REGULATING BUY NOW, PAY LATER: CONSUMER FINANCIAL PROTECTION IN THE ERA OF FINTECH

*Sahil Soni**

Recent years have seen the dramatic growth of Buy Now, Pay Later (BNPL), a class of unregulated fintech products that permit consumers to finance purchases by dividing payments into several interest-free installments. BNPL presents novel regulatory challenges because it is primarily marketed to consumers as an interest-free alternative to credit, and its distinctive market structure is characterized by lender–merchant agreements that promote financing at the point of sale. In the American context, the Consumer Financial Protection Bureau (CFPB) has announced plans to analogize treatment of BNPL to existing credit card regulations, which generally emphasize disclosure requirements.

Though undoubtedly an improvement over the unregulated status quo, this regulatory response is hardly a panacea to the industry's risks, as it would not account for the crucial role that merchants play in driving the industry or the fact that consumers often do not even view BNPL as credit in the first place. This Note proposes a novel framework for the regulation of BNPL under the CFPB's rulemaking authority to regulate actions undertaken by both lenders and merchants in promoting BNPL financing to consumers. This approach would provide the CFPB with the flexibility to ensure that regulations continue to stay abreast of developments in the market and the necessary tools to calibrate consumer financial protection to a landscape that is increasingly shaped by fintech.

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INTRODUCTION

On June 6, 2022, Apple unveiled plans to introduce "Apple Pay Later" in its latest iteration of iOS,[1] joining a growing number of companies hoping to capitalize on the tide of Buy Now, Pay Later (BNPL) taking the consumer finance industry by storm.[2] The announcement is emblematic

1. Press Release, Apple, Apple Unveils an All-New Lock Screen Experience and New Ways to Share and Communicate in iOS 16 (June 6, 2022), https://www.apple.com/newsroom/2022/06/apple-unveils-new-ways-to-share-and-communicate-in-ios-16/ [https://perma.cc/S5CV-WBGW].

2. Companies that announced BNPL offerings in 2021 include Amazon, Microsoft, and Target. See Tara Siegel Bernard, Amazon Strikes a Deal With Affirm, the Buy-Now Pay-Later Provider, N.Y. Times (Aug. 27, 2021), https://www.nytimes.com/2021/08/27/business/amazon-affirm.html (on file with the *Columbia Law Review*) (last updated Aug. 30, 2021); Caitlin Mullen, Microsoft Shoppers Get Another BNPL Option, Payments Dive (Dec. 10, 2021), https://www.paymentsdive.com/news/microsoft-shoppers-get-another-bnpl-

of the dramatic growth of BNPL, a class of largely unregulated fintech[3] installment loans enabling consumers to finance purchases by dividing payments into a series of interest-free installments.[4] While BNPL has been available in the United States since at least 2012,[5] the industry underwent an exponential increase in popularity in the aftermath of the COVID-19 pandemic:[6] The number of BNPL users in the United States doubled to 50.6 million from 2020 to 2021,[7] and global BNPL spending is estimated to increase nearly 300% from 2022 to 2027.[8]

BNPL's unprecedented growth has forced regulators across the globe to grapple with the industry's evasive legal structure and the risks it poses

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option/611269/ [https://perma.cc/A4QV-ZAQ6]; Target Teams With Affirm, Sezzle for BNPL, Pymnts (Oct. 6, 2021), https://www.pymnts.com/buy-now-pay-later/2021/target-affirm-sezzle-bnpl/ [https://perma.cc/KE3J-FTL3]. The "big five" BNPL lenders operating in the United States are Affirm, Afterpay, Klarna, PayPal, and Zip. Peter Coy, Opinion, Buy Now, Regret Later?, N.Y. Times (Dec. 19, 2022), https://www.nytimes.com/2022/12/19/opinion/buy-now-pay-later.html (on file with the *Columbia Law Review*).

3. For a comprehensive definition of "fintech," see Saule T. Omarova, New Tech v. New Deal: Fintech as a Systemic Phenomenon, 36 Yale J. on Reg. 735, 743–45 (2019) (defining "fintech" as an "umbrella term that refers to a variety of digital technologies applied to the provision of financial services" that share an "explicit[] promise to 'revolutionize' the provision of financial services . . . [b]y making financial transactions . . . faster, easier, and cheaper").

4. See, e.g., Julian Alcazar & Terri Bradford, Fed. Rsrv. Bank of Kan. City, The Appeal and Proliferation of Buy Now, Pay Later: Consumer and Merchant Perspectives 2 (2021), https://www.kansascityfed.org/Payments%20Systems%20Research%20Briefings/documents/8504/psrb21alcazarbradford1110.pdf [https://perma.cc/CU82-CHUA] (comparing BNPL to traditional installment loans); see also infra section I.A.1.

5. See Julia Gray, The Evolution of Buy Now, Pay Later, Retail Brew (Dec. 27, 2021), https://www.retailbrew.com/stories/2021/12/27/the-evolution-of-buy-now-pay-later [https://perma.cc/33HA-393J] (explaining that Affirm began offering BNPL in 2012, with Sweden-based Klarna launching services in the United States in 2015).

6. See Peter Rudegeair, Covid-19 Economy Boosts 'Buy Now, Pay Later' Installment Services, Wall St. J. (Dec. 30, 2020), https://www.wsj.com/articles/covid-19-economy-boosts-buy-now-pay-later-installment-services-11609340400 (on file with the *Columbia Law Review*) (attributing the increase in BNPL usage during the pandemic in part to "[c]onsumers' reluctance to take on new revolving debt during economic uncertainty").

7. See Grace Broadbent, US Buy Now, Pay Later Forecast 2022, Insider Intel. (Oct. 4, 2022), https://www.insiderintelligence.com/content/spotlight-us-buy-now-pay-later-forecast-2022 [https://perma.cc/L3QN-8LBJ].

8. See Hanneh Bareham, Has the Buy Now, Pay Later Model Changed American Spending Habits for Good?, Bankrate (Apr. 3, 2023), https://www.bankrate.com/loans/personal-loans/buy-now-pay-later-impact-on-spending/ [https://perma.cc/U8X3-GVNN] (estimating that BNPL "will reach $437 billion in 2027, driven by 'escalating financial pressures from the rising cost of living'" (quoting Press Release, Juniper Research, Buy Now Pay Later Spend to Accelerate, Reaching Over $437 Billion Globally by 2027; Fuelled by Deteriorating Macro-Economic Factors (Oct. 25, 2022), https://www.juniperresearch.com/press/press-releases/buy-now-pay-later-spend-to-accelerate-reaching (on file with the *Columbia Law Review*))).

to consumers.[9] While installment loans are hardly new,[10] BNPL presents novel risks because it is primarily marketed to consumers as an interest-free alternative to traditional credit offerings like credit cards.[11] This interest-free structure is reflected in BNPL's distinctive profit model: Rather than relying on interest payments from consumers, BNPL lenders generate revenue by charging merchants fees on BNPL-financed transactions.[12] BNPL lenders advertise this arrangement to merchants as a way to increase sales and conversions, and consequently, lenders' revenue streams depend on forming partnerships with merchants.[13] Thus, in addition to being a form of consumer credit, BNPL plays a secondary role as a marketing tool that merchants use to drive sales.[14] This unique market

9. The first country to formally announce plans to regulate BNPL was the United Kingdom, which announced its intention to bring BNPL products within the regulatory purview of the country's Consumer Credit Act in June 2022. See HM Treasury, Regulation of Buy-Now-Pay-Later Set to Protect Millions of People, Gov.UK (June 20, 2022), https://www.gov.uk/government/news/regulation-of-buy-now-pay-later-set-to-protect-millions-of-people [https://perma.cc/GWS2-UST2] ("The government's approach to regulatory controls . . . will tailor the application of the Consumer Credit Act . . . to these products[] and the elements of lending practice most linked to potential consumer detriment."). Regulators in Australia and New Zealand have recently announced plans to follow suit, citing concerns that "BNPL looks like credit, . . . acts like credit, [and] carries the risks of credit." Stephen Jones, Assistant Treasurer & Minister for Fin. Servs., Austl., Address to the Responsible Lending & Borrowing Summit (May 22, 2023), https://ministers.treasury.gov.au/ministers/stephen-jones-2022/speeches/address-responsible-lending-borrowing-summit [https://perma.cc/8XFD-U7PQ]; see also Duncan Webb, Minister of Com. & Consumer Affs., N.Z., Government Acts on Consumer Credit Protection, Beehive.govt.nz (Aug. 8, 2023), https://www.beehive.govt.nz/release/government-acts-consumer-credit-protection [https://perma.cc/S2LS-6CLU] (announcing plans to regulate BNPL products under New Zealand's Credit Contracts and Consumer Finance Act). Discussions regarding the regulation of BNPL remain ongoing in several other countries. See, e.g., Akihiro Matsuyama & Tony Wood, Buy Now Pay Later: The Regulatory Landscape in the Asia Pacific Region, Deloitte: Asia Pac. Ctr. for Regul. Strategy (May 5, 2022), https://www2.deloitte.com/cn/en/blog/financial-advisory-financial-services-blog/2022/buy-now-pay-later-regulatory-landscape-asia-pacific-region.html [https://perma.cc/J3ZS-H6FS] (describing policy discussions in Hong Kong, Malaysia, and Singapore).

10. See Joseph P. Jordan & James H. Yagla, Retail Installment Sales: History and Development of Regulation, 45 Marq. L. Rev. 555, 555 (1962) (detailing the growth of installment credit from 1939 to 1961); Timothy Wolters, "Carry Your Credit in Your Pocket": The Early History of the Credit Card at Bank of America and Chase Manhattan, 1 Enter. & Soc'y 315, 318–24 (2000) (describing the development of installment-based consumer credit contracts in the first half of the twentieth century).

11. See infra section II.A.2.

12. See Gordon Kuo Siong Tan, Buy What You Want, Today! Platform Ecologies of 'Buy Now, Pay Later' Services in Singapore, 47 Transactions Inst. Brit. Geographers 912, 918 (2022) (contrasting BNPL lenders' focus on merchant fees with credit card providers' focus on revolving interest).

13. See infra section I.A.2.

14. See Ron Shevlin, Buy Now, Pay Later: The "New" Payments Trend Generating $100 Billion in Sales, Forbes (Sept. 7, 2021), https://www.forbes.com/sites/ronshevlin/2021/09/07/buy-now-pay-later-the-new-payments-trend-generating-100-billion-in-sales/ (on file with the *Columbia Law Review*) (explaining that BNPL is "an element of the

dynamic creates incentives for both BNPL lenders and their partnering merchants to encourage consumers to increase their spending with BNPL.[15] This has led to concerns that BNPL may impair consumers' financial health by promoting overspending and impulsive buying.[16] These risks are compounded by lenders' tendency to represent BNPL as a sensible budgeting tool rather than properly describing it as a form of credit.[17]

Although the consumer risks accompanying the failure to regulate BNPL have garnered significant academic attention internationally,[18]

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marketing mix" that merchants can use to influence consumers' likelihood of making purchases).

15. See generally Lauren Ah Fook & Lisa McNeill, Click to Buy: The Impact of Retail Credit on Over-Consumption in the Online Environment, Sustainability, Sept. 7, 2020, at 1, 10, https://www.mdpi.com/2071-1050/12/18/7322 [https://perma.cc/HV96-4M64] (characterizing the BNPL paradigm as a reconceptualization of consumer credit that severs the traditional association between credit and debt to promote spending).

16. See infra section II.A.1.

17. See Rachel Aalders, Buy Now, Pay Later: Redefining Indebted Users as Responsible Consumers, 26 Info. Commc'n & Soc'y 941, 945 (2023) (arguing that BNPL lenders market their products as "morally superior to credit cards, which they position as . . . either predatory . . . [or] exclusionary"); Tan, supra note 12, at 913 ("[T]he positioning of BNPL as a lifestyle and a fashionable way to pay is deployed to obscure the underlying debt–credit relations forged between the BNPL firm and the user.").

18. The proliferation of BNPL has garnered particular attention in Australia. See, e.g., Julia Cook, Kate Davies, David Farrugia, Steven Threadgold, Julia Coffey, Kate Senior, Adriana Haro & Barrie Shannon, Buy Now Pay Later Services as a Way to Pay: Credit Consumption and the Depoliticization of Debt, 26 Consumption Mkts. & Culture 245, 246 (2023) (drawing on "an analysis of BNPL websites and apps, a walking ethnography of a large shopping centre in Newcastle, Australia, and interviews with BNPL customers"); Paul Gerrans, Dirk G. Baur & Shane Lavagna-Slater, FinTech and Responsibility: Buy-Now-Pay-Later Arrangements, 47 Austl. J. Mgmt. 474, 475 (2022) (relaying the ongoing debate as to whether BNPL products should be considered "credit" under Australia's National Credit Act); Jacob Rizk, Use Now, Regulate Later? The Competing Regulatory Approaches of the Buy-Now, Pay-Later Sector and Consumer Protection in Australia, 10 Victoria Univ. L. & Just. J. 77, 79–80 (2021) ("This explosive growth [of BNPL] has posed an issue to Australia's financial regulators: how to best balance assertive regulatory action to protect consumers and ensure market stability without stifling innovation."); Di Johnson, John Rodwell & Thomas Hendry, Analyzing the Impacts of Financial Services Regulation to Make the Case that Buy-Now-Pay-Later Regulation Is Failing, Sustainability, Feb. 12, 2021, at 1, 3–4, https://doi.org/10.3390/su13041992 [https://perma.cc/5ALQ-TJSJ] (discussing regulatory considerations in Australia); Elizabeth Boshoff, David Grafton, Andrew Grant & John Watkins, Buy Now Pay Later: Multiple Accounts and the Credit System in Australia 2–3 (Oct. 15, 2022), https://ssrn.com/abstract=4216008 [https://perma.cc/YN2D-9BXJ] (unpublished manuscript) (describing Australian consumers' use of BNPL). Outside of Australia, BNPL has also been subject to extensive academic treatment in Asia and Europe. See, e.g., Della Ayu Zonna Lia & Salsabilla Lu'ay Natswa, Buy-Now-Pay-Later (BNPL): Generation Z's Dilemma on Impulsive Buying and Overconsumption Intention, 193 Advances Econ. Bus. & Mgmt. Rsch. 130, 133 (2021) (Indonesia); Lachlan Schomburgk & Arvid Hoffman, How Mindfulness Reduces BNPL Usage and How That Relates to Overall Well-Being, 57 Eur. J. Mktg. 325, 326 (2023) (European Union); Benedict Guttman-Kenney, Chris Firth & John Gathergood, Buy Now, Pay Later (BNPL) . . . On Your Credit Card, 37 J. Behav. & Experimental Fin., no. 100788, 2023, at 1, 1 (United Kingdom); Allen Sng Kiat

there is currently a gap in the literature regarding regulatory considerations in the American context. This gap is important in light of the unique features of the American regulatory scheme, which has been largely constructed through intermittent, politically polarized responses to regulatory crises[19] and has only recently consolidated consumer financial protection into a single federal agency.[20] Moreover, the outsized role of nonfinancial partnering merchants in promoting BNPL to consumers calls into question the efficacy of extending existing financial regulations—which have historically focused on financial and depository entities[21]—solely to BNPL lenders.

Against this backdrop, on September 15, 2022, the CFPB issued its long-anticipated report on the industry,[22] announcing that it was looking into extending existing credit card regulations to BNPL lenders.[23] While this development certainly signals an improvement over not regulating lenders at all, this Note argues that the analogy to credit cards is fundamentally flawed because existing credit card regulations—which largely rely on disclosure requirements[24]—would fail to account for the crucial

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Peng & Christy Tan Muki, Buy Now Pay Later in Singapore: Regulatory Gaps and Reform 2 (Apr. 1, 2022), https://ssrn.com/abstract=3819058 [https://perma.cc/B3HZ-BB4Y] (unpublished working paper) (Singapore).

19. See Lisa Kastner, Tracing Policy Influence of Diffuse Interests: The Post-Crisis Consumer Finance Protection Politics in the US, 13 J. Civ. Soc'y 130, 134–38 (2017) (describing theories regarding the influence of diffuse interest groups in formulating regulatory responses to crises); Kathryn C. Lavelle, Constructing the Governance of American Finance: Timing and the Creation of the SEC, OTS, and CFPB, 29 J. Pol'y Hist. 321, 322 (2017) (arguing that financial crises have historically given rise to a two-stage regulatory response in which the federal government first exercises its emergency powers to temporarily prevent widespread insolvency and then restructures the regulatory system); see also Saule T. Omarova & Margaret E. Tahyar, That Which We Call a Bank: Revisiting the History of Bank Holding Company Regulations in the United States, 31 Rev. Banking & Fin. L. 113, 193–98 (2011) (describing the complexities of enacting regulatory reform in the context of American financial markets).

20. See infra section I.B.2.

21. See infra section I.B.1.

22. Martin Kleinbard, Jack Sollows & Laura Udis, CFPB, Buy Now, Pay Later: Market Trends and Consumer Impacts 1, 3–5 (2022), https://files.consumerfinance.gov/f/documents/cfpb_buy-now-pay-later-market-trends-consumer-impacts_report_2022-09.pdf [https://perma.cc/22SU-EDTA] [hereinafter September Report].

23. Rohit Chopra, Dir., CFPB, Prepared Remarks on the Release of the CFPB's Buy Now, Pay Later Report (Sept. 15, 2022), 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/YT4R-3NGU] [hereinafter Chopra, September Remarks] (explaining that the CFPB will "identify potential interpretive guidance or rules to issue with the goal of ensuring that Buy Now, Pay Later firms adhere to many of the baseline protections that Congress has already established for credit cards"); see also infra section II.B.

24. See, e.g., Ronald J. Mann, Charging Ahead: The Growth and Regulation of Payment Card Markets 159–65 (2006) (explaining the role of disclosure in credit regulation). For a critique of the assumptions underlying the present preference for disclosure, see Hosea H. Harvey, Opening Schumer's Box: The Empirical Foundations of

role that merchants play in driving the industry[25] and the fact that many consumers do not even view BNPL as credit.[26] Moreover, by focusing on the similarities between BNPL and traditional credit products, this approach risks failing to keep up with the industry's rapidly evolving landscape, characterized by market activities that frequently elude traditional legal classifications.[27]

This Note contributes to the literature of consumer finance law by describing the deficiencies in existing regulatory approaches and proposing a novel framework for the regulation of nonfinancial market participants. Part I provides an overview of the BNPL industry and contextualizes regulatory considerations by tracing the historical evolution of federal consumer protection law through the creation of the CFPB. Part II describes the risks that unregulated BNPL products pose to consumers and argues that the CFPB's proposal to extend existing credit card regulations to BNPL lenders is unlikely to sufficiently respond to these risks. Part III explains the important function that regulating merchants can have in creating a comprehensive regulatory scheme for BNPL and addresses some challenges in constructing such a framework. The Note concludes by proposing a framework for regulating representations and activities undertaken by merchants offering BNPL to customers under the CFPB's statutory authority to proscribe unfair, deceptive, or abusive acts or practices (UDAAPs) under the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank).[28]

I. SITUATING BUY NOW, PAY LATER IN THE FEDERAL REGULATORY LANDSCAPE

This Part situates BNPL within the broader context of the consumer finance market to provide an overview of the major actors and laws involved. Section I.A begins by describing the general mechanics of BNPL, with particular attention to the roles of lenders and merchants in offering BNPL financing to consumers. It then explains some of the substantive differences between BNPL and other credit products that are currently subject to some degree of federal regulation. Section I.B describes the historical evolution of federal consumer financial protection law through the creation of the CFPB. It concludes with an overview of the CFPB and its authority to protect consumers by prohibiting UDAAPs.

Modern Consumer Finance Disclosure Law, 48 U. Mich. J.L. Reform 59, 105–09 (2014) (arguing for a shift toward evidence-based policymaking).

25. See infra section II.C.2.

26. See infra section II.C.1.

27. See infra section II.C.3.

28. 12 U.S.C. § 5531 (2018).

A. *Overview of the Buy Now, Pay Later Industry*

1. *How Buy Now, Pay Later Works.* —While BNPL lenders offer a variety of financial products,[29] the most common iteration of BNPL is the four-payment plan, a type of installment loan.[30] Consumers typically use four-payment plans to finance small-ticket purchases, and as a result, BNPL lenders direct their customer acquisition efforts to partnering merchants' point of sale.[31] Once a merchant has entered into an agreement with a BNPL lender, the merchant's customers are presented with the option to finance their purchase through four interest-free installments. Acquisition thus occurs directly within the payment flow at checkout, where BNPL is displayed alongside traditional payment options such as credit cards and debit cards.[32]

For first-time users, clicking on the option to divide payment into interest-free installments will direct them to the lender's application, where consumers are prompted to supply basic information such as their name, contact information, and payment information.[33] If the consumer's application is approved and they proceed with the purchase, the lender will pay the full purchase price, adjusted for fees, to the merchant.[34] The consumer pays 25% of the price upfront to the lender and proceeds to pay the remainder in three equivalent payments every two weeks for a total of

29. See Puneet Dikshit, Diana Goldshtein, Blazej Karwowski, Udai Kaura & Felicia Tan, Buy Now, Pay Later: Five Business Models to Compete, McKinsey & Co. (July 29, 2021), https://www.mckinsey.com/industries/financial-services/our-insights/buy-now-pay-later-five-business-models-to-compete [https://perma.cc/A869-LY8F] (describing offerings including four-payment plans, integrated shopping apps, off-card financing, virtual rent-to-own, and card-linked installments).

30. See Alcazar & Bradford, supra note 4, at 2; see also Marshall Lux & Bryan Epps, Grow Now, Regulate Later? Regulation Urgently Needed to Support Transparency and Sustainable Growth for Buy-Now, Pay-Later 6 (Harv. Kennedy Sch., M-RCBG Assoc. Working Paper No. 182, 2022), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/182_AWP_final.pdf [https://perma.cc/NYX7-FRP5].

31. See, e.g., Dikshit et al., supra note 29 (discussing targeted lending at point of sale and the focus on financing purchases less than $250); see also Anna Omarini, Shifting Paradigms in Banking: How New Service Concepts and Formats Enhance the Value of Financial Services, *in* The Fintech Disruption: How Financial Innovation Is Transforming the Banking Industry 75, 103 (Thomas Walker, Elaheh Nikbakht & Maher Kooli eds., 2023) ("BNPL providers are proposing merchants with a viable tool to increase online sales conversions and order values, reducing user acquisition costs.").

32. Why You Should Use Buy Now, Pay Later (BNPL) Payment Methods for Your Business, Stripe, https://stripe.com/guides/buy-now-pay-later [https://perma.cc/3ZPV-W2UW] (last visited Aug. 17, 2023).

33. See, e.g., Financing Application Process & Affirm Overview, Osim Int'l, https://us.osim.com/pages/financing-application-process-affirm-overview [https://perma.cc/KEQ2-VVAM] (last visited Aug. 17, 2023) (requiring users to enter their name, email, phone number, date of birth, and last four digits of their social security number).

34. Why You Should Use Buy Now, Pay Later (BNPL) Payment Methods for Your Business, supra note 32.

six weeks.[35] These payments are typically made in the form of automatic bank withdrawals or credit card charges.[36] If the consumer misses a payment, some lenders will assess a late fee,[37] and many lenders will also limit access to future extensions of credit.[38] Lenders may also employ a debt collection agency to collect missing payments or report defaults to credit bureaus.[39]

2. *How Buy Now, Pay Later Compares to Credit Cards.* — Along with verifying the prospective user's identity, consumer information collected in the application is usually used to perform soft credit checks and data-driven predictions, typically generating a credit decision immediately.[40] This represents a stark departure from credit cards, which typically require a more involved inquiry into an applicant's income and financial history[41] and are subject to statutory requirements under the Fair Credit Reporting Act (FCRA).[42] BNPL lenders often emphasize this distinction to target young consumers[43] and consumers who lack a formal credit history or are

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35. Id.

36. Ed deHaan, Jungbae Kim, Ben Lourie & Chenqi Zhu, Buy Now Pay (Pain?) Later 4 (Oct. 26, 2022), https://ssrn.com/abstract=4230633 [https://perma.cc/9KAR-APAG] (unpublished working paper).

37. Id. at 8. Not all BNPL lenders assess late fees. Compare Klarna Pay Later in 4 Agreement, Klarna (Aug. 11, 2023), https://cdn.klarna.com/1.0/shared/content/legal/terms/0/en_us/sliceitinx [https://perma.cc/7MJC-5N9M] (up to seven-dollar late fee), with Affirm Terms of Service, Affirm, https://www.affirm.com/terms [https://perma.cc/8PUM-M2KR] (last updated June 21, 2023) ("You will never be charged any late fees when you buy with Affirm.").

38. See, e.g., Klarna Pay Later in 4 Agreement, supra note 37 ("If you are in Default Klarna may prevent you from future use of any Klarna service.").

39. See, e.g., id. ("If you are in Default Klarna may: (i) employ a debt collection agency to collect payment; and (ii) report default information to credit bureaus.").

40. See Tan, supra note 12, at 917 (observing that "BNPL firms emphasise the absence of [hard] credit checks"); deHaan et al., supra note 36, at 8 ("Approval and credit limit decisions are made within seconds.").

41. See Terri Bradford, Fed. Rsrv. Bank of Kan. City, "Give Me Some Credit!": Using Alternative Data to Expand Credit Access 1 (2023), https://www.kansascityfed.org/Payments%20Systems%20Research%20Briefings/documents/9638/PaymentsSystemResearchBriefing23Bradford0628.pdf [https://perma.cc/46A7-85FD] (explaining that conventional credit checks have "strict requirements" and consider "the types of credit accounts a consumer holds, the age of those accounts, the amounts owed, and the consumer's payment history").

42. 15 U.S.C. § 1681 (2018).

43. See David Farrugia, Julia Cook, Kate Senior, Steven Threadgold, Julia Coffey, Kate Davies, Adriana Haro & Barrie Shannon, Youth and the Consumption of Credit, Current Socio., Aug. 5, 2022, at 1, 5, https://journals.sagepub.com/doi/full/10.1177/00113921221114925 [https://perma.cc/P5FJ-7WZG] ("Marketing themselves as suited to the consumption and financial practices of 'generation Z', BNPL services are a key example of the shift to credit as a consumer good in itself positioned within an overall consumer lifestyle."); see also Gerrans et al., supra note 18, at 496 (noting that BNPL lenders position themselves as a "budgeting tool").

otherwise skeptical of traditional financial institutions.[44] While lenders outwardly explain their reliance on alternative data as a means of democratizing access to credit,[45] a more plausible explanation lies in the market advantages that technology-driven lending models confer over traditional credit checks.[46] Unfortunately, these market dynamics may decrease uniformity among lenders' lending models and decrease the predictability of lending decisions from the consumer perspective, as the highly competitive market provides little incentive for lenders to share proprietary decisionmaking information with one another.[47]

Apart from its reliance on technology-enabled decisionmaking, BNPL's profit model is fundamentally different from that of credit cards.[48] Unlike credit card providers, which derive revenue primarily by charging interest to consumers,[49] BNPL lenders rely on partnerships with

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44. See Cook et al., supra note 18, at 255 ("[T]he distancing of BNPL services from other forms of credit [is] not achieved simply through their efforts to skirt credit regulations . . . . It is facilitated by the affective appeal that they make to consumers."); Tan, supra note 12, at 917 (noting that BNPL targets the "credit invisible").

45. For example, Max Levchin, CEO of Affirm, has described the firm's mission as "inclusive credit." Affirm: Q4 2022 Earnings Transcript, Mkt. Screener (Aug. 30, 2022), https://www.marketscreener.com/quote/stock/AFFIRM-HOLDINGS-INC-117540803/news/Affirm-Q4-2022-Earnings-Transcript-41654897/ [https://perma.cc/W666-LYEB] (claiming that Affirm has "worked relentlessly over the last several years to evolve [its] approach to identifying and underwriting creditworthy applicants left outside the traditional credit reporting infrastructure").

46. See Tobias Berg, Andreas Fuster & Manju Puri, FinTech Lending, 14 Ann. Rev. Fin. Econ. 187, 193–94 (2022) (explaining that companies use data-driven lending algorithms to facilitate faster processing times while simultaneously leveraging nontraditional data sources to improve screening and monitoring). For a discussion of the risks associated with algorithmic credit pricing, see Talia B. Gillis, The Input Fallacy, 106 Minn. L. Rev. 1175, 1217 (2022) ("The added variables and the increased flexibility that follow from the use of machine learning can increase . . . credit pricing disparities.").

47. See Tom Akana, Buy Now, Pay Later: Survey Evidence of Consumer Adoption and Attitudes 2 (Fed. Rsrv. Bank of Phila., Consumer Fin. Inst., Discussion Paper DP 22-02, 2022), https://www.philadelphiafed.org/-/media/frbp/assets/consumer-finance/discussion-papers/dp22-02.pdf [https://perma.cc/AC42-AHGY] (noting that this competitive environment disincentivizes the sharing of proprietary information). Compare José Liberti, Jason Sturgess & Andrew Sutherland, How Voluntary Information Sharing Systems Form: Evidence From a U.S. Commercial Credit Bureau, 145 J. Fin. Econ. 827, 828 (2022) (explaining that information sharing in new markets is disincentivized when doing so weakens a lender's informational advantage), with Boshoff et al., supra note 18, at 4 (noting that the opposite is true for incumbent financial institutions).

48. Amit Garg, Diana Goldshtein, Udai Kaura & Roshan Varadarajan, Reinventing Credit Cards: Responses to New Lending Models in the US, McKinsey & Co. (June 23, 2022), https://www.mckinsey.com/industries/financial-services/our-insights/reinventing-credit-cards-responses-to-new-lending-models-in-the-us [https://perma.cc/GLM5-9N2Z] (describing the primacy of revolving credit in the profit models of most credit card providers).

49. See Robert Adams, Vitaly M. Bord & Bradley Katcher, Credit Card Profitability, Bd. of Governors of the Fed. Rsrv. Sys. (Sept. 9, 2022), https://www.federalreserve.gov/econres/notes/feds-notes/credit-card-profitability-20220909.html [https://perma.cc/R95L-SPM6] (last updated Apr. 20, 2023) (finding that the "credit function" of credit

merchants for the majority of their revenues.[50] And while late fees represent a portion of some BNPL lenders' revenues, they are not ordinarily a lender's primary source of income.[51] Instead, most BNPL lenders derive their revenues primarily through merchant fees,[52] which are relatively high commissions charged to partnering merchants on BNPL-financed transactions.[53] Lenders justify these comparatively high costs to merchants by advertising the BNPL arrangement as a means of increasing sales and conversions.[54] And lenders have plenty to boast about—BNPL has been estimated to increase conversion rates by 20% to 30% and average ticket sales by 30% to 50%.[55]

3. *How Buy Now, Pay Later Compares to Other Installment Loans.* — Dating back to the Great Depression,[56] layaway plans also allow consumers

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cards—for which "interest income is the main source of revenue"—accounts for 80% of credit card profitability).

50. See Chay Fisher, Cara Holland & Tim West, Rsrv. Bank of Austl., Developments in the Buy Now, Pay Later Market 63 (2021), https://www.rba.gov.au/publications/bulletin/2021/mar/pdf/developments-in-the-buy-now-pay-later-market.pdf [https://perma.cc/6J27-Y6FF] ("The most common BNPL business model involves the BNPL provider facilitating transactions by entering into direct agreements with both participating consumers and merchants . . . ."); Colleen E. Mandell & Morgan J. Lawrence, Expanding Access for the Credit Invisible With Just Four Easy Payments? The Unregulated Rise of Buy Now, Pay Later, 35 Loy. Consumer L. Rev. 275, 281 (2023) (noting that the interest-free BNPL model "relies heavily on merchants who then foot the bill in the form of high service fees"). For a discussion of how BNPL lenders facilitate strategic partnerships to penetrate the consumer finance market, see Nathalie Martin & David Lynn, The Afterpay Hangover, 34 Loy. Consumer L. Rev. 529, 537 (2022) (discussing BNPL lenders' partnerships with Amazon, Target, and Walmart).

51. See Alcazar & Bradford, supra note 4, at 2 (characterizing late fees as a supplemental revenue stream); deHaan et al., supra note 36, at 9 (noting that late fees only accounted for 9.5% of net revenue for one major lender).

52. Guttman-Kenney et al., supra note 18, at 2.

53. See Marco Di Maggio, Emily Williams & Justin Katz, Buy Now, Pay Later Credit: User Characteristics and Effects on Spending Patterns 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30508, 2022), https://www.nber.org/system/files/working_papers/w30508/w30508.pdf [https://perma.cc/GW6B-876T] (reporting that BNPL lenders charge merchants fees ranging from 5% to 8%, which are "substantially higher than the [2% to 3%] charged by credit card companies").

54. See Cook et al., supra note 18, at 247 ("BNPL services are marketed to prospective merchant partners on the basis that their use reduces 'cart abandonment' . . . ."). For an example of lender representations to merchants, see Tom Musbach, Why Buy Now, Pay Later Increases Website Conversions, Affirm (Feb. 1, 2022), https://www.affirm.com/business/blog/affirm-bnpl-increase-ecommerce-conversion [https://perma.cc/T593-7PNQ] (claiming that BNPL helps to ease "sticker shock" at checkout by "reliev[ing] [the] pressure of having to pay the total price immediately" and that offering BNPL increases customers' sense of goodwill toward the merchant).

55. Dan Perlin, 2021 Outlook: Payments, Processing, and IT Services, RBC Cap. Mkts. (Apr. 9, 2021), https://www.rbccm.com/en/insights/tech-and-innovation/episode/2021-outlook-massive-shift-in-e-commerce-spend [https://perma.cc/53H9-AU8Q].

56. Rob Walker, Delayed Gratification, N.Y. Times Mag. (Nov. 28, 2008), https://www.nytimes.com/2008/11/30/magazine/30wwln-consumed-t.html (on file with the *Columbia Law Review*).

to divide payments into a series of installments and—like BNPL—are typically marketed to budget-constrained consumers. Both plans have the purpose of expanding a merchant's available market and facilitating purchases that consumers might not otherwise make.[57] But because layaway plans only allow consumers to receive purchased goods after payments have been made in full,[58] consumers tend to view BNPL and layaway plans differently.[59] While layaway plans are typically used to finance large, infrequent purchases, consumers tend to use BNPL for smaller, more frequent purchases.[60] On the merchant side, BNPL is easier to offer than layaway because BNPL does not require that the merchant store the item on site while installment payments are made.[61] And crucially, unlike BNPL, layaway plans are generally subject to the regulatory ambit of federal laws such as the Truth in Lending Act (TILA),[62] which only applies to plans comprising more than four payments.[63]

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57. See Daao Wang, Stanko Dimitrov & Lirong Jian, Optimal Inventory Decisions for a Risk-Averse Retailer When Offering Layaway, 284 Eur. J. Operational Rsch. 108, 109 (2020) (explaining that retailers can capture a larger segment of consumers with less capital risk by offering layaway plans instead of traditional credit options).

58. Id. at 108. For this reason, layaway plans have historically been less popular with consumers than other forms of financing. For a dramatic illustration of this phenomenon in the context of early automobile sales, see Kevin M. McDonald, From the Assembly Line to the Credit Line: A Brief History of Automobile Financing, 62 Automotive Hist. Rev. 62, 65 (2021) ("Henry Ford . . . insist[ed] that Ford . . . stick to the traditional layaway plan. . . . [This] plan . . . failed 'miserably' because 'Americans wanted fancy cars[] [that] they could buy on credit.' . . . By 1925 three of every four new cars . . . were . . . financed on the installment plan. Ford eventually reversed course and embraced installment lending." (footnote omitted) (quoting Stephen Smith, The American Dream and Consumer Credit, Am. Pub. Media (2018), http://americanradioworks.publicradio.org/features/americandream/b1.html [https://perma.cc/S8NL-ERT6])).

59. See Mac Schwerin, The 'Buy Now, Pay Later' Bubble Is About to Burst, The Atlantic (Jan. 10, 2023), https://www.theatlantic.com/culture/archive/2023/01/buy-now-pay-later-affirm-afterpay-credit-card-debt/672686/ (on file with the *Columbia Law Review*) ("[T]hough Americans have used layaway programs since the Great Depression, today's pay-later plans flip the order of operations: Rather than claiming an item and taking it home only after you've paid in full, consumers using these modern payment plans can acquire an item for just a small deposit . . . ."); see also Alcazar & Bradford, supra note 4, at 2 (noting that the increase in popularity of BNPL has escalated the decline in layaway offerings).

60. Sarah Papich, Effects of Buy Now, Pay Later on Financial Well-Being 7 (Feb. 7, 2023), https://ssrn.com/abstract=4247360 [https://perma.cc/BB2U-Y2FC] (unpublished manuscript).

61. See id. at 7–8 (noting that BNPL, unlike layaway, allows the consumer to receive the item before paying in full).

62. 15 U.S.C. §§ 1601–1667 (2018); see also Offering Layaways, FTC (Mar. 1986), https://www.ftc.gov/business-guidance/resources/offering-layaways [perma.cc/UL4K-6DZ6] (noting that while no federal law specifically governs layaway plans, they can be subjected to regulation under TILA or the Federal Trade Commission Act).

63. 12 C.F.R. § 1026.2(a)(17) (2023) (defining a "creditor" as a "person who regularly extends consumer credit that is . . . payable by written agreement in more than four installments").

A more recent development than layaway financing,[64] payday loans are short-term, single-payment loans that require consumers to repay the full amount of the loan plus a fixed fee, typically ranging from $15 to $20 per $100 borrowed.[65] Payday loans and BNPL also share several similarities—both products are typically used to finance small purchases, are offered to consumers with limited access to other credit options,[66] and do not require hard credit checks.[67] The central difference between the two is that BNPL four-payment plans do not charge interest as long as payments are made on time, which BNPL lenders have argued makes them a better choice.[68] This claim is necessarily complicated by the fact that many BNPL users report falling behind in payments.[69] Moreover, due to low barriers to access, BNPL users are more likely on average to take out payday loans.[70] The regulation of payday loans represents one arena in which the CFPB has exercised its rulemaking authority under Dodd–Frank: After clarifying that TILA disclosure requirements apply with full

64. See Roman V. Galperin & Andrew Weaver, Payday Lending Regulation and the Demand for Alternative Financial Services 6 (Fed. Rsrv. Bank of Bos., Cmty. Dev. Discussion Paper No. 2014-01, 2014), https://www.bostonfed.org/-/media/Documents/cddp/cddp1401.pdf [https://perma.cc/H7BC-88TU] (noting rapid growth in the payday loans industry from 1999 to 2004).

65. See Ronald J. Mann & Jim Hawkins, Just Until Payday, 54 UCLA L. Rev. 855, 861–62 (2007) (explaining that payday loans developed from the check-cashing business as an arrangement in which the cashier advanced a lower amount in exchange for deferred check presentment).

66. See Jerry Buckland, Building Financial Resilience: Do Credit and Finance Schemes Serve or Impoverish Vulnerable People? 195 (2018) (explaining that payday loans are part of a larger category of "small-loan products that target low-income people"); Papich, supra note 60, at 7 ("BNPL is typically used for small purchases, with the average transaction costing $200. . . . Many consumers who would not qualify for a low-interest credit card can qualify for BNPL." (citation omitted)); see also Lindsay Sain Jones & Goldburn P. Maynard, Jr., Unfulfilled Promises of the Fintech Revolution, 111 Calif. L. Rev. 801, 840 (2023) ("Many of the unbanked rely on check-cashing services and payday lenders who charge higher interest than any chartered bank can legally impose.").

67. See Michael A. Stegman, Payday Lending, 21 J. Econ. Persps. 169, 169 (2007) (explaining that because qualifying for a payday loan does not require a credit check, "the entire transaction can take less than an hour"); deHaan et al., supra note 36, at 8 (describing BNPL lenders' use of soft credit checks).

68. See Ayesha de Kretser, Payday Lenders Give Buy Now, Pay Later a Bad Reputation: AFIA, Fin. Rev. (Mar. 18, 2022), https://www.afr.com/companies/financial-services/payday-lenders-give-bnpl-a-bad-reputation-afia-20220318-p5a5rz (on file with the *Columbia Law Review*) (summarizing statements by BNPL spokespeople differentiating their businesses from online payday lenders).

69. See James Ledbetter, Are "Buy Now Pay Later" Startups the New Payday Lenders?, Bus. of Bus. (Feb. 17, 2021), https://www.businessofbusiness.com/articles/buy-now-pay-later-bnpl-credit-score-damage-late-payments-klarna-affirm/ [https://perma.cc/474D-KH52] (reporting that 38% of users reported falling behind on payments at least once).

70. See Cortnie Shupe, Greta Li & Scott Fulford, CFPB Off. of Rsch., No. 2023-1, Consumer Use of Buy Now, Pay Later: Insights From the CFPB Making Ends Meet Survey 20 tbl.2 (2023), https://files.consumerfinance.gov/f/documents/cfpb_consumer-use-of-buy-now-pay-later_2023-03.pdf [https://perma.cc/2K5Y-KW88] (finding that 11.5% of BNPL users reported taking out payday loans, compared to 2.9% of nonusers).

force to payday lenders,[71] the CFPB issued a final rule in 2017 classifying repeated withdrawal attempts of consumers' checking accounts as a prohibited UDAAP under certain conditions.[72]

B. *Overview of Federal Consumer Financial Regulations*

1. *Statutory Development of Financial Regulations.* — At the turn of the twentieth century, consumer financial protection was considered to fall under the exclusive police powers of the states,[73] which sought to regulate state-chartered financial institutions by passing usury laws[74] and restrictions on the types of financial products that these institutions could offer.[75] While these statutes had the subsidiary effect of providing consumers with some protections, they primarily served to protect financial institutions,[76]

71. See CFPB, Examination Procedures: Short-Term, Small-Dollar Lending 3 (2013) ("Regardless of the channel used by lenders to conduct business[,] . . . [TILA] and . . . Regulation Z[] require lenders to disclose loan terms and Annual Percentage Rates. Regulation Z also requires lenders to provide advertising disclosures, credit payments properly, process credit balances in accordance with its requirements, and provide periodic disclosures.").

72. See Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54,472, 54,472–74 (Nov. 17, 2017) (codified at 12 C.F.R. § 1041 (2020)). For a discussion of challenges to the 2017 Payday Lending Rule, see John Villa & Ryan Scarborough, The Law of Unintended Consequences: How the CFPB's Unprecedented Legislative Authority and Enforcement Approach Has Invited Increasing Challenges, Banking & Fin. Servs. Pol'y Rep., July 2016, at 22, 26–28 (describing how the CFPB's approach has been perceived as regulation by enforcement); see also infra note 211.

73. See Seth Frotman, Reimagining State Banking Regulators: How the Principles Underlying the Consumer Financial Protection Bureau Can Serve as a Blueprint for a New Regulatory Federalism, 72 Me. L. Rev. 241, 258 (2020) ("Every state's police power is founded on the need to protect the general well-being of its citizens, including the power to oversee the companies responsible for the financial futures of those citizens." (footnote omitted)); Adam J. Levitin, Hydraulic Regulation: Regulating Credit Markets Upstream, 26 Yale J. on Reg. 143, 145 (2009) [hereinafter Levitin, Hydraulic Regulation] ("Consumer protection is an essential part of states' police power."). The subsequent concurrent development of state and federal consumer protection laws gave rise to substantial issues implicating preemption and state–federal cooperation. See Robert M. O'Neil, State Consumer Protection in a Federal System, 1975 Ariz. St. L.J. 715, 715–19 (explaining that the rapid expansion in state and federal consumer protection laws generated "risks of confusion, overlap, and competition between regulatory sectors").

74. For an overview of the development of state usury laws, see James M. Ackerman, Interest Rates and the Law: A History of Usury, 1981 Ariz. St. L.J. 61, 62–63, 85–109 (proclaiming that "American usury law represents a venerable body of legal, ethical, religious, and (sometimes) economic thought, reaching back through the Middle Ages to the foundations of western civilization").

75. Adam J. Levitin, The Consumer Financial Protection Bureau: An Introduction, 32 Rev. Banking & Fin. L. 321, 323 (2013) [hereinafter Levitin, The Consumer Financial Protection Bureau].

76. See id. ("While these restrictions often had consumer protection benefits, they were designed first and foremost to protect the solvency of financial institutions by limiting the types of risks they could assume. Enforcement of consumer finance regulation was primarily a private affair, although usury was sometimes a criminal matter.").

a feature that would largely persist in the federal regulatory scheme until the passage of Dodd–Frank.[77]

On a national level, the development of a regulatory framework for consumer protection originated in the unfair competition context[78] with the passage of the Federal Trade Commission Act (FTC Act) in 1914.[79] The FTC Act was novel in that it featured a broad statutory standard for enforcement: In light of market participants' frequent deployment of strategies to evade regulation, Congress decided against drawing up an itemized list of proscribed practices,[80] instead granting the newly created FTC the authority to enforce a broad prohibition on "unfair methods of competition" under section 5 of the Act.[81] Congress later expanded the FTC's authority to section 5's current language proscribing "unfair or deceptive acts or practices" in 1938.[82] Although the FTC was created with

77. See Jean Braucher & Angela Littwin, Examination as a Method of Consumer Protection, 58 Ariz. L. Rev. 33, 56 (2016) (explaining that federal regulatory agencies prioritized "prudential concerns, almost to the exclusion of consumer protection"); Helen A. Garten, The Consumerization of Financial Regulation, 77 Wash. U. L.Q. 287, 288 (1999) ("Historically, safety and soundness rather than consumer protection were the principal articulated goals of most financial regulation . . . . Although, in theory, safety and soundness and consumer protection are not inconsistent, bank regulation was characterized by many examples of safety and soundness rules that, deliberately or accidently, were anticonsumer in effect." (footnote omitted)); see also Mehrsa Baradaran, Banking and the Social Contract, 89 Notre Dame L. Rev. 1283, 1308 (2014) (explaining that during the S&L Crisis of the 1980s and 1990s, federal agencies "announced comprehensive preemption to protect all national banks and thrifts from state consumer protection laws," reasoning that "these public-protecting laws rendered banks less efficient and profitable").

78. See Marc Winerman, The Origins of the FTC: Concentration, Cooperation, Control, and Competition, 71 Antitrust L.J. 1, 6–7 (2003) (noting that the early twentieth century gave rise to a highly publicized string of mergers that consolidated control of several key industries in a small group of businesses, with state common law remedies proving to be mostly ineffectual for preventing consolidation).

79. Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58 (2018)).

80. See S. Rep. No. 63-597, at 13 (1914) (explaining that the committee considered "attempt[ing] to define the[se] many and variable unfair practices" but decided to "leave it to the commission to determine what practices were unfair" because "there were too many unfair practices to define"); see also E.I. Du Pont De Nemours & Co. v. Fed. Trade Comm'n, 729 F.2d 128, 136 (2d Cir. 1984) ("Congress . . . gave up efforts to define specifically which methods of competition and practices are competitively harmful and abandoned a proposed laundry list of prohibited practices . . . [because] there were too many practices to define, and many more unforeseeable ones were yet to be created by ingenious business minds.").

81. 38 Stat. at 719 (current version at 15 U.S.C. § 45).

82. Federal Trade Commission Act Amendments of 1938, ch. 49, 52 Stat. 111 (codified as amended at 15 U.S.C. § 45).

the express purpose of addressing unfair competition,[83] it would later assume authority over some matters concerning consumer protection.[84]

Half a century later, the consumer movement of the 1960s[85] culminated in the passage of the landmark Consumer Credit Protection Act of 1968 (CCPA),[86] Title I of which codified TILA.[87] The CCPA provided for broad federal regulation of financial institutions and was the first federal regulatory framework of its kind.[88] Passage of the CCPA was politically polarizing,[89] with detractors vigorously opposing the extension of federal power into a domain that had traditionally been considered the exclusive province of the states.[90] TILA in particular underwent substantial changes in the years of legislative debate following its first introduction in the Senate in 1960.[91] Ultimately, Congress settled on disclosure requirements

83. See, e.g., S. Rep. No. 63-597, at 13 ("One of the most important provisions of the bill is that which declares unfair competition in commerce to be unlawful[] and empowers the commission to prevent corporations from using unfair methods of competition in commerce . . . ."); see also Earl W. Kintner & Christopher Smith, The Emergence of the Federal Trade Commission as a Formidable Consumer Protection Agency, 26 Mercer L. Rev. 651, 651 (1975) ("The consuming public benefited from the actions of the Federal Trade Commission . . . because in the long run the consumer benefited from honest competition, but the Commission's mandate was not consumer protection.").

84. An early example of the FTC's invocation of its rulemaking authority relating to consumer financial protection is its 1951 rule requiring disclosure of certain terms relating to motor vehicle installment sales. See 1971 FTC Ann. Rep. 71 ("The Commission has no authority to regulate finance charges as to amounts. But it was apparent that the overcharges were being imposed by means of an unfair and deceptive practice within the Commission's jurisdiction.").

85. For an overview of the consumer movement, see generally Kathleen Browne Ittig, The Consumer Movement in the United States, Bridgewater Rev., Oct. 1983, at 7, 9–10 (describing the proliferation of consumer advocacy groups during the 1960s).

86. Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601–1691).

87. 82 Stat. at 146–58 (codified as amended at 15 U.S.C. §§ 1601–1665).

88. See Mark E. Budnitz, The Development of Consumer Protection Law, the Institutionalization of Consumerism, and Future Prospects and Perils, 26 Ga. St. U. L. Rev. 1147, 1149 (2010) ("Before passage of [TILA] . . . there were no federal laws regulating the consumer financial services industry that provided consumers with a private right of action. State laws were inadequate. There were few . . . lawyers whose practice was primarily protecting consumers. Law schools offered few, if any, courses devoted to consumer law.").

89. Id. at 1165–66 (chronicling the political backlash to the expansion of consumer protection during the Carter and Reagan Administrations); see also Carl Felsenfeld, Competing State and Federal Roles in Consumer Credit Law, 45 N.Y.U. L. Rev. 487, 499 (1970) (noting that TILA's requirements were "anathema to many traditional lenders").

90. See Felsenfeld, supra note 89, at 499 ("The traditions of state dominance . . . were deep-seated, and opposition existed almost as much to the specter of federal presence as to the substantive provisions of any law that might be enacted.").

91. Senator Paul Douglas of Illinois first introduced his "Consumer Credit Labeling Bill" in 1960. See 109 Cong. Rec. 2911 (1963). The Bill only vaguely hinted at consumer welfare, focusing instead on the threat to "economic stabilization . . . when credit is used excessively for the acquisition of property and services." S. 2755, 86th Cong. (1960). Following the Act's failure in the Senate, Douglas rechristened it as the "Truth in Lending Act." See S. 1740, 87th Cong. (1961).

as a compromise measure[92] to address the problem of the "uninformed use of credit."[93]

Aware that creditors would attempt to evade TILA requirements by structuring their transactions to fall outside of regulatory guidelines, Congress gave the Federal Reserve Board rulemaking authority to regulate consumer disclosures.[94] Regulations implementing TILA's disclosure requirements are compiled under Regulation Z.[95] Despite TILA's broad purpose to reduce consumer confusion and promote financial literacy, the Act's purview was largely constrained to disclosure requirements for political and practical reasons,[96] and in the immediate years following its passage, consumers and creditors alike expressed dissatisfaction with what they regarded as overly complex disclosure terms.[97] This led to amendments in 1980 that simplified TILA's disclosure terms,[98] purportedly to improve consumer understanding.[99] Despite lingering questions as to

92. See Edward L. Rubin, Legislative Methodology: Some Lessons From the Truth-in-Lending Act, 80 Geo. L.J. 233, 234–35 (1991) ("Our penchant for disclosure laws is in part a political compromise and in part a collective neurosis, but it is also an artifact of the current methodology of statutory design."). For an argument that the primacy of disclosure in consumer financial protection has its origins in Congress's preference for rational consumer choice theory, see Dee Pridgen, Sea Changes in Consumer Financial Protection: Stronger Agency and Stronger Laws, 13 Wyo. L. Rev. 405, 416–18 (2013) (explaining that federal consumer protections were premised on the theory that standardized access to information would promote fairness).

93. 15 U.S.C. § 1601(a) (2018).

94. The Supreme Court recognized as much in Mourning v. Fam. Publ'ns Serv., Inc., 411 U.S. 356, 365–66 (1973), in which the Court explained that Congress empowered the Federal Reserve Board to make classifications and exceptions in light of its awareness that merchants could evade disclosure requirements by "burying" the cost of credit in the price of goods sold.

95. 12 C.F.R. § 1026 (2023).

96. See Dee Pridgen, Putting Some Teeth in TILA: From Disclosure to Substantive Regulation in the Mortgage Reform and Anti-Predatory Lending Act of 2010, 24 Loy. Consumer L. Rev. 615, 616 (2012) [hereinafter Pridgen, Putting Some Teeth in TILA] (arguing that disclosure appealed to Congress because it was the "least costly and most politically acceptable method of regulation"); see also Andrea Ryan, Gunnar Trumbull & Peter Tufano, A Brief Postwar History of U.S. Consumer Finance, 85 Bus. Hist. Rev. 461, 489 (2011) (describing the shift in the regulatory landscape from "restrictions on product offerings and caps on interest rates for deposits and loans" to "a regime of enhanced disclosure").

97. See Jonathan M. Landers & Ralph J. Rohner, A Functional Analysis of Truth in Lending, 26 UCLA L. Rev. 711, 712 (1979) (detailing how TILA's disclosure requirements had become so complex that creditors were able to successfully lobby proconsumer legislators to permit the Federal Reserve Board to issue case-by-case exceptions).

98. Truth in Lending Simplification and Reform Act, Pub. L. No. 96-221, 94 Stat. 168 (1980) (codified in scattered sections of 15 U.S.C. ch. 41).

99. See Pridgen, Putting Some Teeth in TILA, supra note 96, at 619 ("These reforms were supposed to eliminate the problems of information overload and the obscuration of key terms that consumers needed for comparison shopping.").

these amendments' efficacy,[100] it would take Congress nearly another three decades before it significantly revised TILA. This was accomplished with the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act), which strengthened disclosure requirements for significant changes in terms, interest fees, and repayment conditions.[101]

2. *The Consumer Financial Protection Bureau.* — The creation of the CFPB under Dodd–Frank was largely a response to the 2007–2008 financial crisis.[102] The crisis had laid bare the inefficacy of the prior delegation of consumer financial protection to various disparate agencies—including, among others, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the National Credit Union Administration, and the Federal Reserve Board—each with limited enforcement and rulemaking authority.[103] As a result of this fragmentation, no federal agency was primarily concerned with consumer protection as a statutory mandate.[104] Title X of Dodd–Frank, the Consumer Financial Protection Act (CFPA),[105] created the CFPB and finally consolidated rulemaking authority over consumer protection into a single federal agency.[106]

100. See id. at 621 (explaining that the 1990s and 2000s spawned "a new wave of scholarship focusing on behavioral economics [that] pointed out the limits of consumer disclosures for the type of complex credit transactions . . . [and] argued that even a rational consumer faces almost insurmountable cognitive obstacles in seeking to understand TILA disclosures"); Rubin, supra note 92, at 239 (noting that there is "little evidence" that the TILA amendments have "been any more effective in communicating information to consumers or in encouraging them to shop effectively for credit").

101. Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (codified in scattered sections of 15 U.S.C.).

102. See Jolina C. Cuaresma, Commissioning the Consumer Financial Protection Bureau, 31 Loy. Consumer L. Rev. 426, 440–43 (2019) (describing the creation of the CFPB as responsive to public opinion in the wake of the 2007–2008 financial crisis); Arthur E. Wilmarth, Jr., The Dodd–Frank Act's Expansion of State Authority to Protect Consumers of Financial Services, 36 J. Corp. L. 893, 951 (2011) ("Congress designed [the] CFPB to be especially resistant to capture by the financial services industry, because members of Congress and analysts agreed that the industry had exercised excessive influence over bank regulators during the period leading up to the financial crisis.").

103. See Levitin, Hydraulic Regulation, supra note 73, at 149–55 ("The plethora of agencies, each given a small piece of the consumer-protection field to police . . . , has the effect of making consumer protection an orphan in the banking regulation system. Because consumer protection is everybody's responsibility, but each agency is responsible for a very limited piece . . . , it becomes nobody's responsibility.").

104. While the impetus for Dodd–Frank may have been the 2007–2008 financial crisis, criticism of the preexisting fragmented regulatory scheme, which "produced frictions, tensions and uncertainties as to compliance requirements, and claims of anticonsumerism," was hardly new. See Ralph J. Rohner, "For Lack of a National Policy on Consumer Credit . . . "; Preliminary Thoughts on the Need for Unified Federal Agency Rulemaking, 35 Bus. Law. 135, 135 (1979) (deeming it "regrettable" that these "problems should continue and increase through the 1970s and into the 1980s").

105. 12 U.S.C. §§ 5463–5481 (2018).

106. Id. §§ 5491–5492; S. Rep. No. 111-176, at 11 (2010) ("The legislation ends the fragmentation of the current system by combining the authority of the seven federal agencies involved in consumer financial protection in the CFPB, thereby ensuring

Notably, as with TILA, the CFPA was largely the brainchild of a single legislator[107] and was subject to harsh criticism from opponents in Congress.[108]

Under the CFPA, the CFPB is vested with rulemaking, supervisory, and enforcement authority.[109] While the Bureau's supervisory and enforcement authorities are constrained by several significant limitations,[110] the CFPB enjoys broad rulemaking authority. The Bureau has a general rulemaking authority to "prescribe rules . . . as may be necessary" to enforce eighteen federal laws that were previously housed in other federal agencies.[111] Among these "enumerated consumer laws" are TILA, the FCRA, the Equal Credit Opportunity Act, and the Fair Credit Billing Act.[112]

The CFPB is also authorized to promulgate specific rules,[113] including implementing the prohibition of UDAAPs.[114] Notably, Congress expanded the CFPB's regulatory ambit beyond the FTC's section 5 authority[115] with

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accountability."). The consolidation of rulemaking authority over consumer protection into a single regulatory agency was recommended by the National Commission on Consumer Finance, created under the CCPA, in 1972. See Nat'l Comm'n on Consumer Fin., Consumer Credit in the United States 58 (1972) (recommending that "Congress create within the proposed Consumer Protection Agency a unit to be known as the Bureau of Consumer Credit . . . with full statutory authority to issue rules and regulations and supervise all examination and enforcement functions under the Consumer Credit Protection Act, including TIL[A]").

107. See Agostino S. Filippone, Newly Established Consumer Financial Protection Bureau Nets First Enforcement Action, 25 Loy. Consumer L. Rev. 175, 176–77 (2012) (explaining the outsized role of Senator Elizabeth Warren in the genesis of the CFPB). Senator Warren had previously argued for the consolidation of regulatory authority in a single agency in arguing that the current regulatory framework was failing. See Oren Bar-Gill & Elizabeth Warren, Making Credit Safer, 157 U. Pa. L. Rev. 1, 98 (2008) ("We propose the creation of a single federal regulator—a new Financial Product Safety Commission or a new consumer credit division within an existing agency (most likely the [Federal Reserve Board] or FTC)—that will be put in charge of consumer credit products.").

108. See, e.g., 156 Cong. Rec. 13145 (2010) (statement of Sen. Kay Hutchinson) ("I am concerned that a newly formed Consumer Financial Protection Bureau will take the lead rather than our banking regulators, and this is one of the biggest concerns I have with the bill."); 156 Cong. Rec. 13002 (2010) (statement of Sen. Christopher Bond) (characterizing the CFPB as a "new superbureaucracy with unprecedented power," which will make decisions "driven by the administration's political will and agenda").

109. See 12 U.S.C. § 5511(c)(3)–(5).

110. The CFPB's supervisory authority over nondepository institutions is limited to certain "covered persons," including, among others, "larger participant[s] of . . . market[s] for other consumer financial products or services." Id. § 5514(a)(1)(B). The CFPB's litigation enforcement authority is limited to bringing civil suits for violations of "[f]ederal consumer financial law." Id. § 5564(a).

111. Id. § 5512(b)(1).

112. Id. § 5481(12).

113. Id. §§ 5531–5538.

114. Id. § 5531.

115. See supra notes 79–82 and accompanying text.

the insertion of an abusiveness standard.[116] The Bureau's authority to prohibit UDAAPs is bounded by the limitation[117] that its rules be directed to "covered persons," which offer or provide financial services or products to consumers,[118] or to "service providers," which provide a "material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service."[119]

II. BUY NOW, PAY LATER REQUIRES A NOVEL REGULATORY APPROACH

This Part argues that a comprehensive regulatory response to the proliferation of BNPL must go beyond simply copy-and-pasting credit card regulations to BNPL lenders. Section II.A explains how the marketing of BNPL to consumers poses unique risks to consumer financial health by encouraging overspending and providing confusing, potentially misleading representations. Section II.B describes the CFPB's proposal to extend credit card regulations to BNPL lenders, as articulated in the September Report and Director Rohit Chopra's accompanying remarks (the "September Remarks"). Section II.C argues that this plan to treat BNPL products like credit cards—with the accompanying emphasis on mandating disclosure of credit terms—fails to address BNPL's novel risks. This Note contends that the efficacy of extending credit card regulations to BNPL may be impaired by (1) consumers' tendency to view BNPL as fundamentally different from traditional credit, (2) the specialized role played by merchants in marketing financing plans to consumers, and (3) the rapidly evolving landscape of fintech. More broadly, it argues that this approach risks perpetuating the historical pattern of developing consumer protection regulations in response to—rather than in anticipation of—harms in the market.[120]

A. *Buy Now, Pay Later Poses Unique Risks to Consumers*

1. *Excessive Spending.* — By weakening both consumers' personal safeguards against overspending and external procedural safeguards

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116. Under this standard, "abusive[ness]" is defined as an act or practice that either "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service" or "takes unreasonable advantage" of a consumer's "lack of understanding . . . of the material risks, costs, or conditions," "inability . . . to protect [their own] interests . . . in selecting or using a consumer financial product or service," or "reasonable reliance . . . on a covered person to act in the [consumer's] interests." 12 U.S.C. § 5531(d).

117. See id. § 5531(a).

118. Id. § 5481(6)(A).

119. Id. § 5481(26)(A).

120. See Lavelle, supra note 19, at 343 (describing the development of financial regulations as driven "by public attention to the government's initial response . . . and the perceived need to change the institutions to achieve real success").

relating to the extension of credit,[121] BNPL may jeopardize consumers' financial health by encouraging unsustainable spending.[122] By dividing payments into a series of comparatively smaller installments, BNPL distorts consumers' perception of their spending power, thereby reducing their uncertainty before making purchases that they may otherwise ultimately forgo.[123] These risks are compounded when consumers are unable to access safer credit options, as is often the case with BNPL users.[124]

Moreover, because BNPL lenders are generally not subject to uniform reporting requirements under the FCRA,[125] users can quickly find themselves overcommitted with multiple accounts.[126] Because the use of multiple BNPL products is typically not visible to lenders when processing applications,[127] they are less likely to deny credit to consumers who already have multiple BNPL payment plans, regardless of their ability to pay on

121. See Madiha Khan & Shejuti Haque, Impact of Buy Now–Pay Later Mechanism Through Installment Payment Facility and Credit Card Usage on the Impulsive Purchase Decision of Consumers: Evidence From Dhaka City, Se. U. J. Arts & Soc. Scis., June 2020, at 40, 55 (concluding that BNPL encourages impulsive spending that "may have a negative impact on . . . future spending on necessities due to excess current spending on . . . unnecessary goods"); Di Maggio et al., supra note 53, at 2 (finding that "BNPL increases the likelihood that consumers face negative outcomes resulting from low liquidity"); see also deHaan et al., supra note 36, at 2 (hypothesizing that one reason that BNPL lenders may be willing to extend riskier credit is because they "also earn substantial commission and advertising revenues from retailers").

122. See, e.g., Claire Williams, "Buy Now, Pay Later" Users Significantly More Likely to Overdraft Than Nonusers, Morning Consult (Mar. 2, 2022), https://morningconsult.com/2022/03/02/buy-now-pay-later-bnpl-overdraft-data/ [https://perma.cc/WJJ4-M5YA] (finding that in January 2022, 33% of BNPL users overdrafted, compared to 15% of all adults).

123. See Rizk, supra note 18, at 86 (explaining that the structure of BNPL transactions can lead to overconsumption because "consumers' perceptions of the cost of a transaction can decouple from the benefit as time passes"); deHaan et al., supra note 36, at 7 (finding that "BNPL users' total spending increases after BNPL adoption, consistent with BNPL motivating consumers to spend more"); see also Hannah Gdalman, Meghan Greene & Necati Celik, Fin. Health Network, Buy Now, Pay Later: Implications for Financial Health 7–8 (2022), https://finhealthnetwork.org/wp-content/uploads/2022/03/Buy-Now-Pay-Later-Brief-2022.pdf [https://perma.cc/GRF8-5XCD] (reporting that 47% of survey respondents claim that the availability of BNPL led them to either make a purchase they otherwise would not have made or to spend more than they would have without BNPL).

124. See Aaron Gilbert & Ayesha Scott, Auckland Ctr. for Fin. Rsch., Problem Debt, Buy Now Pay Later (BNPL) & Young Adults in Aotearoa New Zealand: Report 34 (2023), https://acfr.aut.ac.nz/__data/assets/pdf_file/0009/817803/FINAL-YA-Debt-Study-Industry-Report-v250823.pdf [https://perma.cc/6LCK-SVE7] (explaining that BNPL can "cause[] harm to low-income individuals or those unable to access safer credit").

125. 15 U.S.C. § 1681 (2018).

126. See Boshoff et al., supra note 18, at 2 (estimating that 40% of BNPL users have multiple accounts).

127. C.f. Gdalman et al., supra note 123, at 9 (noting that underwriting practices may help to prevent unaffordable usage).

them.[128] This is particularly troublesome given that, according to users, one of the primary reasons for using BNPL in the first place is poor credit history and credit card ineligibility.[129] Moreover, the use of multiple BNPL accounts may also increase the likelihood of consumers losing track of payments.[130] This problem is not readily solved by self-regulation tools—such as automated payment reminders—because unlike credit cards, BNPL payment periods are highly irregular.[131]

2. *Confusing and Potentially Misleading Representations.* — Lenders typically market BNPL ambiguously by presenting it as a smart payment option rather than a loan.[132] BNPL is thus portrayed as a convenient, financially responsible way to budget payments rather than a form of consumer credit entailing financial obligations. This may obfuscate the nature and terms of financing to consumers,[133] many of whom already

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128. See Boshoff et al., supra note 18, at 29 (explaining that the "inability to observe BNPL holdings increases adverse selection costs for lenders," and for consumers, "the availability of unregulated BNPL facilities may . . . encourage overborrowing"). A recent study estimates that roughly 13% of BNPL applicants are rejected. See Tobias Berg, Valentin Burg, Jan Keil & Manju Puri, The Economics of "Buy Now, Pay Later": A Merchant's Perspective 14 (June 2023), https://ssrn.com/abstract=4448715 [https://perma.cc/V3S4-KZ35] (unpublished manuscript).

129. See, e.g., Mike Brown, Study: Buy Now, Pay Later Is Surging but Many Consumers Overextend Their Credit, Breeze (Jan. 6, 2022), https://www.meetbreeze.com/blog/buy-now-pay-later-personal-finance-study/ [https://perma.cc/K9XM-2QLW] (finding that 57% of BNPL users stated that BNPL caused them to spend above their means and that 45% indicated that they had turned to BNPL due to poor credit history and inability to secure a credit card).

130. See Martin & Lynn, supra note 50, at 549 ("If a consumer has multiple purchases on multiple schedules with multiple companies, it may be hard to keep track of when payments are scheduled."); see also Nikita Aggarwal, D. Bondy Valdovinos Kaye & Christopher Odinet, #Fintok and Financial Regulation, 54 Ariz. St. L.J. 1035, 1049 (2022) (observing that the risk of losing track of payments can be exacerbated when consumers are still charged by BNPL lenders after returning a product).

131. See Tan, supra note 12, at 920 (arguing that "[u]nder BNPL, the topological spaces of debt become more diffused and stretched across different time periods compared to credit cards" and that "BNPL-induced debt relationships become fragmented, . . . are constructed between the consumer and the BNPL firm[,] and [are] further tied to individual purchases").

132. See Aalders, supra note 17, at 948 (arguing that "financing provided through the BNPL platform is presented as *money*, not credit or debt"); Cook et al., supra note 18, at 252 ("BNPL services . . . did not advertise themselves as providers of 'credit' nor acknowledge any association with 'debt'. Rather, every BNPL service website and app presented itself as an easy, accessible[,] and flexible *means of payment*."); Tan, supra note 12, at 920 (noting that "BNPL offerings are explicitly marketed as a non-credit-based service").

133. See, e.g., Good Shepherd Austl. N.Z., Safety Net for Sale: The Role of Buy Now Pay Later in Exploiting Financial Vulnerability 12 (2022), https://goodshep.org.au/wp-content/uploads/2022/11/Good-Shepherd-Report_The-Role-of-Buy-Now-Pay-Later-in-Exploiting-Financial-Vulnerability_November-2022-Full-Report.pdf [https://perma.cc/82EX-3RPD] (arguing that portraying BNPL to consumers as a financially responsible payment option leads to misconceptions about BNPL).

tend to misunderstand BNPL's key features.[134] BNPL lenders repeatedly emphasize this promise of interest-free credit, particularly toward low-income[135] and young[136] consumers, who tend to use BNPL at higher rates than the general population.[137]

The risk of consumer confusion is compounded by the divergence in structures for charging late fees employed by various BNPL lenders.[138] Consumers' tendency to view their finances both myopically and optimistically may worsen their ability to discern differences in fee structures, which can make it difficult to understand BNPL's true costs even if late fees are clearly disclosed.[139] This is particularly troublesome given that consumers who are already experiencing financial distress tend to use BNPL at higher rates.[140]

B. *The Consumer Financial Protection Bureau's Plan*

The CFPB outlined its concerns about BNPL in late 2022 with the release of the September Report, which offered a surprisingly mild[141] depiction of the industry: The Bureau's discussion of risks posed by BNPL

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134. See, e.g., Press Release, Zilch, Survey: BNPL Has Consumers Confused, 43% Believe BNPL Companies Make Money on the Interest They Collect (Mar. 29, 2022), https://www.businesswire.com/news/home/20220329005316/en/Survey-BNPL-Has-Consumers-Confused-43-Believe-BNPL-Companies-Make-Money-On-the-Interest-They-Collect [https://perma.cc/4D5F-QMLB] (noting a "widespread lack of understanding around how BNPL companies make money").

135. See Aggarwal et al., supra note 130, at 1044 ("BNPL has been touted as a cheaper, safer, and more convenient alternative to other forms of high-cost credit, particularly for low-income, low-FICO score consumers.").

136. See Martin & Lynn, supra note 50, at 550 (noting that "BNPL is marketed to and used primarily by millennials and Gen Zs").

137. See Good Shepherd Austl. N.Z., supra note 133, at 2 (noting highest rates of BNPL use among low-income and young consumers).

138. See Ctr. for Regul. Strategy Ams., Deloitte, The Now and Later: How Consumers' Use of Buy Now, Pay Later Fits Into the Evolving Regulatory Landscape 2 (2022), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/regulatory/us-regulatory-the-now-and-later-bnpl.pdf [https://perma.cc/HSG4-6BSE] (noting risks of customer confusion stemming from differing repayment structures across BNPL providers).

139. See Peng & Muki, supra note 18, at 17 (noting that "consumers often exclude certain pricing information, such as late payment fees, from their consideration entirely if they misperceive that such events would not materialise" and that "[s]uch complexities make it difficult for consumers to properly ascertain the cost of using consumer credit products and compare across products").

140. See Good Shepherd Austl. N.Z., supra note 133, at 3 (noting that "financial stress and hardship among clients using BNPL" is frequent and that "73% of [Financial Counselling and Capability] practitioners say that clients have missed essential payments, or cut back on or gone without essentials, in order to service BNPL debt").

141. See Yizhu Wang, CFPB Unlikely to Take Immediate Action on Buy-Now, Pay-Later Sector, S&P Glob.: Mkt. Intel. (Sept. 29, 2022), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/cfpb-unlikely-to-take-immediate-action-on-buy-now-pay-later-sector-72242601 [https://perma.cc/6M99-KLGS] (summarizing responses to the September Report).

largely mirrored risks associated with traditional credit products, namely the potential for debt overextension and certain "discrete harms" to consumer rights, such as the lack of standardized disclosures, uncertain dispute resolution rights, attempted reauthorization of failed payments, and the use of late fees.[142] Indeed, the CFPB's discussion of novel risks posed by BNPL and other fintech offerings was largely confined to the realm of data privacy.[143]

The September Report's discussion of both overextension and discrete harms to consumer rights appears to be primarily concerned with bringing BNPL lenders in line with existing regulations, without much discussion of modernizing the regulations or adapting them to developments in the fintech industry. The September Report articulates the risk of overextension primarily in terms of the industry's lack of reporting requirements or uniform underwriting procedures.[144] Similarly, it frames discrete harms to consumer rights in terms of lenders not being subject to Regulation Z rules requiring standardized disclosures[145] and dispute resolution rights.[146]

While the CFPB's general plans are mainly found in the September Remarks, the September Report's language also makes clear the Bureau's position that the primary issue facing consumers is the underapplication of current credit card regulations to BNPL lenders. This is reflected in its characterization of BNPL itself, which the September Report repeatedly describes as an "alternative" to credit cards,[147] rather than as a separate class of consumer credit products entirely. This framing naturally gives rise to the inference that these two products should be subject to analogous regulations, without consideration of the different functions they play in the consumer finance market. The September Report also details various similarities between BNPL and credit cards, including the use of merchant fees.[148] But this is an oversimplification; merchant fees associated with credit cards and BNPL are fundamentally different. Transaction fees

142. See September Report, supra note 22, at 64–66 (describing the risk that consumers take out multiple BNPL loans and subsequently are unable to meet their non-BNPL financial obligations); see also id. at 72–74 (describing discrete harms).

143. See id. at 75 ("The BNPL industry provides an example of the data harvesting that is occurring at the intersections of digital commerce, content, and lending.").

144. See id. at 77 (explaining that "BNPL lenders do not currently furnish repayment histories to the consumer reporting companies, which may compound overextension risks by masking borrowers' BNPL usage and loan performance from other lenders").

145. See id. at 72 ("For both open-end and closed-end credit, disclosures provide a standardized, meaningful visual aid about the terms of credit and allow consumers to make informed decisions across a variety of credit products. However, most BNPL lenders do not currently provide the standard cost-of-credit disclosures required by Regulation Z . . . .").

146. See id. at 73 ("Most BNPL lenders surveyed are currently not following Regulation Z's credit dispute resolution provisions and consumers sometimes are required to pay loan installment amounts in dispute pending dispute resolution.").

147. Id. at 2–3, 46.

148. Id. at 6.

associated with BNPL products are typically more than double those of credit cards and account for a significantly larger share of BNPL lenders' revenue.[149] More importantly, the role of the transaction fee in each business model is different.[150] Transaction fees are shared across various actors in the credit model,[151] whereas in the BNPL model, they are charged to a single actor: the merchant. The discussion of merchant fees reflects a broader tendency of the September Report to gloss over fundamental differences between the two industries—indeed, the Report largely confines discussion of any differences between industries to divergent regulatory treatment, rather than intrinsic differences between BNPL lenders and credit card providers.[152]

The proposed steps outlined in the September Remarks reflect this understanding of BNPL's risks being largely solvable by extending existing credit card regulations to lenders. The Remarks indicate that the Bureau will tailor its regulatory response to BNPL by issuing interpretive guidance to "ensur[e] that [BNPL lenders] adhere to many of the baseline protections Congress established for credit cards."[153] While noting that the overextension risk is compounded by issues particular to BNPL, the CFPB nevertheless announced plans to bring reporting in line only with requirements already imposed on credit card providers.[154] While stopping short of articulating concrete rules, the CFPB echoed this language in its semiannual report to Congress on December 14, 2022, stating that it is "working to ensure that Buy Now, Pay Later lenders adhere to the same protocols and protections as other similar financial products to avoid regulatory arbitrage and to ensure a consistent level of consumer protection."[155] Outside of the sphere of data protection,[156] the overall

149. See Di Maggio et al., supra note 53, at 1; see also Tan, supra note 12, at 917.

150. Compare Adams et al., supra note 49, with Austl. Sec. Invs. Comm'n, Rep. No. 672, Buy Now Pay Later: An Industry Update 9 (2020), https://download.asic.gov.au/media/5852803/rep672-published-16-november-2020-2.pdf [https://perma.cc/2G4F-VF79] (finding that merchant fees can account for up to 96% of BNPL lenders' revenue); see also infra section II.C.2.

151. See Scott Schuh, Oz Shy & Joanna Stavins, Who Gains and Who Loses From Credit Card Payments? Theory and Calibrations 1 (Fed. Rsrv. Bank of Bos., Pub. Pol'y Discussion Paper No. 10-03, 2010) https://www.bostonfed.org/-/media/Documents/Workingpapers/PDF/ppdp1003.pdf [https://perma.cc/CCR7-GTVC] ("[M]erchants pay banks a fee . . . proportional to the dollar value of the sale. The merchant's bank then pays a proportional interchange fee to the consumer's credit card bank. . . . [M]erchants mark up their retail prices for all consumers by enough to recoup the merchant fees from credit card sales.").

152. See, e.g., September Report, supra note 22, at 72–74.

153. Chopra, September Remarks, supra note 23.

154. Id.

155. Consumers First: Semi-Annual Report of the Consumer Financial Protection Bureau: Hybrid Hearing Before the H. Comm. on Fin. Servs., 117th Cong. 65 (2022) (prepared statement of Rohit Chopra, Dir., CFPB).

156. See September Report, supra note 22, at 75.

tenor of the CFPB has largely reflected a strategy of extending existing regulations to BNPL lenders.

C. *Extending Credit Card Regulations to Buy Now, Pay Later Is Inadequate*

1. *Divergent Consumer Perceptions.* — By portraying BNPL as a responsible budgeting tool,[157] BNPL lenders have asserted a role for BNPL that is entirely different from that of traditional credit offerings.[158] Alarmingly, this depiction—which deemphasizes the fact that BNPL is a loan that entails substantive financial obligations[159]—has led to many consumers not identifying BNPL as credit at all.[160] Many consumers' understanding of BNPL has been further obfuscated by the lenders' and merchants' exploitation of informational asymmetries at the point of sale.[161] At checkout, consumers are provided only the information that is voluntarily disclosed to them by lenders and merchants,[162] while lenders and merchants are both already aware of the precise terms and conditions antecedent to the extension of credit. As a result, supplementing this three-sided transaction only with a prolix array of legalistic disclosures imported from the credit card context will be insufficient to meaningfully

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157. See supra notes 132–137 and accompanying text.

158. See, e.g., Cook et al., supra note 18, at 254 (arguing that lenders "distinguish[] BNPL services from other, more 'serious' sources of credit"); Deniz Okat, Mikael Paaso & Vesa Pursiainen, Trust in Finance and Consumer Fintech Adoption 7 (Apr. 2023), https://ssrn.com/abstract=3947888 [https://perma.cc/HWP5-SWKQ] (unpublished manuscript) (finding that "consumers [do] not view[] common fintech products as being financial products").

159. See Ida Helene Grøtan & Mari Anette Hjorthol, Consumers' Willingness to Incur Debt With "Buy Now Pay Later" Payment Options 59–60 (July 1, 2021) (M.S. thesis, BI Norwegian Business School), https://biopen.bi.no/bi-xmlui/bitstream/handle/11250/2824333/2942473.pdf?sequence=1 [https://perma.cc/T9DZ-U5R8] ("Many BNPL providers invest heavily in marketing . . . their payment solutions . . . as 'smart' and 'smooth', when in reality [they are] an encouragement to take up unsecured debt. This image is upheld . . . [because] BNPL providers are not required to provide information about what their services actually entail[] in terms of financial obligations.").

160. See Fin. Counselling Austl., It's Credit, It's Causing Harm and It Needs Better Safeguards 5 (2021), https://apo.org.au/sites/default/files/resource-files/2021-12/apo-nid315440.pdf [https://perma.cc/J8HR-2W89] (finding that many consumers "do not view BNPL as debt and may not report [BNPL] to financial counsellors"); Good Shepherd Austl. N.Z., supra note 133, at 3 (noting that many BNPL users "have been led to believe it is something other than credit/debt . . . [and] do not realise BNPL debts may affect their ability to get an affordable loan").

161. See UK Fin. & Oliver Wyman, Same Activity, Same Risk, Same Regulation 12–13 (2021), https://www.ukfinance.org.uk/system/files/Same%20activity%2C%20same%20risk%2C%20same%20regulation%20-%20FINAL.pdf [https://perma.cc/8YDX-TERT] (arguing that regulators must take note of information asymmetries, "where the same activity is occurring but the customer has a different understanding or information about it[] [and thus] . . . may not realise the extent to which they are exposed or vulnerable").

162. See id. at 13.

inform consumers of the consequences of using BNPL financing.[163] Disclosure may be especially ill suited for BNPL products, as disclosure requirements are generally premised on the idea that apprising consumers of interest terms will cause them to pay off larger percentages of their balances and decrease the size of their overall interest payments.[164] Because BNPL products typically do not charge interest at all, this goal is of limited utility in the BNPL context.

The divergent way that consumers perceive BNPL, coupled with widespread misunderstanding as to some of its key features, strongly suggests that conventional disclosure guidelines modeled after the regulations enforcing TILA and the CARD Act are not enough. Although TILA's disclosure requirements are intended to reduce consumer confusion by standardizing credit terms,[165] it is unclear whether they would be effective when applied to a product that many consumers do not even view as credit in the first place. Moreover, the neutral, informational thrust of the CARD Act's disclosure requirements[166] is likely insufficient to lead to any actual behavioral changes among consumers with a limited understanding of how BNPL works. Perhaps most significantly, consumers' interface with the BNPL application process is drastically different from that with credit cards. Applying for BNPL financing for small purchases is less formal than applying for a credit card, and consumers apply for BNPL in the context of already having a basket of goods ready for purchase. Disclosures are particularly ill equipped to modify behavioral biases at the point of checkout, when consumers have the least incentive and time to thoroughly parse lengthy financing terms.[167]

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163. See, e.g., Karin Braunsberger, Laurie A. Lucas & Dave Roach, The Effectiveness of Credit-Card Regulations for Vulnerable Consumers, 18 J. Servs. Mktg. 358, 367 (2004) (concluding that even in the credit card context, disclosure of "variable APR information, whether it is highlighted or not, actually distracts the consumer from considering other important cost information").

164. See Sumit Agarwal, Souphala Chomsisengphet, Neale Mahoney & Johannes Stroebel, Regulating Consumer Financial Products, 130 Q.J. Econ. 111, 112 (2015) (noting concerns that this reduced revenue stream would lead to credit card providers offsetting costs in other contexts).

165. See Mary Curtin, Cleaning House: Achieving Effective Consumer Protection Through TILA Reform, 45 Ariz. St. L.J. 1685, 1690–91 (2013) (explaining that Congress intended for the standardization of credit terms to "'teach' the consumer how to shop for credit"); Landers & Rohner, supra note 97, at 713 n.7 ("The need for standardization was caused by widespread consumer confusion and misinformation and the disparities in methods of stating interest rates in consumer credit transactions, e.g., add on, discount, monthly, and fees.").

166. See Paul Adams, Benedict Guttman-Kenney, Lucy Hayes, Stefan Hunt, David Laibson & Neil Stewart, Do Nudges Reduce Borrowing and Consumer Confusion in the Credit Market?, 89 Economica S178, S181 (2022) (contrasting proposed "valenced language recommending that cardholders 'clear [their] balance faster' or identify 'a quicker way to repay [their] balance'" with "the CARD Act's neutral 'informational' language").

167. See Ronald J. Mann, "Contracting" for Credit, 104 Mich. L. Rev. 899, 903 (2006) ("[Standardized disclosures are] likely to be functionally unreadable, especially when [they

With many consumers already unaware of the details of BNPL financing, complicated credit card disclosure regulations may themselves risk increasing consumer confusion[168] by failing to provide information that is meaningful to the decisionmaking process.[169] This is because the responsible use of BNPL becomes less likely when disclosure is insufficient and the cost of acquiring pertinent information is too high.[170] The extension of credit card regulations to BNPL also does little to address commonly employed industry practices that are unique to the BNPL context. For example, an analysis of the strategies employed by some BNPL lenders in formatting their interfaces has suggested that they may be deliberately exploiting lack of consumer understanding to maximize consumption,[171] meaning that investments in increasing consumers' financial literacy through disclosure alone may not be enough to rein in the excessive spending encouraged by lenders and merchants at the point of sale.[172]

are] presented for the first time at the counter . . . ."); Jonathan Slowik, Credit Card Act II: Expanding Credit Card Reform by Targeting Behavioral Biases, 59 UCLA L. Rev. 1292, 1306 (2012) ("For a disclosure to help a consumer make a better decision, the consumer must take the time to read and understand the information and then use that information to estimate accurately the expected utility of available alternatives.").

168. See, e.g., Elizabeth Renuart & Diane E. Thompson, The Truth, the Whole Truth, and Nothing but the Truth: Fulfilling the Promise of Truth in Lending, 25 Yale J. on Reg. 181, 196 (2008) (explaining that in the context of mortgage loans, "lender-created complexity" renders most disclosures practically incomprehensible to most consumers).

169. See Rubin, supra note 92, at 236 (suggesting that "[TILA] succeeded in making consumers increasingly aware, but it has not managed to explain to them what it is they have been made aware of").

170. See Gerrans et al., supra note 18, at 479 (noting that the utility of a "policy approach based on disclosure will be reduced if there is 'consumer disengagement, complexity of documents and products, behavioural biases, misaligned interests and low financial literacy'" (quoting Explanatory Memorandum, Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018 (Cth) 5 (Austl.), https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6184_ems_45d91dd5-0e85-4166-8753-006baf09524c/upload_pdf/685004.pdf [https://perma.cc/V67Z-VU4F])).

171. See Isabella Johannesson, Dark Patterns in Digital Buy Now Pay Later Services 8 (Aug. 30, 2021) (M.S. thesis, KTH Royal Institute of Technology), https://kth.diva-portal.org/smash/get/diva2:1588606/FULLTEXT01.pdf%20 [https://perma.cc/N7D6-REQK] (finding that the interface of several BNPL lenders deployed four false hierarchies, including a pop-up notification prompting the user to save the installment plan as their "favorite" for future purchases, bypassing Swedish law prohibiting designers from preselecting installment plans and marking the installment plan as "recommended" upon checkout).

172. See, e.g., Morris Altman, Implications of Behavioural Economics for Financial Literacy and Public Policy, 41 J. Socio-Econ. 677, 687 (2012) (concluding that while improvements in financial literacy may promote better informed decisionmaking, this promotion "requires much more than just improvements to financial education," so "organizations marketing financial products[] . . . should be obliged to clearly specify the risks and prospective returns involved in purchasing particular financial products").

2. *Unique Lender–Merchant Dynamic.* — The comparatively high merchant fees associated with BNPL create unique market incentives for lenders and merchants that result in greater attention on users' spending than in the credit card industry.[173] By focusing on extending credit regulations to BNPL lenders alone, the CFPB would effectively confine regulation to only one of the two parties promoting BNPL financing—and not even the primary party responsible for driving customer acquisition at that. Merchants should be a key target for regulation because for many lenders, the primary means of attracting users is through representations by *merchants* to introduce customers to BNPL financing.[174] In fact, at least one prominent lender directs its advertisements almost exclusively to merchants, relying on the payment flow to acquire consumers.[175]

The coordinated relationship between lenders and merchants transforms BNPL from a pure financial product to a subsidiary market channeling device that is designed to increase consumer spending relative to traditional credit.[176] Because the success of this relationship depends on the merchant being able to recoup the cost of merchant fees, it is mutually beneficial for both the lender and the merchant to structure the transaction to maximize consumer spending.[177] Crucially, a merchant's decision to offer BNPL financing is fundamentally different from the decision to accept legacy credit card networks, which are accepted nearly ubiquitously throughout the United States.[178] Instead, the decision to partner with a BNPL lender involves a specific calculation of BNPL's probable effect on the spending behavior of a given consumer demographic—usually young

173. See Garg et al., supra note 48 (explaining that BNPL lenders are "acting as an entry product for younger consumers who are new to credit . . . [and] also starting to shape the wider retail ecosystem by developing shopping apps that drive consumer traffic and stickiness").

174. Rohit Sharma, To Market to Market: How Do BNPL Players Go-to-Market?, Monetary Musings (Oct. 31, 2020), https://blog.thesharmas.org/2020/10/31/bnpl-affirm-klarna-afterpay-gtm/ [https://perma.cc/9TUZ-GW6P] (explaining that "[t]he core revenue source for [BNPL] is merchant revenue and hence merchants are the core customer" and that "merchants are also the core acquisition engine to get consumers").

175. Id. (observing that Affirm almost exclusively directs its marketing efforts toward merchants).

176. See Ainsley Harris, Buy Now, Pay Later Services Are Retailers' Next Great Hope, Fast Co. (May 5, 2022), https://www.fastcompany.com/90739769/buy-now-pay-later-services-are-retailers-next-great-hope (on file with the *Columbia Law Review*) ("BNPL is not only an additional payment option for consumers but also an increasingly essential marketing tool for retailers.").

177. See, e.g., Tan, supra note 12, at 918 ("BNPL is also tightly coupled with mainstream finance institutions for its debt collection system, where a bank-issued credit or debit card is needed to settle the BNPL debt.").

178. See Madison Blancafor, Amex and Discover Accepted in as Many Places as Visa, Mastercard in the US, Points Guy (Sept. 19, 2021), https://thepointsguy.com/credit-cards/american-express/amex-now-accepted-in-as-many-places-as-visa-mastercard [https://perma.cc/XJ3P-ASKP] (reporting "virtual parity" among acceptance rates of major credit card issuers).

customers lacking other credit options[179]—compared to the predicted effects of traditional advertising or marketing.[180] Once a merchant decides to partner with a BNPL lender, they have an incentive to market the spending plan *itself* to the customer,[181] with the explicit purpose of encouraging consumers to spend more than they otherwise would.[182]

Each party to the transaction has a vested interest in increasing consumer spending in a manner that diverges from incentives in the credit card market. On the one hand, lenders must contend with the fact that their per-transaction fees are much higher than merchant fees charged by credit card providers,[183] which forces many of them to offer secondary nonpayment services just to compete in the consumer finance market.[184] On the other hand, merchants are incentivized to increase consumer spending to recoup the cost, and they do so by promoting BNPL directly to customers. And—unlike previous options such as layaway plans—merchants do not themselves bear the risk of offering loans when encouraging consumers to use BNPL because this risk is assumed by lenders.[185]

3. *Developments in Fintech.* — Another challenge posed by BNPL is the industry's rapidly changing ecosystem,[186] which defies regulatory oversight by constantly contorting and eluding precise legal categorization.[187] This

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179. See supra notes 135–137 and accompanying text.

180. See Harris, supra note 176 (describing incentives for merchants to provide BNPL despite high fees).

181. See, e.g., Add Extra Convenience to Holiday Shopping With These 'Buy Now, Pay Later' Options at Target, Target (Oct. 6, 2021), https://corporate.target.com/article/2021/10/buy-now-pay-later [https://perma.cc/GGX4-D9BW] ("With the help of two new partners—Sezzle and Affirm—we've added new payment solutions that let you buy what you need now, take advantage of our best deals, and pay at a pace that works well for you.").

182. See Harris, supra note 176 ("That core promise—that consumers will spend more—is still at the heart of the product's appeal to retailers.").

183. See Di Maggio et al., supra note 53, at 1.

184. See Fisher et al., supra note 50, at 63 (noting that some BNPL lenders have begun offering additional nonfinancial features such as "marketing, customer referrals and data analytics"); Tomio Geron, Invest Now, Win Later: Inside the 'Buy Now, Pay Later' Gold Rush, Protocol (Oct. 4, 2021), https://www.protocol.com/manuals/buy-now-pay-later/bnpl-affirm-klarna-afterpay [https://perma.cc/XE8S-3CB4] (noting that "[a]s competition for merchant placement tightens, the 'buy now, pay later' companies . . . [are] catering to merchants with more and more features").

185. See supra notes 57–61 and accompanying text.

186. See Valerio Lemma, FinTech Regulation: Exploring New Challenges of the Capital Markets Union 20 (2020) (arguing that the highly variegated market for fintech offerings calls for a "juridical order of this new market," while "keeping in mind that demand and supply will look for the elements required to develop an integrated process able to perform activities related to investments, credits/debits and risks").

187. For an argument that the proliferation of fintech companies demands the concomitant development of a similarly technologically sophisticated regime of "RegTech," see Douglas W. Arner, Jànos Barberis & Ross P. Buckley, FinTech, RegTech, and the Reconceptualization of Financial Regulation, 37 Nw. J. Int'l L. & Bus. 371, 373 (2017) (explaining that RegTech, "a contraction of the terms *regulatory* and *technology*[,] . . . comprises the use of technology . . . in the context of regulatory monitoring, reporting, and

changing landscape naturally results in a delayed regulatory response as the law struggles to maintain pace with technological progress.[188] Fintech firms are able to evade regulation by taking advantage of regulatory gaps to engage in regulated activities while formally structuring themselves as nonregulated technology entities. Consequently, BNPL lenders often characterize themselves as technology service providers rather than lending facilities.[189]

A regulatory approach that primarily focuses on the similarities between BNPL products and credit cards may incentivize lenders and prospective fintech companies to simply modify their financing structures to further distinguish themselves from traditional credit options, which could have the unintended effect of further confusing consumers. In contrast to traditional credit offerings, the business model of many fintech products (including BNPL) does not even necessarily rely primarily on the extension of credit, but rather on aiming to attract consumers by cutting costs and streamlining access to financing.[190] Indeed, fintech products are often designed to pull consumers *away* from traditional financial institutions, underscoring the issue with treating the two as equivalent.

III. THE CASE FOR REGULATING PARTNERING MERCHANTS

This Part argues for the tailoring of regulations to the unique lender–merchant relationship at the heart of the BNPL industry. Section III.A explains how regulating merchants would provide the CFPB with a flexible framework for addressing emerging challenges in the BNPL industry and argues that this is preferable to relying solely on extending credit card regulations to BNPL lenders. Section III.B analyzes some of the political and institutional challenges facing such a framework and how said concerns affect regulatory considerations. Section III.C proposes a

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compliance[,] . . . allow[ing] for better and more efficient risk identification and regulatory compliance than that which currently exists"); Gillis, supra note 46, at 1255–56 ("In the machine learning pricing context, regulators themselves can analyze pricing rules before they are applied to real borrowers, . . . creating the potential for ex ante testing.").

188. See Jillian Grennan, FinTech Regulation in the United States: Past, Present, and Future 1–2 (Aug. 31, 2022), https://ssrn.com/abstract=4045057 [https://perma.cc/CL7G-BXJQ] (unpublished manuscript) (arguing that the failure of existing statutes and financial regulations to keep pace with innovation in the fintech sector contributes to regulatory uncertainty and that regulations should be modernized to address evolving characteristics of the financial industry).

189. Tan, supra note 12, at 917 (arguing that in doing so, BNPL lenders fall "outside of consumer credit regulations" and then "insert themselves as intermediaries within the existing space that is dominated by financial incumbents such as banks and established payments providers").

190. See Roberto Moro-Visconti, Salvador Cruz Rambaud & Joaquín López Pascual, Sustainability in FinTechs: An Explanation Through Business Model Scalability and Market Valuation, Sustainability, Dec. 10, 2020, at 1, 2–4 (describing the fintech business model in terms of the strategic deployment of technology-driven enhancements to existing financial business models).

regulatory framework that balances the need to regulate the financial activities of nonfinancial merchants with the political and legal constraints within which the CFPB operates, describing how it can exercise its statutory rulemaking authority to proscribe UDAAPs to regulate both the direct and indirect encouragement of BNPL by merchants to consumers.

A. *The Rationale for Regulating Merchants Offering Buy Now, Pay Later*

1. *Targeting Consumers' Primary Point of Contact With Buy Now, Pay Later*. — Promulgating regulations on merchants' activities and representations in offering BNPL financing to consumers would address many of the challenges accompanying the extension of credit card regulations to BNPL lenders.[191] This is because such an approach would directly target most consumers' first introduction to BNPL: the point of sale.[192] By focusing on consumers' first point of contact with BNPL financing, regulations would effectively address consumers' interface with BNPL at two crucial stages—first, when consumers are introduced to BNPL by merchants and second, when consumers apply for financing from lenders. This two-pronged framework would provide the needed flexibility to ensure that regulations continue to keep up with developments in the fintech space, while simultaneously ensuring that regulations do not overly burden emerging actors[193] or stifle any benefits that innovations in consumer finance may confer to consumers.[194]

Regulating both lenders and merchants would also ensure that each party with a vested interest in encouraging consumer spending[195] is accountable to consumers for its activities and representations. Moreover, focusing on representations by merchants would effectively address their

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191. See supra section II.C.

192. See, e.g., Diana Milanesi, Buy Now, Pay Later ("BNPL") Under Regulatory Scrutiny—The Evolving Regulatory Landscape for BNPL in the United States, the United Kingdom, and Europe 1, 48 (Stan.–Vienna Transatlantic Tech. L.F., Working Paper No. 89, 2022), https://law.stanford.edu/wp-content/uploads/2022/06/TTLF-WP-89-Milanesi.pdf [https://perma.cc/98MC-G4SA] (explaining that BNPL is typically introduced to consumers at the point of sale, whether that be in-store or online).

193. See, e.g., Lisa Quest, Four Ways Regulators Must Keep Up With the Global Digital Economy, Oliver Wyman F. (Aug. 2, 2021), https://www.oliverwymanforum.com/future-of-data/2021/aug/four-ways-regulators-must-keep-up-with-the-global-digital-economy.html [https://perma.cc/ZK48-XG62] (arguing that "[t]ruly protecting consumers, while encouraging more technological advances, will require a more modern, holistic, regulatory architecture from governments").

194. It is particularly important that regulators keep in mind that, in the American context, the status quo itself is shaped by systemic inequities that create profound racial, ethnic, and class disparities in the percentage of income spent on interest and finance-related fees. See, e.g., Meghan Greene, Elaine Golden, Hannah Gdalman & Necati Celik, Fin. Health Network, FinHealth Spend Report 2022, at 11–13 (2022), https://finhealthnetwork.org/wp-content/uploads/2022/05/FinHealth_Spend_Report_2022_Final.pdf [https://perma.cc/TMS9-8YZJ] (describing the ways in which several populations have been traditionally underserved by the financial sector).

195. See supra notes 174–182 and accompanying text.

increasing tendency to push BNPL financing on reluctant customers.[196] This is especially important in light of the significant regulatory gap left by relying on disclosures made by lenders, which ignores merchants' increasingly active role in furnishing BNPL financing to consumers. Merchants have begun using AI-driven recommendations to target their communications to consumers with abandoned carts or who have previously used BNPL; they have also started pairing BNPL financing with price discounts to further lower consumers' psychological spending thresholds.[197] Additionally, focusing on market activities of both lenders and merchants would provide the CFPB with flexibility in targeting merchant industries that may be particularly prone to encouraging over-extension by young consumers or those with poor credit.[198]

2. *Clarifying the Nature of Buy Now, Pay Later.* — Regulating both lenders and merchants can provide an important check on lenders' ability to circumvent regulations by relying on representations made by merchants, which are often integrated into lenders' theory of customer acquisition.[199] Lenders often instruct partnering merchants to aggressively promote BNPL directly to their customers, with suggestions ranging from prominently displaying the lender's name on the merchant's website and social media accounts to sending targeted emails to customers encouraging them to use BNPL.[200] In fact, some lenders now advise partnering merchants to encourage consumers to consider BNPL financing *before*

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196. For example, BNPL lenders encourage partnering merchants to target prospective users who have already elected not to make a purchase. See, e.g., Monica Deretich, 3 Smart Ways to Increase Buy Now, Pay Later Revenue, Retail Touch Points (June 14, 2021), https://www.retailtouchpoints.com/blog/3-smart-ways-to-increase-buy-now-pay-later-revenue [https://perma.cc/C5FG-WE8K] (advising merchants to "add cross-sell or upsell personalized product recommendations with BNPL marketing to abandoned cart emails").

197. Id.

198. See, e.g., Taanya Garg, The (Debt)rimental Surge in Buy Now, Pay Later, Shift London (Jan. 20, 2022), https://www.shiftlondon.org/features/the-surge-in-buy-now-pay-later-and-how-its-debtrimental-to-your-credit-score/ [https://perma.cc/84D8-K94X] (detailing young consumers' experience with BNPL in retail and explaining how they may be particularly prone to incurring debt through BNPL services).

199. Many BNPL lenders already encourage partnering merchants to incorporate their messaging in their representations to customers. See, e.g., Boost Your DTC Strategy to Get More Customers NOW, Afterpay, https://www.afterpay.com/en-US/for-retailers/access/marketing/boost-your-dtc-strategy-to-get-more-customers-now [https://perma.cc/VF55-6MTA] (last visited Aug. 18, 2023).

200. See, e.g., 5 Ways to Promote Your Afterpay Partnership, Afterpay, https://www.afterpay.com/en-US/for-retailers/access/marketing/5-ways-to-promote-your-afterpay-partnership [https://perma.cc/AG74-YDWV] (last visited Aug. 18, 2023) (suggesting that merchants advertise BNPL in "every place [their] customer could be shopping or discovering products"); see also Buy Now, Pay Later for Merchants: The 2023 Guide, PayPal (Jan. 30, 2023), https://www.paypal.com/us/brc/article/buy-now-pay-later-merchant-guide-2023 [https://perma.cc/NH9Q-5GBB] ("In 2023, buy now, pay later for merchants doesn't end with simply offering BNPL at checkout. You can use promotional messaging to let customers know earlier in the buying journey that you offer a certain BNPL option.").

checkout.[201] Clarifying that these consumer-facing representations are also subject to regulatory oversight would be instrumental in ensuring the efficacy of guidelines for lenders. Consequently, guidelines for merchants would provide an additional regulatory mechanism for preventing consumer confusion as to the nature of BNPL financing and help to ensure customers understand that—despite its differences from traditional modes of credit—BNPL represents a financial obligation that requires careful decisionmaking.[202]

Requiring merchants' representations to effectively communicate to consumers that BNPL financing entails taking on an installment loan would also strengthen the CFPB's proposed application of credit card regulations to lenders by contextualizing the information provided in these disclosures as it relates to BNPL.[203] Merchant regulation would also be responsive to the increasingly creative ways in which BNPL lenders may obfuscate the underlying nature of their products[204] because such a regulation would require merchants to initially identify these products accurately. Risks of consumer confusion engendered by BNPL lenders portraying their products as budgeting tools rather than installment loans would be substantially mitigated if, at checkout, merchants' representations to consumers provided an objective overview of what BNPL financing entails.

B. *Challenges to Regulating Merchants*

The primarily challenge in regulating the activities of partnering merchants offering BNPL to consumers is that this is a more complex undertaking than the CFPB's current proposal to extend existing credit card regulations to BNPL lenders. Such a regulatory approach raises issues as to the scope of the CFPB's authority to regulate nonfinancial actors[205]

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201. See, e.g., Tom Musbach, 5 Ways to Reduce Shopping Cart Abandonment, Affirm (Feb. 17, 2022), https://www.affirm.com/business/blog/affirm-reduce-shopping-cart-abandonment [https://perma.cc/96PU-CFBJ] ("[M]ak[e] sure shoppers are aware of the BNPL option well before checkout. One easy way to do this is to display the option as part of the product display page (PDP), showing what the fractional amount would be if buyers choose to make biweekly or monthly payments.").

202. See supra notes 173–185 and accompanying text.

203. For a comparison of the efficacy of TILA and non–TILA disclosures, see Enrique Seira, Alan Elizondo & Eduardo Laguna-Müggenburg, Are Information Disclosures Effective? Evidence From the Credit Card Market, 9 Am. Econ. J. 277, 305 (2017) (concluding that "currently mandated disclosures are likely to have zero effect" and that "alternative messages . . . are probably more effective").

204. See Aalders, supra note 17, at 951 (noting that lenders "present[] BNPL loans not as credit, but as the user's own (future) money"); see also supra section II.A.2.

205. The CFPB has nonetheless regularly exercised regulatory authority over certain activities of nonfinancial actors since its inception. See, e.g., Erin F. Fonté, Mobile Payments in the United States: How Disintermediation May Affect Delivery of Payment Functions, Financial Inclusion and Anti-Money Laundering Issues, 8 Wash. J.L. Tech. & Arts 419, 432 (2013) (explaining that nonfinancial institutions "are also subject to CFPB rulemaking and

and would likely be met with political backlash.[206] Formulating a regulatory response to BNPL must be contextualized within the broader trajectory of regulation in the United States, which has focused primarily on regulating representations made to consumers by credit providers.[207] And given that the CFPB was created primarily to ensure that consumers are protected in their interactions with financial actors,[208] any regulations that the CFPB promulgates over nonfinancial merchants offering BNPL to consumers should reflect a narrow interpretation of the Bureau's statutory authority and should be clearly limited to market activities undertaken pursuant to lender–merchant agreements.

Such a balanced approach is also important in light of current trends in the legal landscape, which have exemplified the federal courts' increasing willingness to scrutinize the power of federal agencies.[209] The

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interpretive authority . . . depend[ing] on [the nonfinancial institution's] role," and that with more independent nonfinancial institutions, "financial services laws, rules, and regulations may be more likely to apply"). For an argument that this trend may lead to a jurisdictional clash with the FTC, see Rory Van Loo, Technology Regulation by Default: Platforms, Privacy, and the CFPB, 2 Geo. L. Tech. Rev. 531, 544 (2018) ("Given the FTC's role in privacy, the CFPB would be faced with a potential jurisdiction clash along the lines of what some scholars predict will become increasingly common in a world in which software infuses most everything.").

206. In fact, House Republicans have indicated their opposition to regulating BNPL in any form. See Letter from U.S. Reps. Patrick McHenry, Ann Wagner, Frank D. Lucas, Pete Sessions, Bill Posey, Blaine Luetkemeyer, Bill Huizenga, Andy Barr, Roger Williams, French Hill, Tom Emmer, Lee M. Zeldin, Barry Loudermilk, Alexander X. Mooney, Warren Davidson, Ted Budd, Trey Hollingsworth, Anthony Gonzalez, John Rose, Bryan Steil, Lance Gooden, William Timmons, Van Taylor & Ralph Norman to Rohit Chopra, Dir., CFPB 2 (Dec. 14, 2022) ("Neither the CFPB nor any government entity should be dictating how consumers spend their money."), https://financialservices.house.gov/uploadedfiles/2022-12-14_hfsc_cfpb_hearing_december_letter_final__final.pdf [https://perma.cc/2L2H-AE9Z].

207. See supra notes 91–101 and accompanying text.

208. See Julie R. Caggiano, Jennifer L. Dozier, Richard P. Hackett & Arthur B. Axelson, Mortgage Lending Developments: A New Federal Regulator and Mortgage Reform Under the Dodd–Frank Act, 66 Bus. Law. 457, 461–62 (2011) (explaining that the primary purpose of the CFPB's creation was to ensure fair and equal access to consumer financial products through the "promulgation of rules and regulations, compliance supervision, and oversight of the entities under its jurisdiction . . . as well as . . . market analysis, assessment of market risks, and enforcement"); see also supra section I.B.2.

209. See, e.g., West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2608 (2022) (noting cases in which "'history and the breadth of the authority that [the agency] has asserted' . . . provide a 'reason to hesitate before concluding that Congress' meant to confer such authority" (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000))); see also Craig Green, Deconstructing the Administrative State: *Chevron* Debates and the Transformation of Constitutional Politics, 101 B.U. L. Rev. 619, 626 (2021) ("In recent years, *Chevron*'s status has dramatically changed, shifting from a bedrock judicial precedent to a contested doctrine that is sometimes toxic even to mention."). For a discussion of the substantial disparity as to the extent of deferring to determinations of federal agencies among the lower courts, see Michael Coenen & Seth Davis, Minor Courts, Major Questions, 70 Vand. L. Rev. 777, 841–42 (2017) (explaining that "not all lower courts may be alike for purposes of implementing a 'major dysfunctions' exception to the *Chevron* test").

scope of the CFPB's regulatory authority over even traditional financial institutions has been challenged by its detractors since its inception,[210] and in recent years, the number of companies that have elected to challenge the Bureau's authority rather than comply with enforcement actions has increased.[211] Accordingly, it is crucial that any regulation of merchants' activities be clearly limited to the offering of BNPL financing to consumers.[212]

Making it clear that regulations are limited to the BNPL interaction will also be critical in minimizing enforcement obstacles stemming from political polarization, which has increasingly threatened the efficacy of agency action.[213] Given the historical backdrop of consumer finance in the

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210. Challenges to the creation of the CFPB have been framed under a variety of theories, most often alleging that the agency's independence violates separation-of-powers principles and the Appointments Clause. See Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2191–92 (2020) (holding the CFPB Director's removal protections unconstitutional as violative of the separation of powers); C. Boyden Gray, Congressional Abdication: Delegation Without Detail and Without Waiver, 36 Harv. J.L. & Pub. Pol'y 41, 42–47 (2013) (arguing that the CFPB is subject to constitutional challenges under the Appointment Clause, the Appropriations Clause, and the nondelegation principle); Arielle Rabinovitch, Constitutional Challenges to Dodd–Frank, 58 Antitrust Bull. 635, 635–38 (2013) ("Arguments concerning the separation of powers contend that Dodd–Frank is problematic from the perspective of the nondelegation doctrine, the Appointments Clause, and Article III. Arguments concerning the Takings Clause are based on substantive challenges to constitutionality. [Another] argument . . . examines a First Amendment challenge to section 1502 . . . .").

211. For example, the Fifth Circuit recently sustained a challenge to the CFPB's 2017 Payday Lending Rule, not on the grounds that the agency acted arbitrarily and capriciously or without substantial evidence, but because "Congress's decision to abdicate its appropriations power under the Constitution, i.e., to cede its power of the purse to the Bureau, violates the Constitution's structural separation of powers." Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau, 51 F.4th 616, 623 (5th Cir. 2022), cert. granted, 143 S. Ct. 978 (2023). The Second Circuit expressly declined to follow this approach. See Consumer Fin. Prot. Bureau v. Law Offs. of Crystal Moroney, P.C., 63 F.4th 174, 182–83 (2d Cir. 2023) (finding no support for the Fifth Circuit's holding in Supreme Court precedent, constitutional text, or the history of the Appropriations Clause). The Supreme Court granted certiorari in *Community Financial Services* on February 27, 2023, and heard oral argument in its October 2023 sitting. See *Consumer Financial Protection Bureau v. Community Financial Services Association of America, Limited*, SCOTUSblog, https://www.scotusblog.com/case-files/cases/consumer-financial-protection-bureau-v-community-financial-services-association-of-america-limited/ [https://perma.cc/79KU-Y57V] (last visited Oct. 26, 2023).

212. See Kristin E. Hickman, Symbolism and Separation of Powers in Agency Design, 93 Notre Dame L. Rev. 1475, 1499 (2018) (arguing that "[g]iven the unrepresentativeness of the fourth branch, public perceptions of agency fairness and legitimacy are crucial if we want people to have faith in government agencies and the rule of law and, correspondingly, to comply with regulatory mandates").

213. See Gillian Metzger, The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege, 131 Harv. L. Rev. 1, 4 (2017) (arguing that "rhetorical anti-administrativism forms a notable link between the contemporary political and judicial attacks on national administrative government," connected by the "political flavor of many of the lawsuits underlying the current judicial attacks[] . . . [and] a shared network of conservative lawyers, organizations, academics, and funders involved in both").

United States,[214] it is perhaps unsurprising that actions taken by the CFPB[215]—along with the existence of the Bureau itself[216]—have been subject to particularly vigorous opposition in the political process,[217] and this represents a substantial hurdle in ensuring the stability of a regulatory scheme for nonfinancial actors. The call to regulate BNPL in any form has been fractured along ideological lines, with Democrats raising concerns of regulatory evasion by lenders[218] and Republicans vigorously denying the Bureau's statutory authority to regulate BNPL lenders at all.[219]

In light of these concerns, regulations on merchants should be directed toward the lender–merchant relationship and should be confined to activities flowing from the convergence of interests between lenders and merchants. While regulating the activities of nonfinancial actors is certainly a departure from the traditional model developed during the twentieth century,[220] such an approach is needed to address the emergence of fintech offerings such as BNPL, which operate in a fundamentally different manner from traditional credit providers and occupy a separate place in many consumers' perceptions.[221] The development of a framework that is responsive to current developments in

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214. See supra section I.B.

215. Backlash to the CFPB's activities has itself often been in the form of accusing the Bureau of partisanship. A letter by Republican Senate leadership expressing opposition to changes in CFPB's rules of adjudication accused the Bureau of "pursuing a radical and highly-politicized agenda unbounded by statutory limits." Letter from Pat Toomey, Richard Shelby, Mike Crapo, Tim Scott, M. Michael Rounds, Thom Tillis, John Kennedy, Bill Haggerty, Cynthia Lummis, Jerry Moran, Kevin Cramer & Steve Daines, U.S. S. Comm. on Banking, Hous. & Urb. Affs., to Rohit Chopra, Dir., CFPB (Sept. 12, 2022), https://www.banking.senate.gov/imo/media/doc/banking_republicans_letter_to_cfpb.pdf [https://perma.cc/ZDA6-A95H].

216. See Deepak Gupta, Reactions to *Noel Canning v. NLRB*: The Consumer Protection Bureau and the Constitution, 65 Admin. L. Rev. 945, 953–55 (2013) (noting that the institutional structure of the CFPB was hotly debated throughout the legislative history of Dodd–Frank and that, after the Act's passage, Congressional Republicans have remained steadfast in attempts to negotiate substantial reforms to the Bureau).

217. See, e.g., Repeal CFPB Act, S. 1363, 117th Cong. (2023); Repeal CFPB Act, S. 1090, 117th Cong. (2021); Repeal CFPB Act, S. 1335, 116th Cong. (2019); Repeal CFPB Act, S. 370, 115th Cong. (2017); Repeal CFPB Act, S. 1804, 114th Cong. (2015).

218. See, e.g., Letter from U.S. Sens. Jack Reed, Sherrod Brown, Chris Van Hollen, Elizabeth Warren, Tina Smith & Jon Ossoff to Rohit Chopra, Dir., CFPB (Dec. 15, 2021), https://www.reed.senate.gov/imo/media/doc/letter_to_cfpb_to_take_action_to_ensure_transparency__oversight_of_buy_now_pay_later_products__providers.pdf [https://perma.cc/VEX3-C4RT] ("Many BNPL providers structure these products in an effort to avoid certain consumer protection obligations under the Truth in Lending Act or the Military Lending Act, which generally apply to loans that are repayable in more than four installments or are subject to a finance charge.").

219. See, e.g., McHenry et al., supra note 206, at 1 (arguing that "the CFPB's recent actions with respect to nonbank entities exceed its statutory authority and harm the very consumers the CFPB was established to protect").

220. See supra section I.B.1.

221. See supra section II.C.1.

consumer finance also accords with the Bureau's statutory authority, which is flexible by design.[222]

C. *Regulating Merchants Under the Prohibition on Unfair, Deceptive, or Abusive Acts or Practices*

1. *Clarifying that Merchants Partnering With Buy Now, Pay Later Lenders Are Statutorily Covered Service Providers.* — The authority to prohibit UDAAPs conferred on the CFPB by Dodd–Frank[223] provides the Bureau with the flexibility needed to effectively regulate merchants' BNPL promotion activities while providing clear, uniform expectations for lenders and merchants alike. The CFPB has expressed a willingness in the past to apply its UDAAP regulatory authority to keep pace with developments in the consumer finance industry. For example, in 2016, the Bureau asserted its authority to regulate data security practices for the first time when it brought an enforcement action against an Iowa-based fintech firm for deceptive data security statements.[224] The CFPB should invoke its statutory authority to regulate certain merchant activities by clarifying that merchants that provide consumers with the option to use BNPL at the point of sale pursuant to lender–merchant agreements fall under the statutory definition of service providers.[225]

The CFPB could model regulations for merchants' BNPL promotion activities on its recent treatment of digital marketing providers that offer services to financial firms.[226] It has issued interpretive guidance characterizing these digital marketing providers' extended involvement with financial companies—including the provision of sophisticated behavioral analytics—as a service provider relationship within the meaning of the CFPA.[227] The CFPB explained that a "'material' service is a service that is significant or important" and includes activities by partnering nonfinancial entities to "identify or select prospective customers and/or select or place content to affect consumer engagement,

222. See Leonard J. Kennedy, Patricia A. McCoy & Ethan Bernstein, The Consumer Financial Protection Bureau: Financial Regulation for the Twenty-First Century, 97 Cornell L. Rev. 1141, 1152 (2012) (describing the Bureau's regulatory approach).

223. See 12 U.S.C. § 5531(b) (2018).

224. See Dwolla, Inc., CFPB No. 2016-CFPB-0007, 5–7 (Mar. 2, 2016). The CFPB has also construed UDAAPs to extend to a company's failure to monitor its relationships with third parties. See Laura Hobson Brown & Dustin C. Alonzo, Online Advertising and Marketing Developments, 73 Bus. Law. 517, 524 (2018) (describing the CFPB's position that a company's "failure to monitor its third-party relationships, both its buy-side vendors and sell-side purchasers, constituted a UDAAP violation").

225. 12 U.S.C. §§ 5481(26)(A), 5536.

226. See Limited Applicability of Consumer Financial Protection Act's "Time or Space" Exception With Respect to Digital Marketing Providers, 87 Fed. Reg. 50,556, 50,557–60 (Aug. 17, 2022) (to be codified at 12 C.F.R. ch. X).

227. Id. at 50,557–60 ("[D]igital marketers that, for example, determine or suggest which users are the appropriate audience for advertisements are materially involved in the development of content strategy[] . . . and are typically service providers under the CFPA.").

including purchasing or adoption behavior."[228] It distinguished this sophisticated marketing function from certain statutorily exempted advertising activities[229] because the activities undertaken by digital marketing providers are "materially involved" with customer acquisition.[230] It further explained that "identifying prospective customers and then attempting to acquire those customers is a significant component of the 'offering' of a consumer financial product or service, which is part of the legally relevant test for determining that a firm is a 'covered person.'"[231]

The Bureau could develop an analogous framework for merchants by characterizing their incorporation of BNPL financing at checkout as providing a material service to BNPL lenders. This would be analogous to the CFPB's regulation of digital marketing providers because lenders rely on merchants' activities and representations to drive customer acquisition.[232] Moreover, many merchants encourage consumers to select BNPL financing with targeted communications,[233] which the CFPB specifically identified in its conclusion that digital marketing providers are covered service providers.[234] The CFPB should exercise its rulemaking authority to extend the definition of UDAAPs to include certain activities undertaken by merchants to influence consumers to finance purchases with BNPL. These activities can either be direct, as in the case of advertising or marketing BNPL to consumers, or indirect, as in the case of omitting specifically enumerated safeguards.

2. Prohibiting Abusive Representations and Activities by Merchants. — Merchants' BNPL promotion activities fall squarely within the Bureau's

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228. Id. at 50,558.

229. See 12 U.S.C. § 5481(26)(B)(ii) (explaining that offering or providing "time or space for an advertisement for a consumer financial product or service through print, newspaper, or electronic media" to a covered person alone is insufficient to qualify a person as a service provider).

230. Limited Applicability of Consumer Financial Protection Act's "Time or Space" Exception With Respect to Digital Marketing Providers, 87 Fed. Reg. at 50,558.

231. Id.

232. See Dikshit et al., supra note 29 ("The most prevalent misconception . . . is that shopping apps offering 'buy now, pay later' (BNPL) solutions are pure financing offerings. . . . [T]he leading Pay in 4 providers are building integrated shopping platforms that engage consumers through the entire purchase journey, from prepurchase to post-purchase.").

233. See Deretich, supra note 196 (discussing the use of BNPL to create long-term customer relationships); see also Nian Wang, Joseph Pancras, Hongju Liu & Malcolm Houtz, "Buy Now, Pay Later" (BNPL): Optimizing Customer Targeting Decisions Using Payment Default and Product Return Option Values 2–4 (Univ. of Conn. Sch. of Bus., Working Paper No. 22-13, 2021), https://ssrn.com/abstract=4066695 [https://perma.cc/XUZ9-QPJL] (describing the use of BNPL for targeted marketing).

234. See Limited Applicability of Consumer Financial Protection Act's "Time or Space" Exception With Respect to Digital Marketing Providers, 87 Fed. Reg. at 50,558 ("When digital marketers target and deliver advertisements to users with certain characteristics, the digital marketer is materially involved in the development of content strategy and is not covered by the 'time or space' exception.").

broad statutory mandate[235] to proscribe abusive practices.[236] Given the informational asymmetry between merchants and consumers, along with consumers' tendency to view BNPL differently from traditional credit,[237] regulation of certain BNPL promotion activities would be analogous to the CFPB's prior interpretation that creating a "sense of urgency" in consumers constitutes an abusive practice in the payday lending context.[238] The CFPB should clarify that merchants' targeting of consumers and urging them to finance purchases with BNPL is a UDAAP in the same way as "creat[ing] and leverag[ing] an artificial sense of urgency to induce delinquent borrowers with a demonstrated inability to repay their existing loan to take out a new . . . loan with accompanying fees."[239]

Prohibiting merchants from encouraging the uninformed use of credit in this manner strikes the best balance between the interests of consumers, lenders, and merchants: Consumers are provided with the information necessary to understand the costs and benefits of BNPL financing, and lenders and merchants are apprised of uniform guidelines that are clear and minimally burdensome. The CFPB can also supplement these guidelines as needed by exercising its supervisory authority to detect and assess risks to consumers.[240] While formulating the precise contours of regulations directed toward merchants requires a fact-intensive inquiry, at a minimum these regulations can address several risks to consumers that have already been identified.[241]

First, regulations could mandate that merchants provide certain safeguards against overspending by limiting the availability of BNPL financing. To address the tendency among consumers to take on multiple BNPL loans,[242] the CFPB could issue a rule defining as a UDAAP merchants' sales that are financed with BNPL loans from multiple lenders. This would have the effect of limiting access to BNPL credit and requiring consumers to pay off existing balances before making purchases, which would in turn discourage impulsive buying and provide consumers with a more realistic appraisal of their financial constraints.

235. See Levitin, The Consumer Financial Protection Bureau, supra note 75, at 343 (characterizing the CFPB's authority in this area as "extremely broad").

236. See supra note 116.

237. See supra text accompanying notes 157–161.

238. See ACE Cash Express, Inc., CFPB No. 2014-CFPB-0008, 10–11 (July 10, 2014).

239. Id. (explaining that such practices take "unreasonable advantage of the inability of consumers to protect their own interests in selecting or using a consumer financial product or service").

240. 12 U.S.C. § 5512(c)(4) (2018).

241. See supra section II.A.

242. See Mandell & Lawrence, supra note 50, at 292 (explaining that risks associated with BNPL "are more pronounced for users who juggle multiple BNPL loans[] and . . . are left to their own financial devices without any TILA protections"); Boshoff et al., supra note 18, at 10 ("Of the consumers experiencing adverse outcomes from BNPL[,] . . . 52% had used at least two BNPL facilities over . . . the past six months.").

Second, regulations could prevent misrepresentations by requiring that merchants provide affirmative notice as to the nature of the loan obligation of BNPL financing at the point of sale. The CFPB's proposed plan to extend credit card regulations to BNPL lenders would otherwise effectively enable lenders to circumvent disclosure requirements by relying on merchants—which are not subject to disclosure requirements under TILA[243]—to convince consumers to choose BNPL financing before they come across any required representations by lenders. Clarifying that a merchant's failure to provide minimum notice to consumers at the point of sale constitutes a UDAAP would ensure that both parties with an interest in the consumer's financing decision are accountable for their representations.[244] This could involve the disclosure of financing terms or else at a minimum require that merchants hosting an option to use BNPL financing direct consumers to lenders' disclosure statements to minimize the risk of circumvention. Merchants could also be required to provide information as to the terms of use for BNPL products in their FAQ section, a practice that some have already employed.[245] Regulations could be further tailored to ameliorate consumer confusion[246] by requiring that merchants provide consumers with notice that BNPL is a form of credit.

Third, regulations could prevent merchants from directly encouraging BNPL financing by prohibiting as a UDAAP the use of BNPL-related pop-up notices at checkout, as well as by placing restrictions on the ability of merchants to advertise partnering lenders' BNPL offerings.[247] This

243. See 12 C.F.R. § 1026.2(a)(17)(i) (2023) (defining "creditor" as a person who, among other things, "regularly extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments").

244. The CFPB has analogously extended UDAAP liability to other activities that are not reached by the enumerated consumer laws. See Press Release, CFPB, CFPB Targets Unfair Discrimination in Consumer Finance (Mar. 16, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-targets-unfair-discrimination-in-consumer-finance/ [https://perma.cc/3ECT-D969] (explaining that "discrimination may meet the criteria for 'unfairness' by causing substantial harm to consumers that they cannot reasonably avoid, where that harm is not outweighed by countervailing benefits to consumers or competition"). A federal district court in the Eastern District of Texas recently held that this regulation exceeded the CFPB's statutory authority under the Major Questions Doctrine. See Chamber of Com. of the U.S. v. Consumer Fin. Prot. Bureau, No. 6:22-cv-00381, 2023 WL 5835951, at *8 (E.D. Tex. Sept. 8, 2023) (determining that "the CFPB faces a high burden in arguing that Congress conferred a sweeping antidiscrimination authority without defining protected classes or defenses, without using the words 'discrimination' or 'disparate impact,' and while separately giving the agency authority to police 'discrimination' only in specific areas").

245. Many merchants who offer BNPL financing through Affirm, for example, provide consumers with information as to their rights and responsibilities directly on their website. See, e.g., Shop Pay Installments/ AFFIRM ABOUT, FAQ's & Terms of Service, Mi Raíz Jewelry, https://www.miraizjewelry.com/pages/shop-pay-installments-affirm-about-faqs-terms-of-service [https://perma.cc/QT79-57W6] (last visited Aug. 18, 2023).

246. See supra section II.C.1.

247. Many BNPL firms provide partnering merchants with advice on how to encourage BNPL use by customers. See, e.g., How to Encourage Customers to Use Buy Now Pay Later

would ensure that the option to finance purchases with BNPL is not portrayed to consumers as preferable to other forms of payment at checkout. Ultimately, regulations should seek to enable consumers to make financing decisions independently, without encouragement by merchants to choose BNPL over any other payment method.

CONCLUSION

The emergence of BNPL represents a critical juncture in the development of consumer financial protection regulations for the modern era and demands an innovative regulatory approach that is responsive to the industry's unique characteristics. Despite its broad popular appeal, BNPL poses several significant risks to consumers that merit close consideration. As the definition of consumer credit continues to expand, regulations must stay abreast of this rapidly developing industry to ensure that offerings are fairly represented to consumers and to encourage the responsible use of credit. This Note makes an important contribution to the literature by presenting a novel regulatory framework for fintech products such as BNPL that recognizes the important role played by nonfinancial market actors such as merchants partnering with BNPL lenders. By harnessing its broad mandate to regulate UDAAPs, the CFPB can tailor regulations to be responsive to current developments in consumer finance and empower consumers to make informed decisions about their finances.

(BNPL) in Your Store, ChargeAfter (Feb. 26, 2021), https://chargeafter.com/how-to-encourage-customers-to-use-buy-now-pay-later-in-your-store/ [https://perma.cc/U3HX-3H6R] (encouraging merchants to send mailers to their subscribers advertising the availability of BNPL financing, to use "catchy banners, icons, or logos to advertise" BNPL services, and to make announcements on social media).