



**Consumer Reports
National Consumer Law Center (on behalf of its low-income clients)**

Comments on:

**Truth in Lending (Regulation Z):
Use of Digital User Accounts to Access Buy Now, Pay Later Loans
CFPB-2024-0017
89 Fed. Reg. 47068 (May 31, 2024)**

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Comment Intake – 2024 BNPL Interpretive Rule
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Founded in 1936, **Consumer Reports (CR)** is an independent, nonprofit and nonpartisan organization that works with consumers to create a fair and just marketplace. Known for its rigorous testing and ratings of products, CR advocates for laws and company practices that put consumers first. CR is dedicated to amplifying the voices of consumers to promote safety, digital rights, financial fairness, and sustainability. The organization surveys millions of Americans every year, reports extensively on the challenges and opportunities for today's consumers, and provides ad-free content and tools to 6 million members across the U.S.

Since 1969, the nonprofit **National Consumer Law Center® (NCLC®)** has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitative practices, help financially stressed families build and retain wealth, and advance economic fairness.

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I. Summary

Consumer Reports and the National Consumer Law Center, on behalf of its low-income comments, are pleased to submit these comments on the Consumer Financial Protection Bureau's (CFPB) proposed Interpretive Rule under the Truth in Lending (Regulation Z) on Use of Digital User Accounts to Access Buy Now, Pay Later Loans.¹

As we described more fully in response to the CFPB's previous request for information on buy now, pay later (BNPL) credit and in reports on BNPL credit, which we incorporate by reference in these comments,² consumers who use BNPL credit face a number of risks. The proposed Interpretive Rule addresses some of those issues. We strongly support the proposed Interpretive Rule, and we also urge the CFPB to take further actions to protect consumers who use BNPL credit.

We agree with the CFPB that BNPL accounts are credit cards within the meaning of the Truth in Lending Act (TILA). The definition of "credit card" under both the TILA statute and Regulation Z has long had a broad interpretation not limited to plastic cards or devices issued on the Visa or Mastercard network. Congress intended TILA to be interpreted liberally in favor of consumers. BNPL credit poses many of the same issues as traditional credit cards do. Consumers who use BNPL credit will benefit from the Subpart B requirements for clear account-opening disclosures; dispute and error protections if consumers do not get what they paid for, have unauthorized charges, or have mistakes on their accounts; and periodic statements that consolidate all of their purchases in one place with clear due dates. The experience with BNPL credit shows that these protections are needed.

The CFPB should clarify that BNPL accounts as charge cards are also required to provide the applications and solicitations required under Subpart G of Regulation Z. Clear, up-front fee disclosures in the standard "Schumer box" are especially important on applications and solicitations, before consumers commit to opening up BNPL accounts. Clear fee disclosures will promote fair competition and help consumers comparison shop.

The CFPB indicated that BNPL credit is closed-end credit, not open-end credit, which means BNPL providers would not need to comply with most of the requirements of the Credit Card Accountability, Responsibility and Disclosure Act of 2009 (Credit CARD Act). However, many BNPL accounts meet the requirements to be deemed open-end credit, including having fees

¹ These comments were written by Lauren Saunders, Jennifer Chien and Chi Chi Wu.

² See National Consumer Law Center et al., Comments Regarding the CFPB's Inquiry into Buy-Now-Pay-Later (BNPL) Providers, Docket No.: CFPB-2022-0002 Mar. 25, 2022), <https://www.nclc.org/wp-content/uploads/2022/10/Joint-BNPL-Comment-FINAL.3.25.pdf> ("2022 BNPL RFI Comments"). See also Consumer Reports, Buy Now, Pay Later: Policy Measures to Mitigate Consumer Risks from Evolving Business Practices, July 2023, <https://advocacy.consumerreports.org/wp-content/uploads/2023/07/BNPL-Policy-White-Paper.pdf>; Consumer Reports, Buy Now, Pay Later: A Case Study for a Digital Finance Standard, May 2023, <https://advocacy.consumerreports.org/wp-content/uploads/2023/05/Buy-Now-Pay-Later-A-Case-Study-for-a-Digital-Standard-1-2.pdf>.

that should be considered finance charges. The CFPB should clarify that such accounts are open-end credit and must comply with the Credit CARD Act requirements.

The Credit CARD Act's ability-to-repay requirements are especially critical. Research has consistently shown that BNPL borrowers are often more financially vulnerable. Compared with non-users, BNPL users have lower savings and liquidity, lower credit scores, and more signs of financial distress. They tend to also be subprime consumers who have already had significant credit card debt.

Another critical Credit CARD Act requirement is the requirement that penalty fees be limited to reasonable and proportional amounts. BNPL providers should not be allowed to use penalty fees as a back-end profit center that struggling financially vulnerable BNPL borrowers cannot afford.

The current proposal does not address credit reporting issues. We urge the CFPB to ensure that any reporting of BNPL credit is done in a manner that benefits consumers who pay on time by encouraging providers to report the product as open-end credit. This is the best way to enable consumers to use BNPL credit to establish and build positive credit histories and strong credit scores.

We also urge the CFPB to do a rulemaking to define the larger participants in the BNPL, installment loan, and line of credit markets in order to establish appropriate supervision for BNPL and other lenders. Supervision is important to ensure compliance with the law, to identify, prevent and correct unfair, deceptive or abusive practices, and to prevent fair lending problems. We address these issues in further detail below.

II. BNPL Credit Needs the Protections Given Credit Cards Under Subpart B of Regulation Z

A. BNPL accounts are credit cards

The CFPB's Interpretive Rule finds that, under the Truth in Lending Act (TILA) and Regulation Z, lenders that issue BNPL accounts are "card issuers" and "creditors" under TILA and Regulation Z. As such, they are subject to and must comply with the protections that apply to credit cards under Subpart B of Regulation Z. We agree with this conclusion.

Congress declared that TILA's purposes including protecting consumers and enhancing competition through the informed use of credit and protections against inaccurate and unfair

credit billing and credit card practices.³ Courts have long held that TILA is a remedial statute designed to protect consumers, and thus it is to be liberally construed in favor of consumers.⁴

There can be no doubt that BNPL lenders, by advancing on behalf of the consumer the full purchase price for goods or services procured by the consumer and securing a right to repayment, are extending credit. Moreover, they extend that credit through an account that meets the definition of “credit card.”

TILA defines “credit card” broadly as “any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor or services on credit.”⁵ Credit cards do not need to take the conventional form of a plastic card, and they do not need to be issued on the Visa or MasterCard network. A credit card merely needs to be a “device” that can be used from time to time to obtain credit.

Courts and the Federal Reserve Board have long interpreted the term “credit card” in TILA to go beyond traditional plastic or Visa credit cards. For example, 20 years ago, a court found that a catalog that contained a preprinted form with an account number that could be used to purchase goods on credit constituted a “credit card” under TILA.⁶ Several courts have emphasized: “The core element of a ‘credit card’ is the account number, not the piece of plastic.”⁷ Consistent with that interpretation, the Federal Reserve in 2011 adopted Commentary to Regulation Z that an “account number” can constitute a credit card if that number can “access [a] line of credit to purchase goods or services (such as an account number that can be used to purchase goods or services on the Internet).”⁸

BNPL accounts are devices that exist “for the purpose of obtaining money, property, labor or services on credit.” Thus, they meet the definition of “credit card.”

³ 15 U.S.C. § 1601(a).

⁴ See, e.g., *Curtis v. Propel Property Tax Funding, L.L.C.*, 915 F.3d 234, 243 (4th Cir. 2019); *Cappuccio v. Prime Capital Funding L.L.C.*, 649 F.3d 180 (3d Cir. 2011); *Rubio v. Capital One Bank*, 613 F.3d 1195, 1202 (9th Cir. 2010); *Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114 (9th Cir. 2009); *Rand Corp. v. Moua*, 559 F.3d 842 (8th Cir. 2009); *Bragg v. Bill Heard Chevrolet, Inc.*, 374 F.3d 1060 (11th Cir. 2004); *Inge v. Rock Fin. Corp.*, 281 F.3d 613 (6th Cir. 2002); *Rossmann v. Fleet Bank*, 280 F.3d 384 (3d Cir. 2002); *Butler v. Sterling, Inc.*, 2000 WL 353502 (6th Cir. Mar. 31, 2000); *Ramadan v. Chase Manhattan Corp.*, 156 F.3d 499 (3d Cir. 1998); *Ellis v. GMAC*, 160 F.3d 703, 707 (11th Cir. 1998); *Fairley v. Turan-Foley Imports, Inc.*, 65 F.3d 475 (5th Cir. 1995); *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142 (11th Cir. 1994); *Semar v. Platte Valley Fed. Sav. & Loan Ass’n*, 791 F.2d 699 (9th Cir. 1986); *King v. California*, 784 F.2d 910 (9th Cir. 1986); *Jones v. TransOhio Sav. Ass’n*, 747 F.2d 1037 (6th Cir. 1984); *Bizier v. Globe Fin. Servs., Inc.*, 654 F.2d 1, 3 (1st Cir. 1981); *generally* National Consumer Law Center, *Truth in Lending* § 1.5.2.3 (11th Ed. 2023), updated at library.nclc.org.

⁵ 15 U.S. Code § 1602(f).

⁶ *Munoz v. Seventh Avenue, Inc.*, 2004 WL 1593906 (N.D. Ill. July 15, 2004).

⁷ *U.S. v. Bice-Bey*, 701 F.2d 1086, 1092 (4th Cir. 1983); *accord* *Towsend v. Swiss Colony, Inc.*, 2008 WL 3009916 (N.D. Ill. Aug. 5, 2008); *Munoz v. Seventh Avenue, Inc.*, 2004 WL 1593906 (N.D. Ill. July 15, 2004).

⁸ Official Interpretations of Reg. Z § 1026.2(a)(15)-2.ii.C.

Regulation Z adds to the statutory definition of “credit card” that it is be a device that “may be used from time to time” to obtain credit.⁹ BNPL accounts are similarly reusable, and consumers are urged to reuse them, which they do. When a consumer uses a BNPL product for the first time, usually they must create a digital user account, which is designed for future use. The consumer’s history of repeat usage of that provider’s BNPL credit becomes part of the consumer’s account under a single account number, internet dashboard or app.

One survey found that Quadpay (now Zip) and Sezzle borrowers average four-to-five transactions per month; Afterpay and Klarna borrowers four per month; and Affirm borrowers two per month.¹⁰ A 2022 Consumer Reports (CR) survey found that:

- 16% of consumers indicated using BNPL once
- 54% of users indicated using BNPL two to five times
- 16% indicated using BNPL six to 10 times
- 7% indicated using BNPL 11 to 20 times
- 8% indicated using BNPL more than 20 times¹¹

A BNPL account is reusable even if not every consumer reuses the account. Indeed, it is not necessary that the actual device that accesses the credit be reusable. TILA’s statutory definition of “credit card” includes coupon books, which can be used from time to time, even though each coupon may be used only once.¹² Similarly, it has long been the rule that an identification card indicating loan approval is a credit card, even if the consumer must sign a separate document or note for each credit transaction.¹³

BNPL lenders are also “card issuers.” A “card issuer” is any “person that issues a credit card or that person’s agent with respect to the card.”¹⁴ BNPL lenders issue the BNPL accounts that are credit cards.

Regulation Z specifies that for purposes of the requirements of Subpart B, a “card issuer” is a “creditor” if the credit is either open-end or “is not subject to a finance charge and is not payable by written agreement in more than four installments.”¹⁵ While we believe that many BNPL accounts should be treated as open-end credit, as discussed below, a BNPL lender clearly falls under the definition of a creditor even if the credit is considered closed end and not to be subject to a finance charge or payable in more than four installments.

⁹ Reg. Z, 12 C.F.R. § 1026.2(a)(15)(i), adopted by 76 Fed. Reg. 18354 (Apr. 4, 2011).

¹⁰ Cardify, Convenience, Debt, and Novelty: Analyzing BNPL Consumer Data (Sept. 8, 2021).

¹¹ Consumer Reports Survey Group, Buy Now Pay Later Services: August 2022 Nationally Representative Internet Survey (Aug. 2022), <https://advocacy.consumerreports.org/wp-content/uploads/2022/11/2022-Consumer-Reports-Buy-Now-Pay-Later-Survey-Report.pdf>.

¹² 15 U.S.C. § 1602(l). Regulation Z deletes the term “coupon book” from its version of the definition, likely because these coupon books are no longer in use.

¹³ Official Interpretations of Reg. Z § 1026.2(a)(15)-2.i.D.

¹⁴ Reg. Z, 12 C.F.R. § 1026.2(a)(7).

¹⁵ Reg. Z, 12 C.F.R. § 1026.2(a)(17)(iii); accord 15 U.S.C. § 1602(g).

Congress specifically directed the CFPB to apply certain TILA requirements to card issuers even if they have no finance charges, have fewer than four installments, and are not open-end credit: “the Bureau shall, by regulation, apply these requirements to such card issuers, to the extent appropriate, *even though the requirements are by their terms applicable only to creditors offering open-end credit plans.*”¹⁶ Those requirements govern rights and procedures governing disputes and billing errors,¹⁷ account opening disclosures,¹⁸ and periodic statements,¹⁹ and are found in Subpart B of Regulation Z.

Thus, the CFPB is plainly correct in interpreting the Subpart B provisions of Regulation Z to apply to BNPL lenders.

B. Clear account opening disclosures will assist BNPL borrowers

Subpart B of Regulation Z requires creditors to make certain account opening disclosures, including fees and charges.²⁰ Fees must be disclosed in a special tabular format (the “Schumer Box”) and, like other TILA disclosures, must be disclosed “clearly and conspicuously.”²¹ These clear, uniform disclosures are sorely lacking and needed for BNPL credit.

Some BNPL lenders charge a variety of fees, including:

- late fees
- account reactivation fees,
- rescheduling fees, and
- convenience fees when using credit or debit cards for a scheduled payment.²²

For example, Sezzle provides one free reschedule on every order, but charges fees for any payment changes beyond that.²³ Fees may also go up as increased competition for merchants may create downward pressure on the merchant subsidy, leading BNPL lenders to push costs onto consumers through additional fees. Late fee policies also vary substantially across BNPL lenders, with some charging a flat fee, some potentially charging multiple late fees for a single

¹⁶ 15 U.S.C. § 1602(g) (emphasis added).

¹⁷ Part D, 15 U.S.C. § 1666 to § 1666j.

¹⁸ 15 U.S.C. §§ 1637(a)(5), 1637(a)(6), 1637(a)(7).

¹⁹ 15 U.S.C. §§ 1637(b)(1), 1637(b)(2), 1637(b)(3), 1637(b)(8), 1637(b)(10).

²⁰ Reg. Z, 12 C.F.R. § 1026.6(b).

²¹ 15 U.S.C. § 1632(a); see Reg. Z § 1026.5(a)(1).

²² Sezzle charges account reactivation, rescheduling, and convenience fees. See <https://legal.sezzle.com/user> (last visited July 23, 2024).

²³ 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-> (last visited July 29, 2024)

missed payment, others charging a percentage of the missed payment, and some not charging any late fees.²⁴

A lack of clear and uniform consumer disclosures, combined with wide variation in industry practices, make it difficult for BNPL consumers to understand the potential fees and to compare costs amongst providers. 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 or how it is calculated.

In addition to account-opening disclosures, the Bureau should clarify that BNPL accounts must provide the solicitation and application disclosures of § 1026.60 in Subpart G, as discussed in Section III below.

C. Dispute and error protections will assist consumers who experience difficulties with BNPL credit

Consumers have long faced challenges resolving disputes with BNPL purchases. A 2022 CFPB report noted that 13.7% of all BNPL loans were either returned or disputed, but that return processes can be long and complicated.²⁵ For example, BNPL policies typically require that the merchant first refund the purchase price to the BNPL lender before the consumer can be reimbursed. Some BNPL providers require consumers to first contact merchants to initiate returns. If a merchant declines to authorize a refund for a disputed item, then consumers can contact the BNPL provider to file a dispute.

Given the lack of clearly designated responsibility to resolve disputes, consumers can find themselves contending with opaque and inconsistent processes and getting trapped in an endless cycle of miscommunication between the merchant and BNPL provider. A March 2024 Bankrate survey found that 18% of BNPL users reported having difficulty returning items or getting a refund.²⁶ Consumers have described instances in which a BNPL lender and a merchant were “pointing fingers at each other” and the consumer was “left holding the bag.”²⁷

In the meantime, consumers are often required to continue making installment payments while disputes are being investigated, in some cases even after a product has been accepted for

²⁴ Consumer Reports. Buy Now, Pay Later: Policy Measures to Mitigate Consumer Risks from Evolving Industry Practices. May 2023. <https://advocacy.consumerreports.org/wp-content/uploads/2023/07/BNPL-Policy-White-Paper.pdf>

²⁵ Consumer Financial Protection Bureau, “Buy Now, Pay Later: Market Trends and Consumer Impacts,” September 2022.

²⁶ <https://www.bankrate.com/loans/personal-loans/buy-now-pay-later-survey/#insights/>

²⁷ Consumer Financial Protection Bureau, “Buy Now, Pay Later: Market Trends and Consumer Impacts,” September 2022.

return, unlike with credit cards. Consumers can be charged even for canceled or non-delivered items, and sometimes more than once.²⁸ Consumer complaints to the CFPB and the Better Business Bureau (BBB) reflect these common challenges with returns and disputes.²⁹

The Interpretive Rule's application of existing requirements in Subpart B of Regulation Z related to billing dispute resolution will help to directly address these long-standing issues and makes practical sense. BNPL credit poses similar dispute resolution issues as with credit cards, hence BNPL providers should be required to follow similar rules. While some BNPL providers purport to already follow TILA-like dispute resolution procedures, establishing a clear and robust standard across the market will be critical to protect all BNPL users and to ensure fair competition.

Chargeback rights. Section 1666i of TILA provides important protections to consumers that enable them to dispute charges on their credit cards.³⁰ They can raise with the credit card company any claims or defenses they would have against the merchant if they have a problem with a good or service and may withhold payment, colloquially known as the "chargeback" protection.

Applying TILA's chargeback rights to BNPL users via the Interpretive Rule's recognition of BNPL accounts as a form of "credit card" will help to resolve the aforementioned problems that consumers have run into with BNPL returns, giving consumers greater protection and confidence when using BNPL credit. Such rights will compel BNPL providers to take on greater responsibility to rapidly resolve disputes.

Dispute rights. TILA also has provisions allowing consumers to resolve "billing errors."³¹ One type of "billing error" is if the consumer is charged for property or services they did not accept or that were not delivered as agreed.³² Consumers can also dispute mistakes, unauthorized charges, and other errors on or questions about their account.³³ TILA also protects consumers from liability for unauthorized charges over \$50.³⁴ These provisions give consumers important rights and prescribe procedures to follow when there are mistakes, unauthorized charges, or other problems with a credit card account.

As the CFPB's Interpretive Rule notes, consumers typically create a digital user account when they use BNPL credit, and that account is designed for repeat usage. Mistakes or unauthorized charges can and do impact BNPL accounts. The constant data breaches that companies have

²⁸ Ed Mierzewski and Mike Litt, U.S. PIRG Education Fund, [The hidden costs of "Buy Now, Pay Later": Complaints to CFPB show need for action](#) (Mar. 2022)

²⁹ *Id.*

³⁰ 15 U.S.C. § 1666i, Reg. Z § 1026.12(c).

³¹ 15 U.S.C. § 1666; Reg. Z, 12 C.F.R. § 1026.13.

³² 15 U.S.C. § 1666(b)(3); Reg. Z, 12 CFR § 1026.13(a)(3).

³³ 15 U.S.C. § 1666(b); Reg. Z, 12 CFR § 1026.13(a).

³⁴ 15 U.S.C. § 1643; Reg. Z, 12 C.F.R. § 1026.12(b). Issuers usually waive the \$50.

can enable account takeovers, leading to unauthorized charges.³⁵ Recognizing BNPL accounts as credit cards places obligations on BNPL providers to correct mistakes and respond to disputes about unauthorized charges on consumers' BNPL accounts. It will also give them the incentive to adopt strong identity verification protocols.³⁶ The TILA dispute resolution framework works well for BNPL accounts and will result in a consistent set of rights and duties with which consumers and companies are familiar.

D. Periodic statements will assist consumers in managing BNPL credit

TILA requires that card issuers provide periodic statements with critical information including: (1) the amount and date of each credit extension, (2) the beginning and ending balance; (2) the payment due date, (3) any interest or fees, (4) the total interest and fees for the calendar year-to-date, (5) any applicable APRs, and (6) the creditor's address for billing error purposes, along with other information.³⁷

Requiring BNPL lenders to provide a consolidated statement for all credit extended under a particular BNPL account will help consumers understand how much credit they have taken on, anticipate payments, avoid late fees, see the fees they have paid, and better manage their finances. The statement billing cycle should be 14 days, and ideally providers will harmonize billing dates for all credit extensions under an account to the same two days each month.

Currently, BNPL lenders do not provide statements. The way in which payments and total charges are displayed initially in confirmation emails and in reminder alerts as payment dates approach varies among providers. BNPL lenders typically do not provide BNPL users with a comprehensive billing statement that indicates all transactions with the provider in a given time period with all upcoming due dates. Each consumer purchase of a product or good is financed with its own payment plan and has its own payment due dates triggered off of the purchase date, not a standard day of the month.

For a consumer who has used BNPL credit repeatedly over the course of four to six weeks, the blizzard of payments due individually on different days throughout the month can cause confusion about when payments are due or make it difficult to manage finances and avoid overdraft and NSF fees.

Requiring BNPL lenders to provide statements would help avoid late payments and late fees, and also help consumers identify billing problems. One study found that 43% of BNPL users

³⁵ See, e.g., Matthew Purnell, Juniper Research, [Buy Now Pay Later Fraud: A Growing Problem for Loan Providers](#) (Jan. 2024) (discussing account takeover fraud); Unit21, [Buy Now Pay Later Fraud: What It Is + How to Prevent It](#) (Feb. 27, 2023) (listing account takeover fraud as one of the common forms of BNPL fraud).

³⁶ See *id.*

³⁷ Reg. Z, 12 C.F.R. § 1026.7(b).

had fallen behind on payments, and of those consumers, two-thirds said that the reason for falling behind was because they had lost track of payments.³⁸ 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.³⁹ As discussed above, BNPL users also run into issues with disputes regarding charges. Providing regular statements would help consumers keep track of payments to avoid late payments and identify billing issues.

In addition, without a consolidated statement, consumers cannot easily see all of their purchases from a given BNPL lender in one place, how much credit they have taken on, or what their total remaining payments are. In many ways, BNPL credit is an antiquated product, taking us back to the days before the “innovation” of credit cards, which consolidated debts in one place. Giving consumers a better view of their total amount of BNPL debt, at least with respect to each individual provider, will help them to appreciate the amount of credit they have taken on, how small payments can add up, and how BNPL debt fits into their broader financial picture.

Providing the total fees charged per billing cycle and calendar year to date will also help BNPL borrowers enormously. BNPL credit is touted as “interest free,” but for many consumers it is not actually free. Enabling them to see how much they are paying in late fees and other fees – including the participation fees being added by some lenders – will help them to understand the true costs of BNPL credit.

The CFPB did not discuss what the statement cycle would be. It should be 14 days,⁴⁰ which would be consistent with the 14-day billing cycle of most BNPL products. The first statement could be provided simultaneously with the confirmation of the purchase, as long as the lender does not charge a late fee if the payment is received within 19 days of the statement.⁴¹ That is consistent with the general practice among many BNPL lenders, as we understand it, to provide a 5-day or longer grace period before charging a late fee.

³⁸ Wang, Penelope. 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/> [hereinafter Wang, Consumer Reports, Hidden Risks (Feb. 2021)].

³⁹ 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->. (last visited July 29, 2024)

⁴⁰ See 12 C.F.R. § 1026.5(b)(2)(ii)(B)(2). The timing requirements applicable to credit cards that have a grace period before interest is imposed, *id.* § 1026.5(b)(2)(ii)(B)(1), are not relevant to BNPL credit that does not charge interest. Although the CARD Act requires statements to be sent 21 days before a payment due date, 12 C.F.R. § 1026.5(b)(2)(ii)(A), the CFPB has the authority to make adjustments. 15 U.S.C. § 1604(a) (“regulations may contain such additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith”).

⁴⁰ 12 C.F.R. § 1026.5(b)(2)(ii)(B)(2).

⁴¹ *Cf.* 12 C.F.R. § 1026.5(b)(2)(ii)(B)(2)(ii); Official Interpretation of 5(b)(2)(ii)-1, -2.

The CFPB should also urge or require BNPL lenders to consolidate, or give consumers the option to consolidate, payments due on multiple purchases so that their due dates all fall on the same day, no more than twice a month. That would greatly assist consumers in managing their payments and finances, helping to prevent late fees. TILA requires credit card due dates to be the same day each month, provided on the statement.⁴² BNPL credit cards should also provide that consistency to consumers, especially in light of the potential for late fees that are effectively finance charges, as discussed below.

BNPL lenders should also be encouraged to provide alerts before each payment.

III. BNPL credit must provide clear application and solicitation fee disclosures

The Interpretive Rule indicates that, in addition to the account opening disclosures of Subpart B of Regulation Z, BNPL lenders “may also” be required to comply with the application and solicitation disclosure requirements of § 1026.60 of Subpart G of Regulation Z.⁴³ The CFPB should clarify that those application and solicitation disclosures are required for BNPL credit.

TILA’s application and solicitation disclosure requirements apply to charge cards,⁴⁴ and for purposes of these disclosures, BNPL credit is a charge card. Section 1637(c)(4)(e) of TILA defines “charge cards” for purposes of that subsection as devices “that may be used from time to time to obtain credit which is not subject to a finance charge.”⁴⁵ In other words, TILA specifically requires that the applications and solicitations disclosures be provided whether or not the credit is subject to a finance charge.

In general, Regulation Z defines “charge card” as a “credit card on an account for which no periodic rate is used to compute a finance charge.”⁴⁶ That definition simply requires no periodic rate; it does not require a finance charge.

Charge card application and solicitation disclosures must disclose key fees and rates in a tabular format – the “Schumer Box” – in a conspicuous and prominent location.⁴⁷

Clear, up-front application and solicitation disclosures are especially important because that is where consumer deception often takes place. By the time that the consumer receives the

⁴² 15 U.S.C. § 1637(o)(1); 12 C.F.R. § 1026.7(11)(i)(A).

⁴³ 89 Fed. Reg. at 47071, n28 (“Other provisions of Regulation Z may also apply to ‘card issuers’ regardless of the type of credit [open- or closed-end]. See 12 CFR 1026.60, in subpart G, which outlines the rules for credit and charge card applications and solicitations.”).

⁴⁴ See also Reg. Z, 12 C.F.R. § 1026.60(a).

⁴⁵ 15 U.S.C. § 1637(c)(4)(E) (emphasis added).

⁴⁶ Reg. Z, 12 C.F.R. § 1026.2(a)(15)(iii).

⁴⁷ 15 U.S.C. §§ 1632(c), 1637(c)(i)(I).

account opening disclosures, it is too late; they have already opened the account. Providing a prominent Schumer Box and other required application and solicitation disclosures for BNPL credit will help consumers to comparison shop and will further TILA's purpose of promoting the informed use of credit.

IV. BNPL Credit Should Comply with the Credit CARD Act Requirements of Subpart G of Regulation Z

A. The CFPB should conclude that much, if not all, BNPL credit is open-end credit

The Interpretive Rule states that BNPL credit payable in four installments without a finance charge is not open-end credit. For that reason, the CFPB concludes that BNPL credit is not subject to the provisions of the Credit Card Accountability, Responsibility and Disclosure Act of 2009 (Credit CARD Act). However, we believe that BNPL credit is indeed open-end credit. At a minimum, the CFPB should require BNPL credit that has charges to comply with the open-end credit card rules.

Regulation Z defines open-end credit as “consumer credit extended by a creditor under a plan in which:

- (i) The creditor reasonably contemplates repeated transactions;
- (ii) The creditor may impose a finance charge from time to time on an outstanding unpaid balance; and
- (iii) The amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid.”⁴⁸

BNPL credit clearly meets elements (i) and (iii) of the definition of open-end credit, and many BNPL accounts should be found to meet element (ii) as well.

Under prong (i), BNPL lenders “reasonably contemplate repeat transactions”⁴⁹ through BNPL accounts, as discussed in Section II.A above. A BNPL account, app or other device can be

⁴⁸ Reg. Z § 1026.2(a)(20)

⁴⁹ Reg. Z § 1026.2(20)(i).

open-end credit even if not every consumer uses it for repeat transactions. It is sufficient that much of the customer base does so.⁵⁰

Under prong (iii), the amount of credit that may be extended under BNPL accounts is generally available if previous credit extensions are repaid.⁵¹ As one article described: “Most BNPL providers offer users a default line of credit upon registering an account. Over time, as the provider collects more of the user’s account data — transaction, payment, and debt pay-back history — lending limits generally increase.”⁵² After a consumer has created a BNPL account, many providers display an “available to spend” amount of credit for future use, and that amount fluctuates as consumers repay their credit.⁵³ An explicit credit limit or line is not necessary for BNPL credit to be considered reusable open-end credit.⁵⁴ It is also not necessary for consumers to have an absolute right to future credit, as long as they have a reasonable expectation of future credit if they have repaid previous advances and are within any spending limits.⁵⁵

Finally, under prong (ii), much BNPL credit does have hidden finance charges, and the market may be moving more and more in that direction.

As noted above, some lenders such as Sezzle charge “convenience” fees if the BNPL credit is repaid by debit or credit card. Those fees are finance charges as they are payable to the creditor and are imposed by the creditor as an incident to the extension of credit.⁵⁶ Similarly, a rescheduling fee is also a finance charge, as it is imposed as a condition of deferring repayment of debt.⁵⁷ Thus, any lender that charges those fees or other fees that are clearly finance charges should be required to comply with the Credit CARD Act requirements.

⁵⁰ Official Interpretations of Reg. Z § 1026.2(a)(20)-3 (“Information that much of the creditor’s customer base with accounts under the plan make repeated transactions over some period of time is relevant to the determination ... The fact that particular consumers do not return for further credit extensions does not prevent a plan from having been properly characterized as open-end.”).

⁵¹ Reg. Z § 1026.2(a)(20)(iii).

⁵² Subboh Jaffery, Tearsheet, “Fast approval fertile for stolen and synthetic identities: BNPL’s fraud problem BNPL fraud rate grew by 66% YoY between 2020 and 2021” (Mar. 1, 2022), https://tearsheet.co/online-lenders/fast-approval-fertile-for-stolen-and-synthetic-identities-bnpls-fraud-problem/?utm_source=Tearsheet+Master+List&utm_campaign=1328e8c163-EMAIL_CAMPAIGN_2022_01_25_09_37_COPY_01&utm_medium=email&utm_term=0_b7e3971c0b-1328e8c163-214241568

⁵³ For examples of how BNPL lenders promote “available to spend” amounts, see 2022 BNPL RFI Comments at [page number].

⁵⁴ See Official Interpretations of Reg. Z § 1026.2(a)(20)-5.ii (“This criterion does not mean that the creditor must establish a specific credit limit for the line of credit or that the line of credit must always be replenished to its original amount.”).

⁵⁵ See Official Interpretations of Reg. Z § 1026.2(a)(20)-5.ii (“While consumers should have a reasonable expectation of obtaining credit as long as they remain current and within any preset credit limits, further extensions of credit need not be an absolute right in order for the plan to meet the self-replenishing criterion.”).

⁵⁶ 15 U.S.C. § 1605(a).

⁵⁷ 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->. (last visited July 29, 2024)

There are also many other charges that should be viewed as sufficient to bring BNPL credit within the definition of open-end credit.

As discussed in Section IV.C below, late fees may be a revenue source, not merely a way of covering the cost of late payments. BNPL lenders often charge late fees that can be as much as 25 percent of the purchase amount. In contrast, the safe harbor for charge card late fees is only 3 percent of the delinquent balance.⁵⁸ BNPL lenders should not be allowed to hide finance charges in their late fees, tricking consumers into costly credit touted as free while also escaping the Credit CARD Act requirement of reasonable and proportional late fees. In addition, some BNPL lenders are starting to charge participation fees in order to access “zero-interest” BNPL credit.⁵⁹ Participation fees are used as a disguised finance charge in other types of credit as well.⁶⁰

While we urge the CFPB to address loopholes in the definition of “finance charge” (and APR disclosures for open-end credit) more generally,⁶¹ for present purposes, the CFPB should clarify, through guidance or rulemaking, that BNPL credit that comes with charges that are hidden profit centers and thus hidden finance charges – *i.e.*, late fees that are not reasonable and proportional to costs, participation fees, or other fees – is open-end credit and is subject to the Credit CARD Act requirements. For late fees in particular, fees that exceed the 3 percent safe harbor for charge cards should trigger Credit CARD Act coverage.

Even if the CFPB declines to extend the TILA open-end credit card provisions to BNPL credit, it should use its authority to prevent unfair, deceptive and abusive acts and practices (UDAAP) to ensure similar protections. BNPL credit with costs especially needs the clear application and solicitation disclosure rules, ability to pay rules, and reasonable and proportional penalty rules that apply to credit cards, as discussed below. Solicitations and applications that do not clearly disclose fees, lending without regard to a consumer’s ability to repay, and excessive penalty fees all can violate the UDAAP ban.

⁵⁸ 12 C.F.R. § 1026.52(b)(1)(ii)(C).

⁵⁹ Kate Fitzgerald, American Banker, How buy now/pay later fintechs are reframing consumer credit (Oct. 9, 2023) (“Another significant change is BNPL fintechs’ recent introduction of subscription fees averaging about \$5 a month for users to continue accessing zero-interest loans, not unlike the cost of a credit card’s annual fee.”).

⁶⁰ See Comments of National Consumer Law Center et al. re Request for Information Regarding Junk Fees Imposed by Providers of Consumer Financial Products or Services Comments (“Junk Fees Comments”) at 59, Docket No.: CFPB–2022–0003, at 35-39, 59 (May 2, 2022, corrected Jan. 19, 2023), <https://www.nclc.org/wp-content/uploads/2022/09/NCLC-comments-on-CFPB-Junk-Fees-RFI-87-FR-5801-pubd-2-2-22-filed-5-2-22.pdf>.

⁶¹ See Junk Fees Comments, *supra*, at 35-39, 59.

B. BNPL lenders should assess the ability to repay

1. BNPL users tend to be more financially vulnerable than non-users

An increasing amount of evidence has consistently shown that BNPL users tend to be more financially vulnerable than non-users. Compared with non-users, BNPL users: (1) are more likely to already have other credit products, (2) have lower savings and liquidity, (3) have lower credit scores, and (4) show more signs of financial distress.⁶²

Contrary to initial portrayals of BNPL as a tool for financial inclusion, BNPL users are actually more likely than non-users to have traditional credit products, including credit cards, retail cards, personal loans, auto loans, and student debt.⁶³ BNPL users also utilize more high-cost loan products and exhibit greater delinquency. Compared with non-users, BNPL users have higher credit card utilization rates, higher incidence of revolving debt on credit cards, and higher utilization rates of high-cost alternative financial services such as payday loans, pawnshop loans, and overdrafts. For example, CFPB research found that delinquency on any credit product was 18% for BNPL users compared with 7% for non-BNPL users.⁶⁴

Consumers who are struggling with their finances are more likely to use BNPL than other users. Recent analysis by the New York Fed found that while 19 percent of individuals overall used BNPL, BNPL usage was noticeably higher for those with credit scores below 620 (43 percent) and those who were thirty days or more delinquent at some point during the past year (37 percent).⁶⁵ In addition, financially fragile BNPL users were almost three times as likely as financially stable users to use BNPL five or more times, evidence of greater high-frequency use of BNPL among financially fragile households.⁶⁶

A 2022 Financial Health Network survey on BNPL similarly found that financially vulnerable households⁶⁷ are nearly four times more likely to use BNPL than financially healthy households (18% vs. 5%), and 24% of BNPL users are financially vulnerable.⁶⁸ In addition, a 2022 Consumer Reports (CR) survey found that compared with non-users, BNPL users were much

⁶² Consumer Financial Protection Bureau, “Consumer Use of Buy Now, Pay Later: Insights from the CFPB Making Ends Meet Survey,” March 2023.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Aidala, Felix, Daniel Mangrum, and Wilbert van der Klaauw. “Who Uses ‘Buy Now, Pay Later’?” Liberty Street Economics (blog). Federal Reserve Bank of New York. September 2023.

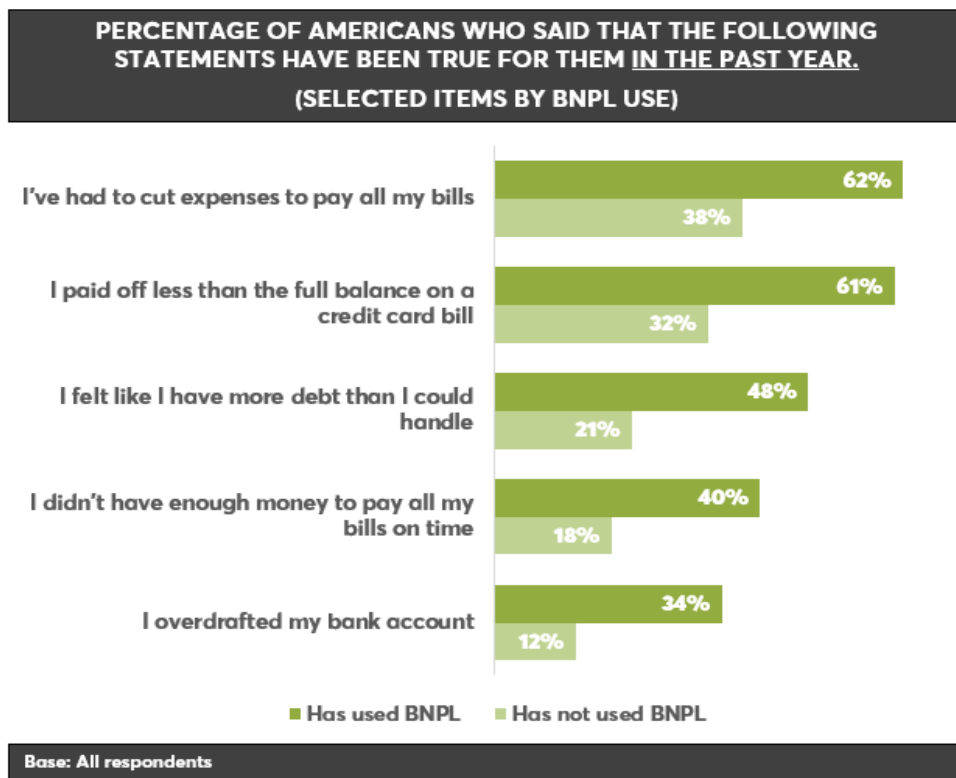
⁶⁶ Aidala, Felix, Daniel Mangrum, and Wilbert van der Klaauw. “How and Why Do Consumers Use “Buy Now, Pay Later”?” Liberty Street Economics (blog). Federal Reserve Bank of New York. February 2024.

⁶⁷ As measured using the Financial Health Network’s FinHealth Score®.

⁶⁸ Hannah Gdalan, Meghan Greene, and Necati Celik, “Buy Now, Pay Later: Implications for Financial Health,” Financial Health Network, March 2022, finhealthnetwork.org/wp-content/uploads/2022/03/Buy-Now-Pay-Later-Brief-2022.pdf.

more likely to have cut expenses to pay their bills and feel like they have more debt than they can handle.⁶⁹ (Additional findings from the 2022 CR survey can be seen in the figure below.) One participant in CR’s 2023 BNPL discussion panel noted that “I would say if I was using a BNPL service, it’s because I’m already strained.”⁷⁰

Increased Signs of Financial Vulnerability between BNPL Users vs Non-Users⁷¹



In fact, evidence suggests that some BNPL providers may actually be targeting more vulnerable consumers. The New York Fed found that 60 percent of survey respondents with credit scores above 760 had received a BNPL offer, compared to about 80 percent of those with credit scores below 620. In addition, consumers who had a credit application rejected or were delinquent on a loan over the past year were more likely to have been offered BNPL payment options.⁷²

⁶⁹ Consumer Reports nationally representative American Experiences Survey of 2,017 U.S. adults (December 2022), article.images.consumerreports.org/image/upload/v1672847923/prod/content/dam/surveys/Consumer_Reports_AES_December_2022.pdf.

⁷⁰ Consumer Reports, “Buy Now, Pay Later Online Discussion Panel,” May 2023, advocacy.consumerreports.org/wp-content/uploads/2023/05/BNPL-Discussion-Board-Jan2023-Report.pdf.

⁷¹ Consumer Reports, “Buy Now, Pay Later: A Case Study for a Digital Standard,” May 2023, <https://advocacy.consumerreports.org/wp-content/uploads/2023/05/Buy-Now-Pay-Later-A-Case-Study-for-a-Digital-Standard-1-2.pdf>.

⁷² Aidala, Felix, Daniel Mangrum, and Wilbert van der Klaauw. “Who Uses ‘Buy Now, Pay Later?’” Liberty Street Economics (blog). Federal Reserve Bank of New York. September 2023.

2. BNPL lenders should not be allowed to accept repayment by credit card, and should allow borrowers to revoke authorization for preauthorized repayment

In order to ensure ability to pay, enforce the Electronic Fund Transfer Act (EFTA), and prevent unfair, deceptive and abusive practices, BNPL lenders should be prohibited from offering repayment by credit card. Most BNPL lenders offer a choice of repayment by debit card or credit card. Offering the credit card option seems primarily to be a vehicle for evading the EFTA's ban on compulsory use of preauthorized payments.

Other BNPL lenders require use of a credit card.⁷³ Repayment by credit card evades the EFTA and runs a high risk of unfair, deceptive and abusive practices.

The EFTA prohibits any "person" from conditioning credit on repayment by preauthorized electronic fund transfers (PEFT).⁷⁴ The scope of credit covered by this provision is broader than that covered by TILA, and does not require that the credit be offered by a "creditor" under TILA, which would require a finance charge, have more than four installments, or be provided by a credit card issuer. The definition of "credit" in Regulation E includes the right to "purchase property or services and defer payment therefor."⁷⁵ That definition clearly covers the product offered by BNPL lenders.⁷⁶ Debit cards are electronic fund transfers within the scope of the EFTA, and an authorization for three biweekly debit card payments constitutes an agreement to repay by "preauthorized electronic fund transfer."

It appears that the only reason that most BNPL lenders offer the option of repayment by credit card is to be able to provide a choice to the consumer and avoid compelling repayment by preauthorized debit card payment. But there seems to be no benefit to the lender to accept repayment by credit card, which results in higher interchange fees. The credit card option also likely indicates more credit risk, because the consumer may have chosen the credit card option because they do not have enough funds in their bank account.

Repayment by credit card fundamentally undercuts the primary reason consumers are marketed and use BNPL credit: to avoid interest charges and longer-term debt. For those with revolving credit outstanding on their cards, BNPL charges will begin to accrue interest from the day they post, and the so-called "free" BNPL loan will not, in fact, be free. Revolvers are also more likely to pay interest on the BNPL charges for months into the future.

⁷³ See <https://www.splitit.com> (last visited July 29, 2024).

⁷⁴ 15 U.S.C. §1693k(1).

⁷⁵ Reg. E, 12 C.F.R. § 1005.2(f).

⁷⁶ While most of Regulation E only applies to financial institutions and the definition of "credit" refers to credit granted by a "financial institution," the compulsory use provision of Regulation E explicitly applies to any "person". 15 U.S.C. § 1693k; Reg. E, 12 C.F.R. § 1005.10(e) ("No financial institution or other person").

It is not clear why a consumer would want to use BNPL credit repaid by a credit card rather than using the credit card directly. The primary reason would appear to be when the consumer does not have the funds in their bank account and they are close to their credit limit so that full credit card purchase would max it out. In that case, the BNPL credit is merely added to unsustainable debt loads.

This practice – essentially using a credit card to pay off other debt – is a sign of inability to repay and is a practice that credit card issuers often do not permit with traditional credit card debt. For example, Visa and MasterCard do not permit a credit card to be paid off with a different credit card. This practice is also prohibited for certain debts like federal student loans.⁷⁷ The practice of repaying BNPL with a credit card has prompted two major credit card issuers to stop processing credit card payments to BNPL lenders, with one noting that BNPL loans can be risky for both the consumer and the bank.⁷⁸ BNPL credit is also boosting credit card debt.⁷⁹

In addition, the CFPB should enforce the EFTA's compulsory use ban and require BNPL lenders to provide consumers the choice of whether to preauthorize payments by EFT. While it may be permissible for BNPL lenders to require a debit card or other EFT for an initial down payment (which is not credit and is not "preauthorized"), for future payments consumers should have the choice of how to repay. Many consumers undoubtedly will authorize automatic payments as a matter of convenience and to avoid paying late. But the risk of nonpayment for those who do not preauthorize repayment will be an important disciplinary measure to give BNPL lenders the incentive to underwrite for ability to repay. And it is the law.

The CFPB should also clarify that consumers have the right to revoke the BNPL lender's preauthorization for debit card payments, as the regulator is requiring in the United Kingdom.⁸⁰ The EFTA clearly gives consumers the right to stop preauthorized payments through their bank.⁸¹ Some courts have held that this right encompasses the right to tell payees to stop debiting their accounts,⁸² and the Regulation E Official Interpretations lend support to this

⁷⁷ See, e.g., <https://www.chase.com/personal/credit-cards/education/basics/can-you-pay-off-a-loan-with-a-credit-card>

⁷⁸ Byron Kaye, Capital One stops 'risky' buy-now-pay-later credit card transactions, Reuters, Dec. 7, 2020, <https://www.reuters.com/article/us-capital-one-fin-payments/capital-one-stops-risky-buy-now-pay-later-credit-card-transactions-idUSKBN28H0OR?il=0>; Ann Carns, Chase to Bar Customers from Using Credit Cards for 'Pay Later' Loans, New York Times, July 26, 2024.

⁷⁹ Ballentine, Claire. Bloomberg News for American Banker, How buy now/pay later services are boosting American credit card debt (Mar. 18, 2022) ("A recent nationally representative Credit Karma survey of 1,028 adults found 22% of respondents used a credit card to pay off a BNPL account.")

⁸⁰ The UK FCA recently pressured four BNPL providers to make changes to their terms as the FCA was "concerned that some of the firms' terms did not make it clear how a consumer could cancel their [continuous payment authority]." Financial Conduct Authority, "FCA drives changes to Buy Now, Pay Later (BNPL) firms' contract terms" (Feb. 14, 2022), <https://www.fca.org.uk/news/statements/fca-drives-changes-buy-now-pay-later-bnpl-firms-contract-terms>.

⁸¹ See 15 U.S.C. § 1693d(a); Reg. E, 12 C.F.R. § 1005.10(c).

⁸² See, e.g., Johnson v. Tele-Cash, Inc., 82 F. Supp. 2d 264 (D. Del. 1999), *rev'd in part on other grounds*, 225 F.3d 366 (3d Cir. 2000) (compelling arbitration).

interpretation.⁸³ Some courts, however, have held that the EFTA only gives consumers the right to direct their bank, not the payee, to stop the payments.⁸⁴ But banks charge stop payment fees, and a stop payment order will not stop the payments from coming in, it will just cause them to bounce, which could cause confusion and problems for the payee as well. It makes much more sense to enable consumers to instruct payees like BNPL lenders to stop debiting their accounts in the first place, and clarifying this right would also help to enforce the ban on compulsory use of preauthorized payments.

3. BNPL lenders do not adequately assess ability to repay

Unlike traditional consumer lending products, BNPL lenders do not engage in significant underwriting.⁸⁵ In fact, rapid approval is one of the main selling points of BNPL. Typically, BNPL providers verify identity, require a debit card or credit card to make payments, and obtain the consumer's credit score or report using a "soft" inquiry.⁸⁶ The focus is primarily on assessing credit risk as opposed to assessing affordability for the consumer.⁸⁷ A BNPL lender also checks the consumer's previous payment history with that lender. Full visibility into use of competitors' BNPL credit is limited due to BNPL lender's failure to ask the consumer about other loans and to the lack of consistent reporting to consumer reporting agencies by BNPL providers. (Credit reporting is discussed in Section V below.) Most importantly, BNPL lenders do not ask the consumer information about their income, assets, or other debts.

BNPL lenders have insufficient incentive to ensure affordable lending because they use coercive repayment methods that ensure the ability to collect even if the consumer struggles to repay while managing other expenses. BNPL lenders typically require a debit card or credit card to be linked to the borrower's account and require customers to authorize auto-pay.⁸⁸ As discussed in Section IV.B.6 below, reliance on autopay reduces incentives to underwrite since the lender can expect to debit the account even when that leaves the borrower with insufficient funds for other expenses.

Some lenders such as PerPay also get direct access to the consumer's paycheck before it even reaches the consumer's bank account by using split direct deposit or payroll deduction.⁸⁹ That

⁸³ If a consumer directs the bank to stop a payment, the Official Interpretations allows the bank to request a copy of the consumer's revocation of the payee's authorization, and to stop blocking the payment if the consumer does not supply that revocation in fourteen days. See Reg. E, Official Staff Interpretations § 1005.10(c)-2. It would make no sense to require the consumer to supply a revocation if there were no right to send that revocation.

⁸⁴ See, e.g., *Estep v. Reliable Credit Assoc.*, 2015 WL 3797243 (W.D. Wash. June 10, 2015).

⁸⁵ CFPB reports that BNPL providers only require that the borrower be at least 18 years old, have a mobile phone number, and have a debit or credit card to make payments, and ensure they can validate the borrower's identity, CFPB, BNPL 2021.

⁸⁶ *Id.*

⁸⁷ Financial Conduct Authority, "The Woolard Review - A review of change and innovation in the unsecured credit market," February 2021. <https://www.fca.org.uk/publication/corporate/woolard-review-report.pdf>

⁸⁸ Issues posed by compulsory use of preauthorized electronic fund transfers are discussed in Section II(C)(6) below.

⁸⁹ See e.g., <https://help.perpay.com/en/articles/450248-setting-up-your-payroll-payment>. (last visited July 29, 2024)

virtually guarantees the ability to collect and further reduces any check on irresponsible lending. The use of payments from payroll that do not stop when the purchase is repaid⁹⁰ also poses the risk of unfair, deceptive and abusive practices.

4. Easy availability of BNPL to financially vulnerable consumers can lead to over-extension and over-spending

The dangerous combination of easy and ubiquitous availability of BNPL to financially vulnerable consumers without adequate assessment of the ability to repay can and does lead to over-extension and harm to financial well-being. Overly easy access to BNPL can lead consumers to make purchases they otherwise couldn't afford, take out multiple loans, and miss payments. BNPL has also been shown to lead consumers to over-spend.

Many BNPL users indicate that they use BNPL credit to purchase something they could not afford otherwise. For example, a 2021 survey, Buy Now, Pay Later Statistics and User Habits by C+R Research, found that 59% of respondents said they purchased an unnecessary item that they otherwise couldn't afford.⁹¹ Similarly, in both CR's and The Ascent's 2022 surveys, the top reason BNPL users cited for using BNPL was to make a purchase that the consumer could not afford to make otherwise, similar to credit cards.⁹² But unlike a credit card, BNPL requires full repayment quickly, in little more than one monthly income and expense cycle, so purchasing an item using BNPL credit does not necessarily make it any more affordable.

BNPL is particularly appealing to consumers who are already over-extended. Some BNPL lenders claim they are especially helping consumers who cannot qualify for other credit. Yet a consumer who does not qualify for other credit is often overburdened by debt already and cannot afford to repay more credit. A 2022 US PIRG report indicated that 33% of BNPL users favored BNPL over credit cards because of the "easy" approval process, and 33% stated their credit was already maxed out.⁹³ Additionally, 22% indicated they had a low credit limit available for purchases.⁹⁴ Similarly, recent research from the Federal Reserve Bank of Boston found that

⁹⁰ See <https://help.perpay.com/en/articles/5949565-stopping-your-payments> (last visited July 29, 2024) ("Perpay is not affiliated with your payroll provider, so we cannot automatically start or stop your payments for you. Once you have set up a direct deposit allotment to Perpay in your payroll system, those payments will continue to be sent to your Perpay account until you or your employer authorizes a change.").

⁹¹ C+R Research. "Buy Now, Pay Later Statistics and User Habits." [Buy Now, Pay Later Statistics and User Habits – C+R Research](#) (last visited July 29, 2024)

⁹² In CR's survey, the top reason for using BNPL cited by 45% of BNPL users was "*I didn't have enough money to purchase what I wanted, so this enabled me to afford it.*" See "Buy Now, Pay Later Services," Consumer Reports nationally representative internet survey of 2,013 U.S. buy now, pay later users (August 2022), [advocacy.consumerreports.org/wp-content/uploads/2022/11/2022-Consumer-Reports-Buy-Now-Pay-Later-Survey-Report.pdf](https://www.consumerreports.org/wp-content/uploads/2022/11/2022-Consumer-Reports-Buy-Now-Pay-Later-Survey-Report.pdf). In The Ascent's survey, the top reason for using BNPL services cited by 45% of respondents was "*to make purchases that otherwise wouldn't fit in my budget.*" See "Study: Buy Now, Pay Later Services Grow in Popularity," The Ascent nationally representative survey of 2,000 U.S. buy now, pay later users (June 2022), www.foo.com/the-ascent/research/buy-now-pay-later-statistics.

⁹³ The Hidden Costs of "Buy Now, Pay Later" US PIRG, March 2022, ([BNPL REPORT USPIRG 0.pdf](#))

⁹⁴ *Id.*

BNPL users are significantly more likely to revolve on their credit cards (71 percent of users revolved on their credit cards in 2023, compared with 40 percent of non-users).⁹⁵ BNPL users were also more likely to have reached the credit limits on their credit cards as BNPL users were found to be more likely than non-users to have paid an over-credit-limit fee for their credit card, preventing them from further borrowing.⁹⁶

Existing data shows that some consumers are taking on multiple BNPL loans and missing payments, a sign of increasing over-indebtedness. Given the ease of obtaining a BNPL loan, the lack of a full assessment of ability to repay, and inconsistent and limited credit reporting, consumers may end up taking out multiple BNPL loans concurrently, further raising the risk of over-extension. CR's August 2022 survey showed:

- 17% of BNPL users had two concurrent BNPL installments,
- 7% had three,
- 7% had four,
- 1% had five, and
- 2% had six or more.⁹⁷

One participant in CR's discussion panel was not even aware that she had three BNPL loans open (at one BNPL provider) until she checked her account as part of the research exercise.⁹⁸

Surveys have also found that a sizeable portion of BNPL users have missed payments on BNPL loans. According to a recent survey conducted for Bloomberg News by Harris Poll, a shocking 43% of those who owe money to BNPL services said they were behind on payments.⁹⁹ Another source found that over one in four BNPL users have missed a payment (14% of BNPL users have missed one payment, while 12% have missed more than one payment).¹⁰⁰

Financially vulnerable consumers and consumers with concurrent BNPL loans are much more likely to have missed payments. The Financial Health Network found that financially vulnerable users were three times as likely as overall users to report difficulty in making

⁹⁵ Stavins, Joanna. "Buy Now, Pay Later: Who Uses It and Why." Federal Reserve Bank of Boston, May 2024. [https://www.bostonfed.org/publications/current-policy-perspectives/2024/buy-now-pay-later-who-uses-it-why.aspx#:~:text=Buy%20now%2C%20pay%20later%20\(BNPL,%2C%20Black%2C%20and%20Latino%20consumers.](https://www.bostonfed.org/publications/current-policy-perspectives/2024/buy-now-pay-later-who-uses-it-why.aspx#:~:text=Buy%20now%2C%20pay%20later%20(BNPL,%2C%20Black%2C%20and%20Latino%20consumers.)

⁹⁶ *Id.*

⁹⁷ "Buy Now, Pay Later Services," Consumer Reports nationally representative internet survey of 2,013 U.S. buy now, pay later users (August 2022), advocacy.consumerreports.org/wp-content/uploads/2022/11/2022-Consumer-Reports-Buy-Now-Pay-Later-Survey-Report.pdf.

⁹⁸ Consumer Reports, "Buy Now, Pay Later Online Discussion Panel," May 2023, advocacy.consumerreports.org/wp-content/uploads/2023/05/BNPL-Discussion-Board-Jan2023-Report.pdf.

⁹⁹ The Harris Poll, America This Week: Buy Now Pay Later's Dark Side, Crypto Is On The Ballot, Forty Years of Student Loans and Parents Vent. (May 15, 2024), <https://theharrispoll.com/briefs/america-this-week-wave-220/>.

¹⁰⁰ Piplsay survey of 31,000 U.S. consumers from September 2020-September 2021. Cited in Julian Alcazar and Terri Bradford, "The Appeal and Proliferation of Buy Now, Pay Later: Consumer and Merchant Perspectives," Federal Reserve Bank of Kansas City, November 2021, [http://www.kansascityfed.org/research/payments-system-research-briefings/the-appeal-and-proliferation-of-buy-now-pay-later-consumer-and-merchant-perspectives](https://www.kansascityfed.org/research/payments-system-research-briefings/the-appeal-and-proliferation-of-buy-now-pay-later-consumer-and-merchant-perspectives).

payments,¹⁰¹ while CR's August 2022 survey found that BNPL users with four or more concurrent BNPL loans were twice as likely to have missed a payment compared with those with fewer concurrent BNPL loans.¹⁰²

In addition to over-extension, BNPL can induce consumers to spend more than they intended. BNPL is often engineered to exploit temptation bias and encourage impulse buying, leading consumers to spend more and to spend more frequently. Data shows that it is quite successful in this regard:

- One survey found that nearly half of BNPL borrowers spent 10 percent to over-40 percent more using BNPL than with a credit card.¹⁰³
- Recent research found that customers spend 20 percent more when BNPL is available, with less creditworthy customers being most responsive to BNPL offers.¹⁰⁴
- A 2022 Financial Health Survey found that 30% of BNPL users reported having spent more than they would have if BNPL was not available, and 34% of BNPL users said they would not have made the purchase at all if the BNPL option had not been available.¹⁰⁵

In addition, numerous surveys indicate that between 20% and 50% of BNPL users regret their purchases afterward.¹⁰⁶

In fact, the concrete impact that BNPL has on how much consumers end up spending on a purchase (or purchases) is often touted by BNPL providers in materials aimed at merchants and investors. For example, Klarna claims that consumers typically spend 68% more when using BNPL.¹⁰⁷ Affirm similarly notes that its merchant clients experience an 85% increase in Average Order Value (AOV) when consumers opt to use its BNPL plan over other payment methods.¹⁰⁸

¹⁰¹ Hannah Gdalmán, Meghan Greene, and Necati Celik, "Buy Now, Pay Later: Implications for Financial Health," Financial Health Network, March 2022, finhealthnetwork.org/wp-content/uploads/2022/03/Buy-Now-Pay-Later-Brief-2022.pdf.

¹⁰² "Buy Now, Pay Later Services," Consumer Reports nationally representative internet survey of 2,013 U.S. buy now, pay later users (August 2022), advocacy.consumerreports.org/wp-content/uploads/2022/11/2022-Consumer-Reports-Buy-Now-Pay-Later-Survey-Report.pdf.

¹⁰³ Consumer Reports, 2021 (citing Cardify.ai survey).

¹⁰⁴ Berg, Tobias and Burg, Valentin and Keil, Jan and Puri, Manju, The Economics of "Buy Now, Pay Later": A Merchant's Perspective (May 15, 2023). Available at SSRN: <https://ssrn.com/abstract=4448715> or <http://dx.doi.org/10.2139/ssrn.4448715>.

¹⁰⁵ Hannah Gdalmán, Meghan Greene, and Necati Celik, "Buy Now, Pay Later: Implications for Financial Health," Financial Health Network, March 2022, finhealthnetwork.org/wp-content/uploads/2022/03/Buy-Now-Pay-Later-Brief-2022.pdf.

¹⁰⁶ Consumer Financial Protection Bureau, "Buy Now, Pay Later: Market Trends and Consumer Impacts," September 2022, files.consumerfinance.gov/f/documents/cfpb_buy-now-pay-later-market-trends-consumer-impacts_report_2022-09.pdf.

¹⁰⁷ Klarna, "Deep Dive," <https://www.klarna.com/assets/sites/2/2020/01/21085652/klarna-deep-dive.pdf>.

¹⁰⁸ Affirm, Fiscal Q4 2021 "Investor Presentation," Fiscal Q4 2021, investors.affirm.com/static-files/18f24d87-9ccd-4e3d-9253-dff937441677.

Academic research has found that access to BNPL even leads to increases in a consumer's total spending, beyond simply the item purchased using BNPL.¹⁰⁹

A business model that revolves around driving borrowers to purchase items they would not otherwise buy or spending more than they had intended is concerning in and of itself. This concern is heightened further when coupled with the lack of underwriting for affordability and the user base of BNPL, which is already in a financially vulnerable state.

5. The consequences of becoming over-extended due to BNPL loans can be significant

The consequences of becoming over-extended on BNPL loans can be significant. BNPL use increases the likelihood of incurring late fees, overdraft fees and nonsufficient funds (NSF) fees.¹¹⁰ BNPL payments can also increase difficulties making payments on other essential bills, among other harms to BNPL users' financial well-being.

As reflected in the below table, substantial portions of BNPL users who missed payments reported having been charged a late fee, as well as having received a letter from a debt collection agency or being visited by debt collectors. As further discussed in Section IV, late fees can add up to a substantial cost, particularly in relation to the size of BNPL debt.

¹⁰⁹ The report found that BNPL use causes a permanent increase in total spending of around \$60 per week, primarily concentrated in retail spending. See Marco Di Maggio, Emily Williams, and Justin Katz, "Buy Now, Pay Later Credit: User Characteristics and Effects on Spending Patterns," National Bureau of Economic Research, Working Paper 30508, September 2022, www.nber.org/papers/w30508.

¹¹⁰ *Id.*

Missed payment consequences by BNPL provider¹¹¹

Table 2: Breakdown of consequences BNPL users who had missed a payment claimed to have experienced, by brand

	Klarna	ClearPay	Laybuy	OpenPay	Payl8r	Flava
Base	138	100	74	86	64	65
I have had my account blocked and/or suspended	37%	39%	47%	51%	48%	49%
I was charged a late fee	Not applicable	54%	57%	58%	53%	Not applicable
I received a letter from a debt collection agency	51%	39%	51%	49%	64%	Not applicable
I was visited by debt collectors	39%	34%	43%	55%*	55%	Not applicable
My credit rating was damaged	Not applicable	42%	54%	Not applicable	55%	Not applicable

Becoming over-extended on BNPL can also lead to overdrafts and bounced payments, which trigger additional fees that financially vulnerable consumers can ill afford. For consumers struggling with unaffordable payments, BNPL payments by debit card could trigger overdraft fees. A 2022 survey found that BNPL users were significantly more likely to overdraft than non-users. The survey found that one in three BNPL users reported over-drafting in a single month, more than twice the rate of non-users.¹¹² A 2023 survey of BNPL users in California found that 37% had incurred an overdraft fee in the last 6 months.¹¹³

Research has found that “new BNPL users experience rapid increases in bank overdraft charges and credit card interest and fees, as compared to non-users,” which is consistent with declines in leading indicators of financial health.¹¹⁴ Whether this disparity is because BNPL payments caused the overdrafts or because BNPL users are more likely to be struggling with their finances is not clear. Either way, the implication is that BNPL credit is being provided to some consumers who cannot afford to repay it.

¹¹¹ *Id.* at 23.

¹¹² See Morning Consult, ‘Buy Now, Pay Later’ Users Significantly More Likely to Overdraft Than Nonusers (Mar. 2, 2022), <https://morningconsult.com/2022/03/02/buy-now-pay-later-bnpl-overdraft-data/>.

¹¹³ Gittleman, Rachel, Lucia Mattox, and Peter Smith. “Issue Brief: Consumer Understanding of Buy Now, Pay Later in California.” Center for Responsible Lending and Consumer Federation of America, October 2023. <https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-cfa-bnpl-issuebrief-oct2023.pdf>

¹¹⁴ Ed deHaan, Jungbae Kim, Ben Lourie, and Chenqi Zhu, “Buy Now Pay (Pain?) Later,” SSRN, September 27, 2022, papers.ssrn.com/sol3/papers.cfm?abstract_id=4230633.

BNPL payments may also be returned for insufficient funds, triggering not only a late fee but also an NSF fee from the bank. Some BNPL providers may also charge returned payments fees, which are triggered when a payment is returned unpaid due to insufficient funds.¹¹⁵ BNPL users are actually at risk of incurring multiple fees for failed payments, because BNPL lenders typically attempt to reauthorize failed payments, sometimes up to eight times for a single installment payment.¹¹⁶ In fact, numerous BNPL providers have faced lawsuits in the past, including a class action against PayPal alleging that PayPal failed to disclose that use of the product might trigger overdraft and/or NSF fees.¹¹⁷ Beyond these cascading fees themselves, overdraft and NSF fees are highly associated with closed bank accounts and exclusion from the financial system.¹¹⁸

Given that BNPL users are already more financially vulnerable compared to non-users, over-extended BNPL users may also be left without sufficient funds for essential living expenses or debts.¹¹⁹ Sustained usage of BNPL has been shown to harm consumers' ability to meet other obligations and to trap consumers in debt cycles. As noted by the CFPB, "frequent BNPL usage may threaten borrowers' ability to meet non-BNPL financial obligations, such as rent, utilities, mortgages, auto loans, and student loans."¹²⁰ Research by ASIC found that 20% of BNPL users cut back or went without essential items in order to make payments, while 15% of people took out other loans to make a BNPL payment.¹²¹ In the U.S., one survey found that 32% of respondents had to "delay or skip paying an essential bill due to the payments on [their] Buy Now Pay Later plans."¹²²

¹¹⁵ See 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)].

¹¹⁶ Consumer Financial Protection Bureau, "Buy Now, Pay Later: Market Trends and Consumer Impacts," September 2022, files.consumerfinance.gov/f/documents/cfpb_buy-now-pay-later-market-trends-consumer-impacts_report_2022-09.pdf.

¹¹⁷ PayPal Faces \$5M Suit Over 'Buy-Now, Pay-Later' Product - Law360

¹¹⁸ Center for Responsible Lending, *Overdraft Fees Cause Financial Exclusion*, July 21, 2021, <https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-testimony-overdraft-financial-exclusion-21jul2021.pdf>

¹¹⁹ One major U.K. bank reported that, in November 2020, 10% of its customers who had made a payment to two large BNPL providers had exceeded their overdraft allowance in the same period. Financial Conduct Authority, *The Woolard Review – A review of change and innovation in the unsecured credit market*, at 49 (Feb. 2, 2021), <https://www.fca.org.uk/publication/corporate/woolard-review-report.pdf> ("Woolard Review").

¹²⁰ Consumer Financial Protection Bureau, "Buy Now, Pay Later: Market Trends and Consumer Impacts," September 2022, files.consumerfinance.gov/f/documents/cfpb_buy-now-pay-later-market-trends-consumer-impacts_report_2022-09.pdf.

¹²¹ Australian Securities & Investments Commission, "Buy now pay later: An industry update," Report 672, November 2020, download.asic.gov.au/media/5852803/rep672-published-16-november-2020-2.pdf.

¹²² "Survey: Buy Now Pay Later Plans Fuel Debt Struggles," DebtHammer nationally representative survey of 1,050 U.S. buy now, pay later plan users (February 2022), debthammer.org/buy-now-pay-later-survey.

6. BNPL should be required to assess applicants' ability to repay

The harms described in the preceding sections provide compelling reasons why BNPL providers should be required to assess applicants' ability to repay. To be sure, there are consumers who can use BNPL safely, particularly those who are more financially secure and are utilizing BNPL primarily for cash flow management purposes. But as the above sections clearly illustrate, many BNPL consumers are financially vulnerable. Easy accessibility to BNPL can and does lead to harm to their financial well-being. Disregarding the current financial status of such consumers, or even targeting them with BNPL offers, is an irresponsible practice. Assessing the ability to repay is the core component of responsible lending and should be mandatory.

Under Subpart G of TILA, credit card issuers are required to consider the consumer's ability to make payments based on the consumer's income or assets and the consumer's current obligations.¹²³ Such requirements should be applied to BNPL lenders, as BNPL poses the same risk of unaffordable debt that Congress intended such requirements to prevent. Requiring BNPL providers to assess the ability to repay will promote responsible lending practices and prevent BNPL providers from targeting financially vulnerable consumers.

The Interpretive Rule recognizes that BNPL lenders are card issuers and creditors. As discussed above, BNPL credit clearly meets two elements of the definition of open-end credit, and often BNPL products have charges that should meet the third element as well. As such, Subpart G of TILA should apply to BNPL lenders, in particular the requirement to assess the ability to repay.

But even if the Credit CARD Act ability to repay provision does not apply directly to BNPL providers, lending without regard to ability to repay should be considered an unfair, deceptive or abusive practice. Federal law and regulatory guidance have long insisted that proper underwriting is a critical feature of responsible small dollar lending.¹²⁴

Other countries have recognized the importance of underwriting to a responsible BNPL market. For example, Australia has introduced draft legislation to bring BNPL under the existing National Consumer Credit Protection Act (Credit Act) and National Credit Code, which include obligations on disclosure, responsible lending, and dispute resolution.¹²⁵ Under the draft legislation, BNPL providers will be required to make reasonable efforts to assess the suitability of a BNPL product

¹²³ See 15 U.S.C. § 1665e ("A card issuer may not open any credit card account for any consumer under an open end consumer credit plan, or increase any credit limit applicable to such account, unless the card issuer considers the ability of the consumer to make the required payments under the terms of such account."); Reg. Z, 12 C.F.R. §1026.51(a)(1)(i) (credit card issuers must consider "the consumer's ability to make the required minimum periodic payments under the terms of the account based on the consumer's income or assets and the consumer's current obligations.").

¹²⁴ See Lauren Saunders, NCLC, Federal Ability-To-Repay Requirements for Small Dollar Loans (Nov. 21, 2021), <https://www.nclc.org/resources/federal-ability-to-repay-requirements-for-small-dollar-loans/>.

¹²⁵ Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024, https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bld=r7199.

for a prospective customer, including an assessment of affordability. BNPL providers will be required to make inquiries about and verify the consumer's financial situation, including information about the consumer's income, expenditures, and other small-dollar credit contracts. What are considered "reasonable" efforts will partly be determined by factors such as the BNPL product design (e.g. amount of credit made available, amount of fees and when they are payable, time provided for making repayment), the target market of the BNPL product (including whether it includes financially vulnerable consumers), and whether the BNPL provider has policies to reduce the risk of unaffordable lending and to mitigate harms from unaffordable lending when it occurs.

The United Kingdom government has also announced its intent to bring BNPL under its Financial Conduct Authority (FCA) regulation and to subject BNPL to various regulatory obligations, including calling for tailored application of the FCA's current rules on creditworthiness assessments.

Developments in the U.S. clearly indicate that it is feasible for BNPL to consider ability to repay. For example, major BNPL lender Klarna gives consumers the option to share bank account transactional data that Klarna will use to determine their ability to repay.¹²⁶ If BNPL providers begin reporting data in a consistent fashion to credit bureaus (something we are far from, as discussed below), that will also make it easier for BNPL providers to consider whether consumers are overextending themselves with BNPL credit.

The TILA ability-to-repay requirements are not onerous and have not impeded a robust credit card market, including for subprime consumers. Nor have they prevented stores from allowing consumers to open up credit cards quickly on the spot at the cash register. If anything, the TILA credit card ability-to-repay requirements are too lax, allowing too many consumers to get too deep into unaffordable credit card debt. There is no reason why these minimal requirements should not also apply to BNPL providers, given the similar risks BNPL credit poses. Other responsible lending measures that could also be beneficial include caps on the number of concurrent BNPL loans a consumer can have at a BNPL provider, which we understand some BNPL providers currently have in place as an internal policy, as well as clear warnings to consumers that BNPL is a credit product with obligations to repay.

C. BNPL credit should have reasonable and proportional penalty fees

As noted above, a significant number of BNPL users miss payments on their BNPL loans and incur late fees. These fees can add up to significant costs for a small loan. If such fees are not linked to actual provider costs related to the BNPL product and are being used to generate revenue, these fee practices raise the same problems that led Congress to require that credit

¹²⁶ See <https://www.klarna.com/us/customer-service/how-can-i-get-approved-to-pay-with-klarna/>. (last visited July 29, 2024)

card late fees be reasonable and proportional to costs. As discussed above, we believe that BNPL credit that has unreasonable or disproportional late fees satisfies the criteria for open-end credit and should be subject to the Credit CARD Act late fee provisions. But even if it does not, such fees are a way of disguising the cost of credit and are unfair, deceptive and abusive.

BNPL late fee policies vary. Afterpay states that it may charge up to a maximum of \$8 per missed payment,¹²⁷ while Zip charges up to \$7.¹²⁸ Several lenders reserve the right to charge multiple late fees for a single missed installment.¹²⁹ For example, Four charges \$7 the day after the due date and another \$8 if the missed payment is not corrected within seven days.¹³⁰ Multiple fees for the same payment is an obviously problematic practice and is prohibited by the penalty fee rules for credit cards covered under the Credit CARD Act.¹³¹ In contrast, Affirm and PayPal do not charge any late fees.¹³²

Given the small size of the average BNPL loan, late fees can add up to a significant cost, particularly if flat fees and/or multiple late fees are charged. One participant in CR's discussion panel on BNPL indicated that they were charged a \$40 late fee on a \$70 purchase.¹³³ While some BNPL lenders cap late fees based on the order amount or the amount of the missed payment, such as Afterpay (which caps fees at 25% of the order amount)¹³⁴ and Zip (which caps fees at a maximum of \$7 per late payment),¹³⁵ even these capped late fees may result in the equivalent of a high APR for an ostensibly "free" product.

For example, consider a consumer who made a \$300 purchase, paid \$75 up front and had three biweekly payments of \$75. If a \$25 late fee was imposed for each of those three payments, that would amount to an annual percentage rate of about 413% APR. In Australia, Afterpay's total late fees on a portfolio-wide basis was found to amount to up to 68% APR.¹³⁶

¹²⁷ Afterpay, "Installment Agreement," www.afterpay.com/en-US/installment-agreement (last visited July 8, 2024).

¹²⁸ Zip, "What happens if I don't pay on time?" help.us.zip.co/hc/en-us/articles/360040937312--What-happens-if-I-don-t-pay-on-time (last visited July 8, 2024).

¹²⁹ Consumer Financial Protection Bureau, "Buy Now, Pay Later: Market Trends and Consumer Impacts," September 2022, files.consumerfinance.gov/f/documents/cfpb_buy-now-pay-later-market-trends-consumer-impacts_report_2022-09.pdf.

¹³⁰ <https://www.paywithfour.com/legal/user-agreement> (last visited July 30, 2024).

¹³¹ Reg. Z § 1026.52(b)(2)(ii); Official Interpretations § 1026.52(b)(2)(ii).

¹³² Tom Akana, "Buy Now, Pay Later: Survey Evidence of Consumer Adoption and Attitudes," Federal Reserve Bank of Philadelphia, June 2022, www.philadelphiafed.org/-/media/frbp/assets/consumer-finance/discussion-papers/dp22-02.pdf. It appears that Klarna has also moved away from charging late fees, per the discussion in its 2021 annual report. See Klarna, "Annual Report 2021," www.klarna.com/assets/sites/15/2022/03/28054307/Klarna-Bank-AB-Annual-report-2021-EN.pdf.

¹³³ Consumer Reports, "Buy Now, Pay Later Online Discussion Panel," May 2023, <https://advocacy.consumerreports.org/wp-content/uploads/2023/05/BNPL-Discussion-Board-Jan2023-Report.pdf>.

¹³⁴ Afterpay, "Installment Agreement," www.afterpay.com/en-US/installment-agreement (last visited July 8, 2024).

¹³⁵ Zip, "Zip Customer Agreement," zip.co/us/quadpay-terms-of-service (last visited July 8, 2024). Note that the stated \$7 cap contradicts information found elsewhere on Zip's website stating late fees of up to \$10.

¹³⁶ McLean Roche Consulting Group, Global Payments 2020-30, A seismic shift in the next ten years, Submission to Treasury Inquiry, at 39, https://treasury.gov.au/sites/default/files/2021-02/147719_mclean-roche_0.pdf.

A wide range of other fees or charges can also be incurred by BNPL users. Sezzle charges fees when more than one payment for an order is rescheduled, reactivation fees when a payment has failed, and convenience fees when credit, debit, or prepaid benefit cards are used for a scheduled payment.¹³⁷ In addition to late fees, some providers may also charge interest on the outstanding balance for missed or late payments. CR found that 28% of consumers with missed payments for BNPL loans said they were charged interest.¹³⁸

Some BNPL providers appear to have significant revenue from late fees. Research by the UK FCA found that for some providers that charge late fees and other penalties, these fees can make up a significant portion of the company's revenue.¹³⁹ Data from Australia found that, among its eight largest BNPL lenders, bad debts amounted to 30% of revenues.¹⁴⁰ To the extent that late fees are used as a profit center, and BNPL providers are targeting consumers they know have a significant chance of paying late, these fees are essentially a finance charge, a hidden form of interest that disguises the cost of credit.

The Credit CARD Act provisions of TILA establish a requirement that penalty fees be "reasonable and proportional" to the consumer's omission or violation.¹⁴¹ This requirement was adopted as a result of abuses by credit card companies that offered credit to consumers knowing they would struggle in order to generate revenue from over-the-limit and late fees.¹⁴²

This is exactly the concern with BNPL late fees, and such requirements should be applied to BNPL as well, in order to establish a reasonable outer limit on late fees. As noted above, many BNPL accounts should be considered open-ended credit and applicable provisions from Subpart G should be applied. This includes both the limitation to reasonable and proportional penalty fees as well as prohibitions on charging multiple penalty fees for a single event or transaction. For example, Australia's draft BNPL regulation prohibits BNPL providers from charging new customers default fees exceeding \$10 per month.¹⁴³

¹³⁷ Sezzle, "Why was I charged a fee?" shopper-help.sezzle.com/hc/en-us/articles/360046781511-Why-was-I-charged-a-fee (last visited July 8, 2024).

¹³⁸ "Buy Now, Pay Later Services," Consumer Reports nationally representative internet survey of 2,013 U.S. buy now, pay later users (August 2022), advocacy.consumerreports.org/wp-content/uploads/2022/11/2022-Consumer-Reports-Buy-Now-Pay-Later-Survey-Report.pdf.

¹³⁹ 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.

¹⁴⁰ McLean Roche Consulting Group, *Global Payments 2020-30, A seismic shift in the next ten years*, Submission to Treasury Inquiry, at 39, https://treasury.gov.au/sites/default/files/2021-02/147719_mclean-roche_0.pdf.

¹⁴¹ 15 U.S.C. § 1665d(a); Reg. Z § 1026.52(b) and (b)(1).

¹⁴² See, e.g., National Consumer Law Center, *Consumer Credit Regulation § 8.4.1* (3d ed. 2020), updated at www.nclc.org/library; Carolyn Carter, Elizabeth Renuart, Margot Saunders & Chi Chi Wu, *The Credit Card Market and Regulation: In Need of Repair*, 10 N.C. Banking Inst. 23 (2006), <https://scholarship.law.unc.edu/ncbi/vol10/iss1/4>; Government Accountability Office, *Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers*, GAO-06-929, at 20–21 (Sept. 2006), available at www.gao.gov.

¹⁴³ National Consumer Credit Protection Amendment (Low Cost Credit) Regulations 2024 (4/3/24 Exposure Draft), <https://treasury.gov.au/sites/default/files/2024-03/c2024-504798-ed-regs.pdf>

The CFPB should assess what is a reasonable and proportional safe harbor late fee for BNPL credit, which should be no higher than the \$8 per month limit recently established for credit cards. In addition, the fee should be capped at a monthly basis for all purchases under a single account rather than biweekly for each payment on each transaction.

More broadly, any revenue models that depend on late fees may be considered an unfair, deceptive or abusive practice. When lenders profit from consumers who struggle, it leads to misaligned incentives and unaffordable, predatory lending. Revenue models should depend on clear, upfront pricing rather than hidden, deceptive back-end pricing through fees that consumers do not anticipate or think they will incur.

V. The CFPB Should Ensure that Any BNPL Credit Reporting Benefits Consumers

A. BNPL reporting carries significant risks for consumers but limited positive benefit

BNPL products are sometimes touted as credit building products. But the credit building aspects of BNPL are limited given that very few of its borrowers are “credit invisible.” For example, the CFPB found that far from being credit-invisible, 88 percent of BNPL users have an open credit card, 13 percentage points more than non-users.¹⁴⁴ In the Equifax BNPL study, only 1% of the consumers were not scoreable.¹⁴⁵ And more importantly, as discussed in the next section, at most only one of the nationwide CRAs includes BNPL loans in the calculation of the credit scores.

On the flip side, there are a lot of risks to consumers' credit reports and scores, or potentially limited benefit, depending on the manner in which BNPL data is reported by furnishers, incorporated by the nationwide consumer reporting agencies (CRAs), and used by creditors. Depending on whether and how BNPL credit is reported, it could either improve or harm credit scores, even for consumers who make their BNPL payments on time. For consumers who struggle with BNPL credit, the negative impact on their credit scores is clear.

The reporting of BNPL accounts can result in substantial damage to a credit history if the consumer is unable to pay the debt. In a 2022 study from Equifax, the inclusion of a delinquent BNPL account resulted in a credit score drop of up to 59 points.¹⁴⁶ And even if the BNPL lender

¹⁴⁴ Consumer Financial Protection Bureau, “Consumer Use of Buy Now, Pay Later: Insights from the CFPB Making Ends Meet Survey,” March 2023.

¹⁴⁵ Equifax BNPL Powerpoint at slide 52.

¹⁴⁶ Equifax Powerpoint Presentation, Buy Now, Pay Later Credit Score Impact Analysis, Feb. 10, 2022, <https://www.equifax.com/resource/-/asset/presentation/market-pulse-buy-now-pay-later-credit-score-impact-analysis-webinar-slides/> (hereinafter “Equifax BNPL Powerpoint”), at slide 52.

does not regularly report to the nationwide CRAs, a defaulted BNPL can result in credit damage because the lender can place or sell the debt with a collection agency that will report it is a collection tradeline, which is inherently negative.

The potential damage from BNPL credit accounts is even more troubling given that the vast majority of BNPL borrowers appear to be subprime and financially vulnerable, as discussed in Section IV.B.1 above. Adding more debt to their credit reports will likely harm their credit scores if that debt results in missed payments or defaults, or if it is reported as closed-end installment lending, as discussed below.

Reporting BNPL credit to the nationwide CRAs will most likely only benefit consumers if it is reported as open-end credit. That is another reason we urge the CFPB to treat most BNPL credit as open-end credit: to enhance the likelihood that BNPL credit will be reported in a fashion that will help consumers. We also urge the CFPB to use its other tools to encourage reporting BNPL credit as open-end credit.

B. BNPL should be reported as open-end credit so there is a potential benefit to consumers

The nationwide CRAs will accept reporting of BNPL products but not all of them include these loans in the calculation of credit scores for now. Experian¹⁴⁷ and Trans Union¹⁴⁸ do not include BNPL loans in credit scores, while it is unclear what Equifax does.¹⁴⁹ More importantly, most BNPL lenders do *not* appear to furnish regular account information to the nationwide CRAs.¹⁵⁰ One of the most prominent companies that had announced plans to furnish to the nationwide CRAs (Apple) subsequently discontinued its BNPL offering.¹⁵¹ As the CFPB knows, furnishing information to the nationwide CRAs is entirely voluntary. The CFPB has encouraged BNPL lenders to furnish both positive and negative data to the CRAs.¹⁵² But we do not encourage

¹⁴⁷ Experian, What You Need to Know About Buy Now, Pay Later at Experian, March 15, 2024, <https://www.experian.com/blogs/ask-experian/what-is-buy-now-pay-later-and-does-it-impact-my-credit/>

¹⁴⁸ Trina Paul, BNPL loans will soon be on your credit report: Here's what you need to know, May 4, 2021, <https://www.cNBC.com/select/bnpl-loans-to-be-reported-on-credit-reports/>

¹⁴⁹ Equifax issued a study finding that BNPL can boost a credit score by 13 points. Equifax Powerpoint Presentation, Buy Now, Pay Later Credit Score Impact Analysis, Feb. 10, 2022, <https://www.equifax.com/resource/-/asset/presentation/market-pulse-buy-now-pay-later-credit-score-impact-analysis-webinar-slides/> But later on, it confusingly stated "As pay-in-four BNPL loans are reported, Equifax acknowledges that both our customers and scoring models need time to adjust. Equifax has the capability to suppress - or "hold" - BNPL pay-in-four tradelines from existing scoring models". Equifax, How does Buy Now, Pay Later Reporting Work? April 10, 2024 , <https://www.equifax.com/newsroom/all-news/-/story/how-does-buy-now-pay-later-reporting-work/>

¹⁵⁰ Jessica Dickler, Buy now, pay later credit reporting moves forward, but a long journey lies ahead, CNBC.com, May 10, 2024, <https://www.cNBC.com/2024/05/10/how-buy-now-pay-later-loans-could-affect-your-credit-score.html>

¹⁵¹ Kate Fitzgerald, Lessons learned from Apple Pay Later for BNPL lenders and banks, American Banker, June 18, 2024, <https://www.americanbanker.com/payments/news/lessons-learned-from-apple-pay-later-for-bnpl-lenders-and-banks>

¹⁵² Martin Kleinbard and Laura Udis, CFPB, Buy Now, Pay Later and Credit Reporting (June 15, 2022).

reporting of BNPL credit unless the reporting is done in a way that can possibly benefit consumers by reporting the credit as revolving or open-end credit.

Unless treated as revolving credit, BNPL products are at best an awkward fit in the credit reporting system. The credit reporting system relies on reporting in the standardized Metro 2 format, which in turn is built on the assumption of monthly payments. An account is not even considered “late” under Metro 2 unless it is 30 days late. Thus, it is unclear how a credit product like BNPL plans, which generally consist of a down payment followed by three bi-weekly payments over a 6-week period, will be reported.

For example, consider a borrower who had their first payment for a BNPL loan due on April 1. That first payment might not be considered late until May 1. Yet if they have not paid by May 1, the borrower has already missed the April 15 second payment and their third payment is now due. How should the two delinquent payments be reflected? And if instead, the borrower pays the April 1 payment on April 29, should the lender mark them as delinquent or not? In short, the Metro 2 format was not designed to report BNPL loans optimally.

Yet BNPL has been promoted by some as a “credit building” product. For example, Equifax touted in a December 2021 press release that “the majority of consumers in [its] study were helped by having an on-time BNPL tradeline in their credit file, with an average FICO Score increase of 13 points.”¹⁵³ However, this increase was due in part to having the BNPL account reported as a revolving account, *i.e.*, as a credit card. Unless BNPL accounts are treated as credit cards, the credit building potential of BNPL is significantly limited given how the structure of BNPL interacts with how credit scoring algorithms are built.

FICO’s algorithms use the following categories of factors, with a generalized weighting of these factors given in parentheses:¹⁵⁴

- Payment History (35%)
- Amounts owed, including in comparison with credit limits/original balances (30%)
- Length of Credit History (15%)
- New Credit (10%)
- Types of Credit in Use (10%)

If BNPL credit is reported as a closed-end loan, many of these factors will impact the borrower’s credit score negatively. For example, BNPL lenders could report the products as a series of

¹⁵³ Equifax, Press Release, Equifax First to Formalize Inclusion of 'Buy Now, Pay Later' Payment Information in Consumer Credit Reports, <https://investor.equifax.com/news-events/press-releases/detail/1204/equifax-first-to-formalize-inclusion-of-buy-now-pay> (hereinafter “Equifax BNPL Press Release”). See also Equifax BNPL Powerpoint at slides 48-53.

¹⁵⁴ FICO, Frequently Asked Questions about FICO Scores 2013–2018, at 2, <https://www.ficoscore.com/ficoscore/pdf/Frequently-Asked-Questions-About-FICO-Scores.pdf>. (last visited July 29, 2024)

small dollar installment loans that are relatively recent and have very short lifespans. This will lower the consumer's score based on the "New Credit" and "Length of History" factors.

Furthermore, the impact of short-term, small dollar loans on the "Amounts Owed" or credit utilization factor is uncertain.

Conversely, based on these factors, BNPL accounts could help a borrower's credit history if the account is reported as open-end, revolving credit. Indeed, the Equifax BNPL study *was based on a lender that reported its BNPL loans as "revolving line of credit accounts."*¹⁵⁵ Thus, any supposed benefit shown by the study might only be achievable if the BNPL accounts are reported as open-end credit cards.

Reporting BNPL as a single revolving account will increase the Length of History factor since it will be reported as one "tradeline" spanning a longer period of time. Furthermore, the fact that each extension of credit will not be reported as a new tradeline will reduce the harm from the "New Credit" factor. Reporting as a credit card might also help with the Amounts Owed factor since there could be a credit limit against which to measure credit utilization.

Thus, another benefit to treating BNPL products as open-end credit is to encourage BNPL lenders to report its products as such.

VI. The CFPB Should Supervise the Larger BNPL Providers

A. The CFPB Should Define the Larger Participants in the BNPL and Installment Loan Markets

The CFPB should issue a rule establishing supervision of the larger participants in the BNPL, installment loan and line of credit markets. The CFPB may already be supervising some BNPL lenders by agreement through the Bureau's risk-based supervision. But all of the larger players should be supervised so that there is an even playing field. A rulemaking will ensure that supervision is consistent, established by rule, and is not subject to the risk of lenders ceasing to allow supervision by consent.

The market for BNPL and other forms of installment loans and lines of credit is large and growing. As with other forms of credit, these products pose enormous risks to consumers and

¹⁵⁵ Equifax, Press Release, Equifax First to Formalize Inclusion of 'Buy Now, Pay Later' Payment Information in Consumer Credit Reports, <https://investor.equifax.com/news-events/press-releases/detail/1204/equifax-first-to-formalize-inclusion-of-buy-now-pay>. (last visited July 29, 2024). See also Equifax Powerpoint Presentation, Buy Now, Pay Later Credit Score Impact Analysis, Feb. 10, 2022, <https://www.equifax.com/resource/-/asset/presentation/market-pulse-buy-now-pay-later-credit-score-impact-analysis-webinar-slides/>.

need supervision for compliance with the law and for avoidance of unfair, deceptive or abusive practices. That is true both of “mainstream” credit, as well as the large market of predatory, high-cost installment credit.¹⁵⁶

We support the rulemaking petition filed two years ago by the Center for Responsible Lending and the Consumer Bankers Association urging a larger participant rule for BNPL lenders and other nonbank personal loans.¹⁵⁷

As those organizations stated:

“CBA long has called on policymakers to institute a level regulatory playing field in the rapidly evolving banking landscape, including in the consumer lending market where fintechs now issue nearly half of all personal loans, up from just 22 percent in 2015. While fintechs continue to grow and increasingly offer traditional financial products, they’re not held to the same federal oversight banks have abided by for more than a decade. By utilizing one of its most effective tools in facilitating competitive markets for consumer financial products and services – the larger participant rule – the Bureau can help to ensure every American receives the protections they deserve, regardless of where they go to meet their financial needs,” said Lindsey Johnson, President & CEO of the Consumer Bankers Association (CBA).

“There are large non-bank lenders, even some publicly listed companies, regularly hawking suspect credit products without meaningful government oversight on behalf of the consumer. There are red flags aplenty, including loans issued to consumers without checking their ability-to-repay, sky-high default rates, and interest rates that stretch to 100% APR and well beyond. It is time for CFPB oversight,” said Mike Calhoun, president of the Center for Responsible Lending (CRL).¹⁵⁸

Given the exploding BNPL market and the number of risks to consumers, oversight over BNPL lenders is extremely important. The practical, concrete impact of the CFPB’s interpretive rule will be greatly enhanced if it is complemented with active supervision. Supervision is a critical tool that enables the CFPB to examine from the inside how a company is operating, how consumers

¹⁵⁶ See, e.g., Comments of Five Organizations Focused on Protecting Consumers; Docket No. CFPB2023-0018; Statement of Policy Regarding Prohibition on Abusive Acts or Practices (July 3, 2023), https://www.nclc.org/wp-content/uploads/2023/07/Consumer-Coalition-Comment-on-Abusive-Practices_FINAL-Lauren-Saunders.pdf; Coalition Comments to FDIC Regarding Community Reinvestment Act Examination of Rent-a-Bank FinWise Bank (Mar. 14, 2023), <https://www.nclc.org/resources/coalition-comments-to-fdic-rent-a-bank-finwise-bank/>. (last visited July 29, 2024)

¹⁵⁷ Center for Responsible Lending and Consumer Bankers Association, [Petition for rulemaking defining larger participants for personal loans](#) (Sept. 15, 2022) (last visited July 29, 2024).

¹⁵⁸ Center for Responsible Lending, Press Release, [Consumer Bankers Association and Center for Responsible Lending File Petition to CFPB for Oversight of “Buy Now, Pay Later,” “Fintech,” and Finance Company Personal Loans](#) (Sept. 15, 2022). The larger participant rule should also cover open-end lines of credit. In addition, the CFPB should supervise earned wage advance providers and other fintech cash advance lenders, ideally through the CFPB’s authority to supervise payday lenders, or if not, by including single-payment loans in a larger participant rulemaking for other nonbank lenders. (last visited July 29, 2024)

are interacting with that company, and what problems or potential risks a product is posing for consumers. Supervision also enables the CFPB to spot problems early and to correct them quickly without the need to bring an adversarial enforcement action.

Federal supervision of BNPL lenders is dearly needed to ensure they are not engaging in unfair, deceptive, or abusive practices and are not violating other laws. Yet unless they are a bank or credit union, BNPL lenders today have no federal supervision. So far, only California appears to be specifically overseeing BNPL lenders at the state level, though some providers that hold other state licenses may receive some level of oversight.

Indeed, as banks enter the BNPL market, there is an uneven playing field where one set of actors is supervised, and another avoids regulatory scrutiny. This disparity harms consumers, as they will not understand the different levels of oversight that companies get and the greater risk with unsupervised companies. Competition is also at risk, as companies that are more highly supervised or that refrain from unscrupulous practices may face unfair competition and incur greater compliance costs, while still potentially being tainted by negative publicity over problematic practices in which they do not engage.

Fortunately, the CFPB has the clear authority to supervise BNPL lenders by issuing a regulation defining the “larger participants” in the BNPL market.¹⁵⁹ The CFPB should promptly do so. The CFPB should also define the larger participants in other growing credit markets that pose risks to consumers but have no federal supervision, including installment lenders, providers of open-end lines of credit, earned wage advances and other emerging credit products.¹⁶⁰

The orders that the CFPB has issued to select BNPL lenders under its Section 1022 authority,¹⁶¹ and this request for comments, give the CFPB a start in identifying the issues posed by BNPL credit. But they are no substitute for supervision going inside companies to see what is actually going on. There is an urgent need for a larger participant rulemaking.

¹⁵⁹ See CFPB, Press Release, Consumer Financial Protection Bureau Opens Inquiry into “Buy Now, Pay Later” Credit (Dec. 16, 2021). The Dodd-Frank Act gives the CFPB the authority to conduct regular examinations of the larger companies in certain markets after issuing a rule defining the larger participants in those markets. 12 U.S.C. §§ 5514(a)(1)(B), (a)(2).

¹⁶⁰ See Letter from 79 consumer, housing, civil rights, legal services, faith, community, small business, and financial organizations groups to CFPB (Dec. 21, 2021), <https://www.nclc.org/resources/group-letter-to-cfpb-regarding-fintech-credit-products/>. For the installment loan and line of credit markets, the CFPB should define separate markets for those offering credit under 36% (as defined by the Military Lending Act) and those offering credit above 36%. These are distinct markets posing very different risks to consumers, and more oversight is needed over those that provide high-cost credit. The CFPB should also supervise providers of earned wage advances, income share agreements, property assessed clean energy (PACE) loans, and shared home appreciation financing, among other newer types of credit. Those companies should already be within the CFPB’s supervision authority over payday loans, student loans and mortgages, but to the extent they are not, the CFPB should do larger participant rulemakings for those markets as well. (last visited July 29, 2024)

¹⁶¹ Section 1022 of the Dodd-Frank Act, 12 U.S.C. § 5512(c)(4), gives the CFPB to collect information from companies as part of its monitoring efforts.

B. Supervision of BNPL Credit is Important to Prevent Fair Lending Problems

One reason that supervision of BNPL credit is important is to ensure fair lending compliance. New financial products can result in disparate impacts on communities of color and other financially vulnerable consumers. It is essential that the CFPB look out for those impacts and enforce anti-discrimination laws for new lending platforms. This is especially important for BNPL credit, which is disproportionately used by Black and Latino Americans, along with young adults. The scope of credit covered under the Equal Credit Opportunity Act (ECOA) is quite broad., It includes the right to “purchase property or services and defer payment therefor” regardless of whether there is a finance charge or more than four installments.¹⁶²

Due to the widespread availability of BNPL credit, fair lending issues are less likely to involve exclusionary issues, such as redlining, and more likely to involve risks related to unaffordable lending targeted at or disparately impacting protected groups. It is also possible that different groups may have different experiences regarding the prevalence of penalty fees, product cost inflation, or access to or excessive credit line increases. BNPL lenders may treat consumers differently based on where they shop, which could result in disparate impacts due to the merchants’ different demographic bases.

Just as traditional lenders must oversee the actions of internal staff, external service providers, and the use of underwriting algorithms in their interactions with consumers, BNPL lenders must carefully monitor the web of relationships among themselves, merchants, and consumers to ensure that there is no unlawful discrimination or disparate impacts.

However, fair lending problems by BNPL lenders will not be spotted unless they are supervised. This is yet another reason why the CFPB must do a larger participant rulemaking for BNPL and other installment credit.

C. Supervision is Important to Prevent or Remedy Unfair, Deceptive or Abusive Acts or Practices in the BNPL Market

Supervision would also help the CFPB to spot other potential unfair, deceptive or abusive acts or practices (UDAAPs) in the BNPL market. As we have discussed at greater length in these comments and earlier ones,¹⁶³ there are several practices that are potentially unfair, deceptive or abusive, including:

- Extending credit without considering ability to repay;

¹⁶² Reg. B, 12 C.F.R. § 1002.2(j).

¹⁶³ See 2022 BNPL RFI Comments.

- Securing repayment of BNPL through a credit card;
- Promoting credit through marketing that emphasizes “no credit check” in order to attract struggling consumers;
- Designing a business model that anticipates and encourages late fees;
- Making deceptive claims about credit building benefits of BNPL;
- Failing to appropriately respond to and resolve consumer disputes;
- Collecting and using data in ways that consumers would not expect or authorize; and
- Engaging in unfair debt collection practices.

Supervision can help prevent, spot, and remedy these and other UDAAPs and other violations of the law.

VII. Conclusion

We support the CFPB’s Interpretive Rule, which will enhance the safety and transparency of the large BNPL market. The CFPB should consider additional measures to ensure that BNPL credit is affordable, fair, honest and transparent and in compliance with the law.

Thank you for the opportunity to submit these comments. If you have any questions, please contact Lauren Saunders, lsaunders@nclc.org, or Jennifer Chien, jennifer.chien@consumer.org.