPL) Providers

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice; request for comment.

SUMMARY: On December 16, 2021, the Consumer Financial Protection Bureau (Bureau) opened market monitoring orders, inquiring into Buy-Now-Pay-Later (BNPL) products in the United States to gain information about the size, scope, and business practices of the BNPL market. The information will help the Bureau better understand how consumers interact with BNPL providers, and how BNPL business models impact the broader e-commerce and consumer credit marketplaces. The Bureau also issued a press release to accompany these orders. The Bureau invites any interested parties, including consumers, small businesses, consumer advocates, financial institutions, trade associations, investors, state and Federal regulators and Attorneys General, and experts in consumer lending, payments, and marketing to submit comments to inform the agency's inquiry.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. **87 Fed. Reg. 3511 (Jan. 24, 2022)**

ADDRESSES: You may submit comments, identified by Docket No.: CFPB-2022-0002, by any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments.

2022 SOUTHEAST BANKRUPTCY WORKSHOP

- *Email:* BNPLInquiry@cfpb.gov. Include Docket No.: CFPB-2022-0002 in the subject line of the message.
- *Mail/Hand Delivery/Courier:* Comment Intake—Statement into BNPL Providers, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552. Please note that due to circumstances associated with the COVID-19 pandemic, the Bureau discourages the submission of comments by hand delivery, mail, or courier.

Instructions: The Bureau encourages the early submission of comments. All submissions should include document title and docket number. Because paper mail in the Washington, DC area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to <https://www.regulations.gov>. In addition, once the Bureau's headquarters reopens, comments will be available for public inspection and copying at 1700 G Street NW, Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. At that time, you can make an appointment to inspect the documents by telephoning 202-435-7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Comments will not be edited to remove any identifying or contact information. This docket is not for submitting other information to the Bureau, such as consumer complaints on a particular company. If you would like to submit a complaint, please visit [consumerfinance.gov](https://www.consumerfinance.gov) (<https://www.consumerfinance.gov/complaint/>).

FOR FURTHER INFORMATION CONTACT: Laura Udis, Program Manager, Small Dollar, Marketplace, and Installment Lending, 202-435-9158. If you require this document in an

alternative electronic format, please contact CFPB_Accessibility@cfpb.gov.

SUPPLEMENTARY INFORMATION:

I. Background

In the December 16, 2021, market monitoring orders and accompanying press release, the Bureau required five providers of Buy-Now-Pay-Later (BNPL) products in the United States to provide information about their size, scope, and business practices.¹ The Bureau listed six areas of specific interest:

- Business Model and Transaction Metrics
- Loan Performance Metrics
- Consumer Protections
- User Contacts and Demographics
- Data Harvesting
- Data Monetization

The Bureau invites any interested parties to submit comments to inform the agency's inquiry.

II. Public Comment

The Bureau encourages comments about BNPL products. For example: what is the consumer experience with BNPL products? What are the benefits and risks to consumers from BNPL products? What is the merchant experience with BNPL products? What perspectives do

¹ The press release and sample order can be found at <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-opens-inquiry-into-buy-now-pay-later-credit/>

regulators and Attorneys General have with respect to BNPL products? Are there ways in which the BNPL market can be improved?

The Bureau is opening a docket on Regulations.gov and invites any interested parties to submit relevant comments to inform the agency's inquiry.

/s/ Rohit Chopra

Rohit Chopra

Director, Bureau of Consumer Financial Protection.

AMERICAN BANKRUPTCY INSTITUTE

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

Re: Comment Regarding the CFPB's Inquiry Into Buy-Now-Pay-Later (BNPL) Providers (CFPB-2022-0002)

Dear Director Chopra,

The undersigned 77 consumer, housing, civil rights, legal services, faith, community, small business, student borrower, and public interest organizations appreciate the opportunity to comment on the CFPB's inquiry into Buy Now, Pay Later (BNPL) credit products that are proliferating across market areas. We welcome the CFPB's recent inquiry into Affirm, Afterpay, Klarna, PayPal, and Zip, however we remain alarmed by the lack of regulation of this exploding consumer credit product market. We urge the CFPB to view BNPL products as credit cards covered by the Truth in Lending Act (TILA), to enact a larger participant rule to supervise this market, and to look out for practices that harm consumers.

BNPL credit may provide some consumers with an affordable way to finance purchases, as the business model typically allows consumers to purchase an item by only paying a portion of the price up front and pay the rest of the debt in three equal, interest-free installments over a set period (usually 6 weeks). However, BNPL credit presents cause for concern, including: a lack of meaningful underwriting for a consumer's ability to repay; hidden fees and absence of clear disclosures; lack of dispute or refund rights should a consumer be unsatisfied with their purchase; an incentive created that could lead consumers into taking on unmanageable amounts of debt; a negative impact on credit reporting; and debt collection issues.

Buy Now, Pay Later (BNPL) options have increased dramatically in recent years. Although purchases financed with BNPL account for only 3% of U.S. online shopping revenue as of December 2021, 8.42 million consumers used BNPL in December 2021, which marked an all-time high.¹ Roughly one third of U.S. adults say that they have used BNPL,² and this is likely to grow dramatically—the industry is expected to increase 10 to 15 times its current size by 2025.³ In California, the top six BNPL providers originated more than 10 million loans to consumers in 2020, which accounted for 91% of all non-bank consumer loans originated in the state that year.⁴

Based on complaints to the CFPB and Better Business Bureau, consumers are already being harmed by a lack of regulatory oversight.⁵ Oversight is especially urgent as these offerings

¹Jonathan Berr, Payments Dive, "Buy now-pay later demand hit U.S. high during holiday season" (Jan. 14, 2022), <https://www.paymentsdive.com/news/buy-now-pay-later-demand-hit-us-high-during-holiday-season/617146/>.

²Erika Giovanetti, Dan Shepard, LendingTree "Shoppers Use 'Buy Now, Pay Later' Financing to Purchase Things They Can't Afford" (Apr. 20, 2021), <https://www.lendingtree.com/personal/buy-now-pay-later-survey/>.

³CB Insights, *Disrupting The \$8T Payment Card Business: The Outlook On 'Buy Now, Pay Later'* (Mar. 2, 2021), <https://www.cbinsights.com/research/report/buy-now-pay-later-outlook/> [hereinafter CB Insights, *Disrupting* (Mar. 2021)].

⁴California Department of Financial Protection and Innovation, *Annual Report of Finance Lenders, Brokers, and PACE Administrators Licensed Under the California Financing Law* (Jan. 2022), <https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/10/2020-CFL-Aggregated-Annual-Report.pdf>.

⁵Ed Mierzwinski and Mike Litt, U.S. PIRG, *The Hidden Costs of "Buy Now, Pay Later": Complaints to the CFPB Show Need for Action*, (Mar. 2022), https://uspirg.org/sites/uspig/files/reports/BNPL%20REPORT%20USPIRG_0.pdf.

continue to expand and infiltrate new market areas that pose even great risks to consumers.⁶ Additionally, without supervision, this product has potential to contribute to unaffordable debt loads. Allowing these products to escape coverage would lead to an undermining of consumer protection laws,⁷ making the financial marketplace less fair and competitive.

Small businesses also benefit from oversight of the financial products marketed towards their business and their employees, as small employers want to improve access to tools that help both themselves and their workers.

Consumer Risks

Marketing of BNPL credit is enticing, with promises of instant approval and no impact on a consumer's credit. However, many providers are **not conducting meaningful underwriting to assess a borrower's ability to repay** along with the rest of a consumer's financial obligations. Although some providers run a "soft" credit check, others do not check credit at all. Many BNPL providers offer the first extension of credit with a limited assessment of the consumer's current obligations, and base future purchase approvals and spending limits on the number of past purchases and on-time payments made on that BNPL application, rather than assessing the consumer's ability to repay the credit within the context of all financial obligations. Without holistically considering a consumer's ability to repay, consumers may accumulate unaffordable amounts of debt or trigger overdraft and non-sufficient fund fees if repayment is made with a debit card.⁸ According to one recent survey, nearly 40% of BNPL users said that they used BNPL credit to make purchases that would otherwise not fit in their budget.⁹ Additional recent analysis found that consumers who had overdrafted their account were more than twice as likely to have used BNPL services.¹⁰

BNPL products offer a promise of interest-free payments, **but many providers charge fees, including late fees, missed payment fees, account reactivation fees, returned payment fees, and rescheduling fees that are not clearly disclosed.** Research by the United Kingdom Financial Conduct Authority found that for some providers that charge fees, these fees can make up a significant portion of the company's revenue.¹¹ Fees vary depending on the provider, but can reach as high as \$25.¹² Unpaid or late fees can trigger overdraft fees in a consumer's bank

⁶Student Borrower Protection Center, *Point of Sale Fail: How a Flood of "Buy Now, Pay Later" Student Debt is Putting Millions at Risk* (Mar. 2022), https://protectborrowers.org/wp-content/uploads/2022/03/SBPC_BNPL.pdf.

⁷ Lauren Saunders, National Consumer Law Center, Testimony to Task Force on Financial Technology U.S. House Committee on Financial Services Hearing on "Buy Now, Pay More Later? Investigating Risks and Benefits of BNPL and Other Emerging Fintech Cash Flow Products" (Nov. 2, 2021), https://www.nclc.org/images/pdf/banking_and_payment_systems/fintech/Fintech-task-force-liquidity-testimony-Lauren-Saunders-2021-11-2-FINAL.pdf.

⁸ Marisabel Torres, Center for Responsible Lending, Testimony to Task Force on Financial Technology U.S. House Committee on Financial Services Hearing on "Buy Now, Pay More Later? Investigating Risks and Benefits of BNPL and Other Emerging Fintech Cash Flow Products" (Nov. 2, 2021), <https://financialservices.house.gov/uploadedfiles/hrg-117-ba00-wstate-torresm-20211102.pdf>.

⁹ Insider Intelligence, Business Insider, *Buy Now Pay Later Report: Market trends in the ecommerce financing, consumer credit, and BNPL industry* (Feb. 3, 2022), <https://www.insiderintelligence.com/insights/buy-now-pay-later-ecommerce-financing-consumer-credit/>.

¹⁰ Claire Williams, Morning Consult, "'Buy Now, Pay Later' Users Significantly More Likely to Overdraft Than Nonusers" (March 2, 2022), <https://morningconsult.com/2022/03/02/buy-now-pay-later-bnpl-overdraft-data/> [hereinafter Williams, BNPL users (Mar. 2022)].

¹¹ Personal Finances and Funds Team, U.K. HM Treasury, *Regulation of Buy-Now Pay-Later Consultation* (Oct. 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1027366/210923_-_BNPL_condoc_-_Cleared.pdf.

¹² Leticia Miranda, NBC News, "The Hidden Costs of 'Buy Now, Pay Later' Loans" (Nov. 4, 2021), <https://www.nbcnews.com/business/consumer/hidden-costs-buy-now-pay-later-loans-rcna4367>.

account; thus, a consumer can be charged by both the BNPL provider and their bank.¹³ Some providers charge returned payment fees, which are triggered when a payment is returned unpaid due to insufficient funds and may also trigger an additional bank fee for the consumers.¹⁴ These fees can accumulate quickly and be incredibly damaging to consumers, as overdraft and NSF fees are highly associated with closed bank accounts, leading to financial exclusion.¹⁵ Further, some BNPL products can only be used with a credit card, resulting in the consumer potentially being charged interest or charges imposed by the credit card company in addition to any fees associated with the BNPL product.¹⁶

Consumers have limited access to refund or redress should there be a problem with the item purchased. If a consumer has a problem with the product purchased, refund and return rights vary between providers, and again, information about these rights is difficult to find.¹⁷ According to complaints to the CFPB and Better Business Bureau, consumers face difficulty initiating disputes, lengthy delays in receiving a refund, and continuing collection of repayment during the refund and return process.¹⁸

Lack of clear and uniform consumer disclosures and statement requirements make it difficult for consumers to understand potential costs, to compare fees amongst providers, and to keep track of multiple BNPL credit extensions and payments at a given time.

Products and providers do not uniformly or clearly disclose how much fees are, where to find information about fees, and whether fees are capped. Some fees are listed in the terms and conditions, while others are listed in an installment agreement or in the “frequently asked questions” sections on websites. Certain products contain disclosures about the possibility of a fee without an indication of the amount of that fee. Further, each consumer purchase of a product or good is financed with its own payment plan and has its own payment due dates, as opposed to a single, monthly payment like other forms of credit. A single monthly payment is easier to track and manage than various payments throughout the month. Consumers with multiple BNPL credit plans may find them difficult to track since due dates vary based on the date of purchase. According to a recent Morning Consult survey, 20% of BNPL users have missed a payment.¹⁹ In some instances, BNPL credit has been subject to rescheduling fees for consumers who need to move their payments, making it burdensome for consumers to change the payment schedule should an unexpected financial obligation arise.²⁰

¹³ U.K. Financial Conduct Authority, *The Woolard Review - A Review of Change and Innovation in the Unsecured Credit Market* (Feb. 2, 2021), <https://www.fca.org.uk/publication/corporate/woolard-review-report.pdf> [hereinafter U.K. Financial Conduct Authority, Woolard Review (Feb. 2021)].

¹⁴ For example, Klarna charges a \$25 (or any lower amount required by law) if payment is returned unpaid for “non-sufficient funds.” See Klarna Pay in 4 Agreement, https://cdn.klarna.com/1.0/shared/content/legal/terms/0/en_us/sliceitinx.

¹⁵ Center for Responsible Lending Statement for the Record: *Overdraft Fees Cause Financial Exclusion; Policymakers Must Act* Hearing on “Banking the Unbanked: Exploring Private and Public Efforts to Expand Access to the Financial System” Before the U.S. House Committee on Financial Services, Subcommittee on Consumer Protection and Financial Institutions (July 21, 2021), <https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-testimony-overdraft-financial-exclusion-21jul2021.pdf>.

¹⁶ For example, Splitit charges all payment to a credit card rather than a bank account, see terms and conditions, (Nov. 5, 2021) <https://www.splitit.com/shopper/>.

¹⁷ Penelope Wang, Consumer Reports, “The Hidden Risks of Buy-Now, Pay-Later Plans” (Feb. 14, 2021), <https://www.consumerreports.org/shopping-retail/hidden-risks-of-buy-now-pay-later-plans-a7495893275/>.

¹⁸ Rachel Gittleman, Consumer Federation of America, Statement for the Record for Task Force on Financial Technology U.S. House Committee on Financial Services Hearing on “Buy Now, Pay More Later? Investigating Risks and Benefits of BNPL and Other Emerging Fintech Cash Flow Products” (Nov. 2, 2021), <https://consumerfed.org/wp-content/uploads/2021/11/CFA-Submits-Statement-for-the-Record-to-U.S.-House-Task-Force-11.2.21.pdf>.

¹⁹ Williams, BNPL users (Mar., 2022)

²⁰ For example, Sezzle provides one free reschedule on every order, but charges fees for any payment moves beyond that, see <https://shopper-help.sezzle.com/hc/en-us/articles/360045946992-How-do-I-reschedule-a-payment->

New financial products can result in disparate impacts on communities of color and other financially vulnerable consumers. **It is essential that the CFPB apply anti-discrimination laws to new lending platforms, and especially BNPL credit, which is disproportionately used by Black and Hispanic Americans,** along with young adults.²¹ Negative disparate impacts of new products will further harm disadvantaged communities. For young adults, who are just starting to build their credit profiles, the lack of sufficient oversight of BNPL credit has the potential to negatively impact credit building.

BNPL has been promoted by some as a “credit building” product. For example, Equifax has touted a study of consumers with a BNPL tradeline in their credit file, where a majority of consumers in its study experienced an average FICO score increase of 13 points when the BNPL tradeline showed on-time payments.²² However, this increase was due in part to consumers choosing to have the BNPL account reported as a revolving account, like a credit card. Unless BNPL accounts are treated as open-end credit, the credit building potential of BNPL is significantly limited given how frequently opening short-term loans (even if they are paid on-time) has a negative effect on credit scores, as opposed to the positive effects associated with managing timely payments on a revolving, open-end credit account. This is another reason BNPL products should be treated as credit cards. There are also significant risks from BNPL to consumer’s credit scores if they fail to make payments on time. If it is regarded and reported as individual loans and not cumulatively as revolving credit, BNPL has the potential to do damage to credit reports. **The CFPB should conduct research on the realistic impact of BNPL on credit scores, develop educational materials about the actual benefits versus risks, and watch out for deceptive claims about credit building aspects.**

BNPL credit can result in unexpected debt collection impacts. Consumer understanding of the terms of BNPL credit varies widely, with many consumers not viewing BNPL as debt.²³ As a result, consumers may not fully understand the consequences of failing to repay, including the possible involvement of debt collectors. Even small BNPL debts can end up being placed with third-party debt collectors for collection, or sold to debt buyers. Since BNPL lenders typically don’t obtain social security numbers from consumers, they cannot pass on this information to collectors— which can make it harder for collectors to confirm that they are collecting from the right person. Correct identifying information is vital when debt collectors and/or debt buyers may attempt to collect accounts for years, especially given that contact information such as phone numbers and email addresses change over time. The CFPB should monitor the treatment of delinquent and charged-off BNPL debt and look out for unfair, deceptive or abusive debt collection practices.

Given the explosion of product offerings and consumer usage, it is imperative that the CFPB supervise BNPL providers to ensure that they are not engaging in unfair, deceptive, or abusive acts or practices.

Financial Inclusion

²¹ Williams, BNPL users (Mar.,2022)

²² Equifax, “Market Pulse: Buy Now, Pay Later Credit Score Impact Analysis - Webinar Slides,” (Feb. 10, 2022) <https://www.equifax.com/resource/-/asset/presentation/market-pulse-buy-now-pay-later-credit-score-impact-analysis-webinar-slides/>.

²³U.K. Financial Conduct Authority, Woolard Review (Feb. 2021).

We are particularly concerned about products that claim to promote financial inclusion but, in reality, may do quite the opposite. Without meaningful, holistic underwriting, affordable repayment options, and price transparency, these products may do more to exacerbate financial exclusion rather than promote financial inclusion.

Many of these products use promises of no credit check, which may entice consumers with thin or damaged credit histories who do not realize that these products are credit. For those consumers with blemished credit histories or who are struggling to make ends meet, they may not have the capacity to take on more debt. These consumers, especially low- and moderate-income workers, those with limited English proficiency (LEP), and people of color, have long been targeted by predatory practices, excluded from traditional financial systems, and struggled to build wealth and financial security. Failing to properly underwrite loans and transparently disclose prices will simply lead to more unaffordable and unsustainable debt for consumers.

Recommendations

BNPL products have largely evaded oversight by federal and state regulators. Although these products could have a place in meeting consumer needs if they operate as promised, they need to be covered by basic consumer protections, as these products still pose risks to consumers.

We recommend that the Bureau:

- Apply credit card protections of the Truth in Lending Act (TILA), including the provisions of the Credit Card Accountability Responsibility and Disclosure Act. BNPL providers issue devices that are “charge cards,” which do not need finance charges or more than four installment payments to be covered by TILA. Applying credit card rules to BNPL credit would provide consumers with basic protections, such as dispute and chargeback rights, cost transparency, uniform disclosures and statements, reasonable penalty fees, and underwriting for a consumer’s ability to repay.
- Issue a larger participant rule to bring the BNPL market (along with other installment loan markets) within the CFPB’s supervision.
- Prevent or take action against unfair, deceptive or abusive acts and practices (UDAAPs) and ensure compliance with fair lending laws.
- Enforce the Electronic Fund Transfer Act’s ban on compulsory repayment of credit by preauthorized electronic fund transfer.
- Conduct research on the impact of the BNPL market on consumers and on their credit reports.

Thank you for considering this request.

Yours very truly,

National Organizations

20/20 Vision DC

2022 SOUTHEAST BANKRUPTCY WORKSHOP

Accountable.US
Americans for Financial Reform Education Fund
Association for Financial Counseling & Planning Education
Bend the Arc: Jewish Action
Better Markets
CAARMA: Consumer Advocates Against Reverse Mortgage Abuse
Center for Digital Democracy
Center for Economic Justice
Center for Responsible Lending
Consumer Action
Consumer Federation of America
Consumer Reports
Consumers for Auto Reliability and Safety
Credit Builders Alliance
Local Initiatives Support Corporation (LISC)
Main Street Alliance
National Association for Latino Community Asset Builders
National Association of Consumer Advocates
National Center for Law and Economic Justice
National Consumer Law Center (on behalf of its low income clients)
National Consumers League
Public Citizen
Public Good Law Center
Revolving Door Project
Student Borrower Protection Center
Student Debt Crisis Center (SDCC)
U.S. PIRG
Woodstock Institute

State and Local Organizations

Alaska PIRG
Arizona PIRG Education Fund
Center for Economic Integrity
Arkansans Against Abusive Payday Lending
California Reinvestment Coalition
CALPIRG (California Public Interest Research Group)
CAMEO - California Assoc for Micro Enterprise Opportunity
Consumer Federation of California
East Bay Community Law Center
Fresno Building Healthy Communities
Housing and Economic Rights Advocates
Public Counsel
Bell Policy Center
Connecticut Legal Services, Inc.
Delaware Community Reinvestment Action Council, Inc.

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Tzedek DC
Florida Consumer Action Network
Georgia Watch
Illinois People's Action
Illinois PIRG
Legal Action Chicago
Citizens Action Coalition of IN
Indiana Community Action Poverty Institute
Kentucky Equal Justice Center
Louisiana Budget Project
CASH Campaign of Maryland
Maryland Consumer Rights Coalition
Public Justice Center
Greater Boston Legal Services
New Jersey Citizen Action
New Mexico Center in Law & Poverty
Prosperity Works
Empire Justice Center
New Yorkers for Responsible Lending
Asheville Area Habitat for Humanity
NC Coalition for Responsible Lending
North Carolina Justice Center
The Collaborative
VOICE OKC (Voices Organized In Civic Engagement)
Columbia Consumer Education Council
SC Appleseed Legal Justice Center
RAISE Texas
Texas Appleseed
Legal Aid Justice Center
Virginia Citizens Consumer Council
Virginia Organizing
Virginia Poverty Law Center
Mountain State Justice



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

March 25, 2022

Submitted Electronically and Via E-mail

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

Re: Notice and Request for Comment Regarding the CFPB's Inquiry Into Buy-Now-Pay-Later Providers, Docket No. CFPB-2022-0002; 87 Fed. Reg. 3511

Dear Director Chopra:

The Attorneys General of Illinois, California, Colorado, Connecticut, Delaware, Hawaii, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington, as well as the Hawaii Office of Consumer Protection submit this letter in response to the Consumer Financial Protection Bureau's ("CFPB") "Notice and Request for Comment Regarding the CFPB's Inquiry into Buy-Now-Pay-Later Providers," CFPB-2022-0002; 87 Fed. Reg. 3511.

I. State Attorneys General Enforcement against Predatory Lending

We commend the CFPB for opening its inquiry into Buy-Now-Pay-Later providers ("BNPL")¹ and hope it is the first step towards greater transparency and regulation of the industry. While we encourage access to safe and affordable credit, we have concerns about new and supposedly innovative financial products that promise to disrupt and democratize the industry but push consumers into cycles of debt and carry some of the same terms and features as other expensive and predatory financial products. We are particularly concerned when such products are popular among younger consumers unfamiliar with navigating credit products and consumers who may already be struggling to make ends meet and to cover their existing debt burdens.

¹ *Consumer Financial Protection Bureau Opens Inquiry into "Buy Now, Pay Later" Credit*, Consumer Financial Protection Bureau (Dec. 16, 2021) [hereinafter *CFPB Inquiry*], <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-opens-inquiry-into-buy-now-pay-later-credit/>

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As the chief law enforcement officers of our states, we have long held lenders to account for their efforts to prey on vulnerable borrowers through attempts to evade consumer credit laws.² Examples of such evasion include structuring loans to fall outside the scope of state lending laws, mischaracterizing fees or interest charges, and leveraging relationships with third-parties to take advantage of that third-party's ability to export higher interest rates than are allowed by state law. Our states have also enacted laws to protect consumers from abuses associated with high-cost, small-dollar credit offered by fringe lenders. These laws reflect the will of the people to encourage safe and affordable loans while restricting predatory lending practices.³ We are concerned that BNPL providers' claims of quick application approvals, no credit checks, no interest or fees, and convenient payment schedules are masking features that will contribute to long-term damage to consumers' financial health. We will continue to use all resources at our disposal to ensure the citizens of our states are protected from the potential harms of new financial products. We appreciate the opportunity to provide our views on BNPL providers and look forward to viewing the results of the CFPB's inquiry.

² *Illinois by Madigan v. CMK Invs., Inc.*, No. 14 C 2783, 2014 WL 6910519, at *2 (N.D. Ill. Dec. 9, 2014) (alleging installment lender's mandatory account protection fee that was charged on a sliding scale based on the amount financed was undisclosed interest in violation of the applicable 36% rate cap imposed by Illinois law); *Oasis Legal Fin. Grp., LLC v. Coffman*, 361 P.3d 400 (Colo. 2015) (finding litigation finance agreements were loans subject to Colorado's consumer credit regulations); *Commonwealth v. Credit Acceptance Corp.* (2084-CV-01954-BLS2, filed August 28, 2020) (alleging subprime loan financier engaged in unfair lending practices, including usury); *Minnesota by Ellison v. Future Income Payments, LLC*, No. 27-CV-1712579, 2018 WL 1512814, *13 (Minn. 4th Dist. Mar. 13, 2018) (finding that financial product is a "loan" and that courts look to the "substance and effect of transactions to ascertain that there is not shrift or device on the part of the lender to evade the law or conceal the real nature and object of the transaction"); *Oregon v. Future Income Payments, LLC et al*, Multnomah County Case No. 18CV18811 (judgment in State's favor declaring loans null and void, saving victims over \$5 million in principal, interest, and fees and fining defendants almost \$5.9 million in civil penalties)

³ See e.g. Illinois Predatory Loan Prevention Act, 815 ILCS 123/15-5-5 (lenders limited to 36% APR on unpaid balance of the amount financed for a loan); 815 ILCS 123/5-5-15 (prohibits any device, subterfuge, or pretense to evade the Act, including charging greater interest than allowed); Cal. Fin. Code §§ 22303, 22304, 22304.5, 22306 (establishing usury caps tied to amount of loan); Haw. Rev. Stat. § 480J-4(a) (lenders limited to 36% APR on the unpaid principal balance of an installment loan); Haw. Rev. Stat. § 480J-4(g) (prohibiting lenders from charging any further amounts on the loan other than permitted interest and loan charges); Maryland Consumer Loan Law, Md. Code Ann., Com. Law § 12-306 (interest rates on consumer loans limited to 33% or less); M.G.L. c. 255B, sec. 14 & M.G.L. c. 140D, secs 4-5 (setting usury cap for certain types of loans and requiring interest rate disclosures); Michigan Usury Law, MCL 438.31 (unsecured loans by unlicensed entities are limited to 5% without a written contract and 7% with a written contract); Minn. Stat. s 334.01 (limiting interest rates on loans by non-exempt lenders); Minn. Stat. s 47.60, 47.601 (providing for registration and rate limits for "consumer small loans" and "consumer short-terms loans"); N.J.S.A. 31:1-1(a) (imposing a maximum interest rate of 16% per annum when there is a written contract specifying a rate of interest, or 6% per annum in the absence of a written contract); N.C. Gen. Stat. § 24-2.1(g) ("It is the paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws.") and N.C. Gen. Stat. § 24-1.1(a), (c) (maximum interest rate that North Carolina's usury laws allow for contract loans of \$25,000 or less is 16% per annum unless another law provides for a higher rate); Nev. Rev. Stat. Ann. § 604A.010; Nev. Rev. Stat. Ann. Title 55, Ch. 675; Oregon Consumer Finance Act, ORS 725.010 – ORS 725.910; Payday and Title Loans and Student Loan Servicing, ORS 725A.010 – 725A.990.

II. The BNPL Industry

We acknowledge the potential benefits of BNPL financing when compared to certain forms of credit, such as high-cost payday and installment loans. For consumers who are able to afford BNPL payments, the ability to split the cost of goods or services into multiple installments without interest or fees can be helpful in paying for merchandise that would otherwise not fit into consumers' budgets. Additionally, we welcome lawful economic activity in our states, including that which benefits local businesses; BNPL products may help to spur economic development through increases in customer acquisition and overall sales.

The CFPB's inquiry comes while the BNPL sector has been experiencing rapid and exponential growth. Every year since 2018, there has been a 300% increase in the number of consumers who have taken out a BNPL loan.⁴ A December 2020 survey found that 42% of Americans had used a BNPL service.⁵ Loan volume in the BNPL sector jumped from an estimated \$3 billion in 2019 to over \$39 billion in 2020.⁶ The growth in the BNPL industry parallels the growth of online shopping in general during the COVID-19 pandemic.⁷ Consumers can find BNPL financing for an ever-growing number of products and services: electronics, clothing, household goods, and concert and travel tickets. Consumers can apply for BNPL financing at a merchant's online or in-store checkout, or directly through a BNPL provider's mobile app. Consumers who utilize BNPL tend to increase their spending. Merchants are willing to pay higher transaction fees than for credit card purchases because they see higher order volumes when purchases are made with BNPL financing.⁸

While BNPL has not overtaken the traditional credit card market share, this nascent yet developing stage is precisely when regulatory inquiry and investigation is necessary to root out potential harms and ensure that market actors are complying with existing laws.

III. Lack of Consumer Protections

We are concerned that some BNPL products are designed to evade certain consumer protection laws, including those loans that allow consumers to pay in four or fewer installments without

⁴ Jennifer Surane, Klarna Says Retailers Paying Less in Buy Now/Pay Later Frenzy, Bloomberg (Jan. 25, 2022), <https://www.bloomberg.com/news/articles/2022-01-25/klarna-says-retailers-paying-less-in-buy-now-pay-later-frenzy>.

⁵ Gaby Lapera, 72% of Americans Saw Their Credit Scores Drop After Missing a 'Buy Now, Pay Later' Payment, Survey Finds, Credit Karma (Feb. 8, 2021), <https://www.creditkarma.com/insights/i/buy-now-pay-later-missed-payments>.

⁶ Brian Riley, *Buy Now, Pay Later: Gaining Scale And Disrupting Status Quo in Lending*, Mercator Advisory Group (May 7, 2021), <https://www.mercatoradvisorygroup.com/product/Buy-Now-Pay-Later:-Gaining-Scale-and-the-Disrupting-Status-Quo-in-Lending/>.

⁷ *Buy Now, Pay Later Statistics and User Habits*, C+R Research, https://www.crresearch.com/blog/buy_now_pay_later_statistics (last accessed March 11, 2022) (51% of consumers say they used Buy Now, Pay Later services during the pandemic); see also Bureau of Consumer Financial Protection, *The Consumer Credit Card Market*, p. 165 (Sept. 2021), https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf.

⁸ Ed Mierzwinski & Mike Litt, U.S. PIRG, *The Hidden Costs of "Buy Now, Pay Later"* (March 2022), https://uspirg.org/sites/pirg/files/reports/BNPL%20REPORT%20USPIRG_0.pdf.

interest.⁹ For example, providers offering these products may opine that they are not required to provide consumers with the same disclosures of interest and fees, and are not subject to the same dispute resolution protections or return/refund procedures as other credit products.¹⁰ Some providers even claim that their products are not loans or credit products at all, but instead refer to them as payment plans.¹¹

Regardless of what some BNPL providers and advocates may claim, BNPL financing is credit. Credit is defined by law as “the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.”¹² While state laws vary as to the precise definition, terms, and allowable charges on various credit products,¹³ we are no less concerned that BNPL providers are frequently failing to provide consumers with clear and conspicuous disclosures, including total costs, payments, fees, and to fully describe available dispute resolution mechanisms. If some BNPL products were to fall outside the scope of certain federal laws or regulations, it would be even more important that the CFPB pay special attention to whether and how providers ensure the same levels of consumer rights and protections for their customers. **We urge the CFPB to analyze whether and how BNPL providers ensure consumer rights and protections, disclosure of fees, charges, and other essential terms to consumers, as well as how they comply with general requirements to refrain from unfair, deceptive, and abusive acts and practices.**

IV. Ability-to-Repay Analysis

We are also concerned that BNPL providers may not be considering a consumer’s ability-to-repay prior to extending loans.¹⁴ A lack of robust underwriting coupled with marketing that touts the ease of splitting the cost of goods or services into multiple payments without interest or fees, provides little protection against an unsustainable accumulation of debt – particularly for younger borrowers and consumers who already struggle to make ends meet or owe on other debts. There is also no guarantee that BNPL providers are able to track when consumers have BNPL loans from multiple providers.¹⁵ One analysis found a correlation between consumers that use BNPL loans

⁹ 15 U.S.C. §1602(g) (The Truth In Lending Act generally only covers creditors who regularly extend consumer credit subject to a finance charge or payable by written agreement in *more than* four installments); see Congressional Research Service, *Rapidly Growing “Buy Now, Pay Later” (BNPL) Financing: Market Development and Policy Issues* (Nov. 1, 2021), <https://crsreports.congress.gov/product/pdf/IN/IN11784/3>; see also CFPB Inquiry, *supra* note 1.

¹⁰ Nelson Akeredolu et al., *Should You Buy Now and Pay Later?*, Consumer Financial Protection Bureau (July 6, 2021), <https://www.consumerfinance.gov/about-us/blog/should-you-buy-now-and-pay-later/>.

¹¹ Elaine S. Povich, *Regulators Scrutinize Buy Now, Pay Later Plans*, Pew Charitable Trusts – Stateline (Feb. 2, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/02/02/regulators-scrutinize-buy-now-pay-later-plans>; Tomio Geron, ‘Buy Now, Pay Later’ is Booking. But Companies are Facing Pressure to Change, Protocol (Nov. 28, 2021), <https://www.protocol.com/fintech/buy-now-pay-later-holidays>.

¹² 15 U.S.C. §1602(f)

¹³ See 815 ILCS 123/15-1-10 (The Illinois Predatory Loan Prevention Act defines “loan” as money or credit provided to a consumer in exchange for the consumer’s agreement to a certain set of terms, including, but not limited to, any finance charges, interest, or other conditions, and includes transactions conducted over the internet.)

¹⁴ Julian Alcazar & Terri Bradford, *The Appeal and Proliferation of Buy Now, Pay Later: Consumer and Merchant Perspectives*, Federal Reserve Bank of Kansas City (Nov. 10, 2021), <https://www.kansascityfed.org/documents/8504/psrb21alcazarbradford1110.pdf>.

¹⁵ *Id.*

and consumers that incur overdraft fees.¹⁶ While this did not show causation, the findings underscore the need for BNPL providers to consider a consumer’s ability to repay so that consumers do not overextend their finances. Customer surveys also show that a substantial percentage of borrowers have fallen behind on payments. A December 2020 study found that 38% of BNPL borrowers had fallen behind,¹⁷ and a 2021 survey found 56% of borrowers had fallen behind.¹⁸ Another study showed that more than half of BNPL users have seen their credit card limits decrease.¹⁹ For the young consumers and thin-credit file consumers that appear to use BNPL products often, early financial trouble risks hindering access to credit in the future. Some preliminary data indicates that these products are particularly attractive to consumers who have difficulty in managing their budgets.²⁰ It is this population that is most susceptible to harm from the use of BNPL. **We ask the CFPB to analyze what steps, if any, BNPL providers take in considering ability-to-repay and the types and sources of information they rely on. The CFPB should also consider specific rulemaking to clarify BNPL providers’ obligations to conduct ability-to-repay analyses.**

V. Credit Reporting

The impact of BNPL products on consumer credit reports is also troubling. Some BNPL providers promote the lack of credit reporting as a central benefit of its products, as it allows for quicker approvals, but this leads to uneven outcomes for consumers. Many BNPL providers fail to report positive credit activity (such as on-time payments) and instead only report late payments or negative activity to credit bureaus.²¹ Moreover, there is much negative activity to report. A survey found that nearly three quarters of consumers with a BNPL loan that had a late payment saw their credit scores decrease.²²

In any event, how credit reporting is handled for BNPL is in flux. Since the CFPB opened its inquiry, the three leading credit bureaus announced plans to add BNPL payment activity to credit reports, including by establishing specific trade lines or independent divisions to handle BNPL payments.²³ Incorporating BNPL payment history into credit reports may help borrowers that make on-time payments build good credit and assist with underwriting to make sure borrowers can afford

¹⁶ Claire Williams, ‘Buy Now, Pay Later’ Users Significantly More Likely to Overdraft Than Nonusers, Morning Consult (Mar. 2, 2022), <https://morningconsult.com/2022/03/02/buy-now-pay-later-bnpl-overdraft-data/>.

¹⁷ Lopera, *supra* note 5.

¹⁸ Mierzewski, *supra* note 8.

¹⁹ Ron Shevlin, *PayPal is Winning the \$24 Billion Buy Now, Pay Later Battle – For Now*, Forbes (November 22, 2020), <https://www.forbes.com/sites/ronshevlin/2020/11/22/the-24-billion-buy-now-pay-later-battle/?sh=40e83c542f53>.

²⁰ *Id.*

²¹ Buy Now, Pay More Later? Investigating Risks and Benefits of BNPL and Other Emerging Fintech Cash Flow Products, Hearing on H.R. 4277 Before the Task Force on Financial Technology U.S. House Committee on Financial Services, 117th Congress (2021) [hereinafter *Hearings*] (statement of Lauren Saunders, Associate Director, National Consumer Law Center).

²² Lopera, *supra* note 5.

²³ Robin Saks Frankel, *TransUnion Follows Equifax’s Move To Include Buy Now, Pay Later Data In Credit Reports*, Forbes (March 7, 2022), <https://www.forbes.com/advisor/personal-finance/transunion-equifax-buy-now-pay-later-credit-report/>; Greg Wright, *Introducing The Buy Now Pay Later Bureau™ from Experian*, Experian, (Jan. 26, 2022), <https://www.experian.com/blogs/news/2022/01/26/buy-now-pay-later-bureau/>.

payments. Reporting to credit bureaus can also help to mitigate or prevent identity theft; when BNPL payments are not reported to credit bureaus, consumers may be unaware that credit has been fraudulently established in their names, and alert and monitoring services may not capture this fraudulent activity.²⁴ Should the industry incorporate credit reporting on a broad scale, we hope that this will lead to BNPL providers conducting rigorous ability-to-repay analyses, including where consumers use BNPL loans through multiple providers at the same time.

However, complaints about inaccurate information in credit reports are too common, and the introduction of credit reporting to the BNPL industry may come with a host of other problems. In fact, one-third of complaints about BNPL loans submitted to the CFPB so far concern incorrect information on a consumer’s credit report.²⁵ **We urge the CFPB to analyze BNPL policies and procedures for credit reporting and the information that BNPL providers furnish to credit bureaus. We further urge the CFPB to monitor the emerging role of credit bureaus in the BNPL marketplace, including to ensure that BNPL providers comply with obligations to furnish accurate information and that credit bureaus comply with validation and dispute resolution requirements. Given the number of complaints about credit reporting, BNPL providers that do report to credit bureaus should implement policies and procedures, and allocate sufficient resources and staff to timely and thoroughly handle consumers’ credit reporting disputes.**

VI. Fees and Charges

We are concerned about the types and amounts of fees that BNPL providers charge consumers, as well as the clarity and adequacy of fee disclosures. While many BNPL products do not charge interest, most do charge several types of fees including late fees or activity fees.²⁶ We are concerned that when considered as interest, these fees may exceed state usury caps.²⁷ We are equally concerned that BNPL providers depend on late fees to drive revenue while not adequately disclosing late fees in advertisements and other statements to consumers.²⁸ We would be troubled to see BNPL loans become more expensive or complicated for consumers, including through the introduction of new or higher fees. As the industry continues to grow, merchants may seek to contract with BNPL providers for lower transaction fees.²⁹ And we are concerned that this will push BNPL providers to increase the fees they assess against consumers.

Additionally, some BNPL providers do charge interest, which may exceed state usury caps, as well as the average interest imposed on credit card users. Further, consumers who link their BNPL

²⁴ Alcazar, *supra* note 14.

²⁵ Mierzwinski, *supra* note 8.

²⁶ Sasha Hupka, *Buy-Now-Pay-Later Apps: How They Work*, Los Angeles Times, (Aug. 11, 2021) <https://www.latimes.com/politics/story/2021-08-11/buy-now-pay-later-apps-how-they-work> (some providers, like Quadpay, charge a \$1 platform fee for each installment payment); see also Akeredolu, *supra* note 10.

²⁷ Student Borrower Protection Center, *Point of Fail: How a Flood of “Buy Now, Pay Later” Student Debt is Putting Millions at Risk*, p. 10, (March 2022) (citing analysis that certain BNPL late fees may equate to 68% APR interest charges), https://protectborrowers.org/wp-content/uploads/2022/03/SBPC_BNPL.pdf.

²⁸ Alcazar, *supra* note 14; see *Hearings, supra* note 21 (Saunders testimony).

²⁹ Surane, *supra* note 4; *Hearings, supra* note 21 (testimony of Marisabel Torres, Director of California Policy, Center for Responsible Lending).

accounts to bank accounts may also incur NSF fees and overdraft charges if they fail to make a timely payment. Those who link their BNPL accounts to their credit cards may also incur interest charges directly on their credit cards.³⁰ **We recommend that the CFPB study the state of BNPL providers' disclosures to consumers, and consider using its rulemaking authority to ensure, first, that BNPL providers are clearly and accurately disclosing all actual and potential fees and charges to consumers and, second, that any fees and charges are reasonable and proportional to the overall cost of the loan.**

VII. Dispute Resolution, Returns, Refunds

We are concerned that if some BNPL providers claim that they are not required to comply with consumer protections required by providers of other forms of credit, consumers will have difficulty returning merchandise and with dispute resolution.³¹ Consumers may continue to be on the hook to repay their loans even if they purchase faulty merchandise or merchandise from a scam company.³² **The CFPB should review the dispute resolution procedures and protections offered by BNPL providers, ensure that BNPL providers implement rigorous oversight policies, immediately take action to cancel loans associated with defective or returned merchandise or purchased through scam merchants, and end relationships with unscrupulous merchants.**

VIII. Debt Collection

We are further concerned that BNPL providers ask for minimal consumer information on applications, which may lead to harms throughout the life-cycle of the loan. In particular, debt buyers and debt collectors that purchase portfolios of debt may have difficulty verifying borrower identity and validating debts when BNPL providers collect limited borrower information in applications and do not rely on credit reports to underwrite loans.³³ Consumers have already submitted complaints to the CFPB about attempts to collect on debts the consumers do not owe or for which the consumers do not remember applying.³⁴ **We recommend that the CFPB look into BNPL provider policies, procedures, and practices related to debt collection to ensure that providers comply with all applicable consumer protections.**

IX. Collection and Use of Consumer Data

We also appreciate the CFPB's focus on BNPL providers' use and monetization of consumer data.³⁵ The BNPL industry is growing while longstanding concerns over the collection, use, sale, and protection of consumer data in the financial services industry remain. BNPL providers collect

³⁰ Mierzwinski, *supra* note 8; citing Akeredolu, *supra* note 10.

³¹ Andrew Braden, *Know Before You Buy (Now, Pay Later) This Holiday Season*, Consumer Financial Protection Bureau (Dec. 16, 2021), <https://www.consumerfinance.gov/about-us/blog/know-before-you-buy-now-pay-later-this-holiday-season/>.

³² Congressional Research Service, *supra* note 9.

³³ *Panel Discusses Viability of BNPL Loans for Buying, Selling*, AccountsRecovery.net, <https://www.accountsrecovery.net/2022/02/10/panel-discusses-viability-of-bnpl-loans-for-buying-selling/> (last accessed, March 14, 2022).

³⁴ Mierzwinski *supra* note 8.

³⁵ *CFPB Inquiry*, *supra* note 1.

consumer data that is valuable for other companies that want to understand shopping behavior in order to target consumers for new products.³⁶ Merchant partnerships, and merger and acquisition activity with banks and other financial service providers, may lead to consumer data being shared amongst a variety of companies in ways that consumers may not understand or expect. **We recommend the CFPB inquire into provider privacy policies, as well as into how BNPL providers collect, use, sell, and protect consumer data.**

X. BNPL Financing for Education

Finally, we are concerned about the apparent emerging relationships between BNPL providers and for-profit schools, including online bootcamps and credentialing programs.³⁷ Many of these types of schools make false or misleading promises that graduates will obtain substantial salary increases. Such claims, combined with few consumer protections from BNPL loans, may lead to students being saddled with unaffordable debts and little recourse. State Attorneys General have spent years cracking down on the consumer harms that result from predatory for-profit schools and the financial products that prop up their dubious and unsubstantiated claims of lucrative salaries and job security.³⁸ The proliferation of partnerships between BNPL providers and for-profit schools occurs while federal regulators pay close attention to the risks of other “innovative” education financing products. For example, only recently the CFPB entered into a consent judgment, and the Department of Education issued guidance, both of which found that “income share agreements,” are in fact “private education loans” under the Truth in Lending Act/Regulation Z and the Higher Education Act respectively.³⁹ While revenue from education financing may

³⁶ Congressional Research Service, *supra* note 9.

³⁷ Student Borrower Protection Center, *supra* note 27.

³⁸ Press Release, *Attorney General Raoul Announces Settlement With ITT Tech Private Student Loan Lender*, (June 18, 2019) (available at https://www.illinoisattorneygeneral.gov/pressroom/2019_06/20190618.html); Colorado Attorney General, *Denver District Court Judge Orders CollegeAmerica to Pay \$3 Million in Civil Penalties to State and Forgive Loans for Deceiving Students*, (Aug. 21, 2020), <https://coag.gov/press-releases/8-21-20/>; Maryland Attorney General, *Attorney General Frosh Announces Over \$2.6M in Debt Relief for Former Brightwood College Students in Maryland* (November 16, 2020) <https://www.marylandattorneygeneral.gov/Press/2020/111620.pdf>; Press Release, *AG Healey Reaches Settlement With U.S. Bank Securing Over \$230,000 in Debt Relief for Massachusetts Student Borrowers*, (May 28, 2021) (available at: <https://www.mass.gov/news/ag-healey-reaches-settlement-with-us-bank-securing-over-230000-in-debt-relief-for-massachusetts-student-borrowers>); New York Attorney General, *A.G. Schneiderman Obtains Settlement With DeVry University Providing \$2.25 Million in Restitution For New York Graduates Who Were Misled About Employment And Salary Prospects After Graduation*, (Jan. 31, 2017), <https://ag.ny.gov/press-release/ag-schneiderman-obtains-settlement-devry-university-providing-225-million-restitution>; *Minnesota by Swanson v. Minn. Sch. of Bus., Inc.*, 899 N.W.2d 467 (Minn. 2017) (holding that higher-education institution’s student lending operations were unlicensed and violated usury laws); Oregon Attorney General, *AG Rosenblum Announces 192 Million Aequitas Settlement* (August, 2017), <https://www.doj.state.or.us/media-home/news-media-releases/ag-rosenblum-announces-192-million-aequitas-settlement-2-1-million-oregon-students/>; Washington Attorney General, *AG Obtains \$7 Million in Debt Relief for Nearly 2,000 Washington Student Borrowers*, (Aug. 17, 2017), <https://www.atg.wa.gov/news/news-releases/ag-obtains-7-million-debt-relief-nearly-2000-washington-student-borrowers>;


³⁹ *In the Matter of: Better Future Forward, Inc., et al*, 2021-CFPB-005, Sept. 7, 2021, https://files.consumerfinance.gov/f/documents/cfpb_better-future-forward-inc_consent-order_2021-09.pdf; see Office of Postsecondary Education, U.S. Dep’t of Education, General 22-12, Comment on Income Share Agreements and Private Education Loan Requirements, (March 2, 2022) (discussing 2021-CFPB-005, and 34 C.F.R.

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represent only a small fraction of the BNPL industry overall,⁴⁰ we believe the trend warrants further investigation and regulatory guidance. **We urge the CFPB to monitor partnerships between BNPL providers and for-profit schools and online course providers and consider issuing guidance and rulemaking clarifying regulations for BNPL credit to finance education.**

Thank you again for this opportunity, and thank you for taking the initiative to open an inquiry into Buy-Now-Pay-Later providers and the risks they may pose in the consumer financial marketplace.


Respectfully Submitted,



Kwame Raoul
Illinois Attorney General




Rob Bonta
California Attorney General



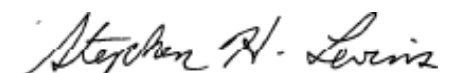
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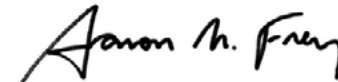
601) <https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2022-03-02/income-share-agreements-and-private-education-loan-requirements>.

⁴⁰ Polo Rocha, *Buy Now/Pay Later is Latest Form of 'Shadow Student Debt'*: Report, American Banker (March 9, 2022), <https://www.americanbanker.com/news/buy-now-pay-later-is-latest-form-of-shadow-student-debt-report>.

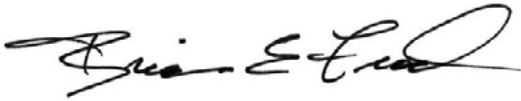
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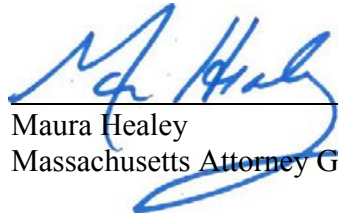
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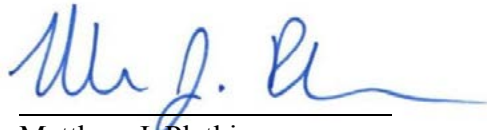
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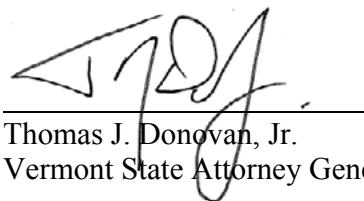
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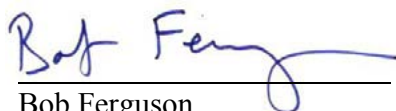
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March 25, 2022

Comment Intake—Statement into BNPL Providers
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

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

Dear Sir or Madam:

The Credit Union National Association (CUNA) represents America's credit unions and their 130 million members. On behalf of our members, we are writing in response to the Consumer Financial Protection Bureau's (CFPB or Bureau) notice and request for information (RFI) on Buy-Now-Pay-Later (BNPL) products.¹

General Comment

CUNA appreciates the CFPB's interest in the growing influence of BNPL products and their impact on consumers. The Bureau's examination of BNPL is appropriate and timely. In 2021, consumers spent nearly \$100 billion in purchases using BNPL programs, up from \$24 billion in 2020.² Nevertheless, BNPL providers remain largely unregulated.

Credit unions are concerned that unregulated BNPL providers are increasingly engaged in financial activities by offering products intended to be glossy, tech-savvy alternatives to traditional loan products. These non-bank providers often strive to offer these products without being subject to robust consumer protection laws and regulations in place for banks and credit unions. We agree that there is value in the Bureau further exploring these products and the companies that offer them as they begin serving a larger segment of consumers' financing purchases.

While credit unions welcome innovation in the market, we are concerned the exponential growth of BNPL products has outpaced prudent regulatory oversight and could ultimately result in consumer harm. In addition, the absence of effective oversight creates an uneven playing field to the material disadvantage of traditional lenders. Credit unions and other well-established financial service providers are heavily regulated for safety and soundness and consumer protection regulatory compliance. This is not always the case for companies offering BNPL products.

¹ Notice and Request for Comment Regarding the CFPB's Inquiry Into Buy-Now-Pay-Later (BNPL) Providers, 87 Fed. Reg. 3511 (Jan. 24, 2022).

² CFPB's Probe of Buy Now Pay Later: What's the Risk to Consumers? Eamonn Moran & Robin Nunn; Morgan, Lewis & Bockius LLP. Feb. 15, 2022 available at <https://news.bloomberglaw.com/banking-law/cfpbs-probe-of-buy-now-pay-later-whats-the-risk-to-consumers>.

Background

In December 2021, the Bureau issued orders to five BNPL companies requiring them to provide information about their size, scope, and business practices.³ The Bureau listed six areas of specific interest: (1) Business Model and Transaction Metrics, (2) Loan Performance Metrics, (3) Consumer Protections, (4) User Contacts and Demographics, (5) Data Harvesting, and (6) Data Monetization. The information is intended to assist the Bureau in better understanding how consumers interact with BNPL providers, and how BNPL business models impact the broader e-commerce and consumer credit marketplaces. The Bureau subsequently expanded the orders to solicit comments from the public, including regulated stakeholders.

Application of consumer protection laws

We understand the attraction of BNPL and other similarly situated financial technology companies (fintech) to consumers as they seem to create novel products and services at a rapid pace. Some of these products and services are truly new while others may merely repackage traditional products and services wrapped in a thin veneer of technology and supported by venture capital that allows for pricing that undercuts traditional service providers in order to rapidly gain market share. While competition is a necessary component of properly functioning markets, we are concerned that some products offered by BNPL providers are intended to skirt state and federal consumer protection regulations by exploiting loopholes in regulatory coverage.

CUNA has long held the position that similar products and services should be regulated similarly so that consumer protections run with a product or service, not with the entity providing the products or service. Credit unions and banks are subject to most of the same consumer protection laws. While not perfect, these consumer protection laws are often intended to be in the best interest of consumers. The CFPB should continue to stay focused on BNPL providers as their business model and substantial growth could result in irreparable harm to consumers and cause consumers to lose trust in the financial services marketplace.

BNPL's impact on consumers

Credit unions are concerned the non-application of consumer protection laws to some BNPL products could leave consumers unprotected while also impacting the ability of credit unions to lend with full and complete credit information. A more evenhanded application of consumer financial protection laws could improve the role BNPL products play in the financial lives of consumers. In an ideal environment, BNPL products would be a tool for consumers use in coordination with traditional financial products like credit cards or personal loans.

In particular, the Bureau should evaluate the disclosures of terms and fees associated with BNPL and whether these disclosures are sufficient to inform consumers of their payment obligations, potential penalties associated with late payments, and the potential pitfalls of using BNPL. For example, some BNPL providers do not inform consumers that their purchases are not covered by the same dispute resolution protections as purchases made using traditional credit cards. In addition, consumers may be unaware that BNPL products may impact the information on their credit reports.

The lack of meaningful underwriting coupled with many easily accessed BNPL providers could lead consumers to take on too many installment payments at one time. This situation is especially concerning because survey data shows consumers are likely to substantially increase their non-essential spending in

³ CFPB press release and sample order can be found at <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-opens-inquiry-into-buy-now-pay-later-credit/>.

response to the availability of BNPL options.⁴ Consumers may be put in a position where the minimum payments on multiple “low cost” BNPL loans are stacked in a manner that substantially impedes their cash flow and increases instances of late payments.

It may also be difficult for consumers to track their BNPL loans and make timely payments, even if they have sufficient funds available to make those payments. We encourage the Bureau to study how BNPL companies assist consumers in keeping track of their payment schedules, how they account for BNPL obligations from other providers, and how they are approaching the issue of credit reporting. While more BNPL obligations are likely to be reported to the credit bureaus in the future, credit unions are concerned about how these “shadow” obligations may impact consumers and the ability of other lenders to appropriately evaluate consumers’ credit profiles.

Consumers are often attracted to BNPL because of their ease of access and focus on digital channels. Often the first time consumers’ learn of BNPL is when they checkout an online cart on a merchant’s website or app. However, access to e-commerce is not uniform in the United States and often leaves certain groups behind. The CFPB should study digital-only BNPL providers and determine how their business model may impact consumers without access to the e-commerce solutions.

Access to credit from traditional providers

We believe credit unions often provide the safest and most affordable loan options for consumers in need of credit. When addressing emerging providers, the Bureau should carefully evaluate and consider the impact its policies may have on the availability of credit for consumers. It is important that the CFPB strike an appropriate balance between its consumer protection goals and the availability of products and services. This balance is critical whether the product is a credit card, installment loan, or emergency loan. Many consumers rely on access to credit to manage their everyday finances and the Bureau should ensure reputable providers, especially community-based providers, are able to meet those needs.

Innovation in consumer financial services

Innovation, through technology and other creative solutions, has the potential to enhance the delivery and quality of financial products and services to consumers. In recent years, credit unions have been at the vanguard of innovation as a byproduct of their cooperative nature, member-driven focus, and relatively small size. Consumers benefit from innovation that offers new delivery channels and products as well as innovations to traditional products. Credit unions want to ensure that financial products and services available from fintech companies or any company offer the same protections as those offered by regulated entities. Our members do not want to discourage innovation, they merely want to ensure that innovation does not allow new entrants to make an end run around regulation.

Protection of consumer data

CUNA is also troubled by how fintechs use, monetize, and protect data collected from consumers. Protecting data from misuse and theft in the current environment has become increasingly difficult. The CFPB should closely evaluate the BNPL companies’ data security and privacy practices to ensure that consumers are thoroughly protected. Everyone should be safeguarding consumer information, especially entities that house and use it the most. Any sharing of information that leads to less protection of credit union members’ valuable information - and that leads to members being less protected or at worst exploited - is not supported by CUNA and our member credit unions.

⁴ Buying the Holidays Now, Paying Later, Cardify (Nov. 22, 2021) available at <https://www.cardify.ai/reports/bnpl-holidays-2021>.

Conclusion

Currently, there are regulatory gaps that BNPL and other fintech companies exploit to provide financial services to consumers. This leads to less consumer protection and, at its worst, leads to the exploitation of consumers as their expectation of consumer protection is based on the regulation of traditional financial institutions and the products and services they offer. Consumer protection can be vastly different when a product or service is offered by non-financial institutions, and consumers do not always appreciate this difference. For the reasons detailed above, CUNA supports the CFPB's inquiry into the BNPL companies' practices and strongly encourages the CFPB to carefully examine and regulate these entities moving forward.

On behalf of America's credit unions and their 130 million members, thank you for your consideration. If you have questions or require additional information related to our comments, please do not hesitate to contact me at (202) 508-3629 or amonterrubio@cuna.coop.

Sincerely,



Alexander Monterrubio
Senior Director of Advocacy & Counsel for Consumer Protection

Faculty

Beverly M. Burden has served as the chapter 13 trustee for the Eastern District of Kentucky in Lexington since 1999. She previously clerked for Hon. Joe Lee, and prior to that was an assistant attorney general for the Commonwealth of Kentucky in its Consumer Protection Division, concentrating on consumer fraud litigation. Ms. Burden has served on the faculty of the annual meeting of the National Conference of Bankruptcy Judges, the annual convention of the National Association of Chapter Thirteen Trustees (NACTT), the Judge Joe Lee Biennial Bankruptcy Institute, the UK Biennial Consumer Bankruptcy Law Conference, the Midwest Regional Bankruptcy Seminar, ABI's Southeast Bankruptcy Workshop, and other regional and local CLE programs. She serves on the Board of Directors of the NACTT Academy for Consumer Bankruptcy Education and is a contributor to www.considerchapter13.org. She also writes a blog for practitioners in the Eastern District of Kentucky at www.ch13edky.wordpress.com. Ms. Burden is a 2017 inductee as a Fellow in the American College of Bankruptcy. She received her J.D. from the University of Kentucky College of Law and holds a B.B.A. in accounting.

Kimberly Field is general counsel at Aqua Finance, Inc. in Chicago, which provides financing programs for dealers and contractors. She previously was a member of senior management with Integra Credit, where she was responsible for legal regulatory and reputational risk management at a financial technology company. Ms. Field received her undergraduate degree from Illinois Wesleyan University in 1999 and her J.D. from Loyola University Chicago School of Law.

Jill C. Walters is a partner with Womble Bond Dickinson (US) LLP in Raleigh, N.C., and has more than 15 years of experience representing and counseling clients in the corporate insolvency, distressed lending, and restructuring and bankruptcy contexts, including in complex chapter 11 cases. She also represents student loan lenders and colleges and universities in litigation and ancillary issues related to debt and insolvency, student loans and alternative payment arrangements. Ms. Walters has bankruptcy litigation experience centered on the prosecution and defense of preference actions, fraudulent transfers and dischargeability contests. Her experience spans multiple sectors, including health care, education, transportation, hospitality and manufacturing, and she also has experience in agricultural cases, including chapter 12 proceedings. Ms. Walters received her B.A. in 2004 from Lake Forest College and her J.D. in 2007 from Michigan State University.

Megan S. Webster is a partner in Mayer Brown's Chicago and New York offices and a member of its Litigation & Dispute Resolution practice. Her broad national practice focuses on complex commercial litigation, investigations, responding to federal and state regulators and enforcement authorities, and compliance counseling. She also counsels companies on risk management, litigation avoidance strategies and general strategic decisions on multidisciplinary matters. Prior to joining Mayer Brown, Ms. Webster spent more than a decade in various high-level in-house counsel positions at large global banking and financial services firms. Most recently as vice president and associate general counsel, she led a team responsible for U.S. personal and commercial banking disputes and investigations at BMO Financial Group. Before joining BMO, she spent a decade at HSBC, where she held several positions, including senior vice president and associate general counsel. In

her in-house roles, Ms. Webster managed a diverse docket of consumer and commercial matters across business lines, including class action and individual litigation, federal and state government investigations and enforcement actions, and internal investigations. She also served as lead counsel responsible for domestic antitrust litigation and transactional matters. During her tenure as in-house counsel, Ms. Webster managed some of the most significant litigation, investigations, and state and federal exam and enforcement matters for her clients. She began her career in private practice at a large international law firm. Ms. Webster received her B.B.A. with honors from the University of Kentucky, her M.B.A. from DePaul University and her J.D. from DePaul University College of Law, where she was a member of the Order of Barristers, president of the DePaul College of Law Moot Court Society, and article and note editor of the *DePaul Business Law Journal*.