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Regulate Now or Pay Later: A Late Start on Regulating the BNPL Industry Endangers Consumers

I. INTRODUCTION

Financial hardship and the barriers to in-person shopping created by the COVID-19 pandemic led to the explosive rise of the Buy Now Pay Later (“BNPL”) industry.¹ As this industry rapidly transforms how American consumers shop, regulatory efforts have not matched pace to ensure proper consumer protections are in place. This Note refers to BNPL as a consumer loan transaction structured to require a 25% down payment upon purchase with the remaining balance due in installments every two-weeks.² Unlike traditional forms of credit, BNPL products feature few, if any, meaningful barriers that customers must contend with before receiving credit.³ For prudent consumers, access to quick, interest-free credit through BNPL transactions offers flexibility.⁴ But the ease of entering into BNPL transactions paired with the lure of zero-interest financing can heighten consumers’ risk of

1. See Penelope Wang, *The Hidden Risks of Buy-Now, Pay-Later Plans*, CONSUMER REPS. (Feb. 14, 2021), <https://www.consumerreports.org/shopping-retail/hidden-risks-of-buy-now-pay-later-plans-a7495893275/> [<https://perma.cc/4UJV-B7Y5>] (“Participation [in BNPL transactions] grew during the pandemic, which hit the incomes of many American families and drove more shoppers online. Afterpay, one of the leading lenders, saw its U.S. monthly sales more than double in November from a year earlier, to \$2.1 billion.”).

2. CONSUMER FIN. PROT. BUREAU, BUY NOW, PAY LATER: MARKET TRENDS AND CONSUMER IMPACTS 3 (2022) [hereinafter CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT], https://files.consumerfinance.gov/f/documents/cfpb_buy-now-pay-later-market-trends-consumer-impacts_report_2022-09.pdf [<https://perma.cc/UD86-EWH6>] (“BNPL is a form of credit that allows a consumer to split a retail transaction into smaller, interest-free installments and repay over time. The typical BNPL structure divides [a purchase] into four equal installments, with the first installment paid as a down payment due at checkout, and the next three due in two-week intervals over six weeks.”).

3. See *id.* at 4 (“The report identifies several competitive benefits of BNPL loans over legacy credit products. These benefits are both financial (*i.e.*, no interest and sometimes no late fees) and operational (*i.e.*, ubiquitous, easy to access, simple repayment structure.”).

4. See Testimony of Lauren Saunders, Assoc. Dir., Nat’l Consumer L. Ctr., before the Task Force on Fin. Tech., U.S. H. Comm. on Fin. Servs. 5 (Nov. 2, 2021) [hereinafter Saunders Testimony], <https://www.nclc.org/wp-content/uploads/2022/10/Fintech-task-force-liquidity-testimony-Lauren-Saunders-2021-11-2-FINAL.pdf> [<https://perma.cc/QB3L-4EEJ>] (“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 case.”).

slipping into financial straits.⁵ Insufficient appreciation of the ramifications of participating in a BNPL transaction can lead to unsound consumer purchase decisions.⁶ The touted spin of BNPL products as budgeting tools rather than consumer loans may contribute to consumers underestimating the financial gravity of BNPL transactions.⁷

While credit installment payments are hardly new in consumer lending, the rapid growth of BNPL transactions in recent years sparked innovation in consumer lending.⁸ Without industry standards and clear regulatory oversight, consumers may face great risk to their long-term credit and financial health when making a quick decision to utilize

5. *Buy Now, Pay More Later? Investigating Risks and Benefits of BNPL and Other Emerging Fintech Cash Flow Products: Hearing on H.R. 4277 Before the Task Force on Fin. Tech. of the H. Comm. on Fin. Servs.*, 117th Cong. 69, 73 (2021) (testimony of Marisabel Torres, Director, California Policy, Center for Responsible Lending) [hereinafter Torres, *Testimony in BNPL Hearing*], <https://www.congress.gov/117/chr/CHRG-117hrg46247/CHRG-117hrg46247.pdf> [<https://perma.cc/VFE3-LKU7>] (“The fact that this appears to be a ‘free credit’ product raises the question: What’s the catch? It turns out there are a number of catches – some demonstrable, some potential – which require regulatory attention and response.”); see also Emily Mason, *Regulator Homes In On ‘Loan Stacking’ Across Buy Now, Pay Later Firms*, FORBES (Sept. 21, 2022, 9:00 AM), <https://www.forbes.com/sites/emilymason/2022/09/21/regulator-homes-in-on-loan-stacking-across-buy-now-pay-later-firms/?sh=1334baa2747f> [<https://perma.cc/T9ZV-7UVJ>] (“The services are designed to be easy to use and are often seamlessly integrated with online checkouts, making it almost too easy for consumers to sign on for a new loan.”). *But see* CONSUMER FIN. PROT. BUREAU, *BNPL MARKET REPORT*, *supra* note 2, at 62 (“The BNPL industry [] posits that the product, unlike a typical general-purpose credit card, is not debt-cycle-inducing. Because BNPL lenders underwrite each purchase individually and do not charge interest, they argue that they have incentive-aligned, debt-cycle-preventing guardrails.”).

6. See Alexis Leondis, *Buy Now, Pay Later? You Might Regret It.*, BLOOMBERG (Feb. 17, 2022, 6:30 AM), <https://www.bloomberg.com/opinion/articles/2022-02-17/buy-now-pay-later-you-might-regret-it> [<https://perma.cc/FJB8-V7AG>] (“Consumers are often lured into impulse buying when allowed to pay later, and they shop across multiple platforms, which can lead to confusion about the terms they’re agreeing to.”); see also Kyle Peterdy, *BNPL (Buy Now, Pay Later)*, CORP. FIN. INST. (Oct. 7, 2022), <https://corporatefinanceinstitute.com/resources/commercial-lending/bnpl-buy-now-pay-later/> [<https://perma.cc/25DT-AZ3M>] (“There’s a psychological risk here when consumers aren’t paying a lot ‘out of pocket’ up front; they are more likely to make a purchase and may also spend more than they would otherwise.”).

7. See Jonathan Berr, *BNPL Faces Tough Economic Challenges*, PAYMENTS DIVE (June 27, 2022), <https://www.paymentsdive.com/news/bnpl-faces-tough-economic-challenges/626020/> [<https://perma.cc/5F87-GG4T>] (“BNPL executives often speak of their service . . . as a ‘budgeting tool’ as opposed to a loan.”).

8. See Trina Paul, *Credit Cards Offer ‘Buy Now, Pay Later’ Options – But Is It Better than Carrying a Balance?*, CNBC (Dec. 19, 2022), <https://www.cnbc.com/select/credit-cards-offering-buy-now-pay-later-options/> [<https://perma.cc/7DDS-568L>] (noting how traditional credit card companies and payment services have begun to offer BNPL options to their customers).

BNPL services at checkout.⁹ Currently, the onus is entirely on the consumer to be financially savvy enough to navigate these novel BNPL transactions, with little regulatory attention paid to these products.¹⁰ With the BNPL industry largely unregulated to date, government entities must quickly play catch-up to remedy potential pitfalls in the BNPL market to protect consumers.¹¹ Regulatory action to establish and enforce consumer protections is important in the near future, as the rapid market incorporation and consumer adoption of BNPL products indicate this new market is here for the long-run.¹²

This Note examines the emergence of the BNPL industry in the United States and the resulting need for this growing industry to face tailored regulation protecting American consumers. This Note proceeds

9. See Comment Letter from Kwame Raoul et al., Att’y Gens., to Rohit Chopra, Dir., Consumer Fin. Prot. Bureau 2 (Mar. 25, 2022) (on file with the Illinois Attorney General’s Office), https://illinoisattorneygeneral.gov/pressroom/2022_03/2022325_CFPB-State_AG_Comment_Letter_onBNPL_Providers2022-0002_87_Fed_Reg3511.pdf [<https://perma.cc/RT63-JGTZ>] (“We are concerned that BNPL providers’ claims of quick application approvals, no credit checks, no interest or fees, and convenient payment schedules are masking features that will contribute to long-term damage to consumers’ financial health.”); see also Andrew Martins, *CFPB Study Outlines Need for “Buy Now, Pay Later” Rules*, INVESTOPEdia (Sept. 23, 2022), <https://www.investopedia.com/cfpb-study-outlines-need-for-buy-now-pay-later-rules-6741356> [<https://perma.cc/5K53-BTUU>] (“By getting younger people in debt sooner, it runs the risk of normalizing debt accrual without proper management. The ease of obtaining a BNPL loan is highlighted by the fact that loan approval ratings rose from 69% in 2020 to 73% in 2021 and that the prevalence of late fees went up from 7.8% to 10.5% in that same time.”).

10. See Alec Klimowicz, Note, *Buy Now, But Pay For It Later: How BNPLs Allow Unsecured Consumer Debt to Accumulate Without Regulation*, 27 Ill. Bus. L.J. 39, 43 (2022) (“But this entire [BNPL] structure relies on the consumer to track their spending with all BNPL services they use.”); see also Nelson Akeredolu et al., *Should You Buy Now and Pay Later?*, CONSUMER FIN. PROT. BUREAU: BLOG (July 6, 2021), <https://www.consumerfinance.gov/about-us/blog/should-you-buy-now-and-pay-later/> [<https://perma.cc/T2Z4-DGNK>] (“Because lenders have different fees and policies, it is important to carefully review the BNPL terms and conditions to understand your obligations.”).

11. See Elizabeth Knight, *The BNPL Party Is Over and Regulations Are the Least of Its Problems*, THE SYDNEY MORNING HERALD (Nov. 21, 2022, 5:33 PM), <https://www.smh.com.au/business/companies/the-bnpl-party-is-over-and-regulations-are-the-least-of-its-problems-20221121-p5c00s.html> [<https://perma.cc/S4SK-8M3C>] (arguing the current “regulatory free-for-all” for BNPL providers harms consumers and the Australian government’s current efforts to regulate the industry are overdue); see also Torres, *Testimony in BNPL Hearing*, *supra* note 5 (advocating for regulatory action in the BNPL industry).

12. Marc Bender & Andrew Pellow, *The Rise and Evolution of Buy Now Pay Later*, DELOITTE: BLOG (Nov. 10, 2021), <https://www2.deloitte.com/au/en/blog/financial-advisory-financial-services-blog/2021/the-rise-evolution-buy-now-pay-later.html> [<https://perma.cc/M9DK-BSW8>] (“One thing is certain: The BNPL experience is here to stay . . .”).

in five parts. Part II provides a background on the BNPL industry and its resulting impact on consumer lending.¹³ Part III assesses how government entities reacted to the emergence of the BNPL industry.¹⁴ Part IV analyzes potential measures that could increase consumer protections in this growing market.¹⁵ The final section, Part V, summarizes and concludes this Note.¹⁶

II. BACKGROUND ON THE BNPL INDUSTRY

A. *Structure of a BNPL Transaction*

The availability of BNPL products is so pronounced that now a BNPL option may be considered a ubiquitous feature of most online checkouts.¹⁷ In a typical BNPL transaction, online consumers of a merchant face a choice at checkout to pay the full price immediately to the merchant, or break up the purchase into four separate payments to a BNPL company.¹⁸ Consumers interested in a BNPL transaction only have to wait a few seconds for their “application” to be approved by the BNPL provider. After just a few seconds the customer has taken on a new debt obligation without needing to jump through the hurdles of securing a traditional source of credit.

BNPL products have now evolved from being used exclusively for online transactions to use in traditional brick and mortar businesses.¹⁹ For example, BNPL providers now offer “virtual cards”

13. *See infra* Part II.

14. *See infra* Part III.

15. *Infra* Part IV; *see also* Rohit Chopra, Dir., Consumer Fin. Prot. Bureau, Prepared Remarks on the Release of the CFPB’s Buy Now, Pay Later Report (Sept. 15, 2022) (transcript available on the CFPB website) [hereinafter Chopra, Remarks on Market Report], <https://www.consumerfinance.gov/about-us/newsroom/director-chopras-prepared-remarks-on-the-release-of-the-cfpbs-buy-now-pay-later-report/> [https://perma.cc/YLD7-KNDY] (announcing the CFPB’s intention to “make sure that Buy Now, Pay Later is fair, transparent, and competitive”).

16. *Infra* Part V.

17. *See Ann Carrns, The Downsides of Using ‘Buy Now, Pay Later’*, N.Y. TIMES (Dec. 29, 2022), <https://www.nytimes.com/2022/12/29/your-money/buy-now-pay-later-loans.html?searchResultPosition=1> [https://perma.cc/6RWW-D5UP] (“The National Retail Federation says almost half of merchants offer at least one pay-later option online.”).

18. *See* CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2, at 16 (noting in typical BNPL transactions customers pay an immediate 25% down payment and three subsequent payments of an identical payment size).

19. Bender & Pellow, *supra* note 12 (discussing the evolution of the BNPL market and predicting “its various forms and flavours will continue to evolve at a rapid pace for

that allow consumers to engage in a pay-in-four transaction even when making purchases from merchants who did not partner with a BNPL provider.²⁰ The consumer appeal of these products attracted the attention of traditional consumer credit providers; credit card companies started to offer pay-in-four options to their consumers.²¹ Even larger companies, such as Apple, have seen the consumer appeal of BNPL and want in on the action, creating their own BNPL products.²²

B. *BNPL Providers' Business Model*

BNPL providers are companies, not non-profits, despite many providers offering zero-interest consumer loans.²³ These companies boast a variety of revenue-generating sources.²⁴ One important source of BNPL providers' revenue is merchants.²⁵ BNPL companies partner with merchants to provide a form of point-of-sale financing. This partnership with a BNPL provider allows merchants to benefit from increased sales, fewer abandoned online shopping carts, and more

consumers, merchants, and BNPL service providers (the specialists or the incumbents) alike”).

20. See CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2, at 48 (“Because those [virtual] cards can be used on the major payment networks that almost all retailers accept, nearly any online merchant is eligible to accept BNPL.”).

21. See Paul, *supra* note 8 (describing how certain credit card companies have launched their own BNPL products); see also Emily Scheer, *Visa Helping Fuel ‘Buy Now, Pay Later’ Growth Around the World*, VISA (Oct. 27, 2021), <https://investor.visa.com/news/news-details/2021/Visa-Helping-Fuel-Buy-Now-Pay-Later-Growth-Around-the-World/default.aspx> [<https://perma.cc/6UAY-FZ4T>] (discussing how VISA plans to add BNPL capabilities to their credit cards).

22. See Ron Shevlin, *How Apple Will Boost the Apple Card with Buy Now Pay Later*, FORBES (June 28, 2022, 8:00 AM), <https://www.forbes.com/sites/ronshevlin/2022/06/28/how-apple-will-boost-the-apple-card-with-buy-now-pay-later/?sh=5a3f624c19c4> [<https://perma.cc/9AFT-XA5W>] (discussing Apple adding pay-in-four capabilities to Apple Pay).

23. See generally CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2 (noting typical BNPL transactions occur interest-free).

24. See generally *id.* (discussing in depth the various methods BNPL providers use to turn profits while providing interest-free credit). *But see* James Ledbetter, *‘Buy Now, Pay Later’ Is the Victim of its Own Success*, N.Y. TIMES: DEAL BOOK (Jan. 28, 2023), <https://www.nytimes.com/2023/01/28/business/dealbook/buy-now-pay-later-struggles.html> [<https://perma.cc/NZ2Y-PRER>] (“Two of the [] big global B.N.P.L. players, Affirm and Afterpay, have never turned an annual profit; Klarna says it was profitable in its early years.”).

25. See Ellen Traupman Berge et al., *Buy-Now-Pay-Later: A 360 Degree Overview*, VENABLE LLP (Jan. 25, 2022), <https://www.venable.com/insights/publications/2022/01/buy-now-pay-later-bnpl-a-360-degree-overview> [<https://perma.cc/EP7V-7UC9>] (“[P]rofitability for BNPL providers [was originally] driven largely by fees they charge[d] to merchants.”).

repeat customers.²⁶ In return, BNPL providers receive merchant fees from their merchant partners at a rate of 3-6% of the transaction price.²⁷ But the merchant fee is not the only benefit certain BNPL providers gain from merchant partnerships. BNPL companies who have developed independent apps available to customers on their phones have additional revenue sources at their disposal.²⁸ BNPL companies can charge merchants to advertise their products on the BNPL app.²⁹ Merchants pay BNPL providers for prominent positions on the app to attract customers' attention, and perhaps increase their impulse spending.³⁰

BNPL is a relatively young market, and it remains to be seen how BNPL providers will weather the changing economy as interest rates continue to rise.³¹ With higher interest rates, BNPL companies face increasing costs to secure funding, but BNPL providers are largely locked into providing interest-free loans to consumers due to their business model.³² As a result, BNPL companies may need to adjust

26. See CONSUMER FIN. PROT. BUREAU, THE CONVERGENCE OF PAYMENTS AND COMMERCE: IMPLICATIONS FOR CONSUMERS 13 (2022) [hereinafter CFPB, IMPLICATIONS FOR CONSUMERS], https://files.consumerfinance.gov/f/documents/cfpb_convergence-payments-commerce-implications-consumers_report_2022-08.pdf [<https://perma.cc/MXH2-B9ST>] (noting that merchants' BNPL partnerships improve sales metrics including increasing unique site visits, order sizes, repeat visits, and decreasing shopping cart abandonment).

27. See Berge et al., *supra* note 25 (stating BNPL providers derive a portion of their profitability from merchant fees).

28. See Ed deHaan, et al., Buy Now Pay (Pain?) Later 3 (Oct. 26, 2022) (unpublished manuscript) (on file with SSRN), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4230633 ("BNPL providers also earn substantial commission and advertising revenues from retailers . . .").

29. See CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2, at 49–50 (describing how BNPL providers with apps can profit due to lead generation fees paid by merchants to place their products in the highest-traffic places in the BNPL app).

30. See *id.* at 50–51 (noting products' placement in the app can ensure the product is in the sightline of target "high-intent shoppers" (quoting *Growing Your Reach with the World's Greatest Shoppers*, KLARNA: FOR BUSINESS, <https://www.klarna.com/us/business/marketing-solutions/ads-sponsored-content/> [<https://perma.cc/5TZ6-E7WG>] (last visited Feb. 3, 2023))).

31. See Marshall Lux & Bryan Epps, *Grow Now, Regulate Later? Regulation Urgently Needed to Support Transparency and Sustainable Growth for Buy-Now, Pay-Later* 16 (Harv. Mossavar-Rahmani Ctr. For Bus. & Gov't Assoc. M-RCBG Working Paper Series, No. 182, 2022) ("The size and rapid growth of the BNPL market and the fact that BNPL has not yet gone through a credit cycle makes some oversight all the more important to prevent a mini-crisis, especially in an uncertain economic environment.").

32. See Reuters, *Buy Now Pay Later Business Model Faces Test as Rates Rise*, THE ECON. TIMES (June 10, 2022, 5:02 PM), <https://economictimes.indiatimes.com/news/international/business/buy-now-pay-later-business-model-faces-test-as-rates-rise/articleshow/92129206.cms> [<https://perma.cc/J2UL->

their business model to account for this hike in liabilities.³³ The adjustments could include increased reliance on consumer fees yielded from BNPL transactions.³⁴

Just because BNPL providers offer interest-free credit to consumers does not mean consumers get off scot-free from BNPL providers' revenue model. BNPL consumers serve as an important source of revenue for BNPL providers, both directly and indirectly. BNPL providers directly generate revenue from consumers through late and insufficient fund fees.³⁵ While late fees currently account for a small portion of a BNPL provider's profits, concurrent marketplace changes and rising interest rates may lead to a shift in the BNPL business model.³⁶ Policies and rates of consumer fees – including late fees and insufficient fund fees – differ between companies in the BNPL industry.³⁷ Data from the five largest BNPL companies in the United

DCV5] (“[R]ising interest rates push[] up BNPL firms’ funding costs, squeezing their margins.”).

33. See CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2, at 10 (noting that the CFPB’s market inquiry revealed that “BNPL lenders have adjusted their business models and strategies in a variety of ways, including . . . increasing their reliance on consumer fees (namely, late fees and other fees), and shifting toward the app-driven ‘lead generation’ acquisition model”).

34. BNPL providers who want to make up for decreasing profits due to the increased cost of conducting business may target consumer fees. The sheer number of BNPL providers in the market has decreased these companies’ leverage over their merchant partners and so BNPL providers could likely not hike up merchant fees to make up for slimmer margins. See Debbie Carlson, *BNPL Faces Headwinds from Rising Rates, Inflation*: *Fitch*, PAYMENTS DIVE (Aug. 10, 2022), <https://www.paymentsdive.com/news/bnpl-faces-headwinds-from-rising-rates-inflation-fitch/629210/> [<https://perma.cc/8BEK-QZ8L>] (“If margins being squeezed by higher interest rates and higher default rates prompt BNPL providers to ask merchants to pay more for the installment services, they may be in a tough spot. They aren’t likely to extract much more from merchants ‘because there’s so many alternatives out there’ . . .”).

35. See *Do Buy Now, Pay Later (BNPL) Loans Have Fees?*, CONSUMER FIN. PROT. BUREAU (Dec. 2, 2021) [hereinafter CFPB, *BNPL Loan Fees*], <https://www.consumerfinance.gov/ask-cfpb/do-buy-now-pay-later-bnpl-loans-have-fees-en-2118/> [<https://perma.cc/2NRK-TYWL>] (“While many BNPL loans don’t charge interest, most do charge late fees if you don’t make payments on time. Each lender has different fees . . .”).

36. See CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2, at 44 (“Lenders have responded to this confluence of events with adjustments to their business models, many of which have direct consequences for borrowers.”).

37. See *id.* at 23 (“Of the three lenders who charge late fees, two have a policy to charge a late fee at 10 days past due (DPFD), while the other lender may charge the fee after one DPD. In the past, several lenders have reserved the ability to charge multiple late fees for a single missed installment, and one lender outside the scope of the inquiry may currently charge two late fees after a missed payment.”); see also Akeredolu, *supra* note 10

States show that the revenue from consumer fees has continued to grow in recent years from 11.7% to 13.4%.³⁸ Meanwhile, the impact of missing a BNPL payment may have more complex consequences than consumers realize.³⁹ Certain BNPL companies report delinquent payments to credit reporting agencies.⁴⁰ The majority of BNPL customers who missed payments noted a subsequent drop in their credit score.⁴¹

BNPL providers also indirectly profit from their consumers through use and sale of consumer data to third-parties. Revenue from third-parties may form an increasingly large base of BNPL providers' income.⁴² BNPL providers with apps have a wealth of potential revenue streams resulting from their customer data.⁴³ This includes gathering lead generation fees from companies with products featured on the BNPL apps.⁴⁴ Alternatively, BNPL providers can utilize customer data to tailor appealing products to each specific customer on the BNPL app,

("Because lenders have different fees and policies, it is important to carefully review the BNPL terms and conditions to understand your obligations.").

38. See CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2, at 9 ("Lenders' share of revenues from consumer fees (late fees and other fees) was 13.4 percent in 2021, up from 11.7 percent in 2020. Late fees specifically accounted for 6.9 percent of revenues in 2021 (up from 4.8 percent in 2020).").

39. See *Carrns*, *supra* note 17 ("But pay-later loans can hurt your credit score if you fail to pay. Lenders may send the account to a collection agency . . .").

40. See Veronica Irwin, *Credit Where It's Due: BNPL Wants in on Credit Reports*, PROTOCOL (Aug. 9, 2022), <https://www.protocol.com/fintech/bnpl-credit-scoring> [<https://perma.cc/A95S-NXD9>] ("Most BNPL companies today do not report data . . . to credit bureaus — that is, unless a customer is delinquent on their payments and the debt is sold to collections. Some companies claim to not report delinquencies either.").

41. See *Buy Now Pay Later Surges Throughout Pandemic, Consumers' Credit Takes a Hit*, CREDIT KARMA (Sept. 9, 2021), <https://www.creditkarma.com/about/commentary/buy-now-pay-later-surges-throughout-pandemic-consumers-credit-takes-a-hit> [<https://perma.cc/EG3Y-98W5>] (finding that at least a third of BNPL consumers fell behind on payments and 72% of these consumers "believe their credit score declined as a result of missing the payment(s)").

42. See CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2, at 10 (noting that the CFPB's market inquiry revealed that the top BNPL providers "shift[ed] toward the app-driven 'lead generation' acquisition model").

43. See *id.* at 50 (noting that venture capitalists value BNPL providers' surplus of proprietary data puts these companies "in position to offer other data-driven services").

44. See *id.* (describing lead generation fees as "essentially a form of disguised advertising [paid by companies] to the lender for each purchase that originated from the preferred brand placement").

providing temptation for consumers to repeatedly use BNPL products to pay for their purchases.⁴⁵

C. *Market Adoption of BNPL*

Globally, the BNPL model has exploded in the past three years, with the United States being no exception.⁴⁶ The COVID-19 pandemic pushed consumers of all age groups to become more tech-savvy and willing to engage in online shopping.⁴⁷ Even absent the benefits of avoiding brick-and-mortar shopping amidst a pandemic, BNPL transactions offer both psychological and financial benefits to consumers.⁴⁸ Breaking up payments into installments may allow consumers to make purchases that are otherwise out-of-reach if required to pay the full lump sum upon checkout.⁴⁹ Seeing a purchase price broken down into fourths may make the purchase price seem more reasonable or achievable.⁵⁰ Over the past few years, U.S. consumers have rapidly adopted BNPL transactions into their financial repertoire.

45. *See id.* (“Behavioral surplus is the engine that powers complex personalization and targeting models for BNPL app placement, which in turn drive consumer engagement and incremental spending.”).

46. *See* Priya Krishna, *Eat Now, Pay Later: Going into Debt for Food*, N.Y. TIMES (Sept. 7, 2022), <https://www.nytimes.com/2022/08/29/dining/buy-now-pay-later-loans-groceries.html> [<https://perma.cc/NQ5E-D2MR>] (reporting that online pay-later transactions worth \$15.3 billion occurred in 2020 and \$45.8 billion occurred in 2021); *see also* Elaine S. Povich, *Regulators Scrutinize Buy Now, Pay Later Plans*, PEW CHARITABLE TRS. (Feb. 2, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/02/02/regulators-scrutinize-buy-now-pay-later-plans> [<https://perma.cc/9CXR-5JCA>] (discussing how surveys indicated BNPL use by US consumers jumped from 37% in July 2020 to 56% in March 2021).

47. *See* CFPB, IMPLICATIONS FOR CONSUMERS, *supra* note 26, at 6 (“The pandemic forced consumers out of retail stores and bank branches and into online solutions. While Millennials and Gen Z consumers were already comfortable with online payments systems, the pandemic increased digital commerce usage across all demographics.”).

48. *See* Robert Farrington, *The Dangerous Rise of ‘Buy Now, Pay Later’ Offers*, FORBES (Aug. 17, 2021, 10:10 AM), <https://www.forbes.com/sites/robertfarrington/2021/08/17/the-dangerous-rise-of-buy-now-pay-later-offers/?sh=20804ca72d14> [<https://perma.cc/3XK3-WQ7H>] (discussing how BNPL may contribute to impulse purchases due to it breaking up the total cost into more palatable smaller number charges).

49. *See id.* (discussing how BNPL may contribute to impulse purchases due to it breaking up the total cost into more palatable smaller number charges).

50. *See* CFPB, IMPLICATIONS FOR CONSUMERS, *supra* note 26, at 13 (discussing how BNPL companies partner successfully with merchants, despite charging fees for each transaction, because offering BNPL companies “improve four key sales metrics: more unique site visitors, higher shopping cart conversion, higher average order size, and increased repeat visits.”).

While data from the five largest BNPL companies indicated that around half of BNPL consumers were less than thirty-four years old, BNPL adoption occurred across many age groups.⁵¹ BNPL transactions appeal to consumers of all age groups.⁵²

BNPL disrupted the traditional path of consumers' access to credit.⁵³ Unlike the longer process of consumers securing credit from banks or credit card companies, credit approval in a BNPL transaction occurs within a matter of seconds.⁵⁴ BNPL transactions quickly dominated consumer lending transactions in the United States during the pandemic.⁵⁵ During this explosive growth,⁵⁶ the substance and variety of BNPL transactions evolved.⁵⁷ Originally, clothing sales dominated BNPL transactions.⁵⁸ As the BNPL sector grew, merchants

51. See CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2, at 17 (“In each of the three years surveyed, approximately half of the borrower base was 33 years old or younger. The youngest cohort (ages 18–24) accounted for 16.8% of the borrower base in 2021, down from 18.8 percent in 2020 and 21.4 percent in 2019.”).

52. See *id.* (analyzing the broad use of BNPL by demographics but noting that younger cohorts were “more over-indexed in their BNPL usage than older cohorts”).

53. See Alan McIntyre, *Buy Now, Regret It Later? The Hype of BNPL and Its Impact on Consumers, Banks, and Merchants*, FORBES (Feb. 15, 2021, 9:11 AM), <https://www.forbes.com/sites/alanmcintyre/2021/02/15/buy-now-regret-it-later-the-hype-of-bnpl-and-its-impact-on-consumers-banks-and-merchants/?sh=b7d425346de2> [<https://perma.cc/4EUW-35S4>] (“Investors love that the fintech firms doing the lending – Klarna, Affirm, Afterpay and others – are disrupting the traditional credit card business.”).

54. See Rebecca Lake, *Buy Now, Pay Later (BNPL): What It Is, How It Works, Pros & Cons*, INVESTOPEdia (May 6, 2022), <https://www.investopedia.com/buy-now-pay-later-5182291> [<https://perma.cc/39NF-4YBA>] (“If approved (you’re told in seconds), you make a small down payment, such as 25% of the overall purchase amount.”).

55. See DFPI Report Shows Changes in Consumer Lending, *Decrease in PACE Program*, CAL. DEPT. OF FIN. PROT. & INNOVATION (Oct. 7, 2021) [hereinafter CAL. DFPI, *Changes in Consumer Lending*], <https://dfpi.ca.gov/2021/10/07/dfpi-report-shows-changes-in-consumer-lending-decrease-in-pace-program/> [<https://perma.cc/S5PX-ATU7>] (reporting that 91% of the 12 million California consumer loans in 2020 were originated by the top six BNPL companies).

56. See Krishna, *supra* note 46 (reporting that online pay-later transactions worth \$15.3 billion occurred in 2020 and \$45.8 billion occurred in 2021).

57. See Ann Carns, ‘Buy Now, Pay Later’ Loans May Soon Play Bigger Role in Credit Scores, N.Y. TIMES (Dec. 31, 2021), <https://www.nytimes.com/2021/12/31/your-money/buy-now-pay-later-loans-credit.html> [<https://perma.cc/W6HK-M5CX>] (noting how the “explosive growth” of BNPL sparked CFPB scrutiny); see *How Visa Helps FIs Tap the \$3T BNPL Market*, PYMNTS (June 10, 2022), <https://www.pymnts.com/bnpl/2022/how-visa-helps-fis-tap-the-3t-bnpl-market/> [<https://perma.cc/P28P-G885>] (forecasting continued growth in BNPL in the next few years is “expected [to be] a \$3 trillion business by 2030”).

58. See CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2, at 35–36 (pointing out that apparel and beauty products constitute a declining percent of total BNPL products sold, as these items accounted for 80% of BNPL sales in 2019 and only 58% in 2021).

in various industries partnered with BNPL companies to get their share of the profits.⁵⁹ The average price per BNPL transaction grew between 2020 and 2021 from \$121 to \$135.⁶⁰

D. Benefits to Consumers and Merchants

BNPL is able to offer consumers quick access to credit in a largely seamless addition to the typical check-out experience regardless of whether the purchase occurs in-person or online. The widespread availability of BNPL transactions fostered access to luxury or regular purchases for the average customer. Because customers with less disposable income can manage purchases with the increased flexibility of BNPL “pay-in-four” plans, these transactions serve as an alternative source of credit for consumers with little or subprime credit history.⁶¹ Customers that may be wary of—or excluded from—more traditional forms of financing may still want or require quick access to credit.⁶² Increasingly consumers turn to BNPL transactions to pay for “everyday” or “necessity” purchases.⁶³ The appeal and utilization of

59. See Matthew Goldstein, ‘Buy Now, Pay Later’ Becomes a New Way to Pay for Guns, N.Y. TIMES (June 24, 2022), <https://www.nytimes.com/2022/06/24/business/buy-now-pay-later-guns.html?searchResultPosition=4> [https://perma.cc/8UUF-ENYQ] (reporting on a BNPL company that finances gun and hunting purchases with a soft credit with approval available within seconds); see also Adriana Nunez, *Afterpay and Sezzle Look to Healthcare Payments for BNPL Greenfield*, BUS. INSIDER (Feb. 24, 2022, 9:25 AM), <https://www.businessinsider.com/bnpl-providers-afterpay-and-sezzle-sign-healthcare-deals-2022-2?op=1> [https://perma.cc/86W2-2F4E] (discussing how certain BNPL companies are partnering with healthcare companies to provide BNPL financing for healthcare services).

60. See CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2, at 9 (reporting that the top five BNPL companies in the United States had average individual orders valued at \$121 in 2020 and \$135 in 2021).

61. See Krishna, *supra* note 46 (discussing a report on BNPL customers which indicated over forty percent of applicants for a BNPL transaction do not have good credit history).

62. See Esme E. Deprez et al., *The Buy Now, Pay Later Juggernaut Is about to Be Tested*, BLOOMBERG (July 28, 2022, 12:01 AM), <https://www.bloomberg.com/news/features/2022-07-28/klarna-affirm-afterpay-face-scrutiny-over-credit-business> [https://perma.cc/67XQ-7K4G] (“Lauded as a much-needed alternative (and threat) to credit cards and predatory lenders and criticized as a gateway drug to debt for the young and inexperienced, BNPL represents one of the biggest and fastest changes to consumer credit in decades.”).

63. See CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2, at 10 (“BNPL usage for ‘everyday’ or ‘necessity’ purchases (gas, groceries, and utilities) was \$229.2 million in 2021 (0.9 percent of GMV), up 434 percent from \$42.9 million in 2020, which itself was up 1,207 percent from \$3.3 million in 2019.”); see also Krishna, *supra* note 46 (“In the last year, Zip . . . has seen 95 percent growth in U.S. grocery purchases, and 64

BNPL transactions in everyday purchases may strengthen as inflation and rising interest rates are fresh in consumers' minds.⁶⁴

Merchants benefit from consumers' adoption of BNPL with increased sales and higher average purchase totals.⁶⁵ BNPL providers originally partnered with merchants to enable BNPL transactions on merchants' online platforms. With the advent of BNPL "virtual cards," the range of merchants and products that can be accessed with BNPL has expanded.⁶⁶ "Virtual cards" may even extend the benefits for merchants who did not intentionally engage with the BNPL market, as the "virtual cards" work independently without merchant partnership required.⁶⁷

percent in restaurant transactions. Klarna reports that more than half of the top 100 items its app users are currently buying from national retailers are grocery and household items. Zilch[] says groceries and dining out account for 38 percent of its transactions."); *see also* Jarni Blakkarly, *Buy Now, Pay Later: The Modern Debt Trap*, CHOICE: PERSONAL LOANS (June 15, 2021), <https://www.choice.com.au/money/credit-cards-and-loans/personal-loans/articles/is-buy-now-pay-later-a-modern-debt-trap> [<https://perma.cc/MFY8-DGUA>] (discussing a national survey in Australia that indicated 12% of respondents "used a BNPL service in recent months to cover a cash shortfall until payday").

64. *See* Kate Fitzgerald, *Buy Now/Pay Later Lenders Face a Higher-Stakes Holiday Season*, AM. BANKER (Nov. 29, 2022, 11:52 AM), <https://www.americanbanker.com/payments/news/buy-now-pay-later-lenders-face-a-higher-stakes-holiday-season> [<https://perma.cc/Y9R7-H5E5>] (theorizing that as inflation "cut[s] into consumers' everyday expenses" and interest rates rise, the demand for interest-free BNPL products may grow).

65. *See* CFPB, IMPLICATIONS FOR CONSUMERS, *supra* note 26, at 13 (discussing how BNPL providers partner successfully with merchants, despite charging merchants a fee for each transaction, because BNPL transactions lead to "more unique site visitors, higher shopping cart conversion, higher average order size, and increased repeat visits").

66. *See* Dominique Tetnowski, *Payment Declined: How Virtual Cards Could Drive BNPL Acceptance*, JUNIPER RSCH. (Aug. 18, 2022), <https://www.juniperresearch.com/blog/august-2022/how-virtual-cards-could-drive-bnpl-acceptance> [<https://perma.cc/G5NT-RUTD>] ("Cards are not tied to a specific merchant and can be used in a range of places, exactly like a traditional bank card. This gives consumers greater control over where they use their BNPL functionalities as they are able to use them wherever card payments are accepted.").

67. *See* Trina Paul, *You Can Use 'Buy Now, Pay Later' Almost Anywhere You Make a Purchase – Here Are the Pros and Cons*, CNBC (Oct. 15, 2021), <https://www.cnbc.com/select/where-can-you-use-buy-now-pay-later-loans/> [<https://perma.cc/J9Y9-WXN7>] (explaining how virtual cards allow consumers to split up payments "even if the service is not integrated as a payment method at the retailer" the consumer uses the virtual card).

E. Concerns About BNPL's Potential Impact on Consumer Debt

Despite BNPL providers' marketing spin on the financial product, a BNPL transaction is a loan.⁶⁸ Albeit intentionally or unintentionally, the structure of a BNPL transaction evades the need to comply with the Truth in Lending Act ("TILA").⁶⁹ Many BNPL companies benefit from a major gap in TILA's provisions—the act only applies to "creditors," who are defined as lenders whose transactions require more than four payments.⁷⁰ TILA sets disclosure and consumer protective standards for consumer lending with the aim of promoting the informed use of credit by US consumers.⁷¹ In this lightly regulated industry, consumers may encounter confusion due to the wide variation between BNPL products from one provider to the next. Besides the pay-in-four interest free transaction structure, other terms (such as the going rate for late or missed payments) vary by provider without uniformity.⁷² Some BNPL providers choose to report customers' missed payments to credit bureaus, while others do not.⁷³ The variation

68. See CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2, at 47 ("The following quotes from BNPL executives underscore that positioning shift: 'It's like we[']re a marketing channel not a payment method. That's key.' . . . 'We are fundamentally a marketing device for merchants.'").

69. See Dylan Sloan, *Why Regulation Will Help the Buy Now, Pay Later Giants*, FORBES (July 12, 2022, 2:16 PM), <https://www.forbes.com/sites/dylansloan/2022/07/12/why-regulation-will-help-the-buy-now-pay-later-giants/?sh=6f2475597f95> [<https://perma.cc/S69L-39UW>] (discussing how most BNPL transactions evade TILA by structuring repayments to be made in less than five payments).

70. See Truth in Lending Act, § 103, 15 U.S.C. § 1602(g) ("The term 'creditor' refers only to a person who both (1) regularly extends . . . consumer credit which is payable by agreement in more than four installments . . ."); see Sloan, *supra* note 69 (discussing how most BNPL transactions evade TILA by structuring repayments to be made in less than five payments).

71. See 15 U.S.C. § 1601(a) ("It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit . . .").

72. The specific terms of BNPL agreements vary widely between companies, from the existence and amount of late fees to the dispute resolution process for returned or damaged products. See CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2, at 22–24 ("BNPL lenders have different operational policies concerning payment method removal.").

73. See Gaby Lapera, *72% of Americans Saw Their Credit Scores Drop After Missing a 'Buy Now, Pay Later' Payment, Survey Finds*, CREDIT KARMA (Feb. 8, 2021), <https://www.creditkarma.com/insights/i/buy-now-pay-later-missed-payments> [<https://perma.cc/CGP7-MMUX>] (noting BNPL providers have the option to report missed payments to credit bureaus).

between BNPL products and providers, in the absence of baseline industry standards, can cause confusion, complications, and negative financial repercussions on BNPL customers.⁷⁴

BNPL providers offer credit quickly due to a rather lax vetting of consumers. BNPL transactions intentionally lack friction to create seamless sales for merchants.⁷⁵ BNPL companies do not perform hard credit checks before accepting a consumer's application for credit. Rather, companies perform soft credit checks and internal company checks on the customer's previous BNPL transaction history.⁷⁶ Currently BNPL companies do not perform and do not have access to a particular applicant's BNPL history or current active debts with other BNPL companies.⁷⁷ This lack of knowledge has the potential to harm both the company and the consumer. In regards to the provider, lax vetting causes the provider to inappropriately approve consumers' applications who will be unable to pay back the debt on time. A missed or late payment is no rare occurrence for BNPL transactions, and may lead to financial penalties from BNPL providers.⁷⁸

Unfortunately, BNPL providers may not have an incentive to perform accurate ability-to-repay assessments before extending credit.⁷⁹

74. *See id.* (reporting that many BNPL customers saw their credit score dropped after missing BNPL payments).

75. *See Barclays Calls for More Robust Regulation of All Buy-Now-Pay-Later Products*, BARCLAYS (Feb. 14, 2022), <https://home.barclays/news/press-releases/2022/02/-barclays-calls-for-more-robust-regulation-of-all-buy-now-pay-la/> [<https://perma.cc/WA5T-M4Z6>] (“The research also suggests that the frictionless nature of BNPL as a way to pay encourages shoppers to overspend with three in 10 (30 per cent) BNPL users between 18 and 34 saying the availability of BNPL has made them shop without thinking, because it’s so easy to buy something in the moment and worry about repayments later.”).

76. *See Akeredolu, supra* note 10 (“Unlike credit card companies or other consumer loan lenders, BNPL companies generally don’t conduct a hard credit inquiry when you apply. Instead, most BNPL providers only require the following: You’re at least 18 years old, you have a mobile home number, you have a debit or credit card to make payments, they are able to validate your identity.”); *see also* CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2, at 16 (“For returning BNPL borrowers, all five lenders surveyed supplement the credit approval decision with the applicants’ prior repayment history with that lender.”).

77. *See* CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2, at 66 (“As one submission to the CFPB’s public request for comment argued, ‘even with credit checking, lenders (BNPL or other lenders) have no lens into how much BNPL debt borrowers are carrying.’”).

78. *See id.* at 23 (noting that in 2021, 10.5% of the borrowers using the top five BNPL providers incurred at least one late fee); *see also* Lopera, *supra* note 73 (noting a survey showed 38% of respondents who used BNPL services missed at least one payment).

79. *See* CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2, at 22 (noting how BNPL providers with automatic autopay can benefit from “increased payment

Many BNPL transactions are structured to automatically deduct the subsequent payments from the customer's account.⁸⁰ The autopay payment structure, therefore, may induce a more lenient underwriting policy in BNPL companies because they have an assurance of payment, even if such payment is to customers' detriment.⁸¹ Furthermore, BNPL companies now increasingly rely on advertising and the creation of business leads as sources of revenue.⁸² With multiple streams of income that do not rely on the actual repayment of the loan, BNPL companies have less motivation to ensure consumers have the ability to repay their BNPL obligations.⁸³

Inaccurate or incomplete ability-to-repay assessments may lead to consumers easily taking on more debt than they can handle. The possibility of incurring these additional charges should cause consumers to reweigh the costs and benefits of participating in a BNPL transaction, since a misstep in the repayment process can cause the transaction to cost significantly more than paying for the product outright at the time of sale.⁸⁴ This increased cost stems not only from additional fees from the BNPL provider but the consumers' bank as well. If a BNPL commitment triggers an automatic withdrawal from an account with insufficient funds, the corresponding bank will charge overdraft fees associated with that account.⁸⁵ While missed payments can be due to a

'stickiness'" to minimize credit losses which allows BNPL providers to take a more lax underwriting approach). This can thereby increase their customer base or transaction frequency.

80. *See id.* (“[F]orced autopay may have the effect of depriving those borrowers of a degree of agency. A borrower facing multiple concurrent debts and bills may prefer to priorities other obligations over their BNPL loan, and policies that limit that ability can be harmful to the borrower’s financial well-being.”).

81. *See id.*; *see also* Torres, *Testimony in BNPL Hearing*, *supra* note 5 (“Reliance on autopay reduces incentives to underwrite since the lender can expect to debit the account even when the borrower may not have sufficient funds.”).

82. *See* CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2, at 22 (“BNPL lenders have adjusted their business models . . . shifting toward the app-driven ‘lead generation’ acquisition model. [This] adjustment has the potential for the most far-reaching consumer impact . . .”).

83. *See* deHaan et al., *supra* note 28 (“BNPL providers earn higher sales commissions and advertising revenues, which likely offset higher bad debt expenses [BNPL providers] extend credit to individuals that credit card providers do not serve.”).

84. *See* CFPB, *BNPL Loan Fees*, *supra* note 35 (noting the possibility of incurring late fees, overdraft fees, or non-sufficient fund fees when engaging in BNPL transactions).

85. *See* Veronica Irwin & Fintech Team, *The CFPB is Coming for ‘Buy Now, Pay Later’*, PROTOCOL (Sept. 15, 2022), <https://www.protocol.com/newsletters/protocol-fintech/cfpb-bnpl-rules?rebelltitem=1#rebelltitem1> [<https://perma.cc/KHK5-ZDMD>] (“The CFPB’s report found that pay-later providers . . . are forcing consumers to enlist in

lack of funds, the difficulty consumers face in tracking multiple debt and BNPL obligations may contribute to repayment failures.⁸⁶

The ease of BNPL transactions may prevent BNPL consumers from truly grasping the stakes of their choice to split up their payments at checkout, or even prevent consumers from grasping that they are acquiring debt.⁸⁷ This can easily lead consumers to overextend themselves at a rapid pace and face difficulty fulfilling their BNPL and traditional credit obligations.⁸⁸ Consumers now often have multiple concurrent BNPL obligations.⁸⁹ The resulting risks of spiraling debt, without regulatory checks, may be more severe for BNPL consumers who are already financially vulnerable.⁹⁰ The risk remains even for savvy BNPL consumers, because of the sporadic due dates of BNPL obligations alongside consumers' other pressing debt obligations.⁹¹

In its September 2022 report, the CFPB expressed particular concern for loan stacking in the BNPL industry, which is “the risk that a borrower takes out concurrent BNPL loans at different lenders and is

automatic payments and that at least one company tacked multiple sneaky late fees onto a single missed payment. The report also said that BNPL companies were making it difficult for users to dispute charges and repeatedly presented failed charges, which can result in multiple overdraft fees from banks.”); *see also* CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2, at 74 (“Most BNPL lenders require that borrowers use autopay and, in addition to debt cards, allow repayments by credit cards (which do not directly debit a consumer’s deposit account). In addition, some BNPL lenders make removing autopay challenging or impossible.”).

86. *See* Wang, *supra* note 1 (reporting how 43% of respondents of a 2020 survey made a payment late on a BNPL transaction and two-thirds of these customers paid late because “they simply lost track of the payments, not because they didn’t have the money”).

87. *See* Peterdy, *supra* note 6 (noting that aspects of a BNPL transaction create a “psychological risk” to consumers that may lead them to impulsively spend and spend at higher rates than they would otherwise).

88. CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2, at 10 (warning that the quick nature of BNPL credit applications creates risk for consumers who may overextend their credit obligations through “BNPL usage at multiple concurrent lenders” and “stress[ing] [their] ability to meet other, non-BNPL financial obligations”); *see Barclays, supra* note 75 (“[A]lmost half (47 per cent) of BNPL users admitting that they have had BNPL loans from different providers at the same time. Of those, three in five (60 per cent) say they had three or more concurrent BNPL providers.”).

89. CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2, at 65 (“BNPL’s ‘free-and-seamless’ product structure may contribute to this borrower behavior [loan stacking] in the form of its low financial and operational burdens.”).

90. *See* Torres, *Testimony in BNPL Hearing, supra* note 5, at 2, 10 (noting that BNPL providers may target consumers who do not qualify for traditional sources of credit).

91. *See* Mason, *supra* note 5 (stating how a senior policy counselor of the Center for Responsible Lending felt BNPL providers have a lack of consideration for their customers’ other financial obligations).

unable to repay some or all of them.”⁹² Despite the fact that concern over loan stacking is woven into the report, the CFPB’s director did not mention any specific measures that the CFPB will use to address this potential consumer pitfall.⁹³ Potential measures the CFPB could take to address loan stacking concerns will be addressed in Part IV.⁹⁴

The risks associated with engaging in BNPL transactions could have disparate impacts on the United States population.⁹⁵ These risks may be heightened for consumers with minimal or subprime credit history who cannot access traditional forms of credit.⁹⁶ Access to lines of interest-free credit could be crucial for these consumers’ physical or financial wellbeing.⁹⁷ Therefore, it is important that the CFPB not eliminate a consumer’s ability to loan stack if necessary, but they should make the process as safe and consumer-empowered as possible.⁹⁸

III. CURRENT OVERSIGHT OF THE BNPL MARKET

No tailored regulation of the BNPL industry exists in the US, despite its growing prevalence and influence on American consumer choices and debt obligations.⁹⁹ Regulation will not necessarily yield negative impacts on BNPL providers and can provide protection to

92. CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2, at 65.

93. *See* Chopra, Remarks on Market Report, *supra* note 15 (stating further research and deliberation will be performed by the CFPB before creating any BNPL regulation).

94. *Infra* Part IV.

95. *See* Deprez et al., *supra* note 62 (“Users skew young—so less financially experienced and savvy, by definition—and female, many with low to moderate incomes.”); *see also* Torres, *Testimony in BNPL Hearing*, *supra* note 5 (“The CA DBO found that Afterpay, “[l]ike other point-of-sale financiers, targets young consumers who are unable to qualify for traditional financing options like credit cards.”); *see also* Saunders Testimony, *supra* note 4, at 18 (discussing how new financial technology products “are aimed at or used by” communities who may have historically limited access to credit, therefore these technologies like BNPL “can result in disparate impacts that further harm disadvantaged communities”).

96. *See* Krishna, *supra* note 46 (“Pay-later users tend to be economically vulnerable. A July report . . . found that they carry more debt than the general population, and that more than 41 percent of applicants have a poor credit history.”).

97. *See id.* (“[A] hair stylist in Phoenix[] said her paycheck varies from week to week, so she finds it easier to pay for food in installments.”).

98. *See* McIntyre, *supra* note 53 (“There is an optimist’s case for BNPL . . . In this optimistic scenario, borrowers are budgeting better, being wary of high-cost revolving debt, and avoiding the credit sins of the past.”).

99. *See* Krishna, *supra* note 46. (noting the BNPL industry is less regulated than traditional forms of credit even though it has gained a strong foothold in the US consumer lending market).

American consumers.¹⁰⁰ Mixing industry self-regulation with government-mandated industry standards may best serve the BNPL industry. Industry and government alike adopting protective measures would serve to prevent more US consumers from slipping into a debt spiral when using this new credit frontier.

A. *States Stand Up in the CFPB's Absence*

There is currently no federal or state regulation specifically tailored to address the BNPL market.¹⁰¹ The absence of targeted regulation does not mean the BNPL market operates completely unregulated.¹⁰² BNPL companies must comply with federal and state unfair, deceptive, and abusive trade practice laws.¹⁰³ A few states require BNPL companies to register as “lenders” to legally operate in the state.¹⁰⁴ For example, California did not need to resort to passing legislation and regulations specifically addressing BNPL in order to provide enhanced consumer protection.¹⁰⁵ Under California’s broad definition of “loans,” BNPL companies were found to have been operating as lenders without licenses.¹⁰⁶ California then required certain

100. See *BNPL Regulation May Be a Win-Win for Providers and Consumers, Consumer Reports Says*, PYMNTS (Apr. 15, 2022), <https://www.pymnts.com/bnpl/2022/bnpl-regulation-may-be-a-win-win-for-providers-and-consumers-consumer-reports-says/> [<https://perma.cc/WLG9-4PPA>] (“But the new regulation wouldn’t necessarily be a bad thing for BNPL providers and merchants The BNPL industry is still evolving, and new products are coming to the market with different rates and rules. New regulation imposing standardized disclosure on BNPL providers would help consumers to navigate all these changes.”).

101. See Berge et al., *supra* note 25 (“Existing state laws are not written to apply specifically to BNPL companies”).

102. See *id.* (noting BNPL transactions may still fall under federal or state scrutiny).

103. See *id.* (“BNPL companies may fall under state licensing regimes for lenders and be subject to state laws prohibiting unfair, deceptive, or abusive acts or practices (UDAAP).”).

104. See Povich, *supra* note 46 (discussing how California requires and has begun to grant loan licenses for BNPL companies and discussing how Massachusetts requires BNPL provider Affirm to have a state license).

105. See CAL. DFPI, *Changes in Consumer Lending*, *supra* note 55 (stating BNPL regulation fell under California’s DFPI regulatory umbrella).

106. See Ross Speier & Josh Dhyani, *California Settlement Offers Reminder that Buy Now Pay Later Participants are Subject to California Licensing Law*, ALSTON & BIRD (Sept. 15, 2022), <https://www.alstonconsumerfinance.com/california-settlement-offers-reminder-that-buy-now-pay-later-participants-are-subject-to-california-financing-law/?cn-reloaded=1> [<https://perma.cc/9BRS-BY9D>] ((explaining that California’s Financing Law applies to making consumer loans, or loans which as intended “primarily for personal, family, or household purposes”) (internal quotations omitted) (quoting Letter from Manual P. Alvarez,

BNPL companies to obtain licenses to operate in the state as “lenders.”¹⁰⁷ California’s Department of Financial Protection and Innovation (“DFPI”) pursued actions against the BNPL companies that operated as lenders without a state license.¹⁰⁸ The decisive stance of California’s DFPI played a crucial role in securing certain regulatory standards for California’s BNPL consumers.¹⁰⁹ Holding BNPL providers to the standards of traditional lenders through existing state law afforded California consumers additional protections in BNPL transactions.¹¹⁰ But due to the differing nature of BNPL transactions from traditional sources of credit, more tailored regulation of BNPL products would enhance Californians’ protections in the BNPL market.

B. The CFPB Is an Appropriate Entity to Regulate the BNPL Industry

The CFPB has been slow to react to the growing BNPL market despite having regulatory tools at its disposal.¹¹¹ The CFPB is tasked

Commissioner, Dep’t of Bus. Oversight, to Requestors of Deferred Payment Prods. (Dec. 20, 2019) (on file with the California’s DFPI), <https://dfpi.ca.gov/wp-content/uploads/sites/337/2019/12/Deferred-Payment-Products-cfl.pdf> [<https://perma.cc/DMC8-EXRG>]).

107. See *id.* (“[T]he California Department of Financial Protection and Innovation entered into a consent order with a company offering point of sale financing products that the DFPI deemed to be buy now pay later (“BNPL”) financing, for which a California Financing Law (“CFL”) license is required.”).

108. See CAL. DFPI, *Changes in Consumer Lending*, *supra* note 55 (“The Department has been a leader in the oversight of BNPL loan products, announcing settlements in late 2019 and early 2020 with Quadpay, Sezzle, and Aferpay. The three companies agreed to refund roughly \$1.9 million in fees to consumers after it was concluded they structured their products to evade regulation.”); see also *Point-of-Sale Lender Sezzle Agrees to Cease Illegal Loans, Pay Refunds in Settlement with the California Department of Oversight*, CAL. DEP’T OF FIN. PROTECT. & INNOVATION (Jan. 16, 2020), <https://dfpi.ca.gov/2020/01/16/point-of-sale-lender-sezzle-agrees-to-cease-illegal-loans-pay-refunds-in-settlement-with-the-california-department-of-business-oversight/> [hereinafter CAL. DFPI, *Settlements*] [<https://perma.cc/CE2D-55KG>] (explaining how BNPL provider Sezzle agreed to stop making illegal BNPL loans and start operating legitimately with a CFL license).

109. See CAL. DFPI, *Settlements*, *supra* note 108 (reporting how the DFPI entered settlements with at least five BNPL providers requiring the provider to stop making loans, pay penalties, get a California license, and refund illegal fees).

110. See CAL. DFPI, *Changes in Consumer Lending*, *supra* note 55 (“Today, these firms . . . must consider customers’ ability to repay loans, are subject to rate and fee caps, and must respond to consumer complaints.”).

111. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) § 1024, 12 U.S.C. § 5514(a)(1)(C) (stating the CFPB may supervise entities that “pose[] risks to consumers with regard to the offering or provision of consumer financial products or

with rulemaking and enforcement of consumer protections for entities providing consumer financial services.¹¹² The CFPB has broad authority to supervise and enforce consumer protection regulation in consumer lending.¹¹³ The statute 12 U.S.C. § 5514 specifically designates certain lending industries subject to CFPB oversight.¹¹⁴ The CFPB has flexed its rulemaking authority in these industries to “define thresholds for entities subject to supervision . . .”¹¹⁵ and 12 U.S.C. § 5514(a)(1)(C) provides the CFPB discretion to proactively survey markets, fledgling and established, for companies and practices posing risks to consumers.¹¹⁶ This provision, and the accompanying authority, has rarely been utilized in the CFPB’s decade-long history.¹¹⁷ With financial technology (“fintech”) companies’ impact on consumers’ financial habits and health, the CFPB intends to dust off this “dormant” provision.¹¹⁸

services”); see Lorelei Salas, *Explainer: What is Nonbank Supervision?*, CONSUMER FIN. PROT. BUREAU: BLOG (May 25, 2022), <https://www.consumerfinance.gov/about-us/blog/explainer-what-is-nonbank-supervision/> [<https://perma.cc/TR4H-CSCY>] (“Congress also authorized the CFPB to supervise nonbank financial companies where we have reasonable cause to believe that the company is posing risk to consumers. There are many indicators of risk, but the law specifies consumer complaints as one indicator of risk.”).

112. See *The Bureau*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/about-us/the-bureau/> [<https://perma.cc/WJP3-84XG>] (last visited Jan. 4, 2023) (“The CFPB was created to provide a single point of accountability for enforcing federal consumer financial laws and protecting consumers in the financial marketplace.”).

113. See Dodd-Frank § 1024, 12 U.S.C. § 5514(a)(1)(A)-(E) (explaining the statute’s coverage includes covered persons who offer payday or private education loans, as well as a covered person “is a larger participant of a market for other consumer financial products and services”).

114. See 12 U.S.C. § 5514(a)(1) (designating student loan serving and debt collection practices specifically).

115. *CFPB Invokes Dormant Authority to Examine Nonbank Companies Posing Risks to Consumers*, CONSUMER FIN. PROT. BUREAU (Apr. 25, 2022) [hereinafter *CFPB, Dormant Authority*], <https://www.consumerfinance.gov/about-us/newsroom/cfpb-invokes-dormant-authority-to-examine-nonbank-companies-posing-risks-to-consumers/> [<https://perma.cc/R54Y-SYD9>] (“The CFPB conducted rulemakings to define thresholds for entities subject to supervision in the markets of consumer reporting, debt collection, student loan servicing, international remittances, and auto loan servicing.”).

116. 12 U.S.C. § 5514(a)(1)(C).

117. See Ryan T. Bergsieker et al., *CFPB Invokes Dormant Dodd-Frank Authority to Regulate Nonbank Financial Companies*, GIBSON DUNN (May 5, 2022), <https://www.gibsondunn.com/cfpb-invokes-dormant-dodd-frank-authority-to-regulate-nonbank-financial-companies/> [<https://perma.cc/Z7YP-842F>] (describing the CFPB’s use of 12 U.S.C. § 5514(a)(1)(C) as “a significant expansion of its supervisory reach” as this provision previously has been “largely unused”).

118. See CFPB, *Dormant Authority*, *supra* note 115 (stating the CFPB’s utilization of the provision allowing CFPB supervision of entities posing risks to consumers “will allow

C. *Congressional Interest Sparks Movement toward BNPL Regulation*

The BNPL industry drew Congressional attention in 2021.¹¹⁹ This attention on the CFPB industry may have hastened, if not sparked, the CFPB’s decision to scrutinize the BNPL industry.¹²⁰ In November 2021, the US House of Representatives’ Committee on Financial Services held a meeting with industry stakeholders and consumer advocates to discuss the BNPL industry.¹²¹ The task force began the meeting by questioning the potential for BNPL products and providers to misuse consumer data and lead consumers into “unsustainable” debt.¹²² Meanwhile advocates of BNPL emphasized the products’ benefits, such as facilitating consumer choice, while directing regulatory attention to other aspects of BNPL transactions, outside the hands of BNPL providers, that may risk consumers’ financial health.¹²³

the CFPB to be agile and supervise entities that may be fast-growing or are in markets outside the existing nonbank supervision program”).

119. *Buy Now, Pay More Later? Investigating Risks and Benefits of BNPL and Other Emerging Fintech Cash Flow Products: Hearing on H.R. 4277 Before the Task Force on Fin. Tech. of the H. Comm. on Fin. Servs.*, 117th Cong. 1 (2021) (Statement of Stephen F. Lynch, Chairman, Task Force on Fin. Tech) [hereinafter *Hearing on BNPL*], <https://www.congress.gov/117/chr/CHRG-117hrg46247/CHRG-117hrg46247.pdf> [<https://perma.cc/VFE3-LKU7>] (“In the last few years, a number of emerging fintech liquidity products have garnered increased attention for both their explosive growth among merchants and their popularity among consumers, as well as the potential for consumer protection risks.”).

120. The CFPB issued a market inquiry order for the BNPL industry, its first action regarding the industry, not long after the US Task Force on Financial Technology held a hearing discussing the benefits and risks of BNPL transactions on the American public. *See Consumer Financial Protection Bureau Opens Inquiry into “Buy Now, Pay Later” Credit*, CONSUMER FIN. PROT. BUREAU (Dec. 16, 2021) [hereinafter *CFPB, Open Inquiry into BNPL*], <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-opens-inquiry-into-buy-now-pay-later-credit> [<https://perma.cc/GKH3-WQMH>] (stating the CFPB issued market inquiry orders).

121. *Hearing on BNPL*, *supra* note 119.

122. *See id.* at 1 (“[T]hese products also raise important questions about the use of consumer data, the exploitation around spending patterns, the application of lending laws, and the potential for unsustainable levels of consumer debt.”).

123. *See id.* at 50 (“Legislation that establishes fair and transparent practices related to the marketing and provision of overdraft practices and meaningful disclosure of overdraft fees would be a welcome development for millions of consumers. Similarly, given the huge influence that credit bureaus exercise over Americans’ financial health and well-being, [the Financial Technology Association] believes Congress should examine efforts to modernize credit bureaus and their business models”)

A month after the task force hearing, the CFPB issued market monitoring orders for the five largest BNPL providers.¹²⁴ In its announcement, the CFPB noted specific areas of concern about the BNPL industry, including debt accumulation and regulatory arbitrage.¹²⁵ The CFPB requested comments from the public and BNPL stakeholders in January 2022 to gain insight into the nuances of the BNPL market.¹²⁶ These comments highlighted the dynamic and evolving variation of BNPL products entering the market.¹²⁷ Stakeholders, such as Experian, noted the need for specialized accommodation of BNPL products; properly regulating the industry cannot be neatly folded into existing frameworks.¹²⁸

BNPL customers and industry stakeholders were not alone requesting action in the BNPL industry—State Attorneys General

124. See CFPB, *Open Inquiry into BNPL*, *supra* note 120 (“The law requires that the CFPB monitor consumer financial markets and enables the agency to require market players to submit information to inform this monitoring.”).

125. See *id.* (“The CFPB is concerned about accumulating debt, regulatory arbitrage, and data harvesting in a consumer credit market already quickly changing with technology.”).

126. CFPB *Study Details the Rapid Growth of “Buy Now, Pay Later” Lending*, CONSUMER FIN. PROT. BUREAU (Sept. 15, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-study-details-the-rapid-growth-of-buy-now-pay-later-lending/> [<https://perma.cc/9D5D-EK8Z>] (stating the CFPB requested comments “from the public on their experiences dealing with Buy Now Pay Later loans” in conjunction with its data collection from the five largest BNPL companies).

127. See Comment Letter from Consumer Reports to Rohit Chopra, Dir., Consumer Fin. Prot. Bureau (Mar. 25, 2022), <https://www.regulations.gov/comment/CFPB-2022-0002-0023> [<https://perma.cc/BRK2-FKU5>] (“Some of these sectors may pose unique challenges or issues because of the nature of the goods and services being financed. For example, using BNPL loans for groceries or gas purchases raises concerns about potential risks relating to the financing of regularly occurring household expenses.”).

128. See Comment Letter from Experian, to Rohit Chopra, Dir., Consumer Fin. Prot. Bureau (Mar. 25, 2022), <https://www.regulations.gov/comment/CFPB-2022-0002-0030> [<https://perma.cc/2E76-FKQE>] (“Today’s credit ecosystem was not designed to take into account some of the unique aspects of BNPL loans Additionally, traditional credit bureaus do not address the unique needs of POS loans such as: (1) real-time reporting; (2) insights related to merchandise purchasing (*e.g.*, SKUs, returns); and (3) rapidly evolving product types.”). Notably the CFPB has begun to take action regarding other areas that put consumers’ financial health at risk in a BNPL transaction. See CFPB *Issues Guidance to Help Banks Avoid Charging Illegal Junk Fees on Deposit Accounts*, CONSUMER FIN. PROT. BUREAU (Oct. 26, 2022) <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-guidance-to-help-banks-avoid-charging-illegal-junk-fees-on-deposit-accounts/> [<https://perma.cc/LWL7-EWVX>] (highlighting the Bureau’s focus on ameliorating overdraft fees).

wrote the CFPB with concerns about the industry.¹²⁹ Attorneys General from across the country collectively requested CFPB regulation of the BNPL industry in a letter to the CFPB.¹³⁰ Their letter voiced a specific request for federal “specific rulemaking to clarify BNPL providers’ obligation to conduct ability-to-repay” analysis given the speed with which consumers may fall into debt with these transactions.¹³¹ Swift action to create a standardized playbook for BNPL companies could assuage the uncertainty that clouds this industry.

In September 2022, the CFPB published a report with key insights from its market monitoring.¹³² Accompanying the release of the report, the CFPB’s Director declared the Bureau’s intention to formulate rules regarding specific BNPL practices that lack consumer protections.¹³³ Consequently, the organization is working to formulate regulation that will curtail potentially surreptitious data harvesting and marketing practices of BNPL industries, apply credit-card company level regulation of BNPL companies, and receive industry advice on how best to regulate.¹³⁴ The CFPB has no intention to take action in the BNPL space that would unnecessarily undercut the benefits BNPL transactions provide to consumers.¹³⁵

The CFPB’s next steps have been viewed favorably by both consumers and BNPL stakeholders.¹³⁶ The release can be interpreted as acknowledging the BNPL industry’s strong foothold in the US

129. See Comment Letter from Kwame Raoul et al., to Rohit Chopra, Dir., *supra* note 9 (stating jointly how attorney generals from numerous states hold concerns about the current state of the BNPL market and lack of industry standards).

130. See *id.* (expressing the concerns of attorney generals across the country about the lack of regulation of the growing BNPL industry).

131. See *id.* (“We ask the CFPB to analyze what steps, if any, BNPL providers should take in considering ability-to-repay and the types and sources of information they rely on. The CFPB should also consider specific rulemaking to clarify BNPL providers’ obligations to conduct ability-to-repay analyses.”).

132. CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2.

133. See Chopra, Remarks on Market Report, *supra* note 15 (“[T]he CFPB will continue to make sure that Buy Now, Pay Later is fair, transparent, and competitive.”).

134. See *id.* (stating the CFPB’s next steps will be to formulate specific guidance for BNPL companies to improve their consumer protection practices).

135. See *id.* (indicating that while the CFPB will seek to pass regulation promoting consumer safety in BNPL transactions it will not use overly heavy-handed measures).

136. See Evan Weinberger, *CFPB Aims to Bring Credit Card Protections to Buy Now Pay Later*, BLOOMBERG L. (Sept. 15, 2022, 9:57 AM), https://www.bloomberglaw.com/bloomberglawnews/banking-law/XC84571000000?bna_news_filter=banking-law#jcite [<https://perma.cc/5Y6A-VEN2>] (noting at least some perceived the tone of Director Chopra’s remarks regarding CFPB’s next steps regulating the BNPL market to be “overall [] positive . . .”).

economy.¹³⁷ The healthy continuation of the BNPL model is undoubtedly a net positive for our country.¹³⁸ BNPL provides valuable credit access to consumers and benefits many consumers and merchants alike.¹³⁹ However, the existence of these benefits does not negate the need for standardized regulation of this ever-evolving industry. The CFPB must utilize its regulatory authority to standardize and increase consumer protections within the BNPL market without undermining the service's benefits to consumers and merchants. The CFPB now faces a game of cat and mouse with the BNPL industry.¹⁴⁰ In the meanwhile, consumers may pay the price for the BNPL industry's large head start in this chase.

D. *International Responses to the BNPL Market*

BNPL transactions have gained a solid foothold in countries across the globe with little to no regulatory oversight. The United States can learn from other countries' efforts to adapt to and regulate BNPL providers. With no global standard, countries use a variety of approaches to adapt to BNPL's disruption of the consumer lending market.

Similar to most states in the United States, BNPL providers operating in Australia do not have licenses to operate nor are they subject to a major credit law offering consumer protection.¹⁴¹ Australia

137. *See id.* (“While we can expect regulatory pressure around certain business practices, the release serves as a clear reaffirmation that the BNPL product is here to stay,” said Isaac Boltansky, the director of policy research at BTIG.”).

138. *See* Deprez et al., *supra* note 62 (“It’s hard to be a fully functioning member of the economy, and thus society, without access to credit. For decades, credit reporting companies . . . functioned as gatekeepers. This traditional system has long been reviled. Data show almost 106 million Americans are considered ‘credit invisible, ‘unscorable,’ or subprime and below.”).

139. *See* CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2, at 62 (discussing how BNPL transactions increase merchant revenue and noting potential benefits to consumers, such as the fact that BNPL is “typically a no-interest product” and that fees are “relatively low . . . and do not compound as does credit card interest”).

140. *See* Irwin & Fintech Team, *supra* note 85 (“The question is whether the CFPB can write rules fast enough and effectively enough to keep the growing industry in line – or whether regulators will find themselves playing a game of cat-and-mouse with fintechs.”).

141. *See* Buy Now Pay Later Sector Must Be Regulated by Government NOT Itself, FIN. COUNSELING AUSTRAL. (Feb. 24, 2021), <https://www.financialcounselingaustralia.org.au/buy-now-pay-later-sector-must-be-regulated-by-government-not-itself/> [<https://perma.cc/ZH4F-L7RA>] (“BNPL services are

relies heavily on industry self-regulation to safeguard BNPL consumers.¹⁴² Regulation, including industry self-regulation, lends a perception of legitimacy to an industry.¹⁴³ Self-regulation may lead to standardized industry practices, thereby increasing consumer familiarity and trust in BNPL transactions. However, self-regulation is ultimately self-serving; may lack focus on the areas of BNPL practices that warrant consumer protective standards.¹⁴⁴ For Voluntary self-regulation may also lack the teeth necessary to properly enforce the standards set by the industry stakeholders. For example, BNPL companies operating in Australia face no repercussions for not joining the industry's self-regulated code.¹⁴⁵ For those BNPL companies who choose to join, they may be able to flounce the rules scot-free; the self-regulated group lacks measures to enforce any disciplinary measures against members who violate the code.¹⁴⁶ While Australia's example of industry self-regulation may offer benefits, industry self-regulation in the United States should be pursued in conjunction with the creation of governmental standards for the BNPL industry.

not currently required to hold a credit license and are not subject to consumer protections under the National Consumer Credit Protection Act of 2009 . . .”).

142. See generally AUSTRALIAN FIN. INDUS. ASS'N, BUY NOW PAY LATER CODE OF PRACTICE (2022), https://afia.asn.au/files/galleries/AFIA_Code_of_Practice_for_Buy_Now_Pay_Later_Providers.pdf [<https://perma.cc/6UVY-GBHF>] (laying out the BNPL industry's self-regulatory code of practice); see also Lux & Epps, *supra* note 31, at 16 (“[T]he Australian Finance Industry Association developed a BNPL code of conduct following a Senate inquiry.”).

143. See Sloan, *supra* note 69 (discussing how regulation may “curb[] practices of some marginal [BNPL] players and creat[e] a sense among consumers that it’s a safe, regulated business”).

144. Australia's self-regulation also offers hardship assistance to BNPL providers. However, the onus is on the customer to request assistance—lack of consumer awareness of this provision in the Australian code may undercut the utility of this provision. See generally AUSTRALIAN FIN. INDUS. ASS'N, *supra* note 142 (offering financial hardship assistance to customers but only to those who make specific requests and these requests can be denied by BNPL providers); see also Blakkarly, *supra* note 63 (“[L]ess than one percent of BNPL customers [in Australia] had requested financial hardship assistance from their BNPL provider, even at the height of the pandemic.”).

145. See Jaime Lumsden et al., *BNPL Code – To B or Not to B A Member*, THE FOLD: BLOG (Mar. 11, 2021), <https://www.thefoldlegal.com.au/blog/bnpl-code-to-b-or-not-to-b-a-member> [<https://perma.cc/C88D-VUHG>] (“[T]he Code is not compulsory . . .”).

146. See FIN. COUNSELING AUSTRAL., *supra* note 141 (Feb. 24, 2021), <https://www.financialcounselingaustralia.org.au/buy-now-pay-later-sector-must-be-regulated-by-government-not-itself/> [<https://perma.cc/ZH4F-L7RA>] (“While it’s positive to see the industry introduce a code with contractually enforceable commitments, it is not a substitute for adequate regulation by Government under Australia’s credit laws.”).

In the United Kingdom, the government will not rely on industry self-regulation to respond to the challenges posed by BNPL.¹⁴⁷ The United Kingdom is actively working to pass both specific BNPL regulation and larger credit reform that will impact the BNPL industry.¹⁴⁸ A priority in the creation of this BNPL regulation is ensuring consumers have adequate protections in BNPL transactions “without unduly limiting the availability and cost of useful financial products.”¹⁴⁹ The complexity of this challenge is evidenced by the lengthy and involved process currently underway to shape appropriate BNPL legislation.¹⁵⁰ Even after drafting tailored BNPL legislation, the United Kingdom government will likely use a long roll-out period for the regulation to allow BNPL firms to adjust.¹⁵¹ The United Kingdom is expected to announce their BNPL regulatory plans in mid-2023.¹⁵²

Singapore has recently announced its plan to ensure the ethical provision of BNPL transactions.¹⁵³ Singapore plans to create a code of

147. See *Regulation of Buy-Now-Pay-Later Set to Protect Millions of People*, HM TREASURY (June 20, 2022) <https://www.gov.uk/government/news/regulation-of-buy-now-pay-later-set-to-protect-millions-of-people> [<https://perma.cc/T34W-TPM9>] (“Millions of people will be protected through strengthening regulation of interest-free Buy-Now Pay-Later credit agreements, under plans announced by the government today.”)

148. See *UK BNPL Regulation Unlikely Before Mid-2023*, PYMNTS (June 21, 2022), <https://www.pymnts.com/bnpl/2022/uk-bnpl-regulation-unlikely-before-mid-2023/> [<https://perma.cc/2LJ5-D8S7>] (stating BNPL providers will likely be impacted by reform of the “Consumer Credit Act, a 50-years old rule which regulates credit card purchases and personal loans”).

149. See HM TREASURY, REGULATION OF BUY-NOW PAY-LATER RESPONSE TO CONSULTATION 4, 28 (2022), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1083547/BNPL_consultation_response_Formatted_.pdf [<https://perma.cc/7U5B-3JT2>] (“The government is committed to ensuring that regulation of BNPL and STIFC products is proportionate and effective.”).

150. See *id.* at 28 (“Given the anticipated complexity of the legislation that will implement the new regulatory regime, the government has assessed that it will be necessary to publish and consult on draft legislation, to ensure that it is achieving the policy objectives intended and that any residual issues can be identified and addressed.”).

151. See *id.* (“The government will also further consider the transitional regime for bringing firms into regulation, to ensure that it runs smoothly and that firms are given sufficient time to acclimatise [sic] to the regulatory requirements that will soon be imposed on them.”).

152. *UK BNPL Regulation Unlikely Before Mid-2023*, *supra* note 148.

153. See Tang See Kit, ‘Buy Now, Pay Later’ Code of Conduct Launched to Protect Consumers Against Debt Accumulation, CHANNEL NEWS ASIA (Oct. 21, 2022, 9:23 AM), <https://www.channelnewsasia.com/singapore/buy-now-pay-later-code-conduct-protect-consumers-debt-3016791> [<https://perma.cc/ZY8V-HRCN>] (“[T]he new code lays out guidelines for BNPL providers in other areas [besides creditworthiness safeguards] such as ethical marketing practices and allowing consumers to voluntarily exclude themselves from

conduct that incorporates creditworthiness safeguards, fee regulation, and hardship assistance.¹⁵⁴ Notably, Singaporean consumers' BNPL spending will ordinarily be capped at S\$2000.¹⁵⁵ Consumers who want to exceed this cap must pass additional ability-to-repay inquiries that will look at the totality of the consumers' financial obligations—using information “shared across all BNPL providers.”¹⁵⁶ This Singapore plan implicitly acknowledges the importance of information sharing between BNPL providers in assessing consumers' true ability-to-repay.¹⁵⁷

The CFPB should analyze how other countries are regulating BNPL products and adjust their proposed plans to accommodate the strengths and weaknesses of these methods. As the CFPB wades into regulating this industry, the CFPB should continue to conduct research on the BNPL industry to ensure its regulations tailor to the practical needs and risks of the evolving industry.

IV. REGULATORY ACTION SHOULD BE TAKEN IN THE U.S. TO CREATE BASELINE STANDARDS IN THE BNPL INDUSTRY

Addressing identifiable risky industry practices should not wait until Congress has the time and capacity to craft legislative solutions for more complex and evolving BNPL concerns.¹⁵⁸ Rather, regulations must be quickly adopted to create consumer-friendly standards in the

such services BNPL providers will also consider extending ‘hardship assistance’ to customers facing financial hardship, and work out a ‘mutually acceptable’ payment arrangement.”).

154. *See id.* (“Customers will also be suspended from making further BNPL purchases once a payment is overdue BNPL providers will also consider extending ‘hardship assistance’ to customers facing financial hardship, and work out a ‘mutually acceptable’ payment arrangement.”).

155. *See id.* (“Customers will not be able to chalk up more than S\$2,000 in outstanding payments with a ‘buy now, pay later’ (BNPL) provider”).

156. *See id.* (noting that BNPL customers can exceed the S\$2,000 cap if they pass an additional assessment that looks at BNPL industry-wide credit data of the customer and other credit information).

157. *See id.* (stating that the availability of certain BNPL features, such as receiving an exception to the S\$2,000 cap, will hinge on the existence of cross-provider disclosures).

158. *See* CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2 (discussing the complex issue of BNPL providers' use of consumer data in its business model and noting that properly addressing this concern may require more in-depth research); *see also* Lux & Epps, *supra* note 31, at 19 (“Given the rapid adoption of BNPL products in the U.S. and the considerable potential for harm to consumers, near-term consumer protection is essential.”).

BNPL industry.¹⁵⁹ BNPL regulation faces a ‘goldilocks’ problem—too strict in scope and it can cripple the benefits of BNPL to consumers, too narrow in scope and it may allow companies to bypass regulations.¹⁶⁰ BNPL providers will try to find end-runs around regulation that restricts their ability to generate profits.¹⁶¹ Therefore, future regulatory action should include flexible, anti-avoidance measures.¹⁶²

The ease with which consumers may slip into a debt spiral with BNPL products should prompt the CFPB to focus on quickly creating baseline standards for BNPL providers.¹⁶³ As the evolution of the industry continues and new BNPL products and entrants flood the market, the CFPB has no time to waste.¹⁶⁴ With at least some protective measures in place, more time could be afforded for Congress to craft targeted legislation addressing the unique concerns of the BNPL industry without endangering consumers’ financial health in the wait.

159. See Lux & Epps, *supra* note 31, at 16 (“The size and rapid growth of the BNPL market and the fact that BNPL has not yet gone through a credit cycle makes some oversight all the more important to prevent a mini-crisis, especially in such an uncertain economic environment.”).

160. See HM TREASURY, *supra* note 149, at 16 (“The government’s position, therefore, remains that it is important that the regulatory controls applied to agreements which are brought into regulation are proportionate to the risk they present, whilst also providing sufficient consumer protection.”).

161. See *id.* at 14 (acknowledging the potential need for the U.K.’s future BNPL legislation to take into account the likelihood BNPLs would be able to synthetically structure transactions to circumvent BNPL regulation).

162. See *id.* at 12 (“Regulation needs to pre-empt likely developments and ensure that it is not possible for BNPL firms to make artificial changes to their business models solely to avoid regulation.”).

163. See Jonathan Berr, *New BNPL Study Raises Concern About ‘Debt Spiral’*, PAYMENTS DIVE (Mar. 10, 2022), <https://www.paymentsdive.com/news/new-bnpl-study-raises-concern-about-debt-spiral/619988/> [<https://perma.cc/J9TY-8PAN>] (“‘Some consumers may be entering a debt spiral transforming a 0% interest BNPL debt that amortizes over a few installments’ into credit card debt with 20% interest rates that can amortize over a decade if they only make a minimum payment, the report stated.”) (quoting Benedict Guttman-Kenney et al. *Buy Now, Pay Later (BNPL) . . . On Your Credit Card 3* (Cornell Univ. Working Paper, No. 2201.01758v5 (2023))).

164. See Josh Howarth, *17 Important BNPL Companies to Watch in 2023*, EXPLODING TOPICS (Dec. 31, 2022), <https://explodingtopics.com/blog/bnpl-companies> [<https://perma.cc/BM3L-EBLU>] (“The BNPL space is estimated to grow to \$3.98T by 2030 . . . With such strong and continued growth over time, it’s likely that more BNPL startups will launch to provide this payment option to customers worldwide.”); see also Tom Richardson, *Flood of New BNPL Entrants Cranks Risk for Investors*, FIN. REV. (July 27, 2021, 5:09 PM), <https://www.afr.com/markets/equity-markets/flood-of-new-bnpl-entrants-cranks-risk-for-investors-20210727-p58da3> [<https://perma.cc/GE3Z-B7T3>] (“The report, by US investment bank Financial Technology Partners (FTP), highlights the incredible amount of competition to enter the [BNPL] sector since April 2020.”).

A. *Flexibility in Arranging Payment Schedule*

In September 2022, the CFPB's Director announced the Bureau's intention to subject BNPL companies to the same level of examination, standards, and regulation as traditional credit card companies.¹⁶⁵ Subjecting BNPL to the same level and types of scrutiny typically applied to credit card companies may ameliorate a series of concerns voiced about the industry, including standardized disclosures and complaint procedures.¹⁶⁶ It will be a step forward in consumer protection. However, applying credit card standards to the BNPL market may not adequately address the unique challenges and potential pitfalls of a BNPL transaction. BNPL transactions warrant tailored regulations to appropriately: (1) achieve desired consumer protective measures, and (2) apply regulations to the continually evolving BNPL industry.¹⁶⁷

Implementing credit card-level protections would require tailoring to the specific nature of BNPL transactions. Credit card companies are subject to the Truth in Lending Act and the Credit Card Accountability, Responsibility, and Disclosure Act of 2009 (The CARD Act).¹⁶⁸ The CARD Act amended the Truth in Lending Act to require that credit card companies' payment dates fall on the same day every month.¹⁶⁹ But the structure of the BNPL transaction differs in nature and duration from traditional credit card payments: instead of monthly payments, the typical BNPL payment is due every two weeks from the

165. See CONSUMER FIN. PROT. BUREAU, *supra* note 12 (stating the goal of the bureau's action regarding BNPL regulation to "ensur[e] that Buy Now, Pay Later firms adhere to many of the baseline protections that Congress has already established for credit cards").

166. See *BNPL Regulation May Be a Win-Win for Providers and Consumers, Consumer Reports Says*, *supra* note 100 (discussing how credit cards are subject to TILA, which requires companies to disclose to consumers the true cost of the credit, including fees, and to have a dispute resolution process).

167. BNPL providers structure their transactions to evade TILA. The BNPL industry is still evolving so future regulation will likely need to incorporate flexibility to allow for its application to new characteristics of BNPL transactions. See HM TREASURY, *supra* note 149 (noting how BNPL providers will likely attempt to create end-runs around future industry regulation).

168. Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734.

169. See CARD Act § 106(a)(1), 123 Stat. 1742 ("The payment due date for a credit card account under an open end consumer credit plan shall be the same day each month.").

purchase date.¹⁷⁰ Inspired by TILA's "same day of the month" requirement, BNPL regulation should aim to allow similar predictability. Consumer clarity and uniformity of BNPL due dates will allow the BNPL consumer to better plan their financial liquidity to meet the demands of each upcoming payment owed—BNPL or traditional credit obligations alike.¹⁷¹ Easing consumers' ability to track BNPL payment due dates will only grow in importance as BNPL providers attempt to generate repeat-use from their customer base.¹⁷²

Focusing on improving consumers' choice when payment schedules begin may lessen the risk of consumers' falling off their payment schedules for both their BNPL and other financial obligations. Loan stacking may be a necessary risk to some consumers' financial health to weather a period of financial difficulty.¹⁷³ Creating a system to clearly delineate payment structures of a consumer's BNPL obligations can help consumers avoid incurring additional costs to the BNPL transaction.¹⁷⁴ Juggling due dates and the need for financial liquidity of single BNPL obligation in conjunction with a customer's other financial obligations can create potentially severe risk of one or more of those obligations going unfulfilled or triggering a fee. The likelihood of a negative repercussion likely compounds if customers have multiple BNPL obligations, potentially from a suite of BNPL providers.¹⁷⁵

Consumers who have the flexibility to determine the start date of their two-week payment schedule can plan ahead and align their payment structure to best fit their other financial obligations. This

170. See Saunders Testimony, *supra* note 4, at 7 ("Due dates will vary, depending on the date of the purchase Consumers with multiple BNPL debts could have multiple payments due at random dates throughout the month.").

171. See Farrington, *supra* note 48 (noting that financial counselors believe BNPL plans make it more difficult for customers to track their spending and "trick people into spending more than they really should" because the broken-up payments appear more manageable).

172. See CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2, at 32 ("[R]epeat usage is a key metric for BNPL lenders' top and bottom lines.").

173. See Krishna, *supra* note 46 (exploring how some BNPL consumers use BNPL to pay for their essentials).

174. See Wang, *supra* note 1 (noting BNPL customers sometimes missed payments because they "simply lost track of the payments, not because they did not have the money").

175. See Saunders Testimony, *supra* note 4, at 7 ("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 [C]onsumers may not be able to use the same BNPL provider at different merchants.").

would be an important tool to combat the CFPB's expressed concern with loan stacking. It does not eliminate the ability of BNPL consumers from accessing this form of credit, but emphasizes the potential need to budget to accommodate purchases.¹⁷⁶ Consumers with multiple ongoing BNPL obligations could choose to overlap their payment due dates to make it easy to remember when money is owed.¹⁷⁷ But requiring this type of overlap would increase the amount owed on these dates, thereby potentially erasing the benefit of breaking up large payments into smaller amounts.¹⁷⁸ Therefore allowing consumers to select the start date of the payment schedule could permit consumers to budget according to their own specific financial needs. For example, consumers could plan ahead to spread out payment due dates to avoid building up high amounts owed on the same date, from another BNPL obligation or non-BNPL debt obligation. Alternatively, payments could be scheduled to align on pay days, as bi-weekly salary remains a common employee payment schedule.

This solution would place a low burden on BNPL providers while addressing consumer protection needs. Indeed, this solution does not need to be necessarily implemented by regulation. BNPL providers can easily and voluntarily adopt this solution. Advocates of a lighter regulatory hand may approve of this simple method to minimize the negative repercussions of loan stacking.¹⁷⁹

B. Disclosures on the Potential Cost of BNPL Obligations and Automatic Payments

Undoubtedly, aligning BNPL transactions with credit card regulation would require mandatory disclosures upon completion of

176. This is especially important as many BNPL transactions are impulse purchases, and potentially at a greater cost than what the consumer would otherwise buy without a pay-in-four option. See Leondis, *supra* note 6 (noting the connection between impulse shopping and BNPL).

177. See Deprez et al., *supra* note 62 (detailing the hard experience of one BNPL user who participated in multiple BNPL transactions to “keep track of a crazy quilt of multiple loans coming due at different times”).

178. See Blakkarly, *supra* note 63 (noting that BNPL transactions can be used “to plug the gaps for vulnerable people who are struggling to make ends meet”).

179. See HM TREASURY, *supra* note 149, at 4 (setting a goal for future BNPL regulation to be “defined as closely as possible to target those products where there is potential for consumer detriment” so as not to “unduly limit[]” the benefits BNPL products can provide to customers).

each BNPL loan.¹⁸⁰ The CFPB could make a rule requiring mandatory disclosures of the true cost of this “interest-free” credit to consumers.¹⁸¹ This could require a BNPL disclosure to incorporate, within its cost calculation, the other non-BNPL provider costs that the consumer could incur through the transaction. These would include the risks associated with automatic withdrawals on the customer’s financial health, such as the risk of overdraft fees or drying up the customer’s liquidity before their non-BNPL financial obligations are satisfied.¹⁸²

Regulating disclosures on the cost of taking on BNPL debt serves a two-fold benefit. First, it fosters consumers’ informed consent to take on the risks and benefits of the debt incurred in a BNPL transaction.¹⁸³ Second, these detailed disclosures would serve to add friction in the BNPL transaction.¹⁸⁴ BNPL transactions appeal to consumers due to their quick and easy nature.¹⁸⁵ Marginally increasing the friction required to complete the transaction will not undercut the availability of these products to willing customers, but may reduce consumers’ impulse purchases and decision regret.¹⁸⁶

Another solution to potential pitfalls for BNPL consumers would be to mandate that automatic payment exists solely as an opt-in feature that consumers could select, if desired, at checkout.¹⁸⁷

180. See Truth in Lending Act § 102, 15 U.S.C. § 1601(a) (“It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit . . .”).

181. See Will Kenton, *Truth in Lending Act (TILA): Consumer Protections and Disclosures*, INVESTOPEDIA (Sept. 29, 2022), <https://www.investopedia.com/terms/t/tila.asp> [<https://perma.cc/SRS4-6E2G>] (noting that, under TILA, traditional credit issuers such as credit card providers must provide the cost of borrowing in a “clear and obvious manner”).

182. See Wang, *supra* note 1 (“Say you end up paying \$30 in late fees on a \$100 item—that effectively raises the price of the item by 30 percent. If you don’t have enough money in the bank to pay that bill, you may get hit by a \$35 overdraft fee on top of that.”).

183. See Lux & Epps, *supra* note 31, at 17 (“[S]tandardized presentation of the real implied cost of finance could help reduce overspending, defaults on credit, and the associated financial distress for consumers.”).

184. See Deprez et al., *supra* note 62 (discussing how friction in a financial transaction can be beneficial).

185. See *id.* (“BNPL companies don’t force you to buy things, of course, but they do lower the barriers.”).

186. See CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2, at 68 (“In the United States, some consumer surveys have indicated that between 20 and 50 percent of BNPL consumers regret their purchases.”).

187. See Letter from Jack Reed et al., U.S. Sens., to Rohit Chopra, Dir., Consumer Fin. Prot. Bureau, (Dec. 15, 2021), https://www.reed.senate.gov/imo/media/doc/letter_to_cfpb_to_take_action_to_ensure_trans

Eliminating automatic withdrawals, unless a customer specifically opts-in, will protect customers' general financial health, even if it may put BNPL providers at risk for not recouping its payments owed.¹⁸⁸ Without automatic withdrawals, consumers may still face late or missed payment penalties from BNPL providers. However, these penalties may pale in the face of overdraft fees from their banks or late or missed payments to other debt obligations that are more important to the customer.

C. *The CFPB Should Work with Credit Bureaus to Standardize BNPL Credit Reporting*

The BNPL industry may especially appeal to individuals who are unable to access more traditional forms of credit.¹⁸⁹ These consumers would benefit from their BNPL transactions – if successfully completed – positively contributing to their credit score and subsequent credit risk assessments.¹⁹⁰ A major goal going forward for the CFPB should be to allow BNPL customers to bolster their credit history by fulfilling their BNPL obligations. However, not all BNPL providers report customer payment data to credit bureaus.¹⁹¹ Until recently, credit bureaus did not incorporate BNPL payment data, but now credit bureaus

parenacy__oversight_of_buy_now_pay_later_products_providers.pdf

[<https://perma.cc/YXL3-SUF5>] (“Consumers are [] exposed to risk of overdrafts because they typically repay BNPL credit through automatic withdrawals from bank accounts or payment via debit cards.”); *see also* Aja McClanahan, *Risks and Rewards of Automatic Bill Payment*, CREDIT KARMA (Jan. 5, 2021), <https://www.creditkarma.com/advice/i/automatic-bill-payment> [<https://perma.cc/C6VB-RVZT>] (“Infrequent bills . . . may not be the best candidates for automatic bill payment, because you’re likely to forget about them. If one of those bills hits your account when your balance is low, you may end up overdrawing your bank account and getting hit with a fee.”).

188. *See* McClanahan, *supra* note 187 (“If you forget about the automatic drafts from your financial accounts, your spending might push your account balance lower than the amount you need to cover your present bill payments.”).

189. *See* Krishna, *supra* note 46 (“Pay-later users tend to be economically vulnerable. A July report by the financial services company Fitch Ratings found that they carry more debt than the general population, and that more than 41 percent of applicants have a poor credit history.”).

190. *See* Lux & Epps, *supra* note 31, at 17 (“Articulation of and enforcement of clear reporting standards could help consumers with low or no credit scores use BNPL products to build credit scores and improve access to affordable finance.”).

191. *See* Carrns, *supra* note 57 (“For now, many of these smaller, short-term loans aren’t reported in a consistent way to credit bureaus, so borrowers don’t build a formal credit history by using them.”).

have begun to utilize this data.¹⁹² These credit bureaus' methods of folding BNPL data into credit assessments varies by bureau, with no uniformity.¹⁹³

Credit bureaus must use alternative methods to incorporate BNPL payment data into their credit scoring algorithm.¹⁹⁴ Otherwise, customers satisfying their BNPL obligations could negatively impact their credit scores due to the short-term nature of the payments.¹⁹⁵ For this reason, credit bureaus recognize the need to adopt new practices to respond to the changes BNPL brought to the credit market.¹⁹⁶ Inconsistent data procedures, however, may shortchange the benefits these tailored programs offer.¹⁹⁷ Therefore, the CFPB should work with credit bureaus to create standardized methods for these bureaus to incorporate BNPL data.¹⁹⁸ Not only should the methods for

192. Experian, *supra* note 128; *see also* Trina Paul, *BNPL Loans Will Soon Be on Your Credit Report: Here's What You Need to Know*, CNBC (Mar. 20, 2022), <https://www.cnbc.com/select/bnpl-loans-to-be-reported-on-credit-reports/> [<https://perma.cc/H7CS-4ZR4>] (“Transunion, Equifax and Experian have announced plans to include BNPL loans on credit reports.”).

193. *See* Martin Kleinbard & Laura Udis, *Buy Now, Pay Later and Credit Reporting*, CONSUMER FIN. PROT. BUREAU: BLOG (June 15, 2022), <https://www.consumerfinance.gov/about-us/blog/by-now-pay-later-and-credit-reporting/> [<https://perma.cc/5C98-F4P5>] (noting that the three largest nationwide consumer reporting companies vary in how they incorporate BNPL payment data).

194. *See id.* (“The CFPB recognizes the unique challenges that come with furnishing BNPL data and encourages NCRCs to incorporate the feedback of BNPL lenders (to reduce operational risk) and the credit scoring companies (to ensure that the unique characteristics of BNPL data can be considered appropriately by scoring models).”).

195. *See* Carrns, *supra* note 57 (noting the need to resolve ‘technical’ issues to properly incorporate BNPL payment data “because the loans are structured differently from traditional loans”); *see also* from Jack Reed et al. to Rohit Chopra, *supra* note 187 (pointing out to CFPB Director Chopra concerns of inconsistent credit reporting and the need for specialized treatment of BNPL payments because even reports of positive payments may harm a consumer’s credit score “by lowering the average age of their credit accounts”).

196. *See* *Buy Now Pay Later*, EXPERIAN, <https://www.experian.com/business/solutions/data-solutions/buy-now-pay-later> [<https://perma.cc/78G8-Z297>] (last visited Oct. 9, 2022) (“Separate from our traditional credit data, The Buy Now Pay Later Bureau will provide visibility into BNPL activity and deliver advanced analytics based on the millions of BNPL credit records available We accept and repose all BNPL loan types separately from our core credit bureau so you can confidently contribute data without negatively impacting consumer credit scores.”).

197. *See* Kleinbard & Udis, *supra* note 193 (“[T]he Bureau is concerned that this inconsistent treatment [of BNPL data from credit reporting companies] will limit the potential benefits of furnished BNPL data to consumers and the credit reporting system.”).

198. *See id.* (“We would . . . like to see the [credit reporting] industry adopt standardized BNPL furnishing codes and formats appropriate to the unique characteristics of the product.”); *see also* CFPB to Supervise Credit Reporting, CONSUMER FIN. PROT. BUREAU (July 16, 2012), <https://www.consumerfinance.gov/about-us/newsroom/consumer->

incorporating the data be standardized, but the method must “calibrate” the data to “account for BNPL loans’ unique characteristics.”¹⁹⁹

D. BNPL Transaction Caps Trigger More Rigorous Scrutiny into Consumers’ Financial Health

The CFPB should pass a rule requiring a thorough loan stacking analysis for certain new BNPL transactions. BNPL providers’ required ability-to-repay analysis would increase if the consumer attempted passed certain threshold amounts.²⁰⁰ This would require BNPL providers to look at the customers’ debt obligations not only from their own previous dealing with the customer but industry-wide. Therefore, a BNPL registry for BNPL providers would need to be created and continually updated, where providers could add their own consumer data and review their competitors’ consumer data.²⁰¹

First, the rule could set a threshold for a single BNPL transaction where any BNPL transaction above this amount would require the BNPL provider to analyze whether the customer had other ongoing BNPL obligations.²⁰² Requiring BNPL providers to screen

financial-protection-bureau-to-supervise-credit-reporting/ [https://perma.cc/R4B7-6NA4] (stating that the CFPB adopted a rule to supervise credit reporting agencies).

199. See Kleinbard & Udis, *supra* note 193 (“[W]e’d expect scoring companies and lenders to build and calibrate models that account for BNPL loans’ unique characteristics.”).

200. Inspired by Singapore’s BNPL regulation that implements a cap on BNPL transactions that can be approved before more thorough ability-to-pay analysis is required. See Kit, *supra* at 153 (discussing how Singapore BNPL customers who have an outstanding balance greater than a specified threshold amount cannot participate in more BNPL transactions “unless they pass an additional credit assessment”).

201. See Comment Letter from Kwame Raoul et al. to Rohit Chopra, *supra* note 9 (“There is also no guarantee that BNPL providers are able to track when consumers have BNPL loans from multiple providers.”); see also CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2, at 66 (“Reducing any loan stacking that may exist – and the credit losses that come with it – . . . requires a coordinated effort across lenders to provide near-real-time data necessary.”); see also John D. Socknat et al., *CFPB Proposes Creation of Registration System for Nonbanks Subject to Agency or Court Orders Involving Alleged Violations of Federal, State, or Local Consumer Protection Laws*, BALLARD SPAHR (Dec. 19, 2022), <https://www.consumerfinancemonitor.com/2022/12/19/cfpb-proposes-creation-of-registration-system-for-nonbanks-subject-to-agency-or-court-orders-involving-alleged-violations-of-federal-state-or-local-consumer-protection-laws/> [https://perma.cc/394E-TK6V] (noting that the CFPB recently announced its intention to create a registry system of nonbank companies for an alternative purpose which suggests the CFPB could be amenable to creating a BNPL registry).

202. See Sadie Keljikian, *Hidden Dangers of Loan-Stacking*, EXPRESS TRADE CAPITAL: BLOG/NEWS (May 31, 2017), <https://www.expresstradecapital.com/hidden->

individual transactions over a specified amount will potentially protect both providers and consumers. BNPL providers may choose to decline providing credit to consumers with a multitude of BNPL obligations registered in the CFPB's BNPL registry for fear that the consumer overextended themselves and would not be able to repay. Consumers who may be screened out of BNPL transaction eligibility in this process may benefit from this paternalistic policy that prevents further 'overextension' of their finances. Since this policy requiring heightened ability-to-repay scrutiny would be triggered solely based on the cost of a single transaction, it would likely not hinder consumers using BNPL transactions to pay for necessities. This regulation would provide greater consumer and provider protections from loan overextension without placing undue barriers to access to BNPL credit.

Second, the regulation could set an overall BNPL obligation cap for each individual consumer. This cap would not act to cut off individual consumers' access to BNPL credit. Rather, any transaction that would place the aggregate amount of active BNPL obligations owed for this customer above the threshold would trigger stricter ability-to-repay scrutiny. Consumers entering BNPL transactions that lead to an aggregate amount below the threshold would not trigger this scrutiny. The goal of this threshold amount should not be to automatically cut off consumers' access to BNPL credit, unlike the cap Singapore imposes.²⁰³ While heightened scrutiny could lead to the BNPL provider declining to offer credit, the rule should provide consumers avenues to appeal declined transactions.²⁰⁴ Providers could still choose to take on the risk related to the individual customer's ability to repay after completing increased scrutiny of the customer's ability to repay. The regulation could potentially incorporate an exception that would allow BNPL transactions over this threshold to not trigger enhanced scrutiny if the transaction consists of 'necessity' items,

dangers-loan-stacking/ [<https://perma.cc/W9BZ-4NQS>] (stating that potential lenders may avoid customers who have a "history of loan stacking").

203. See Kit, *supra* note 153 (noting how BNPL customers in Singapore are cut off from accessing further BNPL credit if they exceed S\$2000 outstanding BNPL obligations).

204. It will be important for the CFPB to focus efforts on improving dispute resolution procedures for CFPB products, whether or not the CFPB adopts this cap on BNPL transactions. See Lux & Epps, *supra* note 31, at 18 ("CFPB complaint records and reviews of BNPL products in App stores reveals a not inconsequential volume of consumer challenges with dispute resolution.").

such as groceries or gas.²⁰⁵ The regulation should be cognizant of the practice and need of customers to occasionally use BNPL transactions to get through periods of acute financial hardship.²⁰⁶

E. Uncertainty Whether CFPB Action Will Occur or Face Legal Challenges May Require Another Entity to Provide Solutions

Considering the appropriate government entity to take steps regulating the BNPL industry, the CFPB may be the most readily responsive and adaptable venue for action. But, the CFPB faces continuing challenges to its validity and legality.²⁰⁷ The CFPB's insulation from political influence has recently been undermined.²⁰⁸ A perennial law is needed to add stability from political pressure in addition to longevity. Without such, the CFPB's will and ability to supervise the BNPL industry may be inconsistent in the future.²⁰⁹ The CFPB, by design, was intended to be insulated from political pressure and sway.²¹⁰ However, a 2020 Supreme Court decision undercut one

205. See Kit, *supra* note 153 (discussing regulations regarding hardship assistance); see also AUSTRALIAN FIN. INDUS. ASS'N, *supra* note 142 (including provisions that offer increased flexibility in payments to customers who register as experiencing financial hardships).

206. See Deprez et al., *supra* note 62 (“Using pay-in-four for groceries and other everyday essentials suggests economic precariousness . . . [that] reinforces the need for stronger protections.”).

207. See Kate Berry, *CFPB's Latest Existential Threat: Legal Challenges to its Funding*, AM. BANKER (May 22, 2022, 9:00 PM), <https://www.americanbanker.com/news/cfpbs-latest-existential-threat-legal-challenges-to-its-funding> [<https://perma.cc/HK5L-VX6U>] (discussing how a Fifth Circuit decision cast doubt on the validity of the CFPB's funding mechanism, which could potentially be violative of the Constitution's separation of powers).

208. See Editorial Board, *Its Director May Now be Subject to Political Winds, but the CFPB is Here to Stay*, THE WASH. POST (July 1, 2020, 4:52 PM), https://www.washingtonpost.com/opinions/its-director-may-now-be-subject-to-political-winds-but-the-cfpb-is-here-to-stay/2020/07/01/337f732e-baf0-11ea-bdaf-a129f921026f_story.html [<https://perma.cc/43MD-KWWE>] (“The [Supreme] court did find that Dodd-Frank violated the Constitution by insulating the CFPB director, a single appointee with sweeping powers and a five-year term, from removal by the president, except for difficult-to-prove ‘malfeasance, inefficiency or neglect of duty.’”).

209. See *id.* (“Yes, CFPB leadership is now somewhat more subject to the winds of politics, which is not what Congress had in mind, but also not the end of the world in practical terms.”).

210. See *Insulated No More: The Seila Decision and the End of the Independent CFPB Director*, DEBEVOISE & PLIMPTON (June 30, 2020), <https://www.debevoise.com/insights/publications/2020/06/insulated-no-more-the-seila-decision> [<https://perma.cc/9UVV-RGMG>] (“Unlike other federal agencies, Congress

pillar of the CFPB's insulation from politics.²¹¹ As a result, the impetus of the CFPB to thoroughly scrutinize risky financial products and industries may waver depending on the larger context of American politics.²¹² The CFPB's resources for enforcing aggressive or necessary regulation may also be partially diverted in the face of challenges to its authority.²¹³

The CFPB finds itself on the defensive in a continuing stream of legal battles.²¹⁴ While this does not handcuff the CFPB from regulating the BNPL industry, it may underscore the benefits of seeking Congressional legislation on BNPL.²¹⁵ A dual approach to supervising

deliberately designed the CFPB to be insulated from changes in presidential administrations by establishing restrictions on the [sole CFPB] Director's removal.”).

211. *See id.* (“The end of ‘for cause’ protection for CFPB Directors will weaken the independence of the agency as it was originally envisioned, and has the effect of politicizing the Bureau’s policy objectives by bringing them more closely into alignment with each presidential administration’s priorities.”).

212. *See The Coming Transformation of the CPB in the Biden Administration: What to Expect and How to Prepare*, PAUL WEISS (Feb. 1, 2021), <https://www.paulweiss.com/practices/litigation/white-collar-regulatory-defense/publications/the-coming-transformation-of-the-cfpb-in-the-biden-administration-what-to-expect-and-how-to-prepare?id=39313> [<https://perma.cc/6YVP-FLUV>] (discussing how the Supreme Court in *Seila* “converted the CFPB from an independent agency into an executive agency” whose teeth regarding regulation depend on the will of the sitting president).

213. *See* Eric C. Peck, *CFPB Accused of Exceeding Statutory Authority*, DSNEWS (Sept. 29, 2022), <https://dsnews.com/news/government/09-29-2022/cfpb-accused-statutory-authority> [<https://perma.cc/XX24-B3NH>] (noting how the CFPB will be fighting another lawsuit alleging it exceeded its statutory authority in the future).

214. Michael Gordon & Alan S. Kaplinsky, *CFPB Responds to Fifth Circuit Ruling That Its Funding Mechanism Is Unconstitutional*, BALLARD SPAHR (Oct. 27, 2022), <https://www.consumerfinancemonitor.com/2022/10/27/cfpb-responds-to-fifth-circuit-ruling-that-its-funding-mechanism-is-unconstitutional/> [<https://perma.cc/6FY8-VWWK>] (anticipating that the CFPB will legally challenge the Fifth Circuit’s non-binding decision clouding the legitimacy of its funding).

215. *See* Jeff Ehrlich & Jonathan Ellis, *Count on Continued Enforcement After Fifth Circuit CFPB Decision*, BLOOMBERG L. (Nov. 1, 2022, 4:00 AM), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/XG6ET3S000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6Ly93d3cuYmXvb21iZXJnbGF3LmNvbS9wcm9kdWN0L2JsYXcvc2VhcmNoL3Jlc3VsdHMvMjZjNDVkJTAxODVmOTViOTcxNzlhYTA3MWE4MzNmYmliXV0--c26396a4f78f122c3d599452e581088deb20d535&criteria_id=26c45de0185f95b97179aa071a833fbb&search32=Z4-Jq7MIbuKF_jsB-tft3w%3D%3DqYTx1VzLqmZxhVOCmt8Bke2R6UDnyTZQNMcrrHT_2fdvHI8se6-VrShoQY_tXOCpboD4JSIdYymPH6O-08oy-pHILwTBg385Bn91a331ToI5MR0XqjunFDjQ5I4qIOtHdI2M4TtWVxRAF6XcP8yixHA%3D%3D [<https://perma.cc/3ZAY-4NC4>] (“The CFPB is therefore formally free to continue that work, with the understanding that unless and until it obtains further review of the Fifth

the BNPL industry, utilizing both the CFPB and Congressional action, will offer long-term stability and legitimacy to the BNPL market. But Congressional action may best be described as slow. BNPL's solid footing in the consumer loan industry warrants Congressional attention before a massive debt crisis emerges.²¹⁶

Congress should pass regulation that will target and address the specific pitfalls created by the business model of BNPL. Congress could amend TILA to expand the definition of "creditors" and remove the "more than four" payment requirements to pull BNPL providers under the Act's oversight.²¹⁷ The legislation should include specific measures to address the CFPB's pressing concern of consumers engaging in unsustainable loan stacking and providers' data harvesting practices.²¹⁸ More research should be conducted to determine the appropriate shape of legislation tailored to the BNPL industry.²¹⁹

V. CONCLUSION

BNPL products offers numerous benefits to consumer lending and consumer choice. However, consumers maximization of these benefits will be increased when regulation of this industry exists. While the CFPB takes its time to regulate this industry, the benefits of BNPL

Circuit's decision, it may well be unwound by federal courts. The tenor of the CFPB's TransUnion brief suggests that it may be willing to take that risk.").

216. See Raynor de Best, *Annual Buy Now, Pay Later (BNPL) Transaction Volume in U.S. 2019-2021*, by Vertical, STATISTA (Oct. 6, 2022), <https://www.statista.com/statistics/1337433/bnpl-market-size-for-different-products-and-industries-usa/> [<https://perma.cc/JD5F-64FW>] ("United States consumers took three times more buy now, pay later (BNPL) loans in 2021 than they did in 2020.").

217. See CONSUMER FIN. PROT. BUREAU, INTERACTIVE BUREAU REGULATIONS: COMMENT FOR 1026.2 – DEFINITIONS AND RULES OF CONSTRUCTION, <https://www.consumerfinance.gov/rules-policy/regulations/1026/interp-2/> [<https://perma.cc/55AW-AT2K>] ("This test is composed of two requirements, both of which must be met in order for a particular credit extension to be subject to the regulation . . . " including (1) either a finance charge or the agreement requires more than four payment installments and (2) "the obligation must be payable to the person in order for that person to be considered a creditor.").

218. See CONSUMER FIN. PROT. BUREAU, BNPL MARKET REPORT, *supra* note 2, at 75 ("BNPL lenders often collect a consumer's data – and deploy models, product features, and marketing campaigns based on that data – to increase the likelihood of incremental sales and maximize the lifetime value they can extract from the consumer.").

219. More thorough research by the CFPB that broadens its search from focusing on the largest BNPL providers may reveal new or urgent areas of the transaction that merit regulation. See *id.* at 7 ("[D]espite its rapid growth, the BNPL industry is less transparent than legacy credit products").

transactions remain clouded by the current risks they pose without industry standardization and oversight. Implementation of baseline industry standards by the CFPB would protect consumers without handicapping their ability to access this untraditional source of credit. With the potential long-term ramifications of BNPL loans on the financial stability of American consumers, CFPB and Congress should swiftly enact measures to prevent consumers from quickly sliding into unmanageable debt as a result of BNPL loans.

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