

**Center for Responsible Lending  
National Consumer Law Center (on behalf of its low-income clients)  
Consumer Federation of America**

**Notice and Request for Comment Regarding the CFPB's Inquiry into Buy-Now-Pay-Later  
(BNPL) Providers  
87 FR 3511  
Docket No.: CFPB-2022-0002**

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Submitted electronically to <https://www.regulations.gov>

Comment Intake – Statement into BNPL Providers

Consumer Financial Protection Bureau

1700 G Street NW

Washington, DC 20552

The **Center for Responsible Lending (CRL)** is a nonprofit, non-partisan research and policy organization founded in 2002 dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, one of the nation's largest nonprofit community development financial institutions.

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.

The **Consumer Federation of America (CFA)** is a nonprofit association of more than 250 national, state, and local consumer groups that was founded in 1968 to advance the consumer interest through research, advocacy, and education. For over 50 years, CFA has been at the forefront of consumer protection with a broad portfolio of issues including financial services, banking, product safety, telecommunications, investor protection, energy, housing, insurance, privacy and saving. CFA's non-profit members range from large organizations such as Consumer Reports and AARP, to small state and local advocacy groups and include unions, co-ops, and public power companies.

## TABLE OF CONTENTS

I. Introduction.....	4
II. BNPL Market Growth and Target Populations.....	5
III. BNPL May Have Benefits for Consumers.....	6
IV. BNPL Presents Significant Concerns for Consumers.....	7
<b>A. BNPL's Lack of Underwriting Creates Pitfalls for Consumers.....</b>	<b>7</b>
1. BNPL has high rates of late payments and delinquency.....	8
2. BNPL leads to overdrafts and bounced payments, which trigger additional fees.....	
3. Provider access to payment devices reduces incentive to underwrite.....	9
4. Repayment by credit card raises particular alarm bells.....	9
5. BNPL can lead to growing, potentially unaffordable debt from multiple BNPL loans, potentially across BNPL lenders.....	10
6. BNPL may induce consumers to spend more than with other credit.....	11
7. Consumers who are struggling are attracted to BNPL.....	14
<b>B. Consumers Experience Difficulties with Disputes and Chargebacks.....</b>	<b>15</b>
<b>C. BNPL Raises Fair Lending Concerns.....</b>	<b>15</b>
<b>D. BNPL Data Collection and Data Monetization Practices Raise Serious Privacy Concerns.....</b>	<b>16</b>
<b>E. BNPL Products May Have More Potential Risks Than Potential Benefits for Consumer Credit Scores.....</b>	<b>17</b>
1. BNPL reporting carries significant risks for consumers.....	18
2. Inconsistent reporting may hamper any benefit from BNPL.....	18
3. Borrower composition of BNPL borrowers is mostly subprime, not credit invisible.....	19
4. Adding BNPL credit to credit reports is like fitting Round Pegs in Square Holes.....	19
5. Whether positive BNPL payments can build credit will depend on how they are reported and treated by credit scoring algorithms.....	20
<b>F. Without Consolidated Statements and Payments, The BNPL Model Makes Managing Payments Difficult.....</b>	<b>21</b>
<b>G. Fee Transparency Is A Concern.....</b>	<b>22</b>
<b>H. BNPL Products Pose Debt Collection Risks.....</b>	<b>24</b>

1. BNPL consumers are experiencing negative impacts from the use of debt collectors.....	24
2. Debt buying and BNPL loans.....	26
3. Collector’s use of the consumer’s email.....	27
<b>V. BNPL Providers are “Card Issuers” Within the Meaning of TILA and are Subject to the TILA Requirements for Credit Cards.....</b>	<b>29</b>
<b>A. BNPL Providers Are Card Issuers Subject To Subpart B Of Regulation Z.....</b>	<b>29</b>
<b>B. BNPL Providers Issue Credit Cards.....</b>	<b>29</b>
<b>C. BNPL Products Are Credit Devices.....</b>	<b>30</b>
<b>D. BNPL Products Are A Type Of Charge Card.....</b>	<b>31</b>
<b>E. BNPL Credit Is Open-End.....</b>	<b>31</b>
<b>F. BNPL Products Are Designed For Repeat Use.....</b>	<b>31</b>
<b>G. BNPL Products Have An Available, Replenishing Credit Line.....</b>	<b>31</b>
<b>H. BNPL Credit Is Subject To The CARD Act Provisions Of Subpart G Of Regulation Z.....</b>	<b>36</b>
<b>VI. Recommendations.....</b>	<b>36</b>
<b>A. Clarify that BNPL Loans are Credit Cards and Are Subject to the Ability-to-Repay, Penalty, Chargeback Protections, Statements, and Dispute Rights Protections that Credit Cards Receive.....</b>	<b>36</b>
1. Fee disclosures.....	36
2. Ability to repay.....	37
3. Reasonable and proportional penalty fees.....	37
4. Chargeback rights.....	37
5. Dispute rights.....	38
6. Statements.....	38
7. More appropriate and helpful credit reporting practices.....	39
<b>B. Supervise the Larger BNPL Providers.....</b>	<b>39</b>
<b>C. Prevent or Remedy Unfair, Deceptive or Abusive Acts or Practices and Disparate Impacts in the BNPL Market.....</b>	<b>40</b>
<b>D. Enforce The EFTA’s Prohibition On Compulsory Repayment By Electronic Fund Transfer.....</b>	<b>41</b>
<b>E. Promote Appropriate Credit Reporting Consideration.....</b>	<b>43</b>
<b>F. Monitor Debt Collection Practices and Clarify the Right to Stop Electronic Communications.....</b>	<b>43</b>
<b>G. Conduct Research.....</b>	<b>43</b>
<b>H. Conclusion.....</b>	<b>44</b>
<b>I. Appendices.....</b>	<b>45</b>

# I. Introduction

Since the 1930's, payment plans have been commonplace in the retailer and consumer goods environment – many consumers during the Great Depression were unable to afford household expenses or high debt interest rates. As a response, retailers allowed consumers to make smaller payments in exchange for an item once the full cost of the item was received.<sup>1</sup> This practice came to be known as layaway, which served as “a purchasing agreement in which the product is reserved for a period of time for the buyer,” and was typical in in-store retail outlets.<sup>2</sup>

Although each retailer imposed different processes for layaway, many transactions followed a similar set of steps. Consumers could select merchandise they wished to pay for in increments by taking that item to a customer service desk; the retailer representative would ensure the merchandise qualified for layaway according to their store policy; and the customer would make a down payment, which is usually a percentage of the total price or a nominal fee. Depending on the retailer, terms of the layaway plan were shared with the customer as well as payment frequency – often weekly, biweekly, or monthly, depending on the price or category of the item(s). Once all payments were completed and there was no balance, the consumer owned the item. Additionally, the process required no credit check.

Over time, retailers have mostly transitioned away from layaway, first to credit cards (their own or third party), and now to a newer product, known as Buy Now, Pay Later (BNPL). BNPL is similar in some respects to the previous layaway purchasing agreement – it allows for installment payments over time (usually 4 payments within 6 weeks for retail items) and does not require a credit check. For example, in 2020 Walmart reportedly phased out its interest-free layaway program and in 2021, ahead of the holiday shopping season, announced it would be officially partnering with Affirm to offer BNPL in stores and online.<sup>3</sup>

While there are similarities, there are also key differences between layaway and BNPL that could be seen as positive for consumers: layaway is a form of savings; BNPL is credit. Unlike layaway, with BNPL the consumer can immediately take the item they wish to purchase home; BNPL providers are becoming pervasive and many retailers provide this option as a payment beyond traditional big box retailers; and this option is attractive to those who are younger, want quick financing options, and conduct their shopping in store *and* online.

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<sup>1</sup> Corporate Finance Institute (CFI). “Layaway” (2022), [Layaway - Overview, History, Benefits and Downsides](https://corporatefinanceinstitute.com) ([corporatefinanceinstitute.com](https://corporatefinanceinstitute.com))

<sup>2</sup> *Id.*

<sup>3</sup> Chain Store Age (CSA). “Walmart Reportedly Replaces Layaway with buy now, pay later option” (Sept. 27, 2021), [Walmart reportedly replaces layaway with buy now, pay later option | Chain Store Age](https://www.businessinsider.com/walmart-replaces-layaway-with-buy-now-pay-later-option); Walsh, Emily. *Business Insider*. “Walmart does away with layaway, which didn’t care any fees, and announces buy now, pay later program that may charge customers interest (Sept. 27, 2021), Walmart Does Away With Layaway, Announcing Buy Now, Pay Later Program ([businessinsider.com](https://www.businessinsider.com/walmart-replaces-layaway-with-buy-now-pay-later-option))

Along with these consumer benefits come consumer protection concerns. BNPL providers do not view themselves as falling within the requirements of federal or state credit laws. BNPL agreements do not exist solely between the retailer and the consumer as layaway did, but additionally involve a third party BNPL provider. Many of these providers are fast growing fintechs. Concerns exist with responsible underwriting and ability to repay, fee transparency, debt collection, potential credit reporting and a host of other consumer issues that were not present under the layaway purchasing agreement. Finally, BNPL has begun to expand to consumer goods outside of traditional retail purchases, such as student lending for bootcamps and other for-profit schools.<sup>4</sup> With the presence of these concerns, BNPL cannot simply be seen as the new layaway – it is a credit product that has potential to cause financial harm if left unchecked.

In response to the Request for Comments issued by the Consumer Financial Protection Bureau, we offer our joint recommendations for further guidance and monitoring of the growing BNPL market overall, which are specific to the “pay-in-four” model. Our comment covers substantial background of the BNPL market; considerations based on current consumer protection laws, and concerns we hope the Bureau, within its authority, will address.

## II. BNPL Market Growth and Target Populations

BNPL options have increased dramatically in recent years. Although purchases financed with BNPL account for only 3% of U.S. online shopping revenue as of December 2021, 8.42 million consumers used BNPL in December 2021, which marked an all-time high.<sup>5</sup> Roughly one third of U.S. adults say that they have used BNPL,<sup>6</sup> and this is likely to grow dramatically—the industry is expected to increase 10 to 15 times its current size by 2025.<sup>7</sup> According to industry reports, the use of BNPL services has risen over 200% in the US.<sup>8</sup> In California, the top six BNPL providers originated more than 10 million loans to consumers in 2020, which accounted for 91% of all non-bank consumer loans originated in the state that year.<sup>9</sup>

By far, according to industry reports, Millennials (approximately ages 23-38) are the primary generation that utilizes BNPL, followed by Generation Z (approximately ages 9-22) (see *Appendix B*).<sup>10</sup> In a December 2021 report authored by Klarna using its proprietary shopping data, merchants could see shopping patterns and receive “hot tips” for attracting these

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<sup>4</sup> Student Borrower Protection Center, “Point of fail: How a Flood of “Buy Now, Pay Later” Student Debt is Putting Millions at Risk (March 2022) [SBPC\\_BNPL.pdf \(protectborrowers.org\)](https://www.protectborrowers.org/SBPC_BNPL.pdf)

<sup>5</sup> Berr, Jonathan. Payments Dive, “Buy now-pay later demand hit U.S. high during holiday season” (Jan. 14, 2022), <https://www.paymentsdive.com/news/buy-now-pay-later-demand-hit-us-high-during-holiday-season/617146/>

<sup>6</sup> Erika Giovanetti, Dan Shepard, LendingTree “Shoppers Use ‘Buy Now, Pay Later’ Financing to Purchase Things They Can’t Afford” (Apr. 2021), <https://www.lendingtree.com/personal/buy-now-pay-later-survey/>.

<sup>7</sup> CB Insights, Disrupting The \$8T Payment Card Business: The Outlook On ‘Buy Now, Pay Later’ (Mar. 2, 2021), <https://www.cbinsights.com/research/report/buy-now-pay-later-outlook/> [hereinafter CB Insights, Disrupting (Mar. 2021)]

<sup>8</sup> Pymnts.com and Afterpay, “Buy Now, Pay Later Tracker” (April 2021) [Pymnts-BuyNowPayLaterTracker-April2021.pdf](https://pymnts.com/research/buy-now-pay-later-tracker/)

<sup>9</sup> California Department of Financial Protection and Innovation, Annual Report of Finance Lenders, Brokers, and PACE Administrators Licensed Under the California Financing Law (Oct. 2021), <https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/10/2020-CFL-Aggregated-Annual-Report.pdf>.

<sup>10</sup> Accenture, commissioned by Afterpay “Economic Impact of Buy Now Pay Later in the US” (September 2021). [Economic-Impact-of-BNPL-in-the-US-vF.pdf \(yourcreative.com.au\)](https://www.yourcreative.com.au/wp-content/uploads/2021/09/Economic-Impact-of-BNPL-in-the-US-vF.pdf).

consumers as well as other age groups (see *Figure 1*). For younger consumers who may be initiating their credit profiles as well as thin file credit holders, BNPL has potential to have benefits, but also introduces many concerns.



**Figure 1: Tips for merchants offering BNPL from Klarna’s State of Smooth 2021. Full images in Appendix B.**

### III. BNPL May Have Benefits for Consumers

BNPL products may provide consumers with an affordable way to finance larger purchases, as the business model typically allows consumers to purchase an item by only paying a portion of the price up front. The consumer then typically pays the rest of the debt in three additional equal, interest-free installments over a set period (usually 6 weeks).

BNPL credit offers consumers an opportunity to pay off debt in a small number of installments rather than in one lump sum through a debit card. In fact, one survey found that 55% of those consumers who had used BNPL credit opted to do so because they would rather pay in installments than in one lump sum.<sup>11</sup> According to one recent survey, nearly 40% of consumers said that they used BNPL credit to make purchases that would otherwise not fit in their budget,<sup>12</sup> illustrating that consumers may see BNPL credit as a financing option for purchases outside or at the outer limits of their budget.

Some consumers may view BNPL credit as a more affordable alternative to credit cards, given that the pay-in-four model is marketed as interest-free. Credit card debt is an increasingly

<sup>11</sup> Consumer Reports. American Experiences Survey: A Nationally Representative Multi-Mode Survey (Jan. 2022), [https://article.images.consumerreports.org/prod/content/dam/surveys/Consumer\\_Reports\\_AES\\_January\\_2022](https://article.images.consumerreports.org/prod/content/dam/surveys/Consumer_Reports_AES_January_2022) [hereinafter Consumer Reports, American Experiences Survey (Jan. 2022)].

<sup>12</sup> Williams, Claire. Morning Consult, “‘Buy Now, Pay Later’ Users Significantly More Likely to Overdraft Than Nonusers” (March 2, 2022), <https://morningconsult.com/2022/03/02/buy-now-pay-later-bnpl-overdraft-data/> [hereinafter Williams, BNPL users (Mar. 2022)].

significant problem for consumers, with the largest observed quarterly increase in credit card debt occurring during the last quarter of 2021.<sup>13</sup> If consumers make on-time payments and are able to handle those payments while meeting other expenses, BNPL credit may indeed provide consumers with a more affordable alternative to credit cards.

BNPL credit is also generally repaid far more quickly than credit card debt, which can be a benefit to consumers. Purchases are typically paid off in six weeks, with three clear, fixed payments. In contrast, credit cards make it easy to amass thousands of dollars of debt that can take years to repay if only minimum payments are made. The amount due on credit cards also fluctuates based on spending and payment history and can be hard for consumers to predict.

Consumers might opt for BNPL merely because of ease and convenience. Of those consumers who have used BNPL credit, 20% said that it was because they thought it would be easier than credit cards.<sup>14</sup> Of the top ten online retailers in the U.S., seven either currently have BNPL options at checkout or have announced plans for BNPL credit options at checkout.<sup>15</sup> The other three are available through third party applications. Consumers may prioritize ease and convenience when online shopping. Further, with third party BNPL providers, once a consumer is approved in their system, the consumer sees advertisements for other items or for many providers, sees their “spending limit” or line of credit when the log in to their account, making the financing option even more convenient.

Some view BNPL credit as a budgeting tool that may provide consumers a more transparent, flexible way to control their finances than other forms of credit.<sup>16</sup>

## IV. BNPL Presents Significant Concerns for Consumers

While BNPL products have the potential to benefit consumers, they also pose many concerns.

### A. BNPL’s Lack Of Underwriting Creates Pitfalls For Consumers

Unlike traditional consumer lending products, BNPL lenders do not engage in significant underwriting.<sup>17</sup> Typically, they verify identity, require a debit card or credit card to make payments and run a “soft” credit check but not a hard credit inquiry.<sup>18</sup> A BNPL lender also

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<sup>13</sup> Center for Microeconomic Data, Federal Reserve Bank of New York. Household Debt and Credit Report (Q4 2021) (Feb. 8, 2022), <https://www.newyorkfed.org/microeconomics/hhdc>

<sup>14</sup> Consumer Reports, American Experiences Survey (Jan. 2022).

<sup>15</sup> Jamie Grill-Goodman, Retail Info Systems, “Top 10 E-Commerce Retailers and Their Digital Experience” (Aug. 12, 2021), <https://risnews.com/top-10-e-commerce-retailers-and-their-digital-experience>.

<sup>16</sup> Penny Lee, Financial Technology Association, Testimony to Task Force on Financial Technology U.S. House Committee on Financial Services Hearing on “Buy Now, Pay More Later? Investigating Risks and Benefits of BNPL and Other Emerging Fintech Cash Flow Products” (Nov. 2, 2021), <https://financialservices.house.gov/uploadedfiles/hhrg-117-ba00-wstate-leep-20211102.pdf>

<sup>17</sup> 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.

<sup>18</sup> *Id.*



frequently checks the consumer's previous payment history with that lender. Several factors suggest that BNPL loans are not meaningfully underwritten for ability-to-repay:

1. **BNPL has high rates of late payments and delinquency.** Data from Australia (which has many of the same large BNPL market providers as the U.S.) found that, among its eight largest BNPL lenders, bad debts amounted to 30% of revenues.<sup>19</sup> Reports vary on the rate of late payments, but they are clearly significant. According to a Reuters-commissioned survey released in September, more than a third of BNPL borrowers had fallen behind on one or more payments.<sup>20</sup> A 2020 study found that 43% had fallen behind, although two-thirds of this group said the reason was having lost track of payments (another risk with BNPL loans) rather than lack of funds.<sup>21</sup> According to a recent Morning Consult survey, 20% of BNPL users have missed a payment,<sup>22</sup> and a U.K. survey found the same level of late payments.<sup>23</sup> Substantial portions of those borrowers, as reflected in the chart below, 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:

**Figure 2: Missed payment consequences by brand**<sup>24</sup>

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

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

Similarly, California consent decrees required three BNPL firms to return \$1.9 million in late and other fees collected from consumers before those firms obtained California

<sup>19</sup>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](https://treasury.gov.au/sites/default/files/2021-02/147719_mclean-roche_0.pdf).

<sup>20</sup> Anna Irrera, As 'buy now, pay later' surges, a third of U.S. users fall behind on payments, Reuters, Sept. 9, 2021,

<sup>21</sup> Consumer Reports, 2021.

<sup>22</sup> 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/>.

<sup>23</sup> See, e.g., Which?, Under Pressure: Who uses BNPL, Policy Report, at 21 (May 2021) [Buy Now Pay Later \(which.co.uk\)](https://www.which.co.uk/research/bnpl-policy-report)

<sup>24</sup> *Id.* at 23.

licenses.<sup>25</sup> The aforementioned data from Australia also found that Afterpay's total late fees were "very high," amounting to up to 68% APR.<sup>26</sup>

**2. BNPL can lead to overdrafts and bounced payments, which trigger additional fees.**

For consumers struggling with unaffordable payments, BNPL payments by debit card could trigger overdraft fees. A recent survey found that BNPL users were significantly more likely to overdraft than nonusers. The survey found that one in three BNPL users reported overdrafting in January, more than twice the rate of nonusers.<sup>27</sup> Whether that disparity is because BNPL payments caused the overdrafts or because BNPL users are more likely to be struggling with their finances is not clear, but either way, the implication is that BNPL credit is being provided to some consumers who cannot afford to repay it. BNPL payments may also bounce, triggering not only a late fee but also a nonsufficient funds fee from the bank. Some BNPL providers also charge returned payments fees, which are triggered when a payment is returned unpaid due to insufficient funds.<sup>28</sup> In fact, numerous BNPL providers have faced lawsuits, including a class action against PayPal alleging that PayPal failed to disclose that use of the product might trigger overdraft and/or NSF fees.<sup>29</sup>

**3. Provider access to payment devices reduces incentive to underwrite.**

BNPL lenders typically require a debit card or credit card to be linked to the borrower's account, against which the lender applies payments. The lenders typically require customers to authorize auto-pay.<sup>30</sup> 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.

**4. Repayment by credit card raises particular alarm bells.** Notably, many BNPL providers also permit repayment via credit card. This practice poses substantial risks to consumers and appears to be designed primarily to evade the compulsory use ban of the Electronic Fund Transfer Act. (There appears to be little benefit to the BNPL provider to be repaid by credit card instead of a debit card, as credit cards have higher interchange fees.) 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. It is not clear why a consumer would benefit from using BNPL credit repaid by a credit card unless the consumer is close to their credit

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<sup>25</sup> See Calif. Dept. of Business Oversight, Press Release, "Point-of-Sale Lender QuadPay Agrees to Cease Illegal Loans, Pay Refunds in Settlement with the California Department of Business Oversight" <https://dfpi.ca.gov/wp-content/uploads/sites/337/2020/04/News-Release-QuadPay-settlement.pdf> (Apr. 22, 2020) (describing total refunds paid by QuadPay, Sezzle and AfterPay).

<sup>26</sup> *Id.* at 20.

<sup>27</sup> 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/>.

<sup>28</sup> For example, Klarna charges a \$25 (or any lower amount required by law) if payment is returned unpaid for "non-sufficient funds." See Klarna Pay in 4 Agreement, [https://cdn.klarna.com/1.0/shared/content/legal/terms/0/en\\_us/sliceitinx](https://cdn.klarna.com/1.0/shared/content/legal/terms/0/en_us/sliceitinx), 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)].

<sup>29</sup> PayPal Faces \$5M Suit Over 'Buy-Now, Pay-Later' Product - Law360

<sup>30</sup> Issues posed by compulsory use of preauthorized electronic fund transfers are discussed in another section below.

limit and a full credit card purchase would max it out – in which 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.<sup>31</sup> The BNPL/credit card practice prompted one major credit card issuer to stop processing credit card payments to BNPL lenders, noting that BNPL loans can be risky for the consumer and the bank.<sup>32</sup>

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### CONSUMER LENDING

## How buy now/pay later services are boosting American credit card debt

By Claire Ballentine, Bloomberg News March 17, 2022, 12:53 p.m. EDT 1 Min Read



Think of it as “buy now, pay later, pay later ... and pay again after that.”



Nearly a quarter of respondents in a recent Credit Karma survey said that their total debt increased after using “buy now, pay later” — or BNPL — services, which allow users to pay off purchases in installments over a few weeks. That’s likely because these customers are using their credit cards to pay off their balances, according to an analysis by the credit-score platform.

*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.<sup>33</sup>*

In some cases, consumers have limited choices as to the form of payment accepted and are required to use direct deposit or credit cards.<sup>34</sup>

5. **BNPL can lead to growing, potentially unaffordable debt from multiple BNPL loans, potentially across BNPL lenders.** One survey found that Quadpay and Sezzle borrowers average four-to-five transactions per month; Afterpay and Klarna borrowers four per month; Affirm borrowers two per month.<sup>35</sup> Without fully integrated credit reporting (discussed further below), the borrower’s BNPL debts across lenders are not

<sup>31</sup> See, e.g., <https://www.chase.com/personal/credit-cards/education/basics/can-you-pay-off-a-loan-with-a-credit-card>

<sup>32</sup> 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>. Capital One has since announced it will test its own BNPL product but has not changed its practice of not permitting BNPL lenders to charge against its credit card.

<sup>33</sup> Ballentine, Claire. Bloomberg News for American Banker, (March 18, 2022.) “How buy now/pay later services are boosting American credit card debt”

<sup>34</sup> See e.g., <https://help.perpay.com/en/articles/450248-setting-up-your-payroll-payment> — allows direct deposit or <https://www.splitit.com> -- solely accepts credit cards

<sup>35</sup> Cardify, Convenience, Debt, and Novelty: Analyzing BNPL Consumer Data (Sept. 8, 2021), <https://www.cardify.ai/reports/bnpl-trend-report>.

aggregated anywhere and, even with credit checking, lenders (BNPL or other lenders) have no lens into how much BNPL debt borrowers are carrying. Recently, Equifax and Transunion have indicated they intend to report BNPL tradelines, which introduces concerns around how these products are reported and scored (see *Section E on credit scoring and reporting*).<sup>36</sup> There are reports in the U.K. of retailers offering five different BNPL deals for the same purchase, which the consumer could use cumulatively to amass the amount of credit needed to make the single purchase.<sup>37</sup>

6. **BNPL may induce consumers to spend more than with other credit.** One survey found that nearly half of BNPL borrowers spent 10-40+ percent more using BNPL than with a credit card.<sup>38</sup> Indeed, as discussed further in the following section, the BNPL business model relies on merchant payments, which presumably merchants are willing to make because they see more or larger purchases resulting.

BNPL lenders market themselves to the merchant on the basis that their partnership will drive increased sales volume. A report commissioned by the U.K. FRA reports that, anecdotally, some BNPL providers claim they will increase sales by 30%.<sup>39</sup> It notes that Klarna refers to “increased conversion” rates to describe shoppers who complete purchases.<sup>40</sup> Afterpay boasts estimates that it drove \$8.2 billion in new sales revenue for merchants in 2021 (representing an 11% increase in profit margin); that the average Afterpay merchant obtains almost 13% more new customers; and that “basket sizes [i.e., shopping carts] are 17% higher in value” than before Afterpay.<sup>41</sup>

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<sup>36</sup> (Equifax First to Formalize Inclusion of 'Buy Now, Pay Later' Payment Information in Consumer Credit Reports :: Equifax Inc. (EFX))

<sup>37</sup> Vincent, Mathew. Financial Times. “FCA calls for full regulation of ‘buy now, pay later’ credit: UK financial watchdog finds ‘significant potential’ for consumer harm” (Feb. 2, 2021). <https://www.ft.com/content/2c9bd737-80a6-45d7-a7f3-bf672850b3bd>.

<sup>38</sup> Consumer Reports, 2021 (citing Cardify.ai survey).

<sup>39</sup> Woolard Review at 47.

<sup>40</sup> *Id.*

<sup>41</sup> Accenture (Commissioned by Afterpay). “The Economic Impact of Buy Now, Pay Later in the US. (September 2021) [Economic-Impact-of-BNPL-in-the-US-vF.pdf](https://yourcreative.com.au/Economic-Impact-of-BNPL-in-the-US-vF.pdf) (yourcreative.com.au)

**Figure 3: Afterpay report graphics highlighting customer buying conversions**

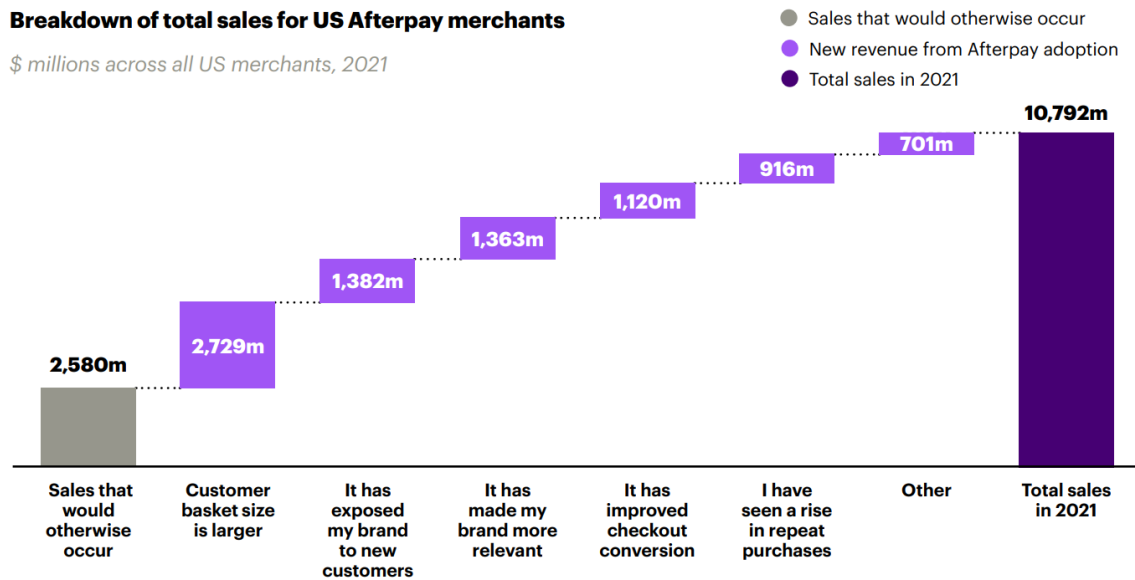


**EXHIBIT 19**

Afterpay has helped US merchants generate \$8.2bn in new revenue in 2021

**Breakdown of total sales for US Afterpay merchants**

\$ millions across all US merchants, 2021

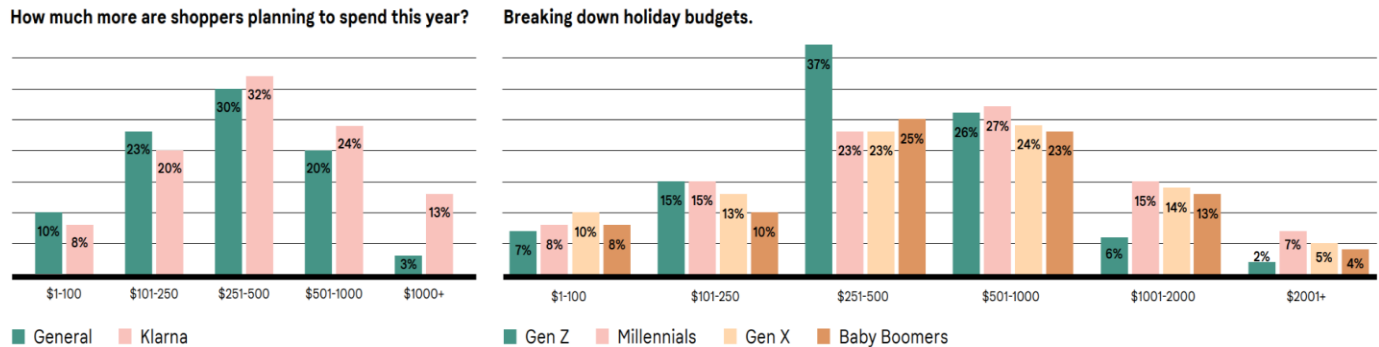


*Note: Total 2021 sales are modelled using historical Afterpay transaction data; larger basket size is comprised of itself and easiness to upsell; greater brand relevance is comprised of itself and greater customer engagement*  
*Source: IPSOS Survey of Afterpay merchants (2021), n=700; Afterpay transaction data; Accenture analysis*

Thus, there is concern that the entire business model rests on driving borrowers to purchase items they would not otherwise buy, which is concerning in and of itself and even more so when coupled with lack of underwriting for affordability.

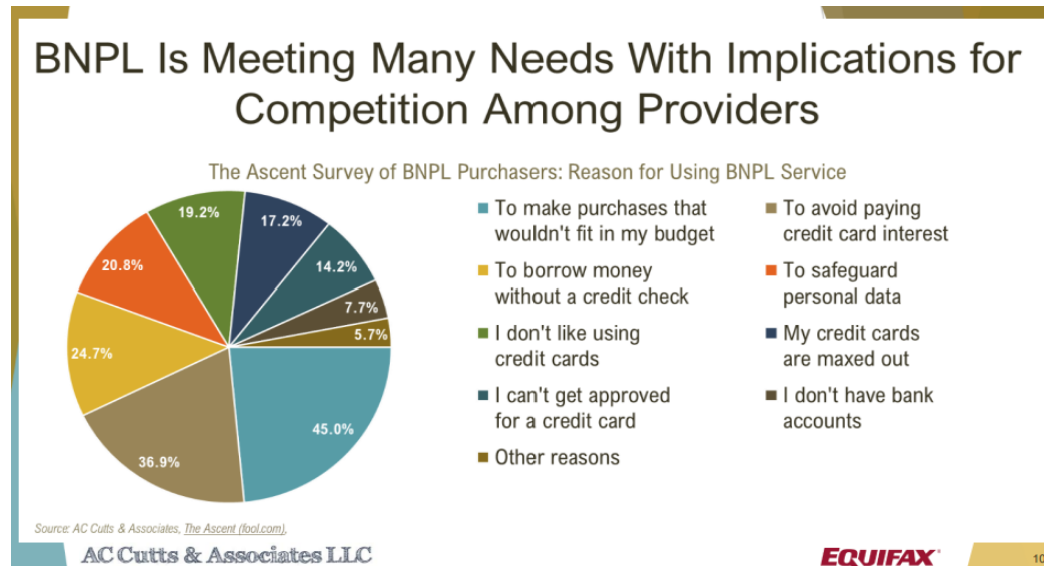
In an industry report released in December 2021, data showed shoppers spent more money by using BNPL with Klarna than other sources of credit:

**Figure 4: Holiday budget spending by Klarna vs “general” and by budget**<sup>42</sup>



7. **Consumers who are struggling are attracted to BNPL.** The reasons many consumers give for using BNPL credit show that many use BNPL credit precisely because they already have too much debt. A recent study conducted by AC Cutts & Associates for Equifax found that a majority of users stated they used BNPL ‘to make purchases that wouldn’t fit in their budget’, “to borrow money without a credit check”, because “I can’t get approved for a credit card” or because “My credit cards are maxed out.”<sup>43</sup>

**Figure 5: “BNPL is Meeting Many Needs with Implications for Competition Among Providers”<sup>44</sup>**



<sup>42</sup> Klarna for Business. “State of Smoooth: 2021 Holidays Unwrapped” (December 2021). [The-State-of-Smoooth-2021-Holidays-Unwrapped-Report-1.pdf \(klarna.com\)](https://www.klarna.com/business/state-of-smoooth-2021-holidays-unwrapped-report-1.pdf)

<sup>43</sup> AC Cutts & Associates LLC. “Musings on the COVID-19 Recession & Highlights from Equifax Credit Trends” (July 29, 2020) [Musings on the COVID-19 Recession and Highlights from Equifax Credit Trends \(urban.org\)](https://www.equifax.com/resource/-/asset/presentation/musings-on-the-covid-19-recession-and-highlights-from-equifax-credit-trends-urban.org)

<sup>44</sup> Equifax, “Market Pulse: Buy Now, Pay Later Credit Score Impact Analysis - Webinar Slides,” (Feb. 10, 2022) <https://www.equifax.com/resource/-/asset/presentation/market-pulse-buy-now-pay-later-credit-score-impact-analysis-webinar-slides/>.



A 2021 survey, Buy Now, Pay Later Statistics and User Habits by C+R Research, a market research company, found that 59% of respondents said they purchased an unnecessary item that they otherwise couldn't afford.<sup>45</sup> Furthermore, more than half (57%) of users say they have regretted making a purchase through BNPL because the item was too expensive.<sup>46</sup> Those who cannot qualify for other credit – whom some BNPL lenders claim to be especially helping – often do not qualify for other credit because they have been overburdened by debt already and cannot afford to repay more credit.<sup>47</sup> 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 maxed out.<sup>48</sup> Additionally, 22% indicated they had a low credit limit available for purchases.<sup>49</sup>

Assessing ability to repay is a critical component of responsible lending and should be required for BNPL credit. Of note, in 2021, the U.K. Financial Conduct Authority (FCA) announced plans to supervise BNPL providers, and reforms contemplated included requiring hard credit checks and affordability assessments.<sup>50</sup>

Developments in the United States also make clear that it is feasible for BNPL to consider ability to repay. Major BNPL lender Klarna gives consumers the option to share bank account transactional data that Klarna will use to determine their ability to repay.<sup>51</sup> While we are skeptical that this option is the full solution, the policy illustrates the feasibility of BNPL lenders' conducting meaningful underwriting.<sup>52</sup> 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 consequences of unaffordable BNPL loans can be severe. In addition to the cascading fees discussed above, overdraft and NSF fees are highly associated with closed bank accounts and exclusion from the financial system.<sup>53</sup> Or, the borrower may have sufficient funds for the BNPL payment but then be left without sufficient funds for other essential living expenses or debts.<sup>54</sup>

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<sup>45</sup> C+R Research. “Buy Now, Pay Later Statistics and User Habits.” [Buy Now, Pay Later Statistics and User Habits – C+R Research](#)

<sup>46</sup> *Id.*

<sup>47</sup> See, e.g., Which?, Under Pressure: Who uses BNPL, Policy Report, at 24 (May 2021) (explaining why some BNPL borrowers may use BNPL because they believe they cannot access other forms of credit: “It may also be that BNPL brands make credit available to people for whom other forms of credit are not affordable.”). [Buy Now Pay Later \(which.co.uk\)](#)

<sup>48</sup> The Hidden Costs of “Buy Now, Pay Later” US PIRG, March 2022, ([BNPL REPORT USPIRG 0.pdf](#))

<sup>49</sup> *Id.*

<sup>50</sup> Mancini Vincent, FCA calls for full regulation of ‘buy now, pay later’ credit: UK financial watchdog finds ‘significant potential’ for consumer harm, Financial Times, Feb. 2, 2021, <https://www.ft.com/content/2c9bd737-80a6-45d7-a7f3-bf672850b3bd>.

<sup>51</sup> See <https://www.klarna.com/us/customer-service/how-can-i-get-approved-to-pay-with-klarna/>.

<sup>52</sup> *Id.*

<sup>53</sup> Center for Responsible Lending, *Overdraft Fees Cause Financial Exclusion*, July 21, 2021, [crl-testimony-overdraft-financial-exclusion-21jul2021.pdf \(responsiblelending.org\)](#)

<sup>54</sup> 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”).

## B. Consumers Experience Difficulties with Disputes and Chargebacks

As discussed below, we believe that BNPL products are covered by and required to comply with the same protections that credit cards receive under the Truth in Lending Act (TILA). However, to date, BNPL providers do not view their products as credit cards, do not provide the same dispute protections, and product returns can be complicated.

Even if a borrower returns an item financed through BNPL credit, the borrower may have to keep paying the BNPL lender at least until the merchant and lender sort out the return. In addition, the practice of requiring consumers to preauthorize payment through a debit or credit card can inhibit the consumer's ability to exercise dispute rights. As discussed below regarding EFTA rights, it is not clear if all consumers are being given the right to revoke authorization for those payments. Notably, a recent study by US PIRG found a number of consumer complaints to the CFPB and Better Business Bureau (BBB) on this issue.<sup>55</sup>

BNPL policies typically require that the merchant first refund the purchase price to the BNPL lender before the consumer can be reimbursed. For returns, consumers can find themselves trapped in a seemingly endless loop in a cycle of miscommunication between the merchant and BNPL provider and never receive their refund.<sup>56</sup> Similarly, even for canceled or non-delivered items, consumers can be charged, or even charged more than once.<sup>57</sup>

In the U.K., the Financial Conduct Authority (FCA) recently required four BNPL providers to make changes to their contracts as a result of problems consumers were experiencing when they attempted to cancel their purchases.<sup>58</sup> The FCA required the providers to cancel the loan agreement when consumers exercised their right to cancel a purchase, rather than requiring consumers who returned goods to continue to pay until the BNPL firm received confirmation from the retailer that the goods had been received and/or the BNPL provider had received the refund from the retailer. The FCA also prohibited BNPL providers from limiting consumers' right to set off refunds due them from other payments that were due, and to make clear how consumers could cancel their payment authorizations.

## C. BNPL Raises Fair Lending Concerns

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

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<sup>55</sup> Ed Mierzwinski and Mike Litt, U.S. PIRG Education Fund, [The hidden costs of "Buy Now, Pay Later": Complaints to CFPB show need for action](#) 17 (Mar. 2022)

<sup>56</sup> Ed Mierzwinski and Mike Litt, U.S. PIRG Education Fund, [The hidden costs of "Buy Now, Pay Later": Complaints to CFPB show need for action](#) 17 (Mar. 2022)

<sup>57</sup> *Id.* at 16

<sup>58</sup> See 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>.



credit, which is disproportionately used by Black and Hispanic Americans, along with young adults.

Fortunately, the scope of credit covered under the Equal Credit Opportunity Act (ECOA) is quite broad – broader than under TILA – and 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.<sup>59</sup> In addition, as the CFPB recently made clear, even where ECOA does not apply, discrimination is an unfair practice.<sup>60</sup>

Due to the widespread publicity and availability of BNPL credit, fair lending issues surrounding the product are far 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 providers may also 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 parties (including brokers and appraisers), and even automated underwriting algorithms in their interactions with consumers, BNPL providers must carefully monitor the web of relationships among themselves, merchants, and consumers to ensure that there is no unlawful discrimination or disparate impacts.

## D. BNPL Data Collection and Data Monetization Practices Raise Serious Privacy Concerns

Consumer data is collected and utilized on a vast scale by BNPL and other fintech applications. The investigation launched by the Subcommittee on Antitrust of the House Judiciary Committee review of BigTech practices raised concerns regarding consumers’ relative lack of power in this context:

*... (I)n the absence of adequate privacy guardrails in the United States, the persistent collection and misuse of consumer data is an indicator of market power online. Online platforms rarely charge consumers a monetary price—products appear to be “free” but are monetized through people’s attention or with their data. In the absence of genuine competitive threats, dominant firms offer fewer privacy protections than they otherwise would, and the quality of these services has deteriorated over time. As a result, consumers are forced to either use a service with poor privacy safeguards or forego the service altogether.<sup>61</sup>*

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<sup>59</sup> Reg. B, 12 C.F.R. § 1002.2(j).

<sup>60</sup> See CFPB, Press Release, “CFPB Targets Unfair Discrimination in Consumer Finance” (Mar. 16, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-targets-unfair-discrimination-in-consumer-finance/>.

<sup>61</sup> (Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee of the Judiciary, US House of Representatives, October 2, 2020

Further, data feeds “surveillance marketing,” which tracks, markets to and leverages power over consumers.<sup>62</sup> BNPL firms and others are importing the same “Big Data”-driven model that has eroded consumer privacy in most markets, including retail, ecommerce and entertainment, and are placing it within the foundations of the US financial services system.<sup>63</sup> Consumers will be confronted with an “all-seeing” banking and payment system that has gathered and deeply analyzed their information so they can be micro-targeted everywhere online for financial services and applications. Younger, lower-income and less financially-sophisticated consumers are at grave risk of being targeted to buy more and accumulate debt that they cannot afford.

Yet these processes are largely unknown to consumers. A recent study indicated that 75% of consumers did not know that their data can be sold for marketing and research. Similarly, 78% were unaware that apps can regularly access personal data, whether or not the app is closed or deleted. Finally, 80% were unaware that fintech apps use third party sources to gather financial data.<sup>64</sup>

## E. Unless Reported Correctly, BNPL Products May Have More Potential Risks Than Potential Benefits for Consumer’s Credit Scores

BNPL products are sometimes touted as a credit building product. But 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 credit bureaus, and used by creditors. Reporting BNPL loans to the nationwide consumer reporting agencies (CRAs) will most likely only benefit consumers if it is reported as open-end credit, and that is another reason we urge the CFPB to treat BNPL credit as credit cards to enhance the likelihood that 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, as well as evaluate the accuracy of credit building claims when it is reported otherwise and to address deceptive claims of credit building.

Notably, early indications are that most BNPL users already have credit histories and are scoreable, and thus do not need BNPL products to build their credit. Reporting and treatment of BNPL credit also varies widely. 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.

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<sup>62</sup> (Big Tech Payment Platforms, Comments of USPIRG and Center for Digital Democracy, CFPB Docket No. 2021-0017, December 21, 2021, [BigTechPaymentPlatforms121921final \(uspig.org\)](https://www.uspirg.org/wp-content/uploads/2021/12/BigTechPaymentPlatforms121921final.pdf)). See also, <https://consumerfed.org/surveillance-advertising-factsheets/>

<sup>63</sup> *Id.*

<sup>64</sup> [New Research Reveals Consumers Remain Uninformed of Fintech App Data Collection Practices \(prnewswire.com\)](https://www.prnewswire.com/news-releases/new-research-reveals-consumers-remain-uninformed-of-fintech-app-data-collection-practices-301456888.html), December 1, 2021)

## **1. BNPL reporting carries significant risks for consumers**

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 recent study from Equifax, the inclusion of a delinquent BNPL account resulted in a credit score drop of up to 59 points.<sup>65</sup> And even if the BNPL lender 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 as 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 - 91% of the borrowers in the Equifax BNPL study had a FICO score under 670.<sup>66</sup> Equifax also reported that many BNPL borrowers used the product because they faced difficulties with mainstream credit: they couldn't get approved for a credit card (14%), their credit card was maxed out (17%) or they wanted to borrow without a credit check (25%).<sup>67</sup> Nearly half (45%) used BNPL to make purchases that wouldn't fit in their budget. Thus, BNPL borrowers were likely credit constrained consumers, which further supports applying the Credit CARD Act's ability-to-repay requirements to this form of credit, as discussed below.<sup>68</sup>

## **2. Inconsistent reporting may hamper any benefit from BNPL**

The nationwide CRAs will not be treating BNPL accounts in the same manner, which is unusual. Equifax and TransUnion<sup>69</sup> will include BNPL accounts in their main credit reporting files. These two CRAs will give users (*i.e.*, lenders, employers, landlords, etc.) the option of obtaining a credit report or score that includes BNPL information.<sup>70</sup> This means any benefit from reporting an BNPL account will depend on the user's decision, not the consumer's choice. Lenders and others who are more conservative in their lending, including secondary mortgage market giants Fannie Mae and Freddie Mac, might not include BNPL data.

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<sup>65</sup> 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.

<sup>66</sup> *Id.* at Slide 47.

<sup>67</sup> *Id.* at Slide 10.

<sup>68</sup> *Id.* at Slide 10.

<sup>69</sup> Press release, TransUnion to Maximize Financial Inclusion Opportunities for the Nearly 100 Million Consumers Using BNPL Loans, Feb. 24, 2022, <https://newsroom.transunion.com/transunion-to-maximize-financial-inclusion-opportunities--for-the-nearly-100-million-consumers-using-bnpl-loans/>.

<sup>70</sup> *Id.* ("Users of TransUnion credit data will be able to opt-in to receive these tradelines as part of their existing credit data delivery. Default credit report delivery, which feeds existing scoring models, will remain unaffected."); Equifax BNPL Press Release (Equifax changes will "give Equifax customers and scoring partners the ability to view and decide how to incorporate the information into their decisioning").

Meanwhile, Experian is creating a specialty CRA consisting of BNPL accounts,<sup>71</sup> similar to other specialty CRAs that focus on subprime or nontraditional credit, such as Clarity or FactorTrust. These accounts will not be included in Experian's main credit reporting files, which means BNPL credit is even less likely to benefit the credit profiles of consumers.

Most importantly, it is unclear how many BNPL lenders will opt in to providing or furnishing regular account information to the nationwide CRAs. As the CFPB knows, furnishing information to the nationwide CRAs is entirely voluntary, at least under the FCRA. As one industry analyst has noted "although Equifax is planning to enable the reporting of split pay plans<sup>72</sup> (and presumably TransUnion and Experian will follow suit), we have yet to see any provider of split pay financing announce plans to begin furnishing this data."<sup>73</sup>

### **3. Borrower composition of BNPL borrowers is mostly subprime, not credit invisible**

The credit building aspects of BNPL might also be limited given that very few of its borrowers are "credit invisible." In the Equifax BNPL study, only 1% of the consumers were not scoreable.<sup>74</sup> Equifax and TransUnion have claimed BNPL reporting will benefit "thin files," but they define "thin file" consumers as those with two or three tradelines<sup>75</sup> – these consumers are scoreable "thin file" borrowers who tend to be younger consumers and will eventually develop thicker files as they mature.

As noted above, the vast majority of BNPL borrowers appear to be subprime borrowers who are credit-constrained. 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.

### **4. Adding BNPL credit to credit reports is like fitting Round Pegs in Square Holes**

BNPL credit is 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.

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<sup>71</sup> Greg Wright, Experian, Introducing The Buy Now Pay Later Bureau™ from Experian, Jan. 26, 2022, <https://www.experian.com/blogs/news/2022/01/26/buy-now-pay-later-bureau>.

<sup>72</sup> "Split pay" appears to be another term for BNPL loans in this discussion.

<sup>73</sup> Jason Mikula, Six Predictions for 2022: Will BNPLs Furnish to CRAs?, Fintech Business Weekly, Jan. 2, 2022, <https://fintechbusinessweekly.substack.com/p/six-predictions-for-2022-will-bnpls?s=r>

<sup>74</sup> Equifax BNPL Powerpoint at slide 52.

<sup>75</sup> *Id.* at 45 ("Thin (<=2 tradelines)"); Press release, TransUnion to Maximize Financial Inclusion Opportunities for the Nearly 100 Million Consumers Using BNPL Loans, Feb. 24, 2022, <https://newsroom.transunion.com/transunion-to-maximize-financial-inclusion-opportunities-for-the-nearly-100-million-consumers-using-bnpl-loans/>. TransUnion also reported that only 9% of BNPL borrowers in its study were "thin file" consumers. *Id.*

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.

## **5. Whether positive BNPL payments can build credit will depend on how they are reported and treated by credit scoring algorithms**

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.”<sup>76</sup>

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.<sup>77</sup>

- 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 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. Commentators have noted this as well, explaining:

“While the record of on-time payments can boost your credit, you could see a blow to your score from using the [BNPL] service,” says Leslie Tayne, founder and managing director at Tayne Law Group. “Every purchase you make with a POS loan is considered

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<sup>76</sup> 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.

<sup>77</sup> FICO, Frequently Asked Questions about FICO Scores 2013–2018, at 2, <https://www.ficoscore.com/ficoscore/pdf/Frequently-Asked-Questions-About-FICO-Scores.pdf>.

a separate account on your credit report that gets closed once you pay off the balance. Since these loans are short-term (generally six weeks), they can bring down the average age of your credit history considerably — especially if you're a regular borrower.”<sup>78</sup>

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.”*<sup>79</sup> Thus, any supposed benefit shown by the study might only be achievable if the BNPL accounts are reported as 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.

However, aside from the lender whose data was used in the Equifax BNPL study, it is unlikely that BNPL lenders are currently reporting their accounts as a revolving open-end line, if they are even reporting at all. And if BNPL lenders are trying to avoid TILA coverage and/or treatment as a credit card, they will have a tremendous incentive to report as closed-end installment credit. Thus, another benefit to viewing BNPL products as credit card accounts – as discussed below – is to remove this incentive. There is no reason for a BNPL lender to report its products as closed-end credit if the Bureau requires it to follow the open-end, credit card rules.

## **F. Without Consolidated Statements and Payments, The BNPL Model Makes Managing Payments Difficult**

Credit card issuers under TILA are required to provide a billing statement that includes the amount and date of each credit extension, the payment due date, any finance charge or fees, the total charges calendar year-to-date, and the creditor's address for billing error purposes.<sup>80</sup>

However, BNPL providers have no such requirement for consolidated statements with a uniform format. The way in which payments and total charges are displayed, both initially and as payment dates approach, varies among providers. Mobile and web application views may differ as well. (See *Appendix D -Afterpay*) Without such requirements, BNPL providers typically do not

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<sup>78</sup> Trina Paul, Buy now, pay later' loans can decrease your credit score even if you pay on time—here's what you need to know, CNBC.com, Sept. 3, 2021, <https://www.cnbc.com/select/how-buy-now-pay-later-loans-can-decrease-your-credit-score/>

<sup>79</sup> 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-later>. 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/>.

<sup>80</sup>Reg. Z § 1026.7



provide BNPL users with a comprehensive billing statement that indicates all transactions with the provider in a given month.

In contrast, credit cards have a single monthly payment due on the same day, provided on the statement. But with BNPL products, 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. Without a consolidated statement, consumers do not get an overall picture of what payments are due when. To further complicate this issue, BNPL users may have accounts with multiple providers. Consumers with multiple BNPL credit plans may find them especially difficult to track since due dates vary based on the date of purchase.

One study found that 43% of users 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.<sup>81</sup> 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.<sup>82</sup>

## **G. Fee Transparency Is a Concern**

Some BNPL lenders charge late fees and other fees.<sup>83</sup> These fees may not be clearly disclosed.

Some BNPL providers appear to have significant revenue from late fees. 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.

Research by the United Kingdom Financial Conduct Authority 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.<sup>84</sup> Fees vary depending on the provider and reach as high as \$25.<sup>85</sup>

### **Figure 5: Sezzle's Receivables based on Past Due Dates<sup>86</sup>**

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<sup>81</sup> 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)].

<sup>82</sup> 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->.

<sup>83</sup> CFPB, BNPL 2021.

<sup>84</sup> 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](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1027366/210923_-_BNPL_condoc_-_Cleared.pdf).

<sup>85</sup> Miranda, Leticia. *NBC News*, "The Hidden Costs of 'Buy Now, Pay Later' Loans" (Nov. 4, 2021), <https://www.nbcnews.com/business/consumer/hidden-costs-buy-now-pay-later-loans-rcna4367>.

<sup>86</sup> From Sezzle SEC 10-K.

The following table summarizes Sezzle's gross notes receivable and related allowance for uncollectible accounts as of December 31, 2020 and 2019:

	2020			2019		
	Gross Receivables US\$	Less Allowance US\$	Net Receivables US\$	Gross Receivables US\$	Less Allowance US\$	Net Receivables US\$
Current	\$ 79,673,073	\$ (2,692,254)	\$ 76,980,819	\$ 25,695,723	\$ (1,014,888)	\$ 24,680,835
Days past due:						
1–28	9,574,902	(3,616,327)	5,958,575	2,251,591	(923,396)	1,328,195
29–56	3,576,255	(2,646,627)	929,628	919,177	(719,910)	199,267
57–90	2,574,438	(2,177,938)	396,500	834,107	(803,643)	30,464
<b>Total</b>	<b>\$ 95,398,668</b>	<b>\$ (11,133,146)</b>	<b>\$ 84,265,522</b>	<b>\$ 29,700,598</b>	<b>\$ (3,461,837)</b>	<b>\$ 26,238,761</b>

Principal payments recovered after the 90 day charge-off period are recognized as a reduction to the allowance for uncollectible accounts in the period the receivable is recovered.

*In 2020 16% of gross receivables were delinquent. 6% were delinquent by more than 28 days.*

While providers may cap the total amount of late fees – i.e., at 25% of the amount of credit – that is still very high in interest rate terms. 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. And even portfolio-wide, as noted above, Australia found that Afterpay's total late fees amounted to up to 68% APR.<sup>87</sup>

In addition to late fees, BNPL providers may charge other fees, including account reactivation fees, returned payment fees, and rescheduling fees.<sup>88</sup> For example, Sezzle provides one free reschedule on every order, but charges fees for any payment moves beyond that.<sup>89</sup> Lack of clear and uniform consumer disclosures 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.

Another risk to price transparency is that merchants may seek to recoup the charges they pay BNPL lenders through hidden charges in the form of inflated prices. To the extent that consumer data is harvested, that data may be used to charge different prices to consumers expected to pay using BNPL credit. Moreover, as this market continues to grow, increased competition may create downward pressure on the merchant subsidy. This raises questions about whether BNPL lenders will seek to compensate for lower merchant subsidies, either through the interest rate,

<sup>87</sup> 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](https://treasury.gov.au/sites/default/files/2021-02/147719_mclean-roche_0.pdf).

<sup>88</sup> See, Sezzle charges both account reactivation and rescheduling fees: <https://legal.sezzle.com/user>, Klarna charges returned payment fees: [https://cdn.klarna.com/1.0/shared/content/legal/terms/0/en\\_us/sliceitinx](https://cdn.klarna.com/1.0/shared/content/legal/terms/0/en_us/sliceitinx).

<sup>89</sup> 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->.



or through additional fees, or by more aggressively pushing purchase volume without affordability assessments.

## H. BNPL Products Pose Debt Collection Risks

Debt collection poses concerns for any credit product, and especially for one that does not do any meaningful underwriting and pushes consumers to spend more than they otherwise would have. The debt collection practices of BNPL providers are just developing, but they are already resulting in complaints. In addition, terms in BNPL agreements may indicate that collectors intend to contact consumers by email in ways that Regulation F may not allow.

### 1. BNPL Consumers are experiencing negative impacts from the use of debt collectors

According to their terms and conditions, the following BNPL companies refer accounts to third-party debt collectors, with some authorizing the recovery of collection fees.

Name of Company	Details about Debt Collection in Terms & Conditions
Affirm	<i>"collection efforts may involve contacting you directly, submitting your information to a collections agency, or taking legal action"</i> <sup>90</sup>
AfterPay	<i>"we may appoint third party collections agencies to collect any amounts owing to us under this Agreement without your consent"</i> <sup>91</sup>
Klarna	<i>"If you are in Default Klarna may: (i) employ a debt collection agency to collect payment . . ."</i> <sup>92</sup>
Laybuy	<i>"We may also arrange for a debt collection agency to collect from you the amount you owe us."</i> <sup>93</sup>
Splitit	<i>"If we refer this Agreement to an attorney who is not our salaried employee for collection, we may require you to pay our reasonable attorneys' fees and expenses, to the extent permitted by applicable law."</i> <sup>94</sup>
ViaBill	<i>"we may declare you to be in default under this Agreement if you fail to make any payment when due and, in such event . . . (c) charge you all reasonable collection expenses we incur, including</i>

<sup>90</sup> Affirm, [Terms of Service](#) (Nov. 8, 2021).

<sup>91</sup> AfterPay, [Installment Agreement - USA](#) (Mar. 2022).

<sup>92</sup> Klarna, [Klarna Pay Later in 4 Agreement](#) (Oct. 14, 2021).

<sup>93</sup> Laybuy, [Consumer Terms & Conditions](#) (Aug. 4, 2021).

<sup>94</sup> Splitit, [Shopper Terms & Conditions: United States - English](#) (Aug. 2020).

	<i>attorneys' and collection agency fees and charges.</i> " <sup>95</sup>
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Consumers, especially young consumers, may not understand that BNPL is a form of debt.<sup>96</sup> Research conducted by the United Kingdom's Financial Conduct Authority found that consumer understanding varies—some consumers do not view BNPL as credit but rather view it as more similar to a debit card.<sup>97</sup>

As a result, consumers may be especially unprepared for the possibility of debt collection if they miss a payment. This is especially true where consumers are not informed that non-payment of BNPL credit may result in the account being placed with a debt collector. Secret shoppers in the United Kingdom found that retailers were not informing consumers at checkout that missed BNPL payments could lead to the account being referred to a debt collector, with any information about the possibility of collection buried in the terms and conditions on other pages.<sup>98</sup>

Although the possibility of default is not frequently discussed with consumers, one survey found that 10.8 percent of BNPL users had defaulted in the past.<sup>99</sup> A study from the United Kingdom found that one in ten BNPL users have been contacted by debt collectors.<sup>100</sup> Of those contacted by a debt collector, "96% experienced a negative consequence . . . [including] sleepless nights; ignoring texts, emails and letters in case they were about debts; avoiding answering the door; borrowing money to repay the debt; or their mental health getting worse."<sup>101</sup>

A report published by U.S. PIRG about complaints filed with the CFPB about BNPL providers found that 25% were complaints about debt collection.<sup>102</sup> Of these complaints, 112 were about "attempts to collect debt not owed" and 18 identified problems with "written notification about debt."<sup>103</sup>

BNPL borrowers may have debts placed with third-party collectors over relatively small balances. Data from the debt collection agency TrueAccord shows that "younger consumers (18-34) are going into collections for lower amounts, reflecting an uptick in lower-value BNPL accounts in default."<sup>104</sup> Data for that age group shows that the mean debt placement amount was less than \$500 in 2021.<sup>105</sup>

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<sup>95</sup> ViaBill, [ViaBill Free Terms and Conditions](#).

<sup>96</sup> See Maurie Backman, The Ascent, [Study: Buy Now, Pay Later Services Continue Explosive Growth](#) (Mar. 22, 2021) ("only 72.31% of our respondents agreed that buy now, pay later is a form of debt"); Erika Giovanetti, Lending Tree, [Shoppers Use 'Buy Now, Pay Later' Financing to Purchase Things They Can't Afford](#) (Apr. 20, 2021) (38% of Gen Z shoppers thought that BNPL was a form of debt).

<sup>97</sup> U.K. Financial Conduct Authority, Woolard Review (Feb. 2021).

<sup>98</sup> Citizens Advice, [One in 10 Buy Now Pay Later shoppers have been chased by debt collectors](#) (Sept. 3, 2021).

<sup>99</sup> Cardify, [Buying the Holidays Now, Paying Later](#) (Nov. 22, 2021).

<sup>100</sup> Citizens Advice, [One in 10 Buy Now Pay Later shoppers have been chased by debt collectors](#) (Sept. 3, 2021).

<sup>101</sup> *Id.*

<sup>102</sup> Ed Mierzwinski and Mike Litt, U.S. PIRG Education Fund, [The hidden costs of "Buy Now, Pay Later": Complaints to CFPB show need for action](#) 7 (Mar. 2022) (155 debt collection complaints out of 616 total complaints received).

<sup>103</sup> *Id.* at 9.

<sup>104</sup> TrueAccord, [Buy Now, Pay Later, Consumer Preferences and Collections Outlook](#) (2021).

<sup>105</sup> *Id.*

## 2. Debt buying and BNPL loans

The following companies have terms and conditions authorizing transfer, sale, or assignment of the loans to other entities like debt buyers:

Name of Company	Provisions about Debt Buying in Terms & Conditions
Affirm	"Affirm may assign this Agreement and its rights and obligations hereunder to any party at any time without any notice to you." <sup>106</sup>
AfterPay	"We may transfer, assign or sell this Agreement, and any rights under this Agreement, to a third party without your consent." <sup>107</sup>
Klarna	"we may transfer or assign these terms or any right or obligation under these terms at any time" <sup>108</sup>
Laybuy	"We may assign our rights, interests, obligations and/or liabilities at any time without your consent or prior notice to you." <sup>109</sup>
Sezzle	"Sezzle reserves the right to transfer or assign this Agreement or any right or obligation under this Agreement at any time." <sup>110</sup>
Splitit	"we may transfer, sell or assign the Installments, and any associated rights, to Splitit or one of its affiliates without your consent" <sup>111</sup>
ViaBill	"We may transfer, sell, or assign this Agreement and/or any of our rights under this Agreement at any time and without notice to you." <sup>112</sup>
Zip	"We may at any time, and without notice to you, sell, assign or transfer your account, any amounts due on your account, this Agreement, or our rights or obligations under your account or this Agreement to any person or entity." <sup>113</sup>

Experts from the debt buying industry have discussed reasons that BNPL loans are "a difficult asset class for debt buyers to purchase and sell."<sup>114</sup> Specifically, the fact that BNPL loans are issued without soliciting consumer social security numbers means that debt buyers obtain the accounts without this crucial piece of information needed to identify consumers.<sup>115</sup>

<sup>106</sup> Affirm, [Terms of Service](#) (Nov. 8, 2021).

<sup>107</sup> AfterPay, [Installment Agreement - USA](#) (Mar. 2022).

<sup>108</sup> Klarna, [Klarna Pay Later in 4 Agreement](#) (Oct. 14, 2021).

<sup>109</sup> Laybuy, [Consumer Terms & Conditions](#) (Aug. 4, 2021).

<sup>110</sup> Sezzle, [Sezzle User Agreement](#) (July 7, 2021).

<sup>111</sup> Splitit, [Shopper Terms & Conditions: United States - English](#) (Aug. 2020).

<sup>112</sup> ViaBill, [ViaBill Free Terms and Conditions](#).

<sup>113</sup> Zip, [Zip Customer Agreement](#), (Nov. 24, 2021).

<sup>114</sup> Accounts Recovery.net, [Panel Discusses Viability of BNPL Loans for Buying, Selling](#).

<sup>115</sup> *Id.*

A debt buyer's ability to identify that it is collecting from the correct consumer is critical to protecting consumers from efforts to collect debt that they do not owe. Moreover, the fact that debt buyers may attempt to collect accounts for a decade or more<sup>116</sup> makes the absence of this critical piece of information increasingly important as other pieces of information like phone number and even email address may change over time. Thus, the debt buyer's ability to identify the correct consumer will get significantly worse over time.

### 3. Collector's use of the consumer's email

The terms of the following BNPL companies also state that a consumer consents to receive collection emails from third-party debt collectors:

Name of Company	Details about Debt Collection in Terms & Conditions
Affirm	"If we need to contact you to service your account or to collect amounts you owe to us, you give direct consent to us, as well as servicers, agents, contractors and collectors of your account, to communicate with you in any way, such as calling, texting, or email via . . . any email address you provide to us, one of our Bank Partners, service providers, or one of our Merchants" <sup>117</sup>
AfterPay	"You also expressly consent to the receipt of electronic communications in connection from the merchant, Afterpay or any third party, including TrueAccord Corp., that is engaged by Afterpay to collect any amount owed under this Agreement." <sup>118</sup>
Klarna	<b>"Consent to Receive Debt Collection Emails.</b> In the event that you are in Default, you consent to receive debt collection emails from our debt collection service providers, TrueAccord Corp., SIMM Associates Inc, and Firstsource Advantage LLC. You certify that any email address you provide to Klarna can be used by TrueAccord Corp., SIMM Associates Inc, and Firstsource Advantage LLC for debt collection communications. You also certify that any email address you provide is a personal email address and not a work email address. If you change your email address, it is your obligation to update your email address with Klarna." <sup>119</sup>
Splitit	"You further agree that we or our service providers may send e-mails

<sup>116</sup> See, e.g., PRA Group, Inc., Annual Report (Form 10-K), at 29 (Feb. 26, 2021) (reporting that, in 2020, the company received \$18.8 million in payments on collection accounts purchased from 1996 to 2010); Encore Capital Grp., Annual Report (Form 10-K), at 46 (Feb. 24, 2021) (reporting that, in 2020, the company received more than \$51 million in payments on collection accounts purchased prior to 2011).

<sup>117</sup> Affirm, [Terms of Service](#) (Nov. 8, 2021).

<sup>118</sup> AfterPay, [Installment Agreement - USA](#) (Mar. 2022).

<sup>119</sup> Klarna, [Klarna Pay Later in 4 Agreement](#) (Oct. 14, 2021) (emphasis in original).

	to you at any e-mail address you provide us or use other electronic means of communication to the extent permitted by law.” <sup>120</sup>
ViaBill	“You also expressly consent to [ViaBill and each of our and its representatives, affiliates, agents and service providers] sending email messages to your email address, including emails delivered to a cell phone or mobile device.” <sup>121</sup>
Zip	“If we need to contact you to service your account or to collect amounts you owe to us, you give direct consent to us that we, as well as servicers, agents, contractors, and collectors of your account, may communicate with you in any way, such as calling, texting, or e-mail via . . . any email address you provide to us or one of our merchants . . .” <sup>122</sup>

Regulation F does not allow creditors to transfer consent to use a particular email address to its debt collectors. Instead, Regulation F outlines an optional method that creditors can use to allow consumers to opt out of having their email address transferred to debt collectors.<sup>123</sup>

Regulation F clearly states that consumers have the right to opt out of emails (or other types of communications),<sup>124</sup> and that debt collectors must include opt-out instructions in electronic communications like emails.<sup>125</sup>

Clauses such as the one identified above may be designed to set up the argument that consumers cannot opt out of such email messages because they consented to receive email messages from debt collectors when they agreed to the terms and conditions.

The CFPB should issue guidance to clarify that, regardless of the terms of the contractual agreement, consumers can always opt out of electronic communications from debt collectors by communicating with the debt collector. Taking steps to address this issue will prevent erroneous court rulings such as those that have arisen interpreting the Telephone Consumer Protection Act, where some courts have held that consumer’s consent is irrevocable when it is part of a binding contract.<sup>126</sup>

<sup>120</sup> Splitit, [Shopper Terms & Conditions: United States - English](#) (Aug. 2020).

<sup>121</sup> ViaBill, [ViaBill Free Terms and Conditions](#).

<sup>122</sup> Zip, [Zip Customer Agreement](#), (Nov. 24, 2021).

<sup>123</sup> 12 C.F.R. § 1006.6(d)(4)(ii).

<sup>124</sup> 12 C.F.R. § 1006.14(h).

<sup>125</sup> 12 C.F.R. § 1006.6(e).

<sup>126</sup> See *Medley v. Dish Network, L.L.C.*, 958 F.3d 1063 (11th Cir. 2020); *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51 (2d Cir. 2017). See also, National Consumer Law Center, *Federal Deception Law* § 6.3.6.5.3 (4th ed. 2022).

## V. BNPL Providers Are “Card Issuers” Within the Meaning of TILA and are Subject to the TILA Requirements for Credit Cards

There can be no doubt that BNPL providers, 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. It is equally clear that these are open-end credit plans since BNPL providers create credit lines on which BNPL consumers can draw. There is, however, a common (mis)understanding that BNPL is not covered by TILA because the plans are repayable in four or fewer installments without any required finance charge.<sup>127</sup> This is a profound misreading of Regulation Z.

To be sure, the general rule stated in the definition of “creditor” limits that terms to a person who “regularly extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments.”<sup>128</sup> However, Regulation Z contains an exception that applies for purposes of subpart B – the subpart addressed to open-end credit -- under which “any card issuer” is a creditor even if that issuer “extends credit that is not subject to a finance charge and is not payable by written agreement in more than four installments.”<sup>129</sup> It is on this basis that charge cards – which, like BNPL products, are payable in less than four payments without a finance charge – have long been covered under TILA. We believe it is clear that BNPL providers are card issuers covered by TILA’s credit card rules.

### A. BNPL Providers Are “Card Issuers” Subject To Subpart B Of Regulation Z

A “**card issuer**” is simply any “person that issues a credit card or that person’s agent with respect to the card.”<sup>130</sup>

### B. BNPL Providers Issue “Credit Cards”

TILA defines “**credit card**” as “any card, plate, coupon book or other **credit device** existing for the purpose of obtaining money, property, labor or services on credit.”<sup>131</sup> Regulation Z adds to the definition of “credit card” that it be a device that “may be used from time to time” to obtain credit.<sup>132</sup> The provisions enacted through the Credit CARD Act of 2009 (including the ability-to-

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<sup>127</sup> As discussed above, some BNPL providers may be counting on significant late fees as part of their profit model. In that situation those late fees should be considered finance charges, because they are not “unanticipated” and thus do not fall within the late fees exemption from the definition of “finance charge” under TILA.Reg. Z, 12 C.F.R. § 1026.4(c)(2) (excluding from the definition of finance charge: “Charges for actual unanticipated late payment, for exceeding a credit limit, or for delinquency, default, or a similar occurrence.”).

<sup>128</sup> Reg. Z, 12 C.F.R. § 1026.2(a)(17)(i).

<sup>129</sup> Reg. Z, 12 C.F.R. § 1026.2(a)(17)(iii).

<sup>130</sup> Reg. Z, 12 C.F.R. § 1026.2(a)(7).

<sup>131</sup> 15 U.S. Code § 1602(l).

<sup>132</sup> Reg. Z, 12 C.F.R. § 1026.2(a)(15)(i).

repay requirement and the limits on penalty fees) are limited to a slightly smaller subset, *i.e.*, “credit cards under an open-end (not home-secured) consumer credit plan;” however, that term only excludes cards that access home-equity lines of credit or overdraft lines of credit.<sup>133</sup>

## C. BNPL Products Are “Credit Devices”

Credit cards are not just pieces of plastic. They can come in other guises, as long as they are a “**device**” of some sort that can be used from time to time to obtain credit. Importantly, the Commentary to this section states 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).”<sup>134</sup> This definition fits BNPL products to a tee. The Electronic Fund Transfer Act also illustrates the variety of mechanisms that meet the EFTA’s similar definition of “access device,”<sup>135</sup> including personal identification numbers, telephone transfer and telephone bill payment codes,<sup>136</sup> security codes,<sup>137</sup> and log-in features provided by banks and aggregator services.<sup>138</sup>

While Regulation Z requires that the device be one that can be used “from time to time,” it is not necessary that the actual device that accesses the credit be reusable. TILA’s definition of “credit card” includes coupon books, which can be used from time to time, even though each coupon may be used only once.<sup>139</sup> Similarly, 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.<sup>140</sup> BNPL providers give consumers devices that can be used from time to time to obtain credit to purchase goods or services. Those devices should be viewed as “credit cards” within the meaning of TILA. These devices may include:

- Account numbers;
- Online accounts through which BNPL credit can be used to obtain goods or services;
- Apps that can be used for both online and in-person purchases, such as by directing the consumer to a merchant website or by generating a virtual card or QR code ;
- Physical cards.

A BNPL account number and other types of BNPL devices clearly can be used to access credit to purchase goods and services.

<sup>133</sup> Reg. Z, 12 C.F.R. § 1026.2(a)(15)(ii).

<sup>134</sup> Official Interpretations of Reg. Z § 1026.2(a)(15)-2.ii.C. See also *United States v. Bice-Bey*, 701 F.2d 1086 (4th Cir. 1983) (upholding conviction for credit card fraud where the defendant never used the plastic card itself, but made fraudulent charges solely using the credit card account number over the telephone); *Munoz v. Seventh Avenue, Inc.*, 2004 WL 1593906 (N.D. Ill. July 15, 2004) (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.)

<sup>135</sup> As defined by Regulation E, an “access device” is “a card, code, or other means of access to a consumer’s account, or any combination thereof, that may be used by the consumer to initiate electronic fund transfers.” 12 C.F.R. § 1005.12(c).

<sup>136</sup> Reg. E, Official Interpretations § 1005.2(a)-1.

<sup>137</sup> Federal Reserve Board, Electronic Fund Transfers, Proposed Rule, 65 Fed. Reg. 40061, 40064 (June 29, 2000).

<sup>138</sup> Office of the Comptroller of the Currency, OCC Bulletin 2001-12, [Bank-Provided Account Aggregation Services](#) (Feb. 28, 2001)

<sup>139</sup> 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.

<sup>140</sup> Official Interpretations of Reg. Z § 1026.2(a)(15)-2.i.D.

## D. BNPL Products Are a Type Of “Charge Card”

Under TILA and Regulation Z, the term “credit card” includes “charge cards,” which are devices “that may be used from time to time to obtain credit which is not subject to a finance charge,”<sup>141</sup> or “for which no periodic rate is used to compute a finance charge.”<sup>142</sup>

## E. BNPL Credit Is Open-End

Like other charge cards, BNPL credit meets the other elements of the definitions of credit card and open-end credit. The credit devices are reusable, and credit is generally available to the extent that previous credit extensions have been repaid:

## F. BNPL Products Are Designed For Repeat Use

BNPL devices are designed to be reusable “from time to time”<sup>143</sup> and BNPL providers “reasonably contemplate repeat transactions.”<sup>144</sup> It appears that users are already averaging multiple uses per month. For example, one survey found that Quadpay and Sezzle borrowers average four-to-five transactions per month; Afterpay and Klarna borrowers four per month; Affirm borrowers two per month.<sup>145</sup> After a consumer uses a BNPL product the first time, usually they must create an account for future use. The consumer’s history of repeat usages of that provider’s BNPL credit becomes part of that account under a single account number, internet dashboard or app.

A BNPL account, app or other device can be a charge card even if not every consumer uses it for repeat transactions. It is sufficient that much of the customer base does so.<sup>146</sup>

## G. BNPL Products Have An Available, Replenishing Credit Line

BNPL accounts and other devices also meet the third element of open-end credit in that the amount of credit that may be extended is generally available if previous credit extensions are repaid.<sup>147</sup> As one article described:

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<sup>141</sup> 15 U.S.C. § 1637(c)(4)(E) (emphasis added).

<sup>142</sup> Reg. Z, § 1026.2(a)(15)(iii) (“Charge card means a credit card on an account for which no periodic rate is used to compute a finance charge.”).

<sup>143</sup> Reg. Z § 1026.2(15)(i).

<sup>144</sup> Reg. Z § 1026.2(20)(i).

<sup>145</sup> Cardify, Convenience, Debt, and Novelty: Analyzing BNPL Consumer Data (Sept. 8, 2021), <https://www.cardify.ai/reports/bnpl-trend-report>.

<sup>146</sup> 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.”).

<sup>147</sup> Reg. Z § 1026.2(a)(20)(iii).



“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.”<sup>148</sup>

After a consumer has created a BNPL account, many providers display an “available to spend” amount of credit for future use. For example, after a consumer made a single purchase with AfterPay, without any request for future credit, her account displayed an estimated \$578.57 “available to spend”:

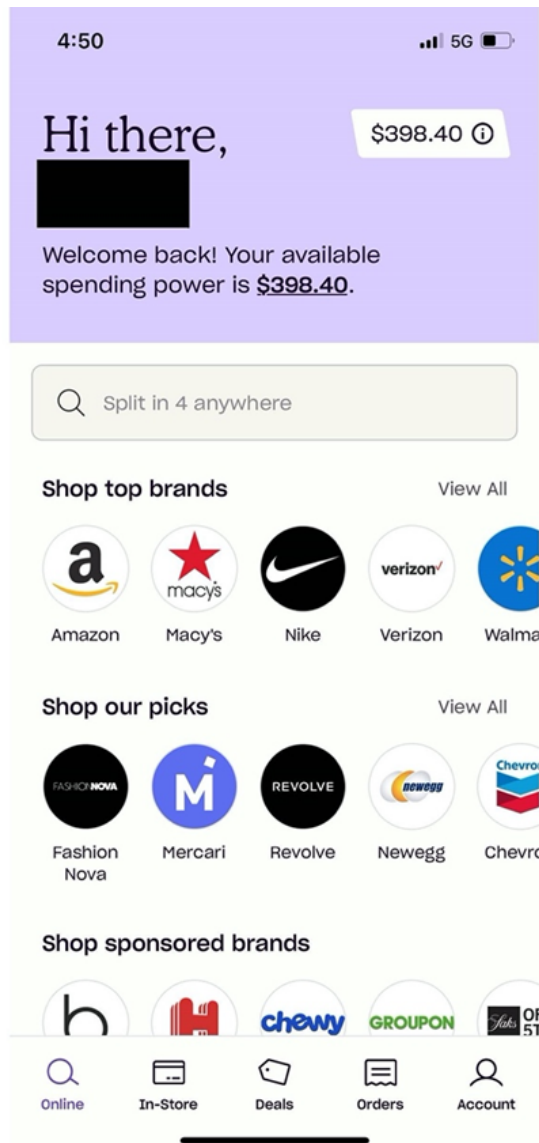
The screenshot shows the AfterPay user interface. At the top, the AfterPay logo is on the left, and navigation links (Home, Payment Schedule, My Account, Help, Logout) are on the right. Below the navigation bar is a teal banner with a white box containing account information: "Hey, [redacted]", "Est. available to spend \$578.57", and "Total you owe \$21.43". To the right of this box is a promotion to download the AfterPay app from the App Store or Google Play. Below the banner are two tabs: "Orders" (selected) and "Recurring Payments". Under the "Orders" tab is a table with the following data:

DATE ▼	ORDER NO.	MERCHANT	ORDER AMOUNT	AMOUNT OWING	ACTION
03/02/2022	[redacted]	Uncommon Goods	\$28.57 USD	\$21.43 USD	<a href="#">VIEW ORDER</a>

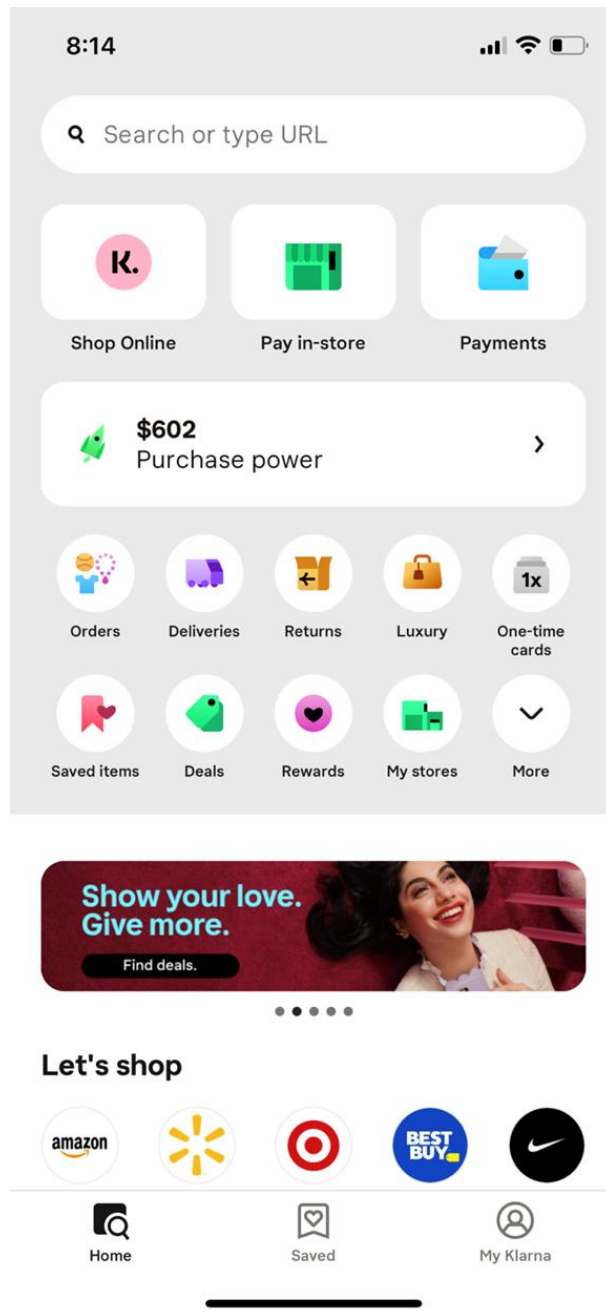
Other BNPL providers also offer an “available to spend” credit line, as shown in the Zip and Klarna apps:

<sup>148</sup> Jaffery, Subboh. 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](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)

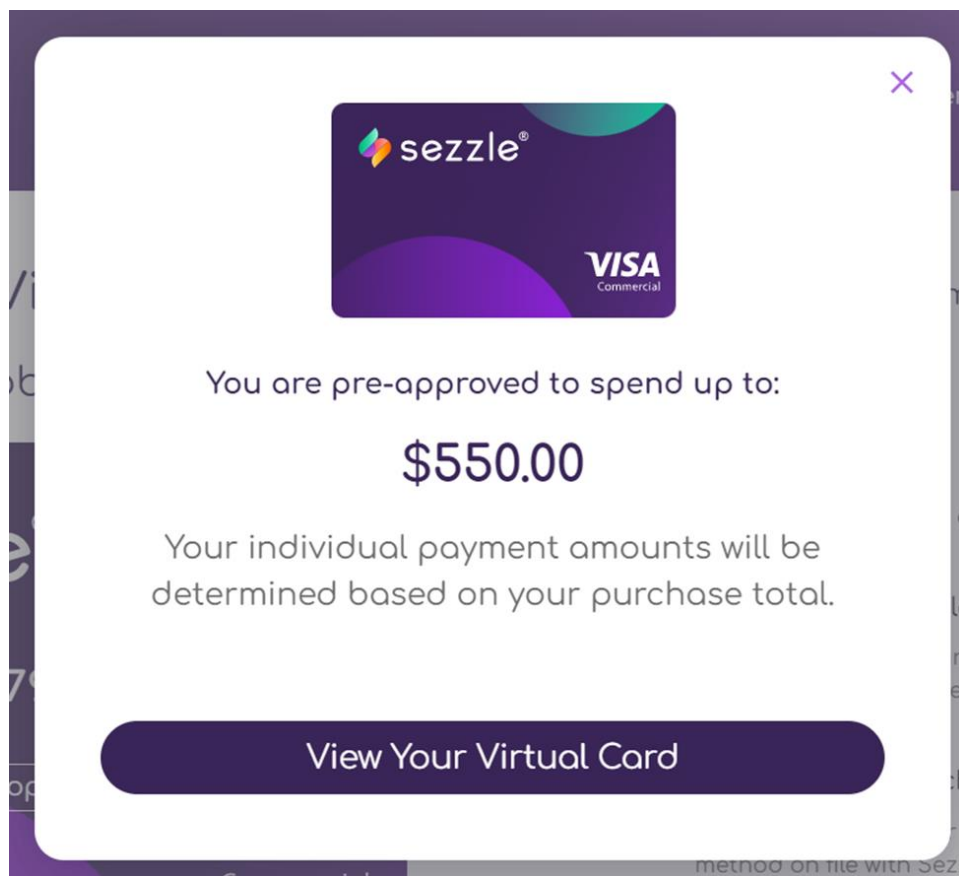
Zip:



## Klarna:



Some, like **Sezzle**, even display a clear virtual credit card:



An explicit credit limit or line is not necessary for a BNPL device to be a credit or charge card, as long as it is usable from time to time.<sup>149</sup> 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 are within any spending limits.<sup>150</sup>

Thus, there should be little doubt that BNPL providers are “card issuers” subject to Part B of Regulation Z.

<sup>149</sup> 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.”).

<sup>150</sup> 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.”).

## H. BNPL Credit Is Subject To The CARD Act Provisions Of Subpart G Of Regulation Z

The special requirements added to TILA by the CARD Act and incorporated into Subpart G of Regulation Z also extend to BNPL providers. Some of those provisions are addressed expressly to “card issuers” and thus apply to BNPL providers for the reasons discussed above, such as the requirement to consider ability to repay.<sup>151</sup> Others, such as the requirement for reasonable and proportional penalty fees,<sup>152</sup> apply to a “credit card account under an open-end (not home-secured) consumer credit plan,” a phrase which Regulation Z defines to mean “any open-end credit account that is accessed by a credit card” other than certain home equity plans and overdraft lines of credit.<sup>153</sup> While open-end credit normally requires that the creditor have the right to impose a finance charge,<sup>154</sup> the Official Interpretation accompanying Regulation Z clearly states that “references to credit card accounts under an open-end (not home secured) consumer credit parts in subparts B and G generally include charge cards,”<sup>155</sup> a term the TILA statute and Regulation Z define to mean credit cards without a finance charge or for which no periodic rate is used to compute a finance charge.<sup>156</sup>

In summary, BNPL products have all the core elements to be considered to be credit cards both under the general TILA definition as well as under the CARD Act definition. BNPL providers issue a device – *i.e.*, an account number, app, etc. – that can access credit to purchase goods and services. BNPL products are open-end credit because the device can be used from time to time and the consumer has an expectation of future credit if previous advances are repaid. The CFPB should issue an interpretive rule to clarify the application of TILA to BNPL providers.

## VI. Recommendations

We have several recommendations regarding BNPL products:

### A. Clarify that BNPL Loans are Credit Cards and are Subject to the Ability-to-Repay, Penalty, Chargeback Protections, Statements, and Dispute Rights Protections that Credit Cards Receive

As discussed above, BNPL providers meet the TILA definition of “card issuers” because they issue devices that are “charge cards” and thus “credit cards” within the meaning of TILA. The CFPB should make clear to BNPL providers that they must comply with TILA’s credit card

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<sup>151</sup> See Reg. Z, 12 C.F.R. § 1026.51.

<sup>152</sup> Reg. Z, 12 C.F.R. § 1026.52.

<sup>153</sup> Reg. Z, 12 C.F.R. § 1026.2(a)(15)(ii).

<sup>154</sup> Reg. Z, 12 C.F.R. § 1026.2(a)(20)(ii).

<sup>155</sup> Official Interpretations of Reg. Z § 1026.2(a)(15)-3.i.

<sup>156</sup> 15 U.S.C. § 1637(c)(4)(E); Reg. Z, 12 C.F.R. § 1026.2(a)(15)(iii).

protections. Those protections, though aimed at a different product, are tailor-made for BNPL credit.

1. **Fee disclosures.** TILA requires that credit card issuers' fees and charges be disclosed "clearly and conspicuously" in solicitations/applications and at account-opening in a special tabular format (the "Schumer box") in writing.<sup>157</sup> These clear, uniform disclosures are sorely lacking and needed for BNPL products.
2. **Ability to repay.** Credit card issuers are required to consider the consumer's ability to make the payments based on the consumer's income or assets and the consumer's current obligations.<sup>158</sup> In light of the problems discussed above regarding failure to consider ability to repay, this requirement should apply to BNPL providers. 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 requirements should not also apply to BNPL providers.
3. **Reasonable and proportional penalty fees.** The Credit CARD Act provisions of TILA establish a requirement that penalty fees be "reasonable and proportional" to the consumer's omission or violation.<sup>159</sup> This requirement was adopted as a result of abuses by credit card companies that generated revenue from over-the-limit and late fees by inducing consumers into exceeding their credit limits or paying late.<sup>160</sup> The better BNPL products have no late fees at all, and any revenue models that depend on late fees may be unfair, deceptive or abusive for the reasons described earlier. At a bare minimum, however, the CARD Act penalty fee requirements would put some outer limit on late fees.
4. **Chargeback rights.** TILA provides an important protection to consumers that enables them to dispute charges on their credit cards.<sup>161</sup> 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, colloquially known as the "chargeback" protection.

As described above, consumers expect this same protection when they use BNPL credit, and some run into problems when they have returned or attempted to return an

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<sup>157</sup> 15 U.S.C. § 1632(a); Reg. Z § 1026.17(a).

<sup>158</sup> 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

<sup>159</sup> 15 U.S.C. § 1665d(a); Reg. Z § 1026.52(b) and (b)(1).

<sup>160</sup> See, e.g., National Consumer Law Center, *Consumer Credit Regulation* § 8.4.1 (3d ed. 2020), updated at [www.nclc.org/library](http://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](http://www.gao.gov)

<sup>161</sup> 15 U.S.C. § 1666i, Reg. Z § 1026.12(c).

item but are still being pursued by the BNPL provider. Applying TILA's dispute rights would solve these problems, protect consumers, and give consumers greater confidence when using BNPL credit.

5. **Dispute rights.** TILA also has provisions allowing people to resolve "billing errors."<sup>162</sup> 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.<sup>163</sup> Consumers can also dispute mistakes, unauthorized charges, and other errors on or questions about their account,<sup>164</sup> and have no liability for unauthorized charges.<sup>165</sup> That give consumers rights and prescribe procedures to follow when there are mistakes, unauthorized charges or other problems with a credit card account. Consumers typically create an account when they use BNPL credit, and that account is designed for repeat usage. Thus, it is possible that mistakes or unauthorized charges could impact a BNPL account. The consumer may have rights against their bank under the Electronic Fund Transfer Act (EFTA) if unauthorized charges are deducted through their debit card, or against their credit card company under TILA if the BNPL repayment is secured through a credit card. But unless BNPL providers are considered to be card issuers, no law specifies the obligations of the BNPL provider to correct mistakes or respond to disputes about unauthorized charges on the BNPL account. The consumer is at the mercy of whatever the BNPL provider puts into the account agreement. The TILA dispute resolution framework would work well for BNPL accounts and would result in a consistent set of rights and duties with which consumers and companies are familiar.
6. **Statements.** TILA requires that card issuers and other creditors that offer open-end credit plans 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, and(5) any applicable APRs.<sup>166</sup> This information would be useful for consumers who use BNPL products as well, especially those making repeat, overlapping purchases, as many do. As discussed above, 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 statements would help with this problem.

The CARD Act does require that statements be sent 21 days before a payment due date;<sup>167</sup> for other types of open-end credit, only 14 days is required.<sup>168</sup> If the first payment on a BNPL purchase (after the down payment) is due in 14 days, it would not be possible to supply the statement 21 days in advance. However, the consequence under

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<sup>162</sup> 15 U.S.C. § 1666; Reg. Z, 12 C.F.R. § 1026.13.

<sup>163</sup> 15 U.S.C § 1666(b)(3); Reg. Z, 12 CFR § 1026.13(a)(3).

<sup>164</sup> 15 U.S.C § 1666(b); Reg. Z, 12 CFR § 1026.13(a).

<sup>165</sup> 15 U.S.C. § 1643; Reg. Z, 12 C.F.R. § 1026.12(b).

<sup>166</sup> Reg. Z, 12 C.F.R. § 1026.7(b).

<sup>167</sup> 12 C.F.R. § 1026.5(b)(2)(ii)(A).

<sup>168</sup> 12 C.F.R. § 1026.5(b)(2)(ii)(B)(2).

TILA of failing to provide a statement 21 days in advance is that the card issuer cannot impose a late fee or penalty rate.<sup>169</sup> The CFPB also has the authority to make adjustments.<sup>170</sup>

BNPL statements need not follow the standard 30-day reporting schedule for traditional credit cards. They must be periodic, based on a billing cycle,<sup>171</sup> but that billing cycle could be biweekly. Nor is there anything in TILA that requires a consolidated payment date for all purchases, as long as consumers are given sufficient time to pay. But we do believe that many consumers would prefer to have BNPL payments aligned on a standard biweekly schedule, rather than falling helter-skelter on whatever dates the purchase triggers.

The CFPB should consider how statements should be provided for BNPL products. For example, the CFPB could clarify that BNPL providers can comply with the TILA statement requirements by (1) providing a new statement every 14 days, which updates the upcoming payment schedule, (2) ensuring that the first payment on each new purchase is at least 14 days away, ideally consolidated with the next payment date for other purchases on a regular billing cycle, and (3) refraining from charging any penalty fees as long as the first payment on a new purchase is received within 21 days of the statement.

**7. More appropriate and helpful credit reporting practices.** While TILA does not dictate how creditors report to credit bureaus, by treating BNPL products as credit cards, it is more likely that the credit will be reported to the nationwide CRAs as such, which will benefit consumers. As the CFPB has noted, credit card information plays an outsized role in the credit reporting system.<sup>172</sup> Much of credit scoring modeling is built around credit cards. As discussed above, the best chance for BNPL products to actually help, as opposed to hurt, consumer credit scores is if they are reported as open-end credit like credit cards rather than as a series of individual loans.

## **B. Supervise the larger BNPL providers**

Given the exploding BNPL market and the number of risks to consumers, oversight over BNPL providers is critical. Supervision is a critical tool that enables the CFPB to examine from the inside how a company is operating, how consumers are interacting with that company, and what problems or potential risks a product is posing for consumers. Supervision also enables the

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<sup>169</sup> 12 C.F.R. § 1026.5(b)(2)(ii)(A)(2).

<sup>170</sup> 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”).

<sup>171</sup>

<sup>172</sup> See CFPB, Key Dimensions and Processes in the U.S. Credit Reporting System: A review of how the nation's largest credit bureaus manage consumer data, Dec. 2012, at 3 (noting that “retail and network-branded revolving credit cards account for nearly 60% of all trade lines”).



CFPB to spot problems early and to correct them quickly without the need to bring an adversarial enforcement action.

Federal supervision of BNPL providers 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 providers today have no federal supervision, and so far, only California appears to be specifically overseeing BNPL providers at the state level, though some providers that hold other state licenses may receive some level of oversight.

Indeed, as banks increasingly look to get into 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 either face unfair competition or be tainted by publicity over practices in which they do not engage.

Fortunately, the CFPB has the clear authority to supervise BNPL providers by issuing a regulation defining the “larger participants” in the BNPL market. 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, and other emerging credit products.<sup>173</sup>

The section 1022 orders that the CFPB has issued to select BNPL providers, 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.

## **C. Prevent or Remedy Unfair, Deceptive or Abusive Acts or Practices and Disparate Impacts in the BNPL Market**

As discussed above, BNPL products are subject to ECOA as well as to a general ban on unfair discrimination practices. The CFPB should closely examine BNPL providers for disparate

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<sup>173</sup> 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/images/pdf/high\\_cost\\_small\\_loans/payday\\_loans/Fintech\\_evasion\\_ltr.pdf](https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/Fintech_evasion_ltr.pdf). 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.

impacts to ensure that these products do not result in further harm to disadvantaged and protected communities.

The CFPB should be alert for other potential unfair, deceptive or abusive acts or practices (UDAAPs) in the BNPL market. As we have discussed, there are several potential practices that are potentially unfair, deceptive or abusive, including:

- Extending credit without considering ability to repay;
- Securing repayment of BNPL through a credit card;
- Promoting credit through marketing that emphasizes “no credit check”;
- 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.

The CFPB should also watch how BNPL providers use consumer data and how the BNPL market evolves to assess whether data is used or BNPL products operate in ways that consumers would not expect or authorize. The CFPB can prevent unfair, deceptive or abusive practices by issuing guidance or other informational statements alerting companies to problematic practices. Supervision can also be used to prevent or remedy UDAAPs. When warranted, enforcement may also be an important tool to address UDAAPs in the BNPL market.

The CFPB should also develop educational materials about the actual benefits versus risks of BNPL accounts on consumers’ credit histories.

## **D. Enforce the EFTA’s Prohibition on Compulsory Repayment by Electronic Fund Transfer**

The CFPB should enforce the Electronic Fund Transfer Act’s (EFTA) ban on compulsory electronic payments and should clarify that consumers have the right to revoke BNPL providers’ authorization to debit their bank accounts.

The EFTA prohibits any person from conditioning credit on repayment by preauthorized electronic fund transfers (PEFT).<sup>174</sup> The scope of credit covered by this provision is broader than that covered by TILA, and does not require that the credit carry 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.”<sup>175</sup> That definition covers BNPL providers.<sup>176</sup>

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<sup>174</sup> 15 U.S.C. §1693k(1).

<sup>175</sup> Reg. E, 12 C.F.R. § 1005.2(f).

<sup>176</sup> 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 ....”).

Most BNPL providers require preauthorized repayment of some sort, usually by debit card or credit card. 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.”

While consumers may be given the choice of repaying by a PEFT or by a credit card, that is a false choice offered primarily to evade the EFTA’s compulsory use ban. First, some BNPL consumers do not have credit cards, and thus they have no choice but to authorize automatic repayment by debit cards. Second, as discussed above, there is little to no benefit and significant risk of harm to a consumer who repays BNPL credit by another credit account. Requiring or allowing repayment in this fashion risks unfair, deceptive and abusive practices, including encouraging credit that the consumer is unable to repay. BNPL providers should not be allowed to evade the EFTA in this fashion.

While BNPL providers can require an initial down payment by debit card or another form of EFT, for future payments, the CFPB should enforce the compulsory use ban and require BNPL providers to provide consumers the choice of whether to preauthorize payments. Many consumers undoubtedly will do so 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 providers 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 preauthorization of debit card payments.<sup>177</sup> The EFTA clearly gives consumers the right to stop preauthorized payments.<sup>178</sup> Some courts have held that this right encompasses the right to tell payees to stop debiting their accounts,<sup>179</sup> and the Regulation E Official Interpretations lend support to this interpretation.<sup>180</sup> Some courts, however, have held that the EFTA only gives consumers the right to direct their bank, not the payee, to stop the payments.<sup>181</sup> 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 providers 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.

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<sup>177</sup> 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>.

<sup>178</sup> See 15 U.S.C. § 1693d(a); Reg. E, 12 C.F.R. § 1005.10(c).

<sup>179</sup> 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).

<sup>180</sup> 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.

<sup>181</sup> See, e.g., *Estep v. Reliable Credit Assoc.*, 2015 WL 3797243 (W.D. Wash. June 10, 2015).

## **E. Promote Appropriate Credit Reporting Treatment**

As the CFPB has noted, credit card information plays an outsized role in the credit reporting system.<sup>182</sup> Much of credit scoring modeling is built around credit cards.

The CFPB should require BNPL providers to comply with the TILA rules for credit cards, as discussed above, which will also make it more likely that the credit will be reported to the nationwide CRAs as such. This is the best chance for BNPL credit to actually help, as opposed to hurt, consumer credit scores.

In addition, the CFPB should:

- Conduct research on how BNPL is actually being reported to the Big Three nationwide consumer reporting agencies (CRAs), the amount of data being furnished, and the realistic impact of BNPL on credit scores, including using data from the Consumer Credit Panel.
- Develop educational materials about the actual benefits versus risks of BNPL accounts on consumers' credit histories, and
- Monitor for deceptive claims about credit building benefits of BNPL.

## **F. Monitor Debt Collection Practices and Clarify the Right to Stop Electronic Communications**

As discussed above, the CFPB should monitor the debt collection and debt sales practices of BNPL providers and look out for unlawful or abusive practices. The CFPB should also issue guidance to clarify that, regardless of the terms of the contractual agreement, consumers can always opt out of electronic communications from debt collectors by communicating with the debt collector.

## **G. Conduct Research**

The CFPB should use its research and market monitoring authorities to shed more light on the BNPL market, including how it operates and how it is impacting consumers. This research should be made public to inform all stakeholders interacting with the BNPL market.

Areas of research could include:

- Basic descriptions of the practices among companies and how they differ;
- Typical usage patterns and debt loads;

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<sup>182</sup> See CFPB, Key Dimensions and Processes in the U.S. Credit Reporting System: A review of how the nation's largest credit bureaus manage consumer data, Dec. 2012, at 3 (noting that "retail and network-branded revolving credit cards account for nearly 60% of all trade lines").

- Characteristics of consumers who use BNPL credit and how those characteristics impact how they use BNPL, are impacted or are treated;
- Types of problems or risks consumers are facing;
- Potential disparate impacts on protected or vulnerable communities;
- How BNPL is actually being reported to the Big Three nationwide consumer reporting agencies (CRAs), the amount of data being furnished, and the realistic impact of BNPL on credit scores, including using data from the Consumer Credit Panel;
- Long-term impact on consumers who use BNPL credit, including the risk of incurring overdraft and NSF fees or becoming unbanked, and migration to other products.

## **VII. Conclusion**

BNPL is a growing market that is projected to continue to expand. CFPB has broad authority to identify and address the risks BNPL poses to consumers and should engage in active oversight of BNPL lenders.

## Appendices

## Appendix A: In Store shopping advertisement for BNPL provider



Source: In person shopping mage from Durham, North Carolina

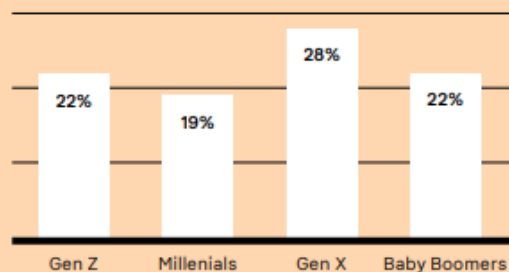
TIMING BLACK FRIDAY

## In-store sales still sleigh.

Despite the shift towards online shopping, nearly 1 out of 4 (23%) shoppers plan to do most of their shopping in physical retail stores during Black Friday. Brands with brick-and-mortar locations should be ready to welcome shoppers who wouldn't miss out on the tradition of picking out presents in person on this big day.

Gen Xers (28%) are more likely than any other age group (Gen Zers: 22%, Millennials: 19%, Baby Boomers: 22%) to do most of their shopping in-store during Black Friday, underscoring how important it is for retailers to become available for shoppers across multiple channels.

### Who's headed to physical stores on Black Friday?



### HOT TIP

In addition to your regular sales, consider hosting an engaging, eye-catching in-store event that will attract customers—especially younger shoppers who crave social shopping experiences.

## RETAILER PREFERENCES

### Big, boxy and beautiful.

Shoppers everywhere agree—big-box retailers (62%) are the hottest place to shop this holiday season. After all, many of these warehouse-style shopping meccas offer shoppers the convenience of picking up everything from gifts to groceries, saving time, and streamlining to-do lists.

Department stores (37%) and malls (34%) come in as the second and third hottest places to shop this holiday season, underscoring the value of convenience and efficiency. Who doesn't want to get all of their holiday shopping done in one place?

### Deck the malls for Gen Z.

Maybe it was *Stranger Things*' most recent season inspiring them, but Gen Zers (44%) are more likely than all other age groups (Millennials: 38%, Gen Xers: 30%, Baby Boomers: 28%) to hit shopping malls this holiday season. With plenty of stores and items in one place, malls provide a great way to browse and explore products.

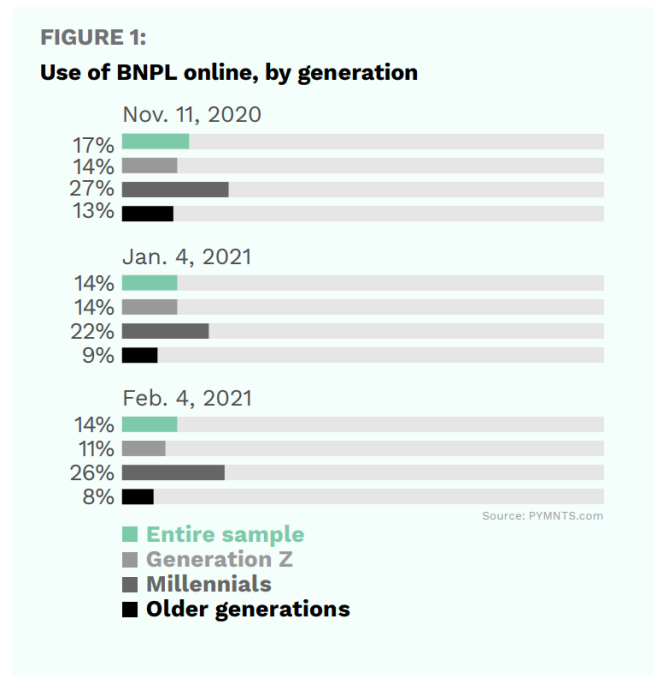
#### HOT TIP

Take advantage of platforms like Instagram and TikTok to showcase your wares and get Gen Z and Millennial shoppers excited to stop by. Keep in mind that this demographic prefers contactless, flexible payment options as well.

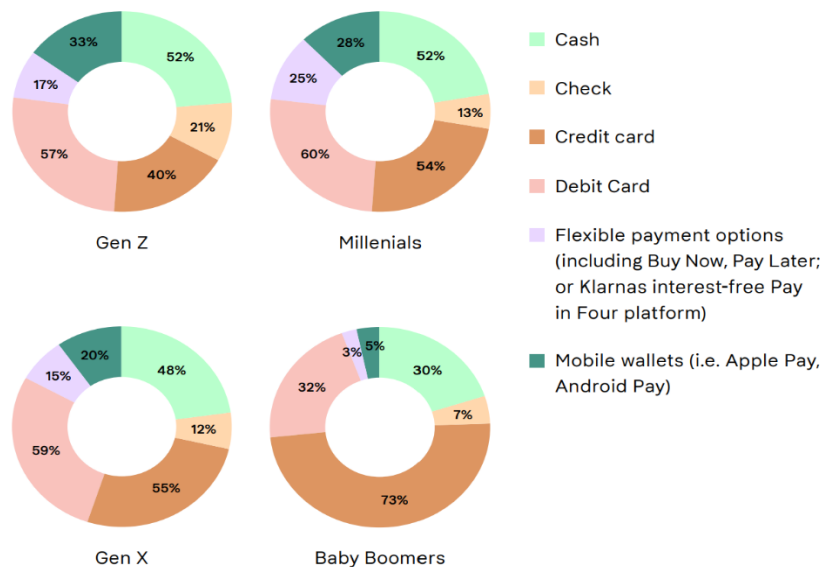
Source: Klarna for Business. "State of Smoooth: 2021 Holidays Unwrapped" (December 2021). [The-State-of-Smoooth-2021-Holidays-Unwrapped-Report-1.pdf \(klarna.com\)](#)



## Appendix C: Use of BNPL by generation via BNPL provider reports

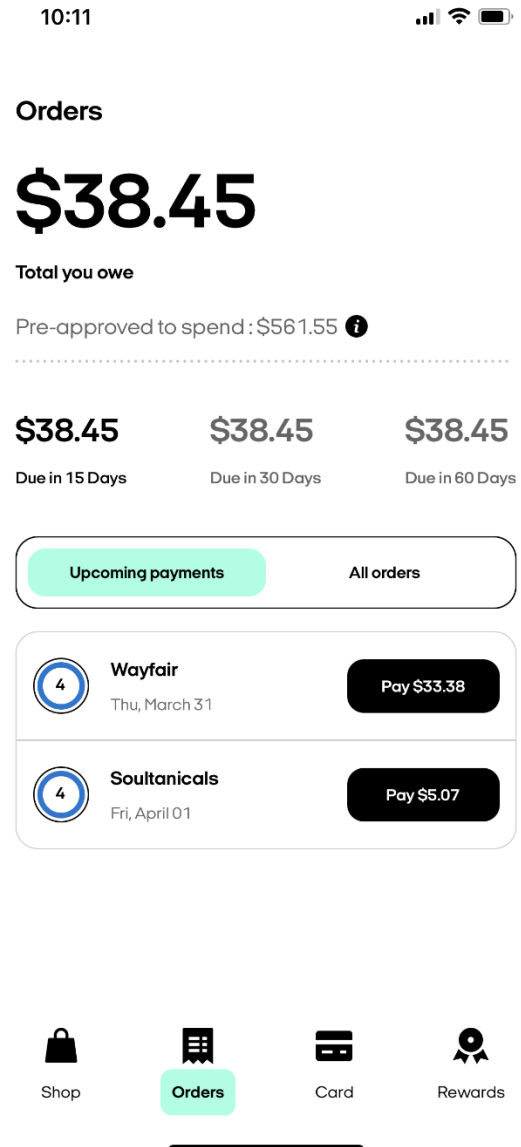
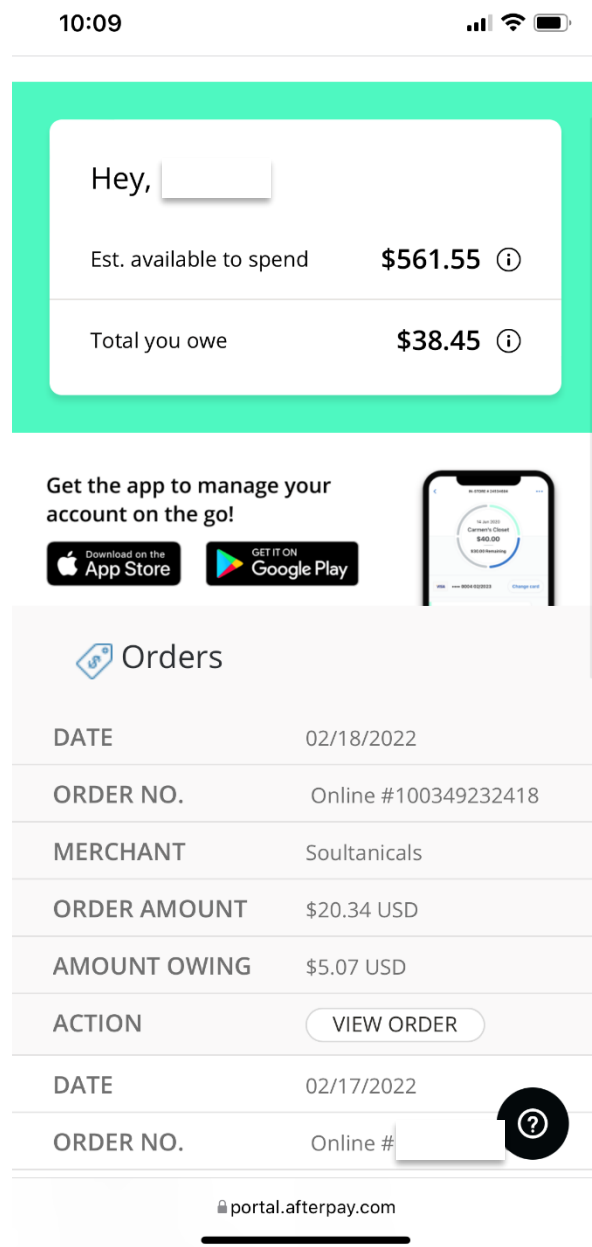


Source: Accenture, commissioned by Afterpay “Economic Impact of Buy Now Pay Later in the US” (September 2021). [Economic-Impact-of-BNPL-in-the-US-vF.pdf \(yourcreative.com.au\)](#)



Source: Klarna for Business. “State of Smooth: 2021 Holidays Unwrapped” (December 2021). [The-State-of-Smooth-2021-Holidays-Unwrapped-Report-1.pdf \(klarna.com\)](#)

**Appendix D: Differing views on Afterpay Mobile display (left) and app (right).**



Source: Screenshots from borrower.