

December 21, 2021
Rohit Chopra, Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Supervision and enforcement of fintech products and fee models that threaten to evade credit, consumer protection, and fair lending laws

Dear Director Chopra,

The undersigned 79 consumer, housing, civil rights, legal services, faith, community, small business, and financial organizations groups would like to thank you for your recent inquiry into buy now, pay later providers, and write to urge you to carefully examine these and other fintech credit products and fee models. New consumer credit products are exploding across market areas, including but not limited to buy now, pay later (BNPL) loans, income share agreements, cash advances, “fintech” overdraft or overdraft avoidance products, and earned wage access products or look-alike products. Although innovation has an important role in the financial marketplace, it should be pursued in a way that is consistent with and enhances consumer protections. It should not shield new products from consumer protection laws and oversight. Although some of these credit products could help consumers manage their finances, they are certainly not risk-free.

Earlier this year, many of the undersigned groups wrote expressing concerns about earned wage access (EWA) products.¹ However, earned wage access products are not an outlier—there are several fintech products across market areas that should be viewed and regulated as credit. The products and fee models discussed below, although each are unique, share similarities in both how they operate and how they use “innovation” to claim that they do not fit within the existing regulatory framework. Some also use deceptive means to disguise the cost of credit. And even products that are clearly forms of credit must be designed to be affordable and not just as fintech payday loans.

Regardless of their structure, each of these products are credit—they provide funding today and are repaid later. Given that, these products should be subject to the host of state and federal consumer protection laws that regulate credit products. At a minimum, they need to be covered by basic consumer protections, including federal and state interest rate limits, ability-to-repay, cost transparency and comparisons, dispute rights, and fair lending laws. The cost of credit should be portrayed to consumers as an Annual Percentage Rate (APR) so that they are able to compare products and make informed, knowledgeable decisions. Further, consumer data should only be used in a responsible manner and in the way that consumers expect it to be used. It is also important that all credit products be examined for unfair, deceptive, or abusive practices and unlawful discrimination independently of compliance with credit laws. Each of these products discussed below should be regulated as the financial services products that they are.

¹ Letter from National Consumer Law Center, Center for Responsible Lending, Consumer Federation of America, et. al, to Consumer Financial Protection Bureau re Rescind Earned Wage Access Advisory Opinion and Sandbox Approval and Treat Fee-Based Earned Wage Access Products as Credit (Oct. 21, 2021), <https://consumerfed.org/wp-content/uploads/2021/10/CFA-joins-Groups-in-Urging-CFPB-to-Reverse-Earned-Wage-Actions-that-Threaten-to-Create-Dangerous-Fintech-Payday-Loan-Loopholes-10.12.21.pdf>.

Oversight is especially urgent as these offerings continue to increase and infiltrate new market areas. Allowing these products to escape coverage would lead to an undermining of consumer protection laws, making the financial marketplace less fair and competitive. Small businesses also benefit from oversight of the financial products marketed towards their business and their employees, as small employers want to improve access to tools that help both workers and small business owners build wealth. The CFPB should also pay attention to and address abuses with new forms of payday loans even if they are clearly covered by lending laws. We also urge you to consider collecting, analyzing, and publishing data to better understand and illuminate the risks associated with these products.

Buy Now, Pay Later

Buy Now, Pay Later products may provide consumers with an affordable way to finance larger purchases, as these products allow consumers to purchase an item by only paying a portion of the price up front. Then, the consumer typically pays the rest of the debt in three or four equal, often interest-free installments over a set period of time (often 6 weeks). However, BNPL products do not underwrite for a consumer's ability to repay, can rely on the expectation of late fees, can be difficult to manage, and can trigger punitive overdraft or nonsufficient fund fees if linked to a bank account. Further, these products can lead consumers into taking on unmanageable amounts of debt² and lack the same dispute or refund rights that credit cards have should a consumer be unsatisfied with their purchase.³ BNPL programs may negatively impact consumer credit reports and scores, as some report negative credit activity like defaulting on a loan, and although some companies are introducing programs to report all payment history to the credit bureaus, even positive payments may have a negative impact on a consumer's credit score since each loan is a separate credit item that gets opened and closed very quickly, reducing the average age of the consumer's credit lines.⁴

BNPL products have largely evaded oversight by federal and state regulators, and although these products could have a place in meeting consumer needs if they operate as promised, they need to be covered by basic consumer protections. Plus, based on complaints to the CFPB and the Better Business Bureau, these products still pose risks to consumers.⁵ Each BNPL product presents different terms and installment plans, but the standard "pay-in-four" model appears designed to fall outside of the scope of the Truth in Lending Act (TILA).⁶ The Bureau should closely examine whether BNPL products are or should be covered by TILA and, either way, the Bureau

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

³ Penelope Wang, *Consumer Reports*, "The Hidden Risks of Buy-Now, Pay-Later Plans" (Feb. 14, 2021), <https://www.consumerreports.org/shopping-retail/hidden-risks-of-buy-now-pay-later-plans-a7495893275/>.

⁴ Trina Paul, *CNBC*, "'Buy Now, Pay Later' Loans Can Decrease Your Credit Score Even if You Pay on Time—Here's What You Need to Know" (Sept. 3, 2021), <https://www.cnbc.com/select/how-buy-now-pay-later-loans-can-decrease-your-credit-score/>.

⁵ Rachel Gittleman, Consumer Federation of America, Statement for the Record for Task Force on Financial Technology U.S. House Committee on Financial Services Hearing on "Buy Now, Pay More Later? Investigating Risks and Benefits of BNPL and Other Emerging Fintech Cash Flow Products" (Nov. 2, 2021), <https://consumerfed.org/wp-content/uploads/2021/11/CFA-Submits-Statement-for-the-Record-to-U.S.-House-Task-Force-11.2.21.pdf>.

⁶ Lauren Saunders, National Consumer Law Center, Testimony to Task Force on Financial Technology U.S. House Committee on Financial Services Hearing on "Buy Now, Pay More Later? Investigating Risks and Benefits of BNPL and Other Emerging Fintech Cash Flow Products" (Nov. 2, 2021), https://www.nclc.org/images/pdf/banking_and_payment_systems/fintech/Fintech-task-force-liquidity-testimony-Lauren-Saunders-2021-11-2-FINAL.pdf.

should supervise this market to prevent unfair, deceptive or abusive acts and practices (UDAAPs) and compliance with fair lending laws. In addition, consumers who use credit at the point of sale should have the same chargeback rights as they do with credit cards, so that consumers have recourse should they run into a problem with their purchase. Further, loans should be structured in an affordable way and pricing should not be based on back-end penalty fees.

Student Financing Providers, specifically those that provide Income Share Agreements:

Income Share Agreements are private student loan products that apply alternative repayment structures to a more traditional loan, which include terms that tie monthly payments to a borrower's post-graduate earnings. The private student loan and student financing marketplace is already rife with consumer risk. However, ISAs present unique risks to consumers with deceitful marketing, questionable underwriting, limited or fully lacking guardrails against unfair practices, unaffordable debt loads, high fees, prepayment penalties and forced arbitration agreements. As previously noted, fees for ISAs can be unaffordable and can reach as high as 40% of a consumer's pre-tax income.⁷ Terms for these loans make early repayment costly, can require consumers to grant unfettered access to bank accounts, and can have lengthy loan terms that may be extended for years. These products lack clear, uniform credit disclosures, including annual percentage rate and total cost, which make them difficult to compare to traditional loan products. In addition to the costly terms, providers have also been accused of illegal and deceptive marketing.

For families of color, the risk is even greater, as they are more likely to borrow for higher education in the first place, have a higher likelihood of delinquency and default, and have a long history of being targeted by exploitive, aggressive, and abusive higher education providers and financiers, including for-profit universities, private lenders, and even failures of the non-profit higher education system. ISAs have already been accused of similar targeting practices, so these companies are positioned to continue to make the burden on communities of color even worse.

Although ISA providers attempt to evade oversight arguing that they are not providing credit, these programs must be regulated as credit, with scrutiny to prevent unfair, deceptive or abusive practices. Because of claims by industry, these lenders may be attempting to operate outside of basic consumer protection laws including the Equal Credit Opportunity Act (ECOA), the Truth in Lending Act (TILA), the Military Lending Act (MLA), and state consumer protection laws, including usury laws. Although we appreciated the CFPB's action against Better Future Forward for making false claims that ISAs are not loans and do not create debt, risks remain throughout the rest of the marketplace and there have been no fundamental changes to the underlying business models.⁸ Further, wrongdoers need to be held accountable for past actions in addition to broader industry reform.

⁷ Center for Responsible Lending, National Consumer Law Center, & Student Borrower Protection Center, Comments to California Department of Financial Protection & Innovation re PRO 01-21, Proposed Rulemaking under the California Consumer Financial Protection Law, (March 15, 2021), <https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/03/3-15-21-Kiran-Sidhu-Center-for-Responsible-Lending-Comments-to-the-DFPI-ISA-3.15.21-FINAL.pdf>.

⁸ Consumer Financial Protection Bureau, "CFPB Takes Action Against Student Lender for Misleading Borrowers about Income Share Agreements" (Sept. 7, 2021), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-student-lender-for-misleading-borrowers-about-income-share-agreements/>.

Faux earned wage access, fintech overdraft, cash advances, liquidity products, and other fintech credit:

Faux earned wage access (EWA) products, fintech overdraft, cash advance, liquidity products, and other new types of fintech credit also pose concerns and deserve scrutiny.

Many of these products are balloon-payment loans that collect “tips” and are simply disguising finance charges under a new name. Tips are often not truly voluntary, as they can be structured so that it is difficult for a consumer to avoid paying the default tip or to make the consumer feel compelled to tip.⁹ The vast majority of consumers tip, and the lenders take advantage of the consumer’s lack of understanding of the consequences of not tipping. Tips can add up quickly, costing nearly as much as traditional payday loans in some instances. For example, one provider encourages users to leave a tip of up to \$14 on a \$100 weekly loan, which would equate to 730% APR, an illegal interest rate in many states across the country. Labeling interest as a “tip” does not change its character or cost. Even if voluntary, tips should be considered finance charges under TILA and therefore be subject to the MLA.

The CFPB should also scrutinize inflated expedite fees, participation fees, and other devices that may be used to hide finance charges and evade TILA and other credit laws. In addition, the CFPB should ensure compliance with fair lending laws and the Electronic Fund Transfer Act’s (EFTA) ban on compulsory electronic repayment, which apply to credit regardless of TILA’s coverage.

Moreover, even when fintech cash advances are openly offered as credit, they are often simply a fintech payday loan. The CFPB must prevent unfair, deceptive and abusive practices such as lending without regard to ability to repay that leads to a similar cycle of debt and the problem of compounding fees as traditional payday loans.

Separately, the CFPB should stop evasions of the credit and overdraft provisions of the prepaid accounts rule by viewing all non-bank deposit accounts as prepaid accounts.

Financial Inclusion

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

Many of these products use promises of no credit checks, which may entice consumers with thin or limited credit histories who do not realize that these products are credit. Other products are aimed at consumers with blemished credit histories who are struggling to make ends meet and do not have the capacity to take on more debt. Many products are balloon payment loans that only

⁹ National Consumer Law Center & Center for Responsible Lending, Comments to California Department of Financial Protection & Innovation re PRO 02-21, Proposed Rulemaking under the California Consumer Financial Protection Law: Earned Wage Access (Mar. 15, 2021), https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/CRL_CA_DFPI_EWA_Comments.pdf.

lead to cycles of debt. Failing to properly underwrite loans, transparently disclose prices, and abide by rate caps will simply lead to unaffordable debt for consumers.

Summary

In summary, we urge the CFPB to carefully examine each of the products and fee models discussed above across all market areas in which they function. The CFPB should supervise providers and ensure that each of these products are complying with applicable consumer protection laws.

Thank you for considering this request. If you have any questions, please contact Rachel Gittleman at rgittleman@consumerfed.org or (609)-571-5953.

National Organizations

Accountable.US
Americans for Financial Reform Education Fund
Better Markets
CAARMA
Center for Digital Democracy
Center for Economic Justice
Center for Responsible Lending
Consumer Action
Consumer Federation of America
Consumer Reports
Consumers for Auto Reliability and Safety
Credit Builders Alliance
Debt Collective
Heartland Alliance
Jewish Women International (JWI)
The Leadership Conference on Civil and Human Rights
Local Initiatives Support Corporation (LISC)
Main Street Alliance
National Association of Consumer Advocates
National Community Reinvestment Coalition
National Consumer Law Center (on behalf of its low income clients)
National Consumers League
National Fair Housing Alliance
Public Citizen
Public Good Law Center
Public Justice
Revolving Door Project
Small Business Majority
Student Borrower Protection Center
Student Debt Crisis Center (SDCC)
The Institute for College Access & Success

U.S. PIRG
Woodstock Institute

State and Local Organizations

Alabama Arise
Alaska PIRG
Center for Economic Integrity
Arkansans Against Abusive Payday Lending (AAAPL)
California Public Interest Research Group (CALPIRG)
California Reinvestment Coalition
Consumer Federation of California
Housing and Economic Rights Advocates
Public Counsel
Public Law Center
San Francisco Office of Financial Empowerment
Connecticut Legal Services, Inc.
Delaware Community Reinvestment Action Council, Inc.
Tzedek DC
Jacksonville Area Legal Aid, Inc.
Georgia Watch
United Vision for Idaho
Financial Inclusion for All Illinois
Illinois PIRG
Legal Action Chicago
Citizens Action Coalition of IN
Hoosiers for Responsible Lending
Indiana Community Action Poverty Institute
Prosperity Indiana
Kentucky Equal Justice Center
Maryland Consumer Rights Coalition
Public Justice Center
The Consumer Assistance Council, Inc.
Community Economic Development Association of Michigan (CEDAM)
Rural Dynamics, Inc.
Nebraska Appleseed
New Jersey Citizen Action
Prosperity Works
New Mexico Center on Law & Poverty
Empire Justice Center
NC Coalition for Responsible Lending
Columbia Consumer Education Council
South Carolina Appleseed Legal Justice Center
RAISE Texas
Texas Appleseed
United Way of Central Texas
Vermont Public Interest Research Group

Legal Aid Justice Center
Virginia Citizens Consumer Council
Virginia Organizing
Mountain State Justice