

## COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

### CONSUMER FINANCIAL PROTECTION BUREAU

Request for Comment and Notice, Re: Market Monitoring Buy Now, Pay Later,

Docket No. CFPB-2022-0002

87 Fed. Reg. 3,511

March 25, 2022

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In response to the request for comment on Buy-Now-Pay-Later (BNPL) providers, published on Jan. 24, 2022,<sup>1</sup> by the Consumer Financial Protection Bureau (CFPB or Bureau), the Electronic Privacy Information Center (“EPIC”) submits the following comment on the Bureau’s Market Monitoring of Buy Now, Pay Later Companies.<sup>2</sup>

EPIC is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging privacy and related human rights issues, and to protect privacy, the First Amendment, and constitutional values.<sup>3</sup> EPIC has long advocated for robust safeguards to protect consumers from exploitative data collection, usage, distribution, and retention practices. EPIC has a strong interest in agencies establishing and enforcing data minimization practices to protect consumers and advocates for requirements that data only be collected, used, or disclosed as

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<sup>1</sup> *Notice and Request for Comment on Regarding the CFPB’s Inquiry into Buy-Now-Pay-Later (BNPL) Providers*, Consumer Financial Protection Bureau (CFPB), 87 FR 3511 (Jan. 24, 2022), <https://www.federalregister.gov/documents/2022/01/24/2022-01278/notice-and-request-for-comment-regarding-the-cfpbs-inquiry-into-buy-now-pay-later-bnpl-providers>.

<sup>2</sup> *Sample Market-Monitoring Order*, CFPB (Dec. 16, 2021), [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).

<sup>3</sup> EPIC, *About Us* (2022), <https://epic.org/about/>.

reasonably necessary to provide the service requested by a consumer.<sup>4</sup> Specifically, EPIC has pushed for greater oversight into how companies and government agencies target individuals based on data collected about those individuals,<sup>5</sup> greater transparency regarding the lifecycle of collection and disclosure of Americans' personal data,<sup>6</sup> and more robust regulatory enforcement to safeguard the rights of consumers, especially as related to abuses involving the misuse of data.<sup>7</sup>

EPIC applauds the Bureau's sample inquiry and effort to enforce regulation regarding BNPL providers. The BNPL industry is gaining traction quickly among consumers who are lower income, younger, and experiencing greater income volatility,<sup>8</sup> making the Bureau's attention timely. EPIC recommends strengthening the CFPB's proposed market-monitoring order by supplementing it with inquiries regarding (1) customer acquisition specifics, (2) controls on the consumer data lifecycle, (3) data governance by BNPL providers, and (4) policies for accessing consumer data. EPIC also urges CFPB to broaden its definitions to ensure the inquiry captures everything it intends to and to provide explicit but non-exhaustive examples of how it might utilize its Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) authority against potential misconduct by BNPL providers.

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<sup>4</sup> See Consumer Reports and EPIC, *How the FTC Can Mandate Data Minimization Through a Section 5 Unfairness Rulemaking* (Jan. 26, 2022), [https://epic.org/wp-content/uploads/2022/01/CR\\_Epic\\_FTCDDataMinimization\\_012522\\_VF\\_.pdf](https://epic.org/wp-content/uploads/2022/01/CR_Epic_FTCDDataMinimization_012522_VF_.pdf).

<sup>5</sup> See, e.g., EPIC Statement to U.S. House Committee on House Administration, Hearing on "Big Data: Privacy Risks and Needed Reforms in the Public and Private Sectors" (Feb. 16, 2022), <https://epic.org/documents/hearing-on-big-data-privacy-risks-and-needed-reforms-in-the-public-and-private-sectors/>.

<sup>6</sup> See, e.g., EPIC Comments on CFPB Inquiry Into Big Tech Payment Platforms, CFPB-2021-0017 (Dec. 2021), available at: <https://epic.org/documents/epic-comments-on-cfpb-inquiry-into-big-tech-payment-platforms/>; Consumer Reports and EPIC, *How the FTC Can Mandate Data Minimization Through a Section 5 Unfairness Rulemaking* (Jan. 26, 2022), available at: [https://epic.org/wp-content/uploads/2022/01/CR\\_Epic\\_FTCDDataMinimization\\_012522\\_VF\\_.pdf](https://epic.org/wp-content/uploads/2022/01/CR_Epic_FTCDDataMinimization_012522_VF_.pdf); see generally, EPIC, *Data Brokers*, available at: <https://epic.org/issues/consumer-privacy/data-brokers/> (last visited Mar. 23, 2022).

<sup>7</sup> See e.g., EPIC, *EPIC Advises Consumer Watchdog to Regulate Lender Use of Machine Learning* (Oct. 5, 2020), available at: <https://epic.org/epic-advises-consumer-watchdog-to-regulate-lender-use-of-machine-learning/> (referring to EPIC Comment CFPB-2020-0026).

<sup>8</sup> See Charlotte Principato, *How 'Buy Now, Pay Later' Consumers Differ From Credit Card Users*, Morning Consult (July 27, 2021), available at: <https://morningconsult.com/2021/07/27/buy-now-pay-later-bnpl-credit-card-customer-differences/>.

**I. The Bureau should inquire about customer acquisition to improve transparency around predatory targeting practices.**

EPIC recommends that the Bureau expand its line of questioning regarding customer acquisition in order to gain insight about how BNPL providers' business models predicated on using alternative data present a substantial risk for predatory practices.<sup>9</sup> Particularly when BNPL offers are marketed toward individuals that have historically decreased access to credit or face discrimination in traditional banking settings, BNPL providers have an increased responsibility not to replicate those same biases and equity issues under a different name.

Using alternative data without transparency or robust required testing for accuracy and nondiscrimination poses significant risk. Upstart, a student loan company, offered significantly higher interest rates to graduates of Historically Black and Hispanic Colleges and Universities when compared to more predominantly white institutions.<sup>10</sup> Beyond encoding more traditional financial bias, the use of alternative data lending poses serious consumer privacy issues. As discussed in Sections II-IV below, when lenders decide they will use more personalized and specific data points in their decision, they may resort to the use of data brokers and other methods to acquire that data. Meanwhile, there is no assurance that data is accurate, relevant, or fair.

Considering this dynamic, EPIC recommends that the Bureau ask for more granular detail about how BNPL providers are targeting and acquiring new business. In addition to the total number of transactions originated from acquisition channels, EPIC recommends that the Bureau inquire into details about the BNPL providers' promotional spending on targeted advertising—specifically,

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<sup>9</sup> See e.g., Patrice Alexander Ficklin and Paul Watkins, *Update on credit access and the Bureau's first No-Action Letter*, Consumer Financial Protection Bureau (Aug. 06, 2019) <https://www.consumerfinance.gov/about-us/blog/update-credit-access-and-no-action-letter/>.

<sup>10</sup> *Initial Report of the Independent Monitor Pursuant to agreement by the NAACP Legal Defense and Educational Fund, the Student Borrower Protection Center, and Upstart Network, Inc.*, Relman Colfax PLLC (Apr. 14, 2021), [https://www.relmanlaw.com/media/cases/1088\\_Upstart%20Initial%20Report%20-%20Final.pdf](https://www.relmanlaw.com/media/cases/1088_Upstart%20Initial%20Report%20-%20Final.pdf).

which subsets or demographics are they targeting, what keywords they are using, and how customer acquisition through those means may inform changes to their lending model.

## **II. The Bureau should inquire about the lifecycle of consumer data**

EPIC urges the Bureau to expand its inquiry into the lifecycle of consumer data. Specifically, CFPB should ask (1) what factors are considered by the algorithms that inform rates and the weight of those factors and (2) if customer data and credit history/determinations are used beyond the express purpose of offering loans (including access to that data by third parties). This is particularly important given that BNPL providers operate in a market where mergers and acquisitions increase the risk of inappropriate data usage.

## **III. The Bureau should inquire about data governance, including data minimization, retention, and deletion practices**

EPIC suggests that the Bureau ask the BNPL providers about their data minimization, retention, and deletion practices. In the absence of a comprehensive federal privacy law that assigns obligations with respect to user data, restricts data collection and use, and establishes data minimization, retention, and deletion requirements, consumers are left vulnerable to harmful practices. BNPL loan providers have capitalized on this, and the industry has grown rapidly with little transparency or regulation. Consistent with the Bureau’s mandate to “ensure[e] that markets for consumer financial products and services are fair, transparent, and competitive[.]”<sup>11</sup> EPIC urges the Bureau to promote transparency by inquiring about BNPL providers’ data governance practices.

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<sup>11</sup> Ashwin Vasani, *Our public inquiry on buy now, pay later*, CFPB Blog (Jan. 12, 2022), <https://www.consumerfinance.gov/about-us/blog/our-public-inquiry-buy-now-pay-later/> (“Congress has tasked us with ensuring that markets for consumer financial products and services are fair, transparent, and competitive. To that end, it has authorized us to require participants in the marketplace to provide information that helps us monitor risks to consumers and to publish aggregated findings that are in the public interest.”).

In addition to the information requested in the Sample Inquiry Sections E and F, EPIC suggests that the Bureau ask BNPL providers to provide a detailed description of their data governance practices, including a description of their data minimization, retention, and deletion practices. Specifically, the Bureau should inquire what entities can access consumer data at any point of the data lifecycle (both Direct BNPL Data and Indirect BNPL data). The Bureau should ask how long data is retained and what security measures are implemented to protect consumer data and should require detailed descriptions of data collection practices.

#### **IV. The Bureau should inquire about policies for consumer access to data and decisions**

EPIC urges the Bureau to ask BNPL loan providers more about their data access policies, both by wholly external parties and by sister services. The Bureau should work to secure access rights for consumers over their own data and ensure transparency by determining who can access the consumer data that BNPL loan providers have. Data sharing may constitute a privacy harm, such as “the failure to honor people’s expectation that your data would not be shared with third parties.”<sup>12</sup> Indeed, “the willingness of entities to refrain from sharing consumer’s sensitive or confidential data with unknown third parties is at the core of fairness in the privacy context.”<sup>13</sup> Currently, BNPL loan providers lack transparency about who can access consumers’ personal information. Consumers do not know whether their personal data is being shared for purposes unrelated to the primary purpose of processing a transaction or if third-party advertisers, analysts, or researchers can access their data.

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<sup>12</sup> Danielle Keats Citron & Daniel Solove, *Privacy Harms*, GWU Legal Studies Research Paper No. 2021-1, 3-4 (Feb. 2021), <https://ssrn.com/abstract=3782222> (“For many privacy harms, the injury may appear small when viewed in isolation, such as the inconvenience of receiving an unwanted email or advertisement or the failure to honor people’s expectation that your data would not be shared with third parties. But when done by hundreds or thousands of companies, the harm adds up. Moreover, these small harms are dispersed among millions (and sometimes billions) of people. Over time, as numerous people are each inundated by a swarm of small harms, the overall societal impact is significant.”).

<sup>13</sup> Cobun Keegan & Calli Schroeder, *Unpacking Unfairness: The FTC’s Evolving Measures of Privacy Harms*, 15 J.L. Econ. Pol’y 19, 34 (2019), <https://jlep.net/home/wp-content/uploads/2019/01/JLEPVolume-15-1.pdf>.

The New York Department of Financial Services recently implemented data security requirements for financial institutions, including, among other things, limits on access privileges.<sup>14</sup> Similarly, the Federal Trade Commission recently updated its Safeguards Rule which included, among other things, limits on internal access to data.<sup>15</sup>

In this inquiry, EPIC urges the Bureau to take similar steps toward effective regulation by inquiring about data access practice to ensure transparency and protect consumers. EPIC encourages the Bureau to inquire about BNPL loan providers' data practices with respect to users' access, correction, and deletion rights over their own personal data.

**V. The Bureau should broaden its definitions of direct BNPL data and indirect BNPL data, to ensure its inquiry captures what information it sets out to obtain**

EPIC recommends the Bureau expand and clarify the definitions of Direct BNPL Data and Indirect BNPL Data as used in the Sample Inquiry. They are currently strong but not fully inclusive of the universe of data the Bureau seeks to obtain. Definitions that are too narrow in scope will limit what information the Bureau obtains from BNPL providers, and in what context, for example information that is collected by the provider but maintained by a third party might be reported as Indirect BNPL Data rather than Direct BNPL Data, and information aggregated in a very minor way might evade reporting altogether.

The definition of Direct BNPL Data (Definition 9) calls for data collected and maintained by an entity. This would fail to capture data collected by the entity but maintained by another entity.<sup>16</sup>

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<sup>14</sup> 23 CRR-NY § 500.0 et seq., <https://govt.westlaw.com/nycrr/Browse/Home/NewYork/NewYorkCodesRulesandRegulations?guid=I5be30d2007f811e79d43a037eefd0011>.

<sup>15</sup> *FTC Strengthens Security Safeguards for Consumer Financial Information Following Widespread Data Breaches*, Fed. Trade Comm'n (Oct. 27, 2021), <https://www.ftc.gov/news-events/pressreleases/2021/10/ftc-strengthens-security-safeguards-consumer-financial>.

<sup>16</sup> Presumably if the entity responding to the inquiry subsequently accesses that data, it should be reflected in Indirect BNPL Data.

The definition of Indirect BNPL Data (Definition 13) only captures data about individual users. As such, data aggregating transactions for all members of the same family living in the same household would not be captured by the definition of Indirect BNPL Data as—despite sharing an address and possibly a name—they are distinct users.

Additionally, EPIC suggests including specific non-exhaustive examples as part of the Indirect BNPL Data definition (e.g., connecting data about a user’s social media affiliations), as the Bureau did with its definition of Direct BNPL Data (e.g., providing “specific product information collected during BNPL transactions” in Definition 9).

**VI. The Bureau should provide explicit, but non-exhaustive examples of how it might utilize its UDAAP authority to regulate misconduct by BNPL providers**

An ounce of prevention is worth a pound of cure. In addition to its inquiry, the Bureau should provide a non-exhaustive list of examples to BNPL providers of acts or practices that the CFPB might consider misconduct, with the aim of preventing the misconduct before it occurs rather than bringing enforcement actions after consumers have suffered harm. EPIC offers two examples that highlight harms related to data collection, usage, and disclosures.

As one example: the Bureau should state explicitly that the failure to audit for discriminatory impact, even where the provider does not collect or generate data on consumers’ personal characteristics directly, could still potentially be considered misconduct. The Bureau recently clarified that discrimination can be actionable as an unfair practice.<sup>17</sup> In its inquiry to BNPL providers, the Bureau asks about unique users, users whose transactions go to third party collectors, and users who are denied or declined a BNPL transaction, by certain personal characteristics that a BNPL provider may collect or generate (e.g. age, sex, income, race). This is a strong but insufficient

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<sup>17</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/>.

list, as other data points can serve as proxies for personal characteristics. One example is ZIP code, which is likely not considered a personal characteristic, but can be highly correlated with race<sup>18</sup> or income.<sup>19</sup>

A BNPL provider should not get a pass on auditing for discrimination simply because they collect zip code data instead of data on age, race, or income; the structure of the Bureau's inquiry may lead a BNPL provider to think that they are exempt from this requirement because they do not collect data on consumers' personal characteristics. The Bureau can better prevent this misconduct before it occurs by providing a hypothetical example of unfairness in which a BNPL provider engages in unintentionally discriminatory practices by failing to audit its processes to prevent, detect, and remedy disproportionate impact on users sharing a personal characteristic. Academic literature, and the Bureau's own research, calls this proxy information or proxy data.<sup>20</sup>

Another model example of an Unfair, Deceptive, or Abusive Acts or Practice that the Bureau can provide is when a third party's conduct makes the BNPL provider's representation about its data usage practices to consumers deceptive or abusive. The Bureau recently published updated guidance on how examiners should understand the Bureau's UDAAP enforcement authority.<sup>21</sup> In the document, the Bureau outlined the standards for such acts or practices and provided a few examples (e.g., the bank that failed to prevent, detect, and remedy fraudulent transactions engaged in an unfair

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<sup>18</sup> See, e.g., Alexandra George, *Thwarting bias in AI systems*, Carnegie Mellon University College of Engineering (Dec. 2018), <https://engineering.cmu.edu/news-events/news/2018/12/11-datta-proxies.html>

<sup>19</sup> See, e.g., Jim Zarroli, *A Look At The Wealth And Income Gap, By ZIP Code*, NPR (Feb. 25, 2016), <https://www.npr.org/sections/thetwo-way/2016/02/25/468120288/a-look-at-the-wealth-and-income-gap-by-zip-code>

<sup>20</sup> See, e.g., Anya E.R. Prince and Daniel Schwarcz, *Proxy Discrimination in the Age of Artificial Intelligence and Big Data*, 105 Iowa L. Rev. 1257 (2020), available at: <https://ilr.law.uiowa.edu/print/volume-105-issue-3/proxy-discrimination-in-the-age-of-artificial-intelligence-and-big-data>; Matthew A. Bruckner, *The Promise and Perils of Algorithmic Lenders' Use of Big Data*, 93 Chi.-Kent L. Rev. 3 (2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3137259](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3137259) (citing CFPB, *Using publicly available information to proxy for unidentified race and ethnicity: A methodology and assessment* (Summer 2014), [https://files.consumerfinance.gov/f/201409\\_cfpb\\_report\\_proxy-methodology.pdf](https://files.consumerfinance.gov/f/201409_cfpb_report_proxy-methodology.pdf) (articulating how proxy data can be used to evaluate discrimination in mortgage lending)).

<sup>21</sup> See CFPB, *Exam Manual on Unfair, Deceptive, or Abusive Acts or Practices, Manual* (Mar. 2022), available at: [https://files.consumerfinance.gov/f/documents/cfpb\\_unfair-deceptive-abusive-acts-practices-udaaps\\_procedures.pdf](https://files.consumerfinance.gov/f/documents/cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf)



practice<sup>22</sup> and the TV ad prominently showing “\$0 down” without prominently showing total amount due was a deceptive act<sup>23</sup>). It also instructed examiners to consider how employees and third parties interact with customers. For instance, whether the entity: conducts audits to ensure employees and third parties are not engaging in unfair, deceptive, or abusive acts or practices; uses performance evaluation criteria that create unintended incentives to engage in such acts or practices; or ensures employees and third parties refrain from engaging in servicing or collections practices that lead to differential treatment or disproportionately adverse impacts on a discriminatory basis.<sup>24</sup>

In its inquiry, the Bureau asks about data shared with third parties but not how third parties use the data nor how the BNPL provider represents its data usage and disclosure practices to consumers. The Bureau can better prevent this misconduct before it occurs by providing a hypothetical example of deception or abuse in which a BNPL provider states that it will “never sell” consumer data gathered to provide products and services, but the BNPL provider shares consumer data with a third party who then sells that consumer data.

EPIC can discuss other data-related harms the Bureau could consider including as examples of misconduct that might otherwise seem to fall outside the purview of its inquiry to BNPL providers.

## **VII. Conclusion**

EPIC applauds the Bureau for acting now to gather information about a growing alternative system for determining consumer creditworthiness. EPIC urges the Bureau to supplement its proposed inquiry as described above to better capture the data collection, usage, disclosure, and retention practices of BNPL providers. This will improve transparency and oversight of an industry

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<sup>22</sup> *See id.* at 4.

<sup>23</sup> *See id.* at 7.

<sup>24</sup> *See id.* at 17-18.

that seems to be gaining traction among multiply marginalized consumer populations. EPIC also urges the Bureau continue its important work regarding other entities with access to consumer data, such as data aggregators.

Respectfully submitted,

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