

March 24, 2022

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

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

Dear Director Chopra:

As the Consumer Financial Protection Bureau (CFPB) knows, Buy-Now-Pay-Later (BNPL) products have exploded in popularity. As such, the American Financial Services Association (AFSA)¹ supports the CFPB's Request for Information (RFI) to learn more about the size, scope, and business practices of the BNPL market. Current BNPL providers are not regulated as thoroughly as providers of products like traditional installment loans, vehicle finance contracts, mortgage loans, and credit cards. Thus, we are glad to see the CFPB's data request for the BNPL providers and the RFI about the product.

AFSA's members follow at least 22 different federal laws, spanning eight different agencies, which creates a layered system of laws that protect consumers. Our state-licensed members also comply with a myriad of state-specific lending and general consumer protection laws that govern all aspects of their relationship with their customers. AFSA members provide customers with disclosures. They also have comprehensive underwriting systems and perform a thorough ability to repay analysis on each applicant. BNPL providers, which should not be confused with traditional installment lenders or retail installment sales finance companies, are **not** part of that legal framework. Operating outside that legal framework exposes consumers to potential risks, as outlined below in Section I.

To mitigate those risks, AFSA recommends that the CFPB consider: (1) supporting the credit bureaus as they develop a framework to allow for BNPL credit reporting, and (2) consider requiring BNPL providers to disclose all relevant product information in a clear, transparent, and truthful manner.

I. Potential Risks to Consumers from BNPL Products

Required autopay, loan stacking, lack of disclosure, limited or no underwriting, and concerning dispute procedures create potential risks for consumers.

¹ Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

a. *Autopay Requirement*

Some BNPL providers require consumers to enroll in autopay as a condition of credit.² Allowing the use of credit cards as a method of payment, combined with BNPL lenders' lack of rigorous underwriting practices, may facilitate consumer debt accumulation through the over extension of credit by the use of debt to pay debt. While these autopay practices may not result in any regulatory violation, we encourage the Bureau to examine this practice. We note that while AFSA members allow consumers to set up ACH payments or autopay from a deposit account, it is not required. It's simply offered as a convenience that consumers may use, if they choose.

b. *Loan Stacking*

The ability of a consumer to take multiple BNPL loans with a single lender and across multiple lenders is loan stacking. This is problematic because consumers that overextend with BNPL products can quickly assume more BNPL debt than they can service with the balance in their autopay tied account. This is all the more troubling for consumers that are steered into autopay at the outset while using a BNPL provider that makes it difficult or impossible to cancel autopay. These consumers are vulnerable to falling into a BNPL-initiated fee cycle due to being overextended by the BNPL debt. Because most consumers only have one checking account, if they use that account as their payment method, they are likely using it for multiple BNPL loans. Thus, if the consumer has incurred NSF and returned payment fees on one loan, they are probably incurring those fees on other loans as well. Many states already have laws that either limit or prohibit such practices in the types of lending engaged in by members of AFSA.

c. *Lack of Disclosure*

The Truth in Lending Act (TILA) promotes the informed use of consumer credit, in part by mandating understandable, standardized disclosures and common terminology to simplify consumer comparisons of credit terms and rates. TILA's disclosures and protections do not extend to BNPL consumers. Though the basic terms of the products may be generally understood (pay in four equal installments over approximately six weeks), the lack of consistent, clear, uniform easily accessible terms and conditions sets BNPL apart from other consumer credit subject to TILA. Important terms and conditions (like payment practices and fees) may be absent from BNPL disclosures, difficult to find, or described in ways that consumers are may not understand.

d. *Underwriting*

BNPL do not always underwrite the loans they approve. They may not pull credit bureaus,³ ask about rent payments, look at job history, or do any of the other ability-to-repay analysis in which AFSA members engage. The lack of rigorous underwriting means that many BNPL lenders are extending credit to consumers without the ability to repay, which can result in quickly accumulating fees. This is risky for consumers who may quickly end up in a cycle of debt.

² Renzulli, Kerri Anne, "Beware of These Hidden Risks in Popular Buy Now, Pay Later Plans." Newsweek. Feb. 9, 2022. Available at: <https://www.newsweek.com/2022/02/18/beware-these-hidden-risks-popular-buy-now-pay-later-plans-1677143.html>

³ If BNPL providers do check a credit bureau, it is usually as a check against fraud, not for underwriting.

e. *Dispute Procedures*

BNPL dispute procedures differ from other consumer credit products, especially as compared to credit card purchases. This is an issue the Bureau should consider fixing given that BNPL is most often used to purchase personal, family, and household goods.

BNPL consumers may find that returning merchandise and settling merchant disputes can be time consuming and complicated. Many BNPL providers do not provide any merchant or fraud dispute provisions and expressly state that consumers must resolve returns or problems with their order directly with the merchant.⁴ Consumers are therefore at the mercy of the return/refund policies of any given merchant. This can leave consumers on the hook for payments to the BNPL provider who provides the consumer with no meaningful recourse should a merchant refuse to honor its policies, fail to fulfill an order, ship faulty or damaged goods, defraud the consumer, etc.

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

II. Recommendations

In the RFI, the CFPB asks if there are ways that the BNPL market can be improved. AFSA recommends the following: (1) support the credit bureaus as they develop a framework to allow for BNPL credit reporting, and (2) consider requiring BNPL providers to disclose all relevant product information in a clear, transparent, and truthful manner.

Such disclosures should specifically include information about: how the product works and when payments are due; whether fees are charged and if so, how much and when; whether the BNPL provider reports payment information to credit bureaus, both positive and negative information; whether merchant and fraud dispute protections are available and how they function; and whether consumers are required to enroll in auto pay. Those steps will help prevent consumers from getting into a cycle of debt from BNPL loans and ensure that consumers do not get surprised and harmed by hidden fees.

Other steps the CFPB may be considering include a larger participant rule or an ability to pay rule. AFSA recommends that the CFPB approach both of these steps cautiously. If the CFPB concludes that a larger participant rule is necessary, it should apply solely to BNPL companies, not other financial institutions, to address the risks unique to BNPL described above. Any approach that is not tailored to BNPL ignores the unique qualities of BNPL and risks confusion for the very consumers the Bureau was created to protect.

As we learned with the CFPB's payday rule, writing an ability to repay rule that allows for flexibility in underwriting to address consumers' varied needs is challenging. The underwriting process can be different for each lender – an approach which leads to competition in the marketplace and expanded access to credit, which is

⁴ Wang, Penelope, "The Hidden Risks of Buy-Now, Pay-Later Plans." Consumer Reports. Feb. 14, 2021. Available at: <https://www.consumerreports.org/shopping-retail/hidden-risks-of-buy-now-pay-later-plans-a7495893275/>

vitaly important to consumers generally and particularly for those with less than stellar credit. As such, the Bureau should consider approaches other than an ability to repay rule to address consumer risk in the BNPL marketplace.

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We look forward to working with the Bureau as it explores the BNPL marketplace. Please contact me by phone, 202-776-7300, or email, cwinslow@afsamail.org, with any questions.

Sincerely,

A handwritten signature in cursive script that reads "Celia Winslow".

Celia Winslow
Senior Vice President
American Financial Services Association