March 25, 2022

Rohit Chopra
Director
Bureau of Consumer Financial Protection
Comment Intake – Statement into BNPL Providers
1700 G Street NW
Washington, DC 20552

RE: CFPB's Inquiry into Buy-Now-Pay-Later Providers, Docket No. CFPB 2022-0002

Dear Director Chopra:

We appreciate this opportunity to comment on Buy Now Pay Later (BNPL) services. In general, the National Association of Convenience Stores (NACS) supports new payment innovations and more competition among modes and forms of payment. BNPL services, however, raise some issues that merit inquiry by the Consumer Financial Protection Bureau (CFPB).

By way of background, NACS is an international trade association representing the convenience store industry with more than 1,500 retail and 1,600 supplier companies as members, the majority of whom are based in the United States. The industry includes over 2.3 million employees and generated $548.2 billion in sales in 2020. The industry as a whole conducts approximately 165 million transactions per day – equivalent to nearly half of the U.S. population. While large in scope, this is truly an industry of small businesses. Single store operators account for more than 60 percent of the stores in the industry.

BNPL services are relatively new to the U.S. market and have been growing quickly. BNPL has had more time to develop overseas. Convenience and other retailers have concerns about the fees that BNPL services charge them for each transaction. In large measure, these concerns arise because of the artificially expensive fees that dominate electronic payments today. Credit card swipe fees drive a range of problematic dynamics including aspects of BNPL services.

In order to understand the merchant experience with BNPL, some background on credit card payments is helpful. Credit card payments have dominated the U.S. payments landscape for decades. Visa and Mastercard came to dominate the credit card industry as associations of their respective bank members. They each set the merchant-facing prices and practices that their bank members charge and engage in when issuing credit cards and carrying transactions. The two companies have used these roles to shield swipe fees from price transparency and market forces which has resulted in huge increases in the fees for decades – and cemented the two companies' dominant positions in the market. The two companies are the sole payment card networks on nearly 80 percent of credit card transactions in the United States. And, while both have now changed their corporate structure so that they are not associations, their market behavior still tracks that which they set in motion when they were associations.

All of this creates an artificially inflated cost structure that U.S. retailers must pay on credit card transactions. BNPL providers take things from there. They market their services to retailers based on the proposition that they bring additional customers to those retailers. That, in turn, could hasten purchases that those customers would not yet have the financial ability to make. Whether that creates a situation in which consumers are enticed by BNPL providers to go beyond their means is a question to consider – though not one into which merchants have insight.

That potential for new, accelerated sales appeals to some merchants and has led to adoption of BNPL. But, the cost of BNPL to merchants is very high. That cost is based on the artificially inflated fees charged by credit card providers – though BNPL is generally more expensive because of the value those incremental new customers may bring. That exacerbates the problems created by Visa and Mastercard's pricing and attendant unfair competition problems.

In addition to the impact of the large fees to merchants charged by BNPL (and credit card) providers negatively impacts retail businesses and the economy as a whole, the impact on consumers should be recognized. Having an uncompetitive and inflated income stream from merchants changes the risk assessment that credit providers make when extending credit to consumers and gives them license to take unwarranted risks. This can lead vulnerable consumers to incur debt that they cannot handle. And, BNPL (like credit card) providers are increasingly encouraging consumers to incur those debts not only through infrequent, large purchases but also through everyday purchases of less expensive items. The result is analogous to the subprime mortgage acceleration of the early 2000s with the risk of default being defrayed by large fees imposed on merchants rather than through the creation of financial instruments that offload the risk of default.

This is a particularly significant moment for BNPL because Mastercard now plans to launch its own BNPL service. That raises serious concerns. Mastercard (and Visa) already has rules in place that require merchants that accept any cards issued with Mastercard's brand to accept all of them. Mastercard plans to leverage that position (which already violates antitrust laws) to automatically apply its BNPL service to any online merchant that accepts its payment cards and does not opt out of its BNPL service. This adds another layer of unfair practices on top of what exists in the market today.

It is similar to the way that Visa and Mastercard tied acceptance of debit cards to acceptance of their credit cards in the 1990s. While that practice was later the subject of antitrust litigation which resulted in the largest antitrust settlement to that point in U.S. history ($3 billion) and a dissolution of the tying arrangement, the litigation took so long that Visa and Mastercard debit cards were firmly entrenched and the effects of those unfair practices could not be undone.

We do not want to see that history repeat itself with BNPL. These services should be forced to develop on a competitive market basis without an assist from anticompetitive practices brought to bear by dominant firms in the sector. We ask that CFPB closely investigate any such service offered by Mastercard (or Visa) in the future.

We would also note that BNPL services – particularly if offered by Mastercard or through its banking institutions – likely meet the legal definition of credit cards and, if so, should have to comply with the full range of consumer protections that cover credit cards issued by such institutions under federal law. Credit cards include, "any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit." 15 U.S.C. §1692(l). The term "other credit device" is quite broad and it is accepted, for example, that entering numbers into a website to access a credit account to obtain goods constitutes use of a credit card just like it does when a physical card is used in a store. It is difficult to see the distinction between the use of a number to access credit that we all recognize is a credit card and using a BNPL service to do so given the breadth of the language in the legal definition. The fact that one number is printed on a physical card at some point does not seem like an adequate distinction (and is a practice that could be abandoned by Visa and Mastercard banks in the near future given the proliferation of mobile phone applications that can communicate such account information to facilitate transactions). CFPB therefore should consider holding BNPL services to the standards applicable to analogous providers of credit.

* * *

We appreciate the opportunity to provide comments on BNPL providers and services. We look forward to continued opportunities to provide feedback on CFPB's efforts.

Sincerely,

Doug Kantor
NACS General Counsel

1600 Duke Street | Alexandria VA 22314-3436 | 703.684.3600 office | 703.836.4564 fax