

## Federal Trade Commission Releases Guidance to Merchants That Offer Buy Now/Pay Later (BNPL) Options to Customers

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On September 26, the Federal Trade Commission (FTC) [published a blog post warning](#) all entities that have a role in the “BNPL ecosystem” that “basic consumer protections” in the Federal Trade Commission Act apply to such payment offerings.

In advising merchants and others to undertake a Buy Now/Pay Later compliance check, the FTC suggests the following:

- (1) ensure that claims about BNPL are true for the “typical customer.” Claims about BNPL product offerings must be supported by reliable data.
- (2) computer interfaces in connection with the offering of BNPL options must be drafted and presented to consumers in a manner that does not obscure material information the consumer needs to make decisions about use of the product. Practices that obscure material information include burying information in dense “terms of use” documents and using non-descript icons.
- (3) regardless of contractual provisions, merchants cannot disclaim liability for third-party BNPL financing products it offers on their websites or at its brick-and-mortar locations. Specifically, the FTC stated that, “When retailers and BNPL companies offer payment plans to consumers, *both may be held liable* when people are deceived or treated unfairly” (emphasis added).

Notably, the FTC’s interest in BNPL products is consistent with the focus the financing products are receiving from the Consumer Financial Protection Bureau (CFPB). On September 15, the [CFPB issued a report](#) entitled *Buy Now, Pay Later: Market Trends and Consumer Impacts*. The CFPB’s report separately noted that BNPL products have inconsistent consumer protections (as in, typical consumer protections do not apply to many BNPL products) and serve as a basis for data harvesting by BNPL providers who operate “apps” that track and store consumers’ shopping habits and purchases.

### Why It Matters

Many merchants have embraced BNPL products as a means to drive sales in a manner that imposes no costs on customers (given that nearly all BNPL programs do not have an associated interest rate or Annual Percentage Rate). Most have assumed that any liability for compliance failures related to the offering of such product would be borne solely by the BNPL provider given that nearly all agreements between merchants and BNPL providers require such provider to commit to complying with all applicable laws. However, this guidance makes clear that contractual allocations of liability, even if contractually required between the parties, will not absolve

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merchants from claims if the FTC finds that a BNPL product offered by the merchant presents any of the issues identified above. As such, merchants should consult legal counsel to perform a periodic assessment of their BNPL provider(s) to ensure there are no apparent violations of consumer financial protection laws or federal or state agency guidance or requirements.

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