



Testimony of Lauren Saunders
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(on behalf of NCLC’s low-income clients)

Before the
Task Force on Financial Technology
U.S. House Committee on Financial Services

On
“Buy Now, Pay More Later?
Investigating Risks and Benefits of BNPL and Other Emerging Fintech Cash
Flow Products.”

November 2, 2021

Chairman Lynch, Ranking Member Davidson, and Members of the Task Force:

Thank you for inviting me to testify today on behalf of the low-income clients of the National Consumer Law Center.

Since 1969, the nonprofit [National Consumer Law Center® \(NCLC®\)](#) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people in the United States through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitative practices, help financially stressed families build and retain wealth, and advance economic fairness. Our 21-volume consumer law series includes several treatises that cover issues relevant to the forms of credit discussed in this hearing, including Consumer Credit Regulation, Truth in Lending, and Unfair and Deceptive Acts and Practices.

1. Introduction and Summary

We are seeing an explosion of new products allowing consumers to purchase goods and services on credit or to take advances when money runs out before payday. Some are balloon-payment loans, repaid in full with the next deposit or paycheck. Others are repaid over time, some in four installments, others over a longer time period. Some of these products are free, some purport to be free but have hidden or deceptive costs, others charge interest.

Some new types of financing products are seizing opportunities posed by gaps or failures in the current marketplace. If well designed, they may have a place in meeting consumers' needs. Other fintech liquidity products appear primarily to be designed to evade consumer protection laws.

I am worried about credit products that claim not to be covered by federal or state credit laws. Even credit products that can help consumers to manage their finances need to be covered by basic consumer protections, including interest rate limits, underwriting for ability-to-repay, cost transparency, dispute rights and fair lending laws.

However they are styled, products that provide funding or cash today and that are repaid later are credit. The use of new technologies or models does not make these products fundamentally different than forms of credit that have been around a long time. Shiny fintech garb does not remove the need for basic consumer protections to ensure that credit is affordable, responsible, transparent, and fair.

We must keep a close eye on how products evolve, as products may not stay free or low-cost. The ultimate business model may not always be or remain what it appears.

In brief, here are my observations about some of the newer forms of credit that have caught our eye and that are designed in ways that claim to be outside of some or all credit laws:

- **Buy-now-pay-later products**, if affordable and truly free to the consumer, may help consumers manage larger purchases without the long-term debt and high costs of credit cards. But some BNPL products may have deceptive and abusive profit models built on

the expectation of late fees from struggling consumers. Consumers may be led to take on debts they cannot afford to repay, and managing frequent irregular BNPL payments can be challenging. If there is a problem with the product or service the consumer financed, refunds may be difficult to obtain, without the dispute rights that credit cards have.

- **Earned wage access products** are a lower-cost form of payday loan – wage advances repaid on payday – and should be regulated as credit. The trend is for employers to offer access to earned wages for free, which may help workers if used sparingly, but more study is warranted. Regulators should not carve loopholes in lending laws for fee-based products, which can be more expensive than they appear and frequently lead to a cycle of reborrowing that may not ultimately provide useful liquidity. Instead of encouraging employees to spend next week’s pay today, employers should focus on savings programs; affordable small dollar installment loans; regular, predictable schedules; and paying a living wage.
- **Fake earned wage advance products that are offered directly to consumers** have no direct connection to earned wages. These payday cash advances have most of the negative features and impacts of standard payday loans.
- **Overdraft and cash advance apps and loans that collect “tips” have an evasive and deceptive business model** that attempts to disguise finance charges and to evade interest rate limits, including the Military Lending Act’s 36% cap, and other lending laws. The “tips” model is found in fake earned wage access products; in “fee-free” overdraft and cash advance loans on non-bank banking apps; and on “peer-to-peer” loan platforms. Tips added by default can result in annual percentage rates (APRs) that can reach 520% APR and create cycles of debt. Though purportedly voluntary, companies have continuously evolving ways of pressuring people into “tipping” or making it difficult not to tip. Regulators will be playing whack-a-mole if they let this dangerous model continue.

Highlights of my recommendations are:

- Newer financing and cashflow products should be viewed as **credit** and subject to federal and state lending and fair laws. The CFPB should reverse or significantly revise its recent actions on earned wage access programs.
- Regulators should closely examine and crack down on **evasive pricing models** built on “tips,” late fees, or inflated “expedite” fees.
- **Responsible underwriting and affordable loan structures** are essential for all forms of credit. Fintech models targeted at struggling consumers or designed to result in a cycle of debt may be unfair, deceptive or abusive and warrant attention.

- Credit offered at the point of sale should have the same **chargeback, reasonable and proportional penalty fees, ability-to-repay, and statement** requirements that apply to credit cards.
- The CFPB should use its **supervision authority** over payday lenders or larger participants in financial markets to examine providers of fintech credit products.
- **Data should be used in ways consumers expect**, and Congress should improve privacy laws.
- Regulators should look out for **disparate impacts** posed by fintech credit products.

I discuss these issues in more detail below.

2. Buy-now-pay-later products

The term “buy-now-pay-later” (BNPL) typically refers to payment plans in four installments (sometimes after a down payment) with no interest or finance charges. Products are structured in that manner in order to fit outside of the scope of the federal Truth in Lending Act (TILA), which, with some exceptions, only covers creditors who regularly extend consumer credit subject to a finance charge or payable by written agreement in more than four installments.¹

The term “buy-now-pay-later” is sometimes used to refer to other types of installment loans, with more than four payments and interest charges. These types of installment loans are clearly covered by TILA and are not addressed in this testimony, though there are issues in that area as well.²

BNPL products are clearly credit – the right to incur a debt and defer its payment.³ Although they may fall outside of TILA’s scope,⁴ they can be covered by state licensing and credit statutes.⁵

¹ 15 U.S.C. §1602(g). TILA does cover some forms of credit that do not have four installments or finance charges, including credit and charge cards.

² Point-of-sale installment loans, like buy-here-pay-here credit, also do not have the chargeback rights and other protections that apply to credit cards. Some use rent-a-bank schemes to charge high, predatory rates that violate state laws, and some loans offered through auto mechanics, pet stores, furniture stores and other locations engage in highly deceptive practices. *See, e.g.*, Congress Must Protect Consumers from Predatory Lending, <https://consumerfed.org/wp-content/uploads/2021/03/Rent-A-Bank-Stories-By-State-2021.pdf> (collecting consumer complaints).

³ 15 U.S.C. §1602(f).

⁴ BNPL products could potentially fall within TILA’s scope if they are structured to hide a finance charge, such as in an inflated purchase price or in fees. Depending on how they are set up and evolve, some BNPL products could be viewed as credit cards.

⁵ California announced settlements in late 2019 and early 2020 with Quadpay, Sezzle and AfterPay under which the three companies agreed to refund roughly \$1.9 million in fees to consumers and to obtain licenses and comply with applicable lending laws. California recently issued a report with data on the top six buy now pay later lenders. *See* Calif. Dep’t of Fin’l Prot’n & Innov., Press Release, “DFPI Report Shows Changes in Consumer Lending,

The BNPL market is exploding. Nearly every day there is an announcement about a new BNPL product or partnership. Companies with BNPL products include AfterPay (now acquired by Square), Affirm, Klarna, Sezzle, Splitit and Zip (previously QuadPay). Banks and established payments players like Capital One, Goldman Sachs, MasterCard, PayPal, and Synchrony Bank also have or are developing BNPL products. Many BNPL providers also offer traditional installment loans or other products.

BNPL products are most visible in online shopping, but BNPL options are also becoming available for in-person purchases. The potential uses of BNPL are endless. For example, Gravie,⁶ which works with brokers of health care plans for employers, and Scratchpay,⁷ which works through medical providers, both offer BNPL for medical expenses. One study found that 42% of respondents used BNPL to finance home and furniture goods, followed by electronics (30%) and apparel (24%), but uses also included music festivals and luxury items.⁸

Consumers are predicted to make nearly \$100 billion in purchases using BNPL programs in 2021, up from \$24 billion in 2020.⁹ According to a 2021 survey conducted by the Mercator Advisory Group, around 52% of customers aged 18-24 had used BNPL solutions in the past 12 months.¹⁰

Though the BNPL explosion appears to be primarily driven by merchants looking to increase sales and payment providers worried about being left out, the BNPL market also exploits the flaws of credit cards, which do not always serve consumers well. Credit cards provide a convenient way to make purchases on credit. But it is far too easy to get deep into credit card debt, and minimum payments that go heavily to interest and do little to reduce principle make it far too hard and take too long to pay off that debt. These problems have provided an opportunity for point-of-service installment loans and have led to installment loan features on credit cards. BNPL products go to the next level by limiting the number of installment payments and eliminating interest.

When they operate as promoted, BNPL can help consumers manage larger purchases without the long-term debt and high costs of credit cards. There are real benefits to being able to pay on credit with clear, simple payments that will quickly pay off the purchase at no greater cost than paying in cash.

Decrease in PACE Program” (Oct 7, 2021), <https://dfpi.ca.gov/2021/10/07/dfpi-report-shows-changes-in-consumer-lending-decrease-in-pace-program/>.

⁶ <https://www.gravie.com/blog/gravie-pay-prioritizing-health-without-compromising-financial-wellbeing/>.

⁷ <https://scratchpay.com>.

⁸ Credit Karma, Press Release, “Buy now pay later surges throughout pandemic, consumers’ credit takes a hit” (Sept. 9, 2021) (describing survey by Qualtrics on behalf of Credit Karma).

Kate Fitzgerald, American Banker, “Missed payments don’t faze new buy now/pay later lenders” (Sept. 17, 2021), <https://www.americanbanker.com/news/missed-payments-dont-faze-new-buy-now-pay-later-lenders>.

⁹ Ron Shelvin, Forbes, “Buy Now, Pay Later: The “New” Payments Trend Generating \$100 Billion In Sales” (Sept. 7, 2021), <https://www.forbes.com/sites/ronshelvin/2021/09/07/buy-now-pay-later-the-new-payments-trend-generating-100-billion-in-sales/?sh=7144ed5a2ffe>.

¹⁰ <https://www.grandviewresearch.com/industry-analysis/buy-now-pay-later-market-report>

No product is free to offer, and much of the cost of BNPL products is covered by merchants, who see a benefit to paying fees to BNPL providers in order to increase sales. When the cost is borne by merchants and BNPL is free and affordable to consumers who make their payments as scheduled and do not get overloaded with debt, these products can be a win-win.

Younger consumers are heavy users of BNPL,¹¹ and distrust of credit card debt may be part of the appeal to younger generations. Credit vehicles that require full repayment in management payments over a reasonable time period can provide a safer way to access credit than those that result in long-term debt. But some BNPL users may not fully appreciate that BNPL products are credit and, like credit cards, can create unmanageable debt loads.

The short time-horizon of BNPL products – six to eight weeks – is not all that different from how a credit card could be used without incurring interest. Depending on when in the statement cycle a credit card purchase is made, it might not need to be paid off for six weeks. It is not clear if BNPL payments are much more affordable than paying a credit card bill in full, or if they are merely designed to make a purchase price look lower or more manageable.

There are troubling indications that BNPL products may lead consumers to incur debt they cannot afford to repay. Disturbingly, part of the business model of some BNPL providers may count on consumers who do not pay on time and who incur late fees.

BNPL providers do not directly consider the consumer’s ability to repay. Even if they check do a soft check of credit reports, those reports may not reveal BNPL debt. Industry analysts have warned that BNPL providers may underestimate consumers’ debt levels and may be headed for even higher default rates.¹²

Some advertise “no credit check,” appealing to those who may already be overextended. A report by the former head of the United Kingdom’s Financial Conduct Authority pointed out that BNPL products may play on behavioral biases and understate the impact of late payments, encouraging impulse purchases rather than careful consideration about affordability.¹³ The report also highlighted concern about the high use of point-of-sale credit by consumers with mental health problems.¹⁴

BNPL products should not be viewed as a way to build credit or to provide credit to those who are underserved. BNPL products do not generally report payments to credit bureaus, so they do not help consumers to build access to traditional credit. But late or defaulted payments

¹¹ R. Shevlin, Buy Now, Pay Later: The “New” Payments Trend Generating \$100 Billion In Sales (Sept. 7, 2021), <https://www.forbes.com/sites/ronshevlin/2021/09/07/buy-now-pay-later-the-new-payments-trend-generating-100-billion-in-sales/?sh=7929e54c2ffe>.

¹² Weizhen Tan, CNBC, The ‘buy now, pay later’ trend could be the next hidden source of consumer debt, analysts warn (Aug. 10, 2021), <https://www.cnbc.com/2021/08/10/buy-now-pay-later-instalment-plans-may-cause-consumer-credit-card-debt-to-rise.html>.

¹³ Financial Conduct Authority, The Woolard Review – A review of change and innovation in the unsecured credit market at 47 (Feb. 2, 2021), <https://www.fca.org.uk/publication/corporate/woolard-review-report.pdf> (“Woolard Review”).

¹⁴ Woolard Review at 48.

may be reported,¹⁵ so BNPL products may have the potential to harm but not help credit access. Lack of underwriting is more of a flaw than a benefit. With the advent of cashflow underwriting, it is increasingly possible to underwrite those who have the ability to repay but do not have previous credit history.¹⁶ Offering credit without any underwriting at all is not the path to financial inclusion.

Small purchases can add up. A 2020 survey by Cardify.ai found that nearly half of shoppers said they increased their spending between 10 percent to over 40 percent when they used BNPL instead of a credit card.¹⁷ Serial BNPL purchases, potentially at multiple BNPL providers, can mount in ways that are not obvious.

A series of BNPL loans can be more difficult to understand and manage than a credit card bill. Under TILA, credit cards are required to send monthly statements, which accumulate all purchases into a single balance and have a single monthly payment, with a clear due date and amount. No such consolidated statement is required from BNPL providers, and consumers may not be able to use the same BNPL provider at different merchants. Due dates will vary, depending on the date of the purchase, and could be biweekly rather than monthly. Consumers with multiple BNPL debts could have multiple payments due at random dates throughout the month. Many consumers who have incurred late fees have simply lost track of payments.¹⁸

A recent survey found that 34% of people who have tried a BNPL loan have fallen behind on one or more of their installment payments.¹⁹ Younger consumers were more likely in one survey to report missing payments. More than half of Gen Z and millennial respondents said they had missed at least one payment, compared to 22% of Gen X and just 10% of Boomers.²⁰

In the United Kingdom, one bank found that 10% of its customers who made a payment to one of the two large BNPL providers overdrew their accounts beyond their overdraft allowance that month.²¹

¹⁵ Woolard Review at 49.

¹⁶ See Testimony of Chi Chi Wu, National Consumer Law Center, before the U.S. House of Representatives Committee on Financial Services, Task Force on Financial Technology, Regarding “Preserving the Right of Consumers to Access Personal Financial Data” (Sept. 21, 2021), <https://financialservices.house.gov/uploadedfiles/hhr-117-ba00-wstate-wuc-20210921.pdf>.

¹⁷ 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/>.

¹⁸ Anna Irrera, *As ‘buy now, pay later’ surges, a third of U.S. users fall behind on payments*, Reuters, Sept. 9, 2021 <https://www.reuters.com/technology/buy-now-pay-later-surges-third-us-users-fall-behind-payments-2021-09-09/> (reporting on an August 2021 Qualtrics survey of 1,044 adults on behalf of Credit Karma).

¹⁹ Credit Karma, “Buy now pay later surges throughout pandemic, consumers’ credit takes a hit” (Sept. 9, 2021) (describing survey by Qualtrics on behalf of Credit Karma), <https://www.creditkarma.com/about/commentary/buy-now-pay-later-surges-throughout-pandemic-consumers-credit-takes-a-hit>; Kate Fitzgerald, American Banker, “Missed payments don’t faze new buy now/pay later lenders” (Sept. 17, 2021) (describing Qualtrics survey), <https://www.americanbanker.com/news/missed-payments-dont-faze-new-buy-now-pay-later-lenders>.

²⁰ *Id.*

²¹ Woolard Review at 49.

AfterPay also had a high proportion of late fee revenue at 20%,²² down somewhat from 25% the previous year.²³ In the Australian BNPL market overall, 21% of users surveyed had missed a payment in the last 12 months.²⁴ Some consumers who used BNPL experienced “financial hardship, such as cutting back on or going without essentials (e.g. meals) or taking out additional loans, in order to make their buy now pay later payments on time.”²⁵ Another Australian report found bad debts (BNPLs not repaid) averaging 30% of revenue, and late fees that equated to 68% APRs.²⁶ ZipMoney also got 61% of its revenue from other consumer fees.²⁷

Reliance by some BNPL providers on late fees as a hidden, back-end payment mechanism is especially troubling. Some of the worst financial abuses can occur when there are misaligned incentives between the provider and the consumer – when the provider wins when the consumer loses. Overdraft fees,²⁸ predatory lending,²⁹ and credit cards that put consumers in the “sweat box”³⁰ are examples of dysfunctional markets where companies promote and profit off of products or practices that harm consumers. We cannot let these misaligned incentives take over the BNPL market.

Some have questioned the viability of the BNPL profit model, even with late fees.³¹ As competition for merchants drives down merchant fees, BNPL providers will look elsewhere for revenue, which could increase costs for consumers. BNPL products may primarily be a way to acquire customers who are then pitched other products.³²

BNPL products also may pose problems for consumers seeking a refund or redress if there is a problem with the item or service financed. Consumers have the right to contest credit card charges if they did not get what they paid for. Most consumers do not understand that the

²² Australian Securities & Investments Comm’n, Report 672: Buy now pay later: An industry update at 9 (Nov. 2020) (“Australian Report 672”), <https://download.asic.gov.au/media/5852803/rep672-published-16-november-2020-2.pdf>.

²³ Australian Securities & Investments Comm’n, Report 600: Review of buy now pay later arrangements at 10 (Nov. 2018), <https://download.asic.gov.au/media/4947835/rep600-published-28-11-2018.pdf>.

²⁴ Australian Report 672 at 4.

²⁵ *Id.*

²⁶ McLean Roche Consulting Group, Submission to Treasury Inquiry – Payments System Review 2020/21 at 39, https://treasury.gov.au/sites/default/files/2021-02/147719_mclean-roche_0.pdf. (“McLean Roche Submission”).

²⁷ Australian Report 672 at 9.

²⁸ See, e.g., Peter Smith et al., Center for Responsible Lending, Overdraft Fees: Banks Must Stop Gouging Consumers During the COVID-19 Crisis (June 2020), <https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-overdraft-covid19-jun2019.pdf>.

²⁹ See Lauren Saunders, et al., National Consumer Law Center, Misaligned Incentives: Why High-Rate Installment Lenders Want Borrowers Who Will Default (July 2016), <https://www.nclc.org/issues/misaligned-incentives.html>.

³⁰ Ronald Mann, Columbia Law School, Bankruptcy Reform and the “Sweat Box” of Credit Card Debt (2006), https://scholarship.law.columbia.edu/faculty_scholarship/1407/.

³¹ McClean Roche Submission at 39 (“The BNPL profit model is highly questionable); Jemima Kelly, Financial Times, “Is ‘buy now pay later’ a viable business model?” (Oct. 7, 2021), <https://www.ft.com/content/ddb2e207-2450-4ca8-bad0-871290d80ea7>.

³² See *id.*; McKinsey & Company, Buy Now, Pay Later: Five Business Models to Compete (Jul. 29, 2021), <https://www.mckinsey.com/industries/financial-services/our-insights/buy-now-pay-later-five-business-models-to-compete>.

TILA chargeback and claims and defenses rights that apply to credit cards do not apply to BNPL products. They should.

Finally, BNPL products may not receive adequate oversight. In some states they are subject to licensing, and banks that offer BNPL products are subject to supervision. But non-bank players are not currently supervised at the federal level. They should be, given the dramatic growth in this market and the potential impact on consumers.

3. Earned Wage Access Products

Earned wage access products are styled as a way for workers to access wages they have already earned ahead of the regular payday. Some are more problematic than others, though all are balloon-payment loans that lead to a cycle of reborrowing. They are a form of payday loan, albeit lower cost and less dangerous (at least for now). Fee-based products should be regulated as credit.

The term “earned wage access” properly refers to programs that, through a connection to the employer’s time and attendance system, assesses the wages that the employee has worked but has not yet been paid and provides advances on those wages ahead of payday. Companies offering earned wage access include Branch, Ceridian, DailyPay, Even, Finfit, FlexWage, Gusto, Instant Financial and PayActiv.³³ Providers generally estimate the net wages due to the employee after deductions, but at least one provider has visibility into actual deductions, including any garnishments. Advances are often, but not always, limited to 50% of expected net wages. Repayment may be by payroll deduction; by offsetting incoming direct deposits to an associated debit or payroll card; by intercepting the wages through an intermediate pass-through account (which could delay receipt of wages); or, in certain circumstances, from the employee’s bank account.³⁴

Fake earned wage access products, *i.e.*, Earnin, discussed in the next section, have no connection to wages or time and attendance records and are repaid by debiting the bank account.

Pricing models vary. Some are free, paid for completely (or partially) by the employer, payroll provider or provider of a payroll or debit card. Some charge \$1 to \$2 per advance, sometimes with a weekly or biweekly cap. But workers who want their pay right away – and almost all do³⁵ – pay \$1 to \$2 more per advance for instant access. Other providers charge monthly for a package of services.

Earned wage access products are loans. While claiming to pay actual wages, earned wage access products are a form of payday loan – an advance on pay by a third party, repaid later on

³³ See Leslie Parrish, Aite, Making Ends Meet: On-Demand Pay and Employer-Based Loans (Feb. 2021).

³⁴ Bank account debits may be used when an advance is requested after payroll has closed or in states where regulatory issues preclude payroll deduction.

³⁵ I understand from conversations with earned wage access providers that it is common for 90% of workers to request instant access.

payday. Whether particular federal or state laws apply can be complicated,³⁶ but earned wage loans should generally be considered subject to lending laws, especially if there is any cost, including rate limits, licensing, and disclosure rules.

Earned wage providers characterize their products as something other than a loan, analogizing that the consumer is only paying a “convenience fee” for accessing their “own money.” But employees have no right to wages until payday, and time worked is not a bank account from which the employee has the right to make withdrawals. Unpaid wages are merely an asset securing a payday advance, just as another lender might secure a loan with a car, a diamond ring or home equity. Indeed, many states explicitly characterize loans secured by wage assignments as loans.³⁷

Assessing the hours the borrower has worked since the last paycheck is merely a form of underwriting. Payday lenders also evaluate whether a borrower gets a regular paycheck and when the borrower’s payday will come. Indeed, payday borrowers may not take out their first loan on the day they are paid, but instead when money runs out as payday approaches – after they have worked for several days and accumulated some unpaid wages. Exemptions for earned wage providers could be exploited by conventional payday lenders.

Repayment through payroll deduction does not distinguish loans based on earned wages from other loans; it is a common method of repaying loans. Payroll automated program interfaces (APIs) are making it even easier for lenders to obtain payment: “This sort of ‘voluntary garnishment’ can reduce losses for lenders ... [P]ulling directly from payroll puts the lender in question at the top.”³⁸ One commentator observed that “getting consumers to agree to this voluntary garnishment via signing over access to payroll systems is going to be much easier because people have gotten used to giving Plaid, Venmo and others access to their accounts.”³⁹

Earned wage loan providers typically retain the right to debit future, unearned payrolls if the first is insufficient, reinforcing the fact that these are loans.⁴⁰ Most earned wage access programs do

³⁶ For an analysis of the applicability of TILA, see Letter from National Consumer Law Center & Center for Responsible Lending to CFPB Direct Rohit Chopra (Oct. 12, 2021) (“NCLC CFPB EWA Letter”), https://www.nclc.org/images/pdf/banking_and_payment_systems/fintech/EWA-letter-to-CFPB_Oct-4-2021.pdf.

For an analysis under California law, see Letter from National Consumer Law Center & Center for Responsible Lending to Calif. Dep’t of Fin’l Prot’n & Innov. at 11-12 (Mar. 15, 2021), https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/CRL_CA_DFPI_EWA_Comments.pdf.

³⁷ California, for example, defines “finance lender” to include the business of “lending money and taking ... as security for a loan ... any lien on, assignment of, or power of attorney relative to wages, salary, earnings, income or commission.” Cal. Financial Code § 22009.

³⁸ Anish Acharya, Seema Amble, and Rex Salisbury, Andreessen Horowitz, The Promise of Payroll APIs (Oct. 20, 2020), <https://a16z.com/2020/10/20/payroll-apis/>.

³⁹ Timothy Ogden, Financial Access Initiative, The Weekly faiv, The Wage Garnishment Edition (Mar. 8, 2021), <https://www.financialaccess.org/faiv/2021/3/8/the-wage-garnishment-edition>.

⁴⁰ See Program Terms and Conditions ¶ 3.2 at 3, Appendix A to Compliance Assistance Sandbox Submission to CFPB from Payactiv, Inc. (“PayActiv Sandbox Submission”), https://files.consumerfinance.gov/f/documents/cfpb_payactiv_approval-request_2020-12.PDF.

not have full information about actual net wages, including garnishments, so they could be advancing pay that will not be received in the next paycheck and will have to be repaid later.

Chronic reborrowing is the norm, and fees often start small, but add up quickly. Most workers take advances multiple times a month, one or more every pay period.⁴¹

Company	Typical Frequency Of Use	Typical Advances Per Year*
Daily Pay	1.5 times per week	78
Even	1.4 accesses per month	17
FinFit	Limit of 1 access per pay period	24
FlexWage	1 to 4 accesses per month depending on employer settings	12 to 48
Instant Financial	4 to 5 accesses per pay period	96 to 120
Payactiv	1 to 4 accesses per pay period	24 to 96

Source: Aite.
*NCLC calculations assuming semi-monthly pay.

PayActiv, for example, has one version of its product that charges \$1 per access, up to \$3 for a one-week pay period, plus \$1.99 per transfer to employees who want their funds instantly. Thus, at the high end, a worker who took three instant delivery advances per week could pay more than \$36 per month in fees.

Moreover, those fees may buy very little. They often just help restore the paycheck to a bit less of what it would have been if the employee had not taken an advance the previous pay period. A \$100 advance taken out five days before payday with a \$5 fee is equivalent to a 365% APR.

⁴¹ Leslie Parrish, Aite, Employer-Based Loans and Early Pay: Disruption Reaching Scale at 13-14 (April 2019). The typical advances per year were calculated by NCLC assuming semi-monthly paychecks.

Fees also may increase in the future, especially if these lenders secure exemptions from lending laws. Indeed, earned wage lobbyists are pushing legal interpretations and state bills that would exempt their loans from lending laws regardless of cost.

Analogies that earned wage providers make to ATM fees for accessing one's cash bear a striking resemblance to the arguments that payday lending lobbyists used decades ago to seek exemptions from usury laws. Most payday loan laws do not use the term "loan" but instead govern "deferred deposit presentment," as lenders claimed that the loans were not loans but were simply check cashing fees for post-dated checks.⁴²

The CFPB's 2020 advisory opinion and sandbox approval order concluding that certain earned wage access products are not "credit" were deeply flawed and should be reversed.⁴³ In late 2020, the CFPB issued an Advisory Opinion concluding that free, employer-based earned wage programs that are repaid by payroll deduction do not create "debt" and thus are not "credit" under the Truth in Lending Act (TILA).⁴⁴ The CFPB has not previously addressed the definition of "debt," which is not defined in TILA, and the CFPB took this action under an Advisory Opinion Program, adopted in 2020, that allows industry players to seek legal interpretations with no opportunity for consumers or the general public to comment.

While completely free earned wage access programs may not be covered by TILA for other reasons,⁴⁵ the slippery slope of the CFPB's flawed reasoning became clear a month later when the CFPB granted an "approval order" under the CFPB's "compliance assistance sandbox program"⁴⁶ to PayActiv.⁴⁷ The approval order found that PayActiv was not offering credit even for programs that charge fees that could reach \$36 a month and that could involve the debiting of

⁴² See Calif. Fin. Code § 23001 (defining "deferred deposit transaction" as "a transaction whereby a person defers depositing a customer's personal check until a specific date, pursuant to a written agreement for a fee or other charge"); See also *McGhee v. Arkansas State Bd. Of Collection Agencies*, 375 Ark. 52, 289 S.W.3d 18 (2008) (Service fees authorized by Check-Cashers Act constituted "interest" subject to usury provisions of state constitution since fee was in reality an amount owed to check-casher in return for the use of borrowed money, especially when customer chose a deferred-presentment option, in which check-casher would not cash check customer wrote, in exchange for another fee).

⁴³ For a more detailed discussion, see Letter from National Consumer Law Center & Center for Responsible Lending to CFPB Director Rohit Chopra (Oct. 12, 2021) ("NCLC CFPB EWA Letter"), https://www.nclc.org/images/pdf/banking_and_payment_systems/fintech/EWA-letter-to-CFPB_Oct-4-2021.pdf.

⁴⁴ CFPB, Advisory Opinion, Truth in Lending (Regulation Z), Earned Wage Access Programs, 85 Fed.Reg. 79404 (Dec. 12, 2020), https://files.consumerfinance.gov/f/documents/cfpb_advisory-opinion_earned-wage-access_2020-11.pdf. TILA defines "credit" as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." 15 U.S.C. §1602(f). TILA does not define "debt,"

⁴⁵ The providers may not be "creditors" covered by TILA if they do not extend credit repayable in more than four installments or with a finance charge. 15 U.S.C. §1602(g).

⁴⁶ The sandbox program created in 2020 allows industry players to seek approval orders that provide immunity from the law, without any public input, even if the CFPB's interpretation of the law turns out to be wrong.

⁴⁷ See CFPB, Press Release, Consumer Financial Protection Bureau Issues an Approval Order to Facilitate Employee Access to Earned but Unpaid Wages (Dec. 30, 2020), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-issues-an-approval-order-to-facilitate-employee-access-to-earned-but-unpaid-wages/>.

future, unearned pay.⁴⁸ PayActiv has been mischaracterizing the order to imply CFPB endorsement of its products, to gain an upper hand over competitors, and to push for exemptions from state payday loan laws for its products regardless of cost.⁴⁹ As outlined in a lengthy legal analysis⁵⁰ and in a letter from 96 consumer, labor, civil rights, legal services, faith, community and financial organizations and academics,⁵¹ the CFPB should reverse the advisory opinion and approval order, as the legal reasoning was deeply flawed and could lead to widespread evasions of both credit and fair lending laws.

Exempting fee-based earned wage programs from credit laws may stifle the trend of employers and payroll providers to provide early wage access for free. Increasingly, employers are offering early wage access for free as a benefit, covering the costs of the earned wage lender. Some payroll providers also provide free programs as part of their services. Regulating earned wage products as credit could help to encourage the trend towards free products, which otherwise have a hard time competing against those that offer services free to the employer by pushing the costs onto low-wage workers.

It is not clear if free earned wage loans, even if free, help or exacerbate money management problems. The cycle of reborrowing earned wage loans is not surprising due to their balloon-payment nature. If an expense cannot be handled with this week's paycheck, then a worker is likely to struggle with a hole in the next paycheck. The ability to spend next week's pay today, given the constant press of expenses low-wage workers face, may make it harder to stay on a budget or to cover large monthly bills like rent. Surveys may reflect consumers' belief that earned wage products help them avoid overdraft and late fees,⁵² but the help may only be covering the shortfall from the previous earned wage advance. Payday loan users also report that the loans help, and many do not appreciate the costs and cycle of debt. More study is needed. The better earned wage access programs not only are free, but they do not depend on use of earned wage loans for profits and do not drive workers to use them. Instead, the loans are one option in a suite of services that includes the better options of savings and budgeting tools.⁵³

Employers can play a role in helping workers manage their finances. But encouraging savings is a higher priority, and affordable small dollar installment loans may be a better option for unplanned expenses. A \$200, three-month loan at 36% APR repaid semi-monthly has a \$35.09 payroll deduction, costs \$10.54, and is fully repaid in three months. A worker who takes a \$200

⁴⁸ Under the approval order, PayActiv is permitted to charge \$1 per access, capped at \$3 for a one-week pay period and \$5 for a biweekly pay period, plus \$1.99 per instant transfer. At the high end, assuming 12 instant accesses per month, the cost would be almost \$36.

⁴⁹ NCLC CFPB EWA Letter at 27-34.

⁵⁰ NCLC CFPB EWA Letter.

⁵¹ Letter from 96 consumer, labor, civil rights, legal services, faith, community and financial organizations and academics to Director Chopra (Oct. 12, 2021), https://www.nclc.org/images/pdf/banking_and_payment_systems/fintech/CFPB-EWA-letter-coalition-FINAL2.pdf.

⁵² See Leslie Parrish, Earned Wage Access Use and Outcomes: Findings From a Survey of DailyPay Customers (Sept. 9, 2021), <https://aite-novarica.com/report/earned-wage-access-use-and-outcomes-findings-survey-dailypay-customers>.

⁵³ But when there is a fee for that package of services, the earned wage loans may be the primary service the employee is buying, and the fee should be considered a finance charge.

wage advance and pays \$5 per semi-monthly pay period, reborrowing \$200 each pay period for three months, would pay \$30 in fees and still have a \$205 hole in the next paycheck. Used sparingly, free earned wage loans might be a tool to help workers manage expenses, but more research is needed.

4. Fake direct-to-consumer earned wage access products that debit bank accounts

The only true “earned wage” loans are through employers based on time-and-attendance records. But at least one app, Earnin, purports to offer access to wages but has no connection to payroll or the employer’s time and attendance records. Instead, it uses various methods to estimate earnings and then provides payday advances that are repaid by debiting the consumer’s bank account.

The lack of connection to earned wages is also apparent from the terms and conditions. Consumers must promise to ensure that there are sufficient funds in their account to repay an advance, and “Failed or rejected debits may be reinitiated at any time up to 150 days after the first debit.”⁵⁴

Overdraft and nonsufficient funds (NSF) fees can add to the costs, as Earnin’s estimates of the amount or timing of expected pay can be wrong. While Earnin promises to reimburse those fees, often it has not, and Earnin paid \$12.5 million to settle a class action.⁵⁵ Even after that settlement, one user complained about \$180 in overdraft fees that Earnin refused to reimburse, and others have complained as well.⁵⁶

Earnin makes money through purportedly voluntary “tips” (discussed in the next section). A \$100 advance taken out one week before payday with a \$10 “tip” would have an APR of 520%. Those fees can add up quickly with a cycle of reborrowing. These are simply fintech payday loans and should be regulated as such.

5. The “tips” evasion

The use of purportedly voluntary “tips” to disguise interest charges is an evasion, pure and simple, that should not be countenanced. The tips are unlikely to be truly voluntary, and the label does not change the cost to or the impact on consumers.

The “tips” model is spreading. The cost of “tips” is typically downplayed in promotions about these products implying that loans are free:

- Earnin, the fake earned wage advance app described above, advertises “no fees” to access “your paycheck.”⁵⁷

⁵⁴ <https://www.earnin.com/privacyandterms/#terms>.

⁵⁵ Tara Siegel Bernard, New York Times, [Apps Will Get You Paid Early, for a Price](#) (Oct. 2, 2020).

⁵⁶ See Letter from National Consumer Law Center & Center for Responsible Lending to Calif. Dep’t of Fin’l Prot’n & Innov. at 11-12 (Mar. 15, 2021), https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/CRL_CA_DFPI_EWA_Comments.pdf. Numerous other complaints are available at <https://www.bbb.org/us/ca/palo-alto/profile/financial-services/earnin-1216-642613/complaints>.

⁵⁷ <https://www.earnin.com/>; <https://earnin.com/privacyandterms>.

- Chime, a non-bank⁵⁸ deposit account, offers “Overdraft fee-free up to \$200,” comparing the “\$0” Chime SpotMe fees to a \$34 traditional overdraft fee.⁵⁹
- Dave, another non-bank “banking” app, advertises “up to \$200 advances without paying a fee” and “no interest.”⁶⁰ Dave collects “tips” and “donations,” and also charges an “Optional Express Fee” of \$1.99 to \$5.99, depending on the amount advanced.⁶¹
- MoneyLion, another non-bank banking app, offers “cash advances up to \$250 with no interest.” MoneyLion collects “tips” plus “delivery fees” of \$3.99 to \$4.99 for instant delivery.⁶²
- Solo is a “community” where consumers can access “short-term funds.”⁶³ To solicit lenders, consumers first set a “lender appreciation tip.”⁶⁴ The sample loans shown are 14-18 days with tips that generally equate to 260% APR, though no APR is shown.⁶⁵

These are all balloon-payment loans, with repayment in full with the next deposit or on a short schedule. Like other balloon-payment loans, they are likely to lead to dependency and a cycle of reborrowing.

Companies can employ strategies to make it difficult not to tip or to make the consumer feel compelled to tip. Earnin users reported having their access to advances restricted if they did not tip enough.⁶⁶ Earnin appears to have changed that practice after it became public. The SoLo app – which requires consumers to designate the “tip” in advance of funding -- “notes that loans are much more likely to be funded when users tip the maximum amount.”⁶⁷

Default tip amounts are often set in advance and may be difficult to undo. An Earnin user reported being completely unable to undo the default tip, even after deleting the app and reinstalling it.⁶⁸ An article about SoLo noted that “the only way to avoid [a tip] is through a

⁵⁸ Chime was forced to stop calling itself a bank in response to state enforcement actions. See Anna Hrushka, BankingDive, California regulator orders Chime to stop calling itself a bank (May 6, 2021), <https://www.bankingdive.com/news/california-regulator-orders-chime-to-stop-calling-itself-a-bank/599710/>; State of Illinois, Dep’t of Fin’l and Prof’l Reg., Settlement agreement and Consent Order, In re Chime Financial, Inc., No. 2021-DB-01 (March 25, 2021),

<https://www.idfpr.com/banks/cbt/Enforcement/2021/2021%2003%2025%20Chime%20-%20IL%20Settlement%20Agreement%20and%20Consent%20Order.pdf>

⁵⁹ <https://www.chime.com/>.

⁶⁰ <https://dave.com/>.

⁶¹ <https://dave.com/terms>.

⁶² <https://www.moneylion.com/instacash/>.

⁶³ <https://solofunds.com/>.

⁶⁴ <https://solofunds.com/borrow/> (under “Your Terms”).

⁶⁵ Three examples are for a \$100 loan with \$10 tip for 14 days and one is a \$100 loan with \$6 tip for 18 days.

⁶⁶ Kevin Dugan, New York Post, [Cash-advance app Earnin gets subpoenaed by NY regulator: source](#) (Mar. 28, 2019) (“Earnin encouraged users to leave a tip of anywhere between zero and \$14 on a \$100 weekly loan. Users who don’t leave a tip appear to have their credit restricted. Meanwhile, a \$14 tip would equate to a 730-percent APR — nearly 30 times higher than New York’s 25 percent cap.”).

⁶⁷ Fast Company, [These 2 Black founders aim to offer a fairer alternative to payday loans](#) (Feb. 18, 2021).

⁶⁸ Conversation with Brent Adams, Woodstock Institute.

toggle in SoLo’s settings menu, which must be reactivated for each request. There’s no way to opt out of donations while making the request itself.”⁶⁹

Apps may also use different user interfaces to send psychological signals and encourage quick action without thought about the default tip. Disingenuous statements encourage borrowers to “pay it forward” and to support a “community,”⁷⁰ ignoring the large companies and wealthy hedge fund investors who profit from the “tips.”

Even without direct messages or policies to disadvantage low tippers, consumers may believe they must make ample tips or they will be cut off – a threat to people who are caught in a cycle of debt.

The tipping model takes advantage of consumers’ lack of awareness of how the tips add up, and how the price easily gets into the territory of payday loan pricing. The supposedly voluntary nature of the tips makes it easier to get sucked into a cycle of debt. As one borrower described:

Earnin didn’t charge Raines a fee, but asked that he “tip” a few dollars on each loan, with no penalty if he chose not to. It seemed simple. But nine months later, what was originally a stopgap measure has become a crutch.

“You borrow \$100, tip \$9, and repeat,” Raines, a highway-maintenance worker in Missouri, told me. “Well, then you do that for a bit and they raise the limit, which you probably borrow, and now you are in a cycle of get paid and borrow, get paid and borrow.” Raines said he now borrows about \$400 each pay cycle.⁷¹

Most borrowers likely have no idea what a high rate of interest they are paying:

One former Earnin user, Nisha Breale, 21, who lives in Statesboro, Georgia — [another state where payday lending is illegal](#) — said she hadn’t fully realized that, when converted to an annual percentage interest rate, what seemed like a small \$5 tip on a \$100 advance payment (repayable 14 days later) was actually equivalent to a 130 percent APR.

“I definitely didn’t think about the payback time and the interest,” Breale, a student at Georgia Southern University, said. “They just portray it as being so simple and so easy.”⁷²

⁶⁹ Fast Company, [These 2 Black founders aim to offer a fairer alternative to payday loans](#) (Feb. 18, 2021) (“When requesting a loan, for instance, SoLo asks borrowers to choose a “donation” to the app on top of their tip to the lender, starting at 7% or \$3.50 for new borrowers seeking \$50 loans. Technically, the donation is optional, but the only way to avoid it is through a toggle in SoLo’s settings menu, which must be reactivated for each request. There’s no way to opt out of donations while making the request itself. Industry watchdogs have also raised concerns about the tipping model. While SoLo’s tips are also voluntary, and about 7% of loans funded on the platform involve no tipping at all, the app notes that loans are much more likely to be funded when users tip the maximum amount. Between tips and donations, users may end up paying a rate that’s not much more favorable than payday loans, even if the model for late payments is less predatory.”).

⁷⁰ <https://www.chime.com/spotme/>.

⁷¹ Sidney Fussell, The Atlantic, [The New Payday Lender Looks a Lot Like the Old Payday Lender](#) (Dec. 18, 2019).

⁷² Cyrus Farivar, NBC News, [Millions use Earnin to get cash before payday. Critics say the app is taking advantage of them.](#) (July 26, 2019).

A small number of users may manage to use tip-based services for free. But for-profit enterprises counting on tips as a profit center, with investors who need a significant return on investment, will not put up with a lot of non-paying users.

Regulators cannot be expected to constantly monitor the subtle and not so subtle back-end ways that companies will make sure that the vast majority of their borrowers tip. When caught using practices to coerce tips, companies may change their policies, but they will devise new ways to ensure that they get paid. Allowing lenders to escape credit laws whenever they claim that interest payments are voluntary will only lead to a game of whack-a-mole.

Using the “tips” label does not make a high-cost balloon-payment payday loan any less dangerous and any less likely to lead to a cycle of debt and reborrowing. Nor should claims that high interest charges are “voluntary” allow a loan to evade lending laws or exceed interest rate limits, whether under the federal⁷³ or state⁷⁴ laws. Regulators must put a stop to the tips model before it spreads further.

6. Collection of consumer data

Many fintech credit products collect consumer data. It is not always clear whether that data is being used or shared in ways that consumers do not expect and would not allow. The ultimate goal of acquiring consumers may also be obscure. The business model presented may not be the long-term game plan, which instead may be to harvest data or pitch other products.

As one report explained, the “most prevalent misconception across banks and traditional players is that shopping apps offering ‘buy now, pay later’ (BNPL) solutions are pure financing offerings.... The largest players are steadily building scale and engagement with an aspiration to become a ‘super app,’ similar to large China-based players such as TMall or Ant Group, that offer shopping, payments, financing, and banking products in a single platform. These large

⁷³ As the Federal Reserve Board stated before authority over TILA was transferred to the CFPB: “The Board has generally taken a case-by-case approach in determining whether particular fees are ‘finance charges,’ and does not interpret Regulation Z to automatically exclude all ‘voluntary’ charges from the finance charge.” 61 Fed. Reg. 49,237, 49,239 (Sept. 19, 1996). The Military Lending Act generally, with some exceptions, relies on TILA’s definition of “credit” and “finance charge.”

⁷⁴ As California Chief Justice Roger Traynor explained:

“The theory of (the Usury) law is that society benefits by the prohibition of loans at excessive interest rates, even though both parties are willing to negotiate them. Accordingly, ‘voluntary’ payments of interest do not waive the rights of the payors. ‘Payments of usury are not considered voluntary, but are deemed to be made under restraint.’ (Citation.) If no loophole is provided for lenders, and all borrowers save fraudulent ones are protected, usurious transactions will be discouraged.”

Stock v. Meek, 35 Cal.2d 809, 817, 221 P.2d 15, 20 (1950) (citing cases); *accord Hardwick v. Wilcox*, 11 Cal.App.5th 975, 988-89 (2017); *Buck v. Dahlgren*, 100 Cal.Rptr. 462 (Ct. App. 1972); *Heald v. Friis-Hansen*, 52 Cal.2d 834, 837, 345 P.2d 457, 459 (1959) (“In the absence of fraud by the borrower, the parties to a usurious transaction are not in *pari delicto*, and, where a loan agreement calls for usurious interest, the borrower may recover any interest paid.”).

providers already monetize consumer engagement through offerings other than financing (for example, affiliate marketing, cross-selling of credit cards and banking products).⁷⁵

The Gramm-Leach-Bliley Act provides some, but inadequate, limits on the ability to share data, and also imposes security standards to safeguard information, which the FTC recently strengthened. The Fair Credit Reporting Act also may be implicated depending on how and what data is collected, used or expected to be used. Regulators must keep an eye out for inappropriate collection, use and safeguarding of data, and Congress should update our inadequate privacy laws.

7. Disparate impacts on communities of color and evasions of fair lending laws.

New technologies can impose disparate impacts on communities of color and other disadvantaged people. But evasions of credit laws could also result in evasions of fair lending laws.

Many of the products discussed in my testimony are aimed at or used by people who are struggling to manage their finances paycheck to paycheck, have blemished credit histories, or are concerned about managing debt or credit.

These consumers will disproportionately come from Black and other communities that have been deprived of assets, income and affordable credit options due to centuries of discrimination and systemic racism that continues today. They are best served by fair, transparent and affordable forms of credit, not those with unaffordable balloon payments that lead to a cycle of debt, hidden and multiplying fees, or credit not based on ability-to-repay that increases unmanageable debt loads.

New forms of credit that rely on new technologies may also use alternative forms of data, algorithms and other technologies to market to and review consumers. These technologies also can result in disparate impacts that further harm disadvantaged communities.

It is essential that our anti-discrimination laws apply fully to new financial products and new technologies. Yet lenders whose products are styled to evade credit laws may also argue that they are not covered by fair lending laws. The Equal Credit Opportunity Act (ECOA) uses a similar (though somewhat broader) definition of “credit” to TILA’s. Some products – like buy now pay later – may be clearly covered under ECOA’s definition even if they are outside of TILA’s.⁷⁶ But for some other products, the same arguments used to claim that TILA does not apply could be

⁷⁵ McKinsey & Company, Buy Now, Pay Later: Five Business Models to Compete (Jul. 29, 2021), <https://www.mckinsey.com/industries/financial-services/our-insights/buy-now-pay-later-five-business-models-to-compete>.

⁷⁶ Under ECOA, credit “means the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.” 15 U.S.C. §1691a(d). This definition includes a second prong – the right “to purchase property or services and defer payment therefor” – that is absent from TILA. In addition, the term “creditor” has a broader definition under ECOA than under TILA, not tied to a finance charge or four installments. *Compare* Reg. B, 12 C.F.R. §1002.2(l) *with* Reg. Z, 12 C.F.R. § 1026.2a(17).

used against ECOA coverage. That is yet another important reason why evasions of our consumer protection laws must not be tolerated.

8. Recommendations

Whatever form credit takes, certain fundamental consumer protections are important:

- Interest rate limits;
- Price transparency and the ability to compare the cost of different forms of credit using a single metric, the APR;
- Responsible underwriting and affordable loan structures to ensure that consumers have the ability to repay the credit without reborrowing while meeting other expenses;
- Protection when there is a problem with the product or service financed and the consumer did not get what they paid for;
- Transparent, safe and fair use of consumers' data;
- Fair lending and the assurance that new forms of credit and underwriting models will not have disparate impact on disadvantaged and protected communities;
- Supervision and oversight to ensure compliance with the law and to prevent unfair, deceptive or abusive practices.

Unfortunately, many of these fundamentals are missing in new forms of credit. To remedy these gaps, my recommendations are:

1. **Newer financing and cashflow products should be viewed as credit and subject to federal and state lending laws**, including TILA, the Military Lending Act, state interest rate laws and other lending laws. The CFPB should rescind or significantly limit its recent actions on earned wage access products. Legislators and regulators should not carve loopholes in lending laws to exempt old wine in new bottles.
2. **Regulators should closely examine and crack down on evasive pricing models**, with interest charges hidden in purportedly voluntary “tips,” late fees, inflated “expedite fees,” or other obscure or back-end forms of pricing. Profit models built on penalty fees should be viewed as unfair, deceptive and abusive.
3. **All forms of credit should be based on ability-to-repay and should have affordable repayment structures**. Not every loan requires extensive underwriting, and new technologies and data are making it easier to assess whether a consumer can afford to take on additional debt. Regulators should discourage balloon-payment loans that merely put consumers in a cycle of debt without providing additional liquidity. Business models that primarily derive profits from consumers who do not have the ability to repay credit are unfair, deceptive or abusive.

4. **Products promoted at the point of sale should have chargeback protections, reasonable and proportional penalty fees, ability-to-repay, and statements.** These protections apply to credit cards, and they are important for BNPL loans as well. Consumers presented with multiple payment options at the point of sale should not have to be consumer law experts. They should be confident that whatever payment method they choose will be safe.
5. **The CFPB should begin supervising providers of fintech credit products** to ensure compliance with the law and to prevent unfair, deceptive or abusive practices. The CFPB can use its supervision authority over payday lenders and its ability to designate and supervise the larger participants in particular markets. Even generally responsible and useful credit products need oversight. Products may not always perform as they appear, and the long- term game plan with consumers may change.
6. **Regulators should ensure that data is used in ways consumers expect,** and Congress should improve privacy laws.
7. **Regulators should look out for disparate impacts** posed by fintech credit products. Any product aimed at people who have difficulty making it from paycheck to paycheck or accessing mainstream credit will disproportionately impact communities of color and other disadvantaged people. It is critical to ensure that those communities not be exploited by products that put them farther behind.

Thank you for the opportunity to testify. I would be happy to answer your questions.