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March 25, 2022

*Via Electronic Submission*

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

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

Dear Sir or Madam:

The Independent Community Bankers of America (“ICBA”)<sup>1</sup> welcomes the opportunity to provide comment in response to the Consumer Financial Protection Bureau’s (“CFPB” or “Bureau”) Request for Comment (“RFC”) regarding Buy Now, Pay Later (“BNPL”) providers and products. While alternative products and services such as BNPL can assist consumers, especially un- and under-banked Americans, ICBA believes that such products are best when offered in a regulated ecosystem and by supervised entities, such as community banks. In particular, ICBA believes that consumers should receive transparent details before entering into a BNPL transaction, akin to disclosures required by the Truth in Lending Act (“TILA”) and be provided a pathway for building their credit profiles.

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<sup>1</sup>The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services.

With nearly 50,000 locations nationwide, community banks constitute roughly 99 percent of all banks, employ nearly 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding nearly \$5.9 trillion in assets, over \$4.9 trillion in deposits, and more than \$3.5 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers’ dreams in communities throughout America. For more information, visit ICBA’s website at [www.icba.org](http://www.icba.org).

*The Nation’s Voice for Community Banks.*®

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## Background

BNPL is a point-of-sale financing product that allows a consumer to purchase and take possession of an item immediately and pay for it over a certain period, often in four payments or less.<sup>2</sup> Many of the BNPL products that have this structure are advertised as having no fees or interest. Instead, BNPL providers typically charge merchants for a percentage of the purchase price rather than charge the consumer interest on the loan.<sup>3</sup> Reports indicate that merchants are willing to pay BNPL providers up to approximately seven percent of the purchase price in order to encourage and facilitate customer transactions.<sup>4</sup> BNPL providers typically conduct only a “soft” credit check on the applicant to verify the consumer’s identity and to prevent fraud.

BNPL usage has dramatically surged in the last several years. For example, nearly seventy-five percent of respondents to a recent poll indicated they have used BNPL at some point.<sup>5</sup> As a result, many BNPL providers have indicated a doubling in usage over the past year, including PayPal’s BNPL service seeing a 400% increase on Black Friday 2021 compared to the same day the prior year; Klarna doubled its U.S. audience to 20 million from June 2020 to August 2021; and Affirm doubled its user base since September 2020.<sup>6</sup>

With such growing use, there has been an equally commensurate growth in regulatory interest of BNPL products and their providers, including whether BNPL is to the benefit or detriment of consumers. To learn more about this market and how consumers interact with BNPL, the CFPB issued Section 1022 inquiry orders to five BNPL providers.<sup>7</sup> The 1022 inquiry requested information about the BNPL companies’ size, scope, and business practices, among other items.

Subsequently, on January 12, 2022, the Bureau issued an RFC to seek input and feedback from other interested parties on BNPL products and marketplace participants, including from

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<sup>2</sup> See House Financial Services Committee, Memorandum to Members, Committee on Financial Services, From FSC Majority Staff, November 2, 2021, “Buy Now, Pay More Later? Investigating Risks and Benefits of BNPL and Other Emerging Fintech Cash Flow Products,” at 2, *available at* [hrg-117-ba00-20211102-sd002.pdf](https://www.house.gov/committees/financial-services/documents/117/ba00-20211102-sd002.pdf) (house.gov).

<sup>3</sup> Alcazar, Julian and Bradford, Terri, “The Appeal and Proliferation of Buy Now, Pay Later: Consumer and Merchant Perspectives,” Federal Reserve Bank of Kansas City, Nov. 10, 2021, *available at* <https://www.kansascityfed.org/research/payments-system-research-briefings/the-appeal-and-proliferation-of-buy-now-pay-later-consumer-and-merchant-perspectives/>.

<sup>4</sup> *Id.*

<sup>5</sup> Brown, Mike, “Buy Now, Pay Later is surging but consumers overextend their credit,” Breeze, Jan. 6, 2022, *available at* <https://www.meetbreeze.com/blog/buy-now-pay-later-personal-finance-study/?msID=9d56f546-efa0-49b9-8a64-dd06e0559eb5>.

<sup>6</sup> *Id.*

<sup>7</sup> Pursuant to Section 1022(c)(4) of the Consumer Financial Protection Act, the CFPB has the statutory authority to order covered persons to turn over information to help the Bureau monitor for risks to consumers and to publish aggregated findings that are in the public interest. The Sample Order is available [https://files.consumerfinance.gov/f/documents/cfpb\\_bnpl\\_sample-order\\_2021-12.pdf](https://files.consumerfinance.gov/f/documents/cfpb_bnpl_sample-order_2021-12.pdf); The Order was sent to Affirm, Afterpay, Klarna, PayPal, and Zip.

consumers, small businesses, consumer advocates, financial institutions, and trade associations. ICBA's comments are in response to that January 12 RFC.

### ICBA Comments

#### **Consumer choice of products and services can open growth and opportunities for un-/under-banked populations.**

Many Americans are struggling financially, and unfortunately, many of those are un- or under-banked. Approximately 6 percent of Americans are unbanked,<sup>8</sup> having no relationship with a bank, and an additional 16 percent are underbanked.<sup>9</sup> Further, nearly 20 percent of adults are considered to be "credit invisible"<sup>10</sup> or do not have sufficient history at a credit agency to generate a score. Low-income and rural areas are disproportionately represented. Almost 30 percent of Americans in low-income census tracts, and approximately 15 percent of adults in rural areas are credit invisible.

Given these numbers, consumers need a suite of options that can address their credit needs, including non-traditional products such as BNPL. Responsible competition, appropriate products/services, and ingenuity are all needed to help meet the needs of un/underbanked consumers. Simply put, consumers need products and services that can address these problems, and BNPL can be one of many products to meet that need. However, it is imperative that BNPL, or any other option for consumers, be provided in a responsible manner, in a regulated and supervised environment, with adequate consumer protections.

#### **However, potential pitfalls exist, especially when BNPL is offered by under-regulated or un-supervised entities.**

Consumers with thin or no credit profiles are some of the most likely to benefit from accessing BNPL, as these consumers are least likely to qualify for traditional credit products. For example, reports have indicated that younger consumers – those that have yet to establish a robust credit profile – are more likely to use BNPL.<sup>11</sup>

Yet, given their inexperience with credit products, many of these consumers are at more risk from harm caused by misunderstanding of or lack of protections associated with BNPL

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<sup>8</sup> Report on the Economic Well-Being of U.S. Households in 2018, Board of Governors of Federal Reserve System, May 2019, at 25. The Board of Governors of the Federal Reserve System define 'unbanked' as adults without a checking, savings, or money market account.

<sup>9</sup> *Id.* The Board of Governors of the Federal Reserve System defines "underbanked" as having a bank account but also using an alternative financial service product.

<sup>10</sup> Do not have a credit record with a nationwide credit reporting agency.

<sup>11</sup> *Supra* note 3.

products. Problems identified include how the product is promoted to consumers and presented as a payment option; misunderstanding of the product by consumers, including the absence of information given to consumers about the features of the agreement; the potential to create high levels of indebtedness; and the visibility of BNPL debts on an individual's credit file.

More specific examples of concern include missed payments, where 1 in 5 U.S. adults who took out a BNPL loan missed a payment in January 2022 according to a recent survey.<sup>12</sup> Additionally, a recent study that analyzed BNPL-related complaints found that several form responses to consumer complaints instructed consumers to direct their issue toward the merchant that accepted the BNPL transaction, an aberration among standard credit products which provide consumers with a robust dispute resolution process.<sup>13</sup>

### **Recommendations to optimize BNPL**

To address some of these potential pain points, ICBA has several recommendations that would improve BNPL products:

1. Provide transparency to consumers by providing disclosures and protections to consumers on par with TILA.
2. Report positive repayment history and open accounts to credit reporting agencies.
3. Incorporate BNPL products into a regulated ecosystem where supervised entities have experience complying with consumer protections outlined above.

#### 1. Provide transparency to consumers

ICBA has long maintained that a well-informed consumer is the best form of consumer protection. Yet, for consumers to have an optimal level of information to make the best decision specific to their unique situation, it is incumbent on providers of those financial services or products to disclose all relevant information to that consumer. As such, ICBA believes that BNPL products should contain detailed disclosures.

For example, as the Bureau has noted in blog posts, many BNPL companies do not charge “interest,” as that term is commonly understood. However, many do charge late fees if a payment is not made.<sup>14</sup> Further, a consumer may be charged a fee from his or her financial

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<sup>12</sup> Williams, Claire, “Buy Now, Pay Later’ Users Significantly More Likely to Overdraft Than Nonusers,” Morning Consult, Mar. 2, 2022, *available at* [https://morningconsult.com/2022/03/02/buy-now-pay-later-bnpl-overdraft-data/?mkt\\_tok=ODUwLVRBQS01MTEAAAGC\\_p5BSvgd5jJF4-CHnGz8W14fMurQ5dwuFZhcHirzbJV3d\\_NkCLk9IP5txQQtS1LuWYz-L8BShaFTqZlOmY6xap0BAwEE3\\_Gib\\_xmB\\_hRFNL](https://morningconsult.com/2022/03/02/buy-now-pay-later-bnpl-overdraft-data/?mkt_tok=ODUwLVRBQS01MTEAAAGC_p5BSvgd5jJF4-CHnGz8W14fMurQ5dwuFZhcHirzbJV3d_NkCLk9IP5txQQtS1LuWYz-L8BShaFTqZlOmY6xap0BAwEE3_Gib_xmB_hRFNL).

<sup>13</sup> Mierzwinski, Ed and Litt, Mike, “The Hidden Costs of ‘Buy Now, Pay Later’: Complaints to CFPB show need for action,” U.S. PIRG Education Fund, Mar. 2022, at 12, *available at* <https://uspigedfund.org/sites/pirg/files/reports/BNPL%20REPORT%20USPIRG.pdf>

<sup>14</sup> CFPB, Should you buy now and pay later?, 6 July 2021, <https://www.consumerfinance.gov/about-us/blog/should-you-by-now-and-pay-later/>.

institution when directing repayment to a BNPL provider or incur a non-sufficient fund fee if the consumer's account does not have enough money to cover the charge.<sup>15</sup> These conditions need to be explicitly communicated by the BNPL provider to a consumer.

Community banks already provide robust disclosures to their customers, including for products that are covered under TILA, which provides “a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him [and] to avoid the uninformed use of credit.”<sup>16</sup> Along with TILA, the Fair Credit Billing Act (“FCBA”) is designed “to protect the consumer against inaccurate and unfair credit billing and credit card practices.”<sup>17</sup> However, certain BNPL products do not meet the definition of “credit” under TILA and, as such, are not required to meet disclosure requirements.

Though the Bureau unlikely has the authority to require TILA disclosures on all BNPL products, ICBA recommends that the Bureau establish a standardized framework of disclosures modeled on TILA for use by non-bank providers, given that many consumers are familiar with TILA disclosures. Among others, information provided in the disclosure should include the annual percentage rate (“APR”), finance charge, amount financed, sum of payments, number of payments, monthly payment amount, late fees, whether the loan can be prepaid without a penalty, and other important terms.

Likewise, the Bureau should consider the protections afforded by FCBA, including whether BNPL providers must investigate and resolve certain billing errors when the consumer sends a written notice to the provider within 60 days after the lender provides the periodic statement that reflects the alleged billing error.<sup>18</sup> The consumer is not required to notify the merchant and attempt to resolve the dispute, including a transaction reflected on a periodic statement involving goods or services that the consumer did not accept or was not delivered or was not delivered as agreed.<sup>19</sup> Until a billing error is resolved under FCBA, the consumer is entitled to withhold payment to the provider for the amount owed the merchant and any associated finance charges, and the provider is prohibited from reporting negative information about the consumer's credit standing because the consumer failed to pay this amount.

Without FCBA coverage, some reports have indicated that BNPL customers are directed to the merchant when a dispute arises.<sup>20</sup> By establishing non-standard, and often, contrasting, dispute

<sup>15</sup> *Id.*

<sup>16</sup> Section 302 of the FCBA, Pub. Law 93–495 (October 28, 1974). Codified at 15 U.S.C. §1601(a).

<sup>17</sup> 12 C.F.R. §1026.13(b)(1).

<sup>18</sup> *Id.* at §1026.13(a).

<sup>19</sup> *Id.*, Comment 13(a)(3)-1 of the official staff commentary (commentary) for Regulation Z provides these examples for this type of billing error: the appearance on a periodic statement of a purchase when the consumer refused to take delivery of the goods because the goods did not comply with the contract; and delivery of property or services different from that agreed upon.

<sup>20</sup> *Supra* note 13.

resolution procedures for BNPL customers, non-bank BNPL providers risk creating deep dissatisfaction and distrust among consumers that could spread to community banks that have done no wrong. As it conducts its 1022 review of non-bank BNPL providers, ICBA recommends that the CFPB further study the dispute resolution process among non-bank BNPL providers and identify a standardized response to such issues.

## 2. Reporting positive repayment history to credit reporting agencies

Inclusion of BNPL performance to credit reporting companies could help certain segments of the population build credit profiles. Such reporting will build the credit profiles of thin/no profile consumers. Reporting open BNPL accounts will also help BNPL providers to assess the underwriting risk of the borrower – i.e., if there are too many outstanding BNPL products. This will result in improved credit underwriting models while simultaneously limiting repeat lending or incurring additional debt to settle prior debt. Without a reporting mechanism of outstanding BNPL accounts, there is the potential to create high levels of indebtedness.

Recent developments indicate that credit bureaus are starting to create platforms that allow for the reporting of BNPL data.<sup>21</sup> ICBA encourages the CFPB to recognize and support the consumer reporting agencies that are facilitating the receiving and reporting of data that better informs this marketplace while simultaneously building the credit profiles of consumers that responsibly pay their debt in a timely manner.

## 3. Community bank environment is the safest and best for consumers – responsible innovation

BNPL is best when incorporated into a regulated ecosystem where supervised entities have experience complying with consumer protections outlined above. Not only do community banks have familiarity and comply with TILA and FCBA, but they also routinely undergo active supervision by federal agencies to assess their adherence to safety and soundness principles, as well as compliance with other consumer protection laws and fair lending requirements.

In contrast, un-supervised non-banks, such as fintech and big tech, do not undergo routine examinations by federal agencies to ensure compliance with fair lending laws. Nor are these entities required to comply with data security and privacy standards, such as Gramm-Leach-Bliley Act (“GLBA”) with which community banks are required to comply. Under current federal law, technology companies and other parties that process or store consumer financial data are not subject to the same federal data security standards and oversight as financial institutions. More troubling, certain big tech companies might use BNPL to generate and harvest consumer data to be used for other purposes, unbeknownst to the consumer/customer.

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<sup>21</sup> Saks Frankel, Robin, “How the Big Three Credit Bureaus are Using Buy Now Pay Later Data, Forbes, Mar. 22, 2022, available at <https://www.forbes.com/advisor/personal-finance/transunion-equifax-experian-buy-now-pay-later-credit-report/>.

Non-bank entities benefit from unregulated access to and storage of sensitive consumer financial data without the scrutiny of examinations. Technology companies wield great power and influence over the market with limited incentive to ethically manage consumer financial data. Like the examination and oversight authority prudential regulators have with respect to the financial industry, the CFPB should play an equally active role in defining and identifying the risks big tech poses to consumers and businesses alike.

### **Conclusion**

ICBA believes that un- and under-banked, as well as “credit invisible” consumers can benefit from a wide array of options and choices, such as BNPL. However, despite this potential benefit, there is certain potential harm that can be associated with these products, especially when offered by non-bank, un-supervised entities that are not required to comply with federal consumer protection laws.

As the Bureau assesses the BNPL marketplace, ICBA supports a framework that allows for innovation of novel financial products and services, but also one which is conducted and supervised in an ecosystem commensurate with laws and regulations that are in place to protect consumers and in which community banks currently operate.

ICBA appreciates this opportunity to provide comment in response to the RFC. If you have any questions or would like to discuss anything further, please do not hesitate to contact me at [Michael.Emancipator@icba.org](mailto:Michael.Emancipator@icba.org) or (202) 821-4469.

Sincerely,

/s/

Michael Emancipator  
Vice President and Regulatory Counsel