Buy Now, Pay Later: How this Fintech Consumer Credit Product Preys on Unwary Borrowers and Evades Regulation

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I. INTRODUCTION

Buy-Now, Pay-Later (BNPL) is a form of personal loan that provides consumers with the ability to change their large purchases into smaller, split payments over time.[1] It is also the colloquial name given to those entities that offer BNPL products. The Consumer Financial Protection Bureau (CFPB) defines BNPL as either a "pay-in-four" model or a "split pay" model of consumer loan.[2] Instead of spending $200 today on those new jeans,

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* J.D. Candidate, The University of Iowa College of Law, 2024. I would like to thank my mom, Dr. Tamra Mitchell, for her support in my research endeavors, and my dad, Shawn Mitchell, and brother, Evan Mitchell, for helping me learn about consumer finance regulation and for bouncing ideas with me. Finally, I would like to thank the JCL editorial team for fixing my many pages of passive voice.

1. Robin Saks Frankel, *What Is Buy Now, Pay Later?*, FORBES (Apr. 10, 2023), https://www.forbes.com/advisor/credit-cards/buy-now-pay-later/ [https://perma.cc/4HQG-VJTB].

2. CONSUMER FIN. PROT. BUREAU, BUY NOW, PAY LATER: MARKET TRENDS AND CONSUMER IMPACTS 6 (2022).

the purchaser can use a company—like Klarna, Afterpay, or Affirm[3]—to make four payments of $50 spread out over six to eight weeks.[4] Often, consumers do not incur an interest payment to accompany these services, though penalties may occur if consumers do not meet their contractual obligations.[5] While BNPLs do not typically request credit information before offering their services, they usually reserve the right to pull credit information and report incidents to credit reporting agencies should a consumer miss a payment or otherwise default.[6] The average BNPL loan principal was around $135 in 2021;[7] similar to the average size of a purchase on an American Express credit card.[8] While the typical American Express customer can expect to pay between 16% and 24% Annual Percentage Rate (APR),[9] BNPL consumers are generally not subject to interest payments.[10]

Entering the consumer credit scene in the mid-2010s, the BNPL model experienced a significant rise in popularity among consumers and has seen its greatest rise within the last three years.[11] Though the credit card industry has a significant lead on BNPLs in terms of total transaction volume,[12] this massive increase in BNPL usage may indicate a broader shift away from more traditional forms of consumer credit.[13] This trend has the potential to create serious consumer credit problems as BNPLs are not currently regulated with the same scrutiny as other consumer finance options.[14] Notably, because BNPLs use lending techniques that circumvent modern regulatory schemes, consumers are not offered the

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3. Even since the initial drafting of this Note, new BNPLs have secured significant market positions in the BNPL scene, including Sezzle, Perpay, and Splitit. Additionally, PayPal now offers its own BNPL method of payment called, "PayPal Pay in 4." Lee Huffman, *Best Buy Now, Pay Later Apps*, INVESTOPEDIA (Mar. 3, 2023), https://www.investopedia.com/best-buy-now-pay-later-apps-5186864 [https://perma.cc/G7FX-9DQ3].

4. *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/VX7W-WCP5].

5. *See, e.g.*, *id.* ("A Late Fee of up to $7 may be charged if any scheduled payment remains unpaid after 10 days . . . ."); *but see AFFIRM Terms of Service*, AFFIRM (June 21, 2023), https://www.affirm.com/terms [https://perma.cc/N7D9-K9QC] ("You will never be charged any late fees when you buy with Affirm.").

6. Frankel, *supra* note 1; *Klarna Pay Later in 4 Agreement*, *supra* note 4.

7. CONSUMER FIN. PROT. BUREAU, *supra* note 2, at 31.

8. *Average Value of Transaction Per Credit Card Worldwide in 2016, by Brand*, STATISTA (Mar. 15, 2022), https://www.statista.com/statistics/279249/purchase-transactions-on-general-purpose-cards-worldwide/ [https://perma.cc/M2FS-7HMC] (providing the average size of a purchase on an American Express card to be about $141).

9. Jaclyn DeJohn, *Interest Rates Continue to Rise: American Express Increases APRs on Card Products*, CNET (May 9, 2022), https://www.cnet.com/personal-finance/credit-cards/interest-rates-continue-to-rise-american-express-increases-aprs-on-card-products/ [https://perma.cc/L35N-UQED].

10. CONSUMER FIN. PROT. BUREAU, *supra* note 2, at 4, 6.

11. *Id.* at 10 ("The five lenders surveyed [by the CFPB] originated $24.2 billion in BNPL loans in 2021 . . . $8.3 billion originated in 2020 and . . . $2 billion originated in 2019.").

12. CONSUMER FIN. PROT. BUREAU, THE CONSUMER CREDIT CARD MARKET 31 (2021) ("For all of 2019 and early 2020, general purpose card purchase volumes for card issuers in the Bureau's sample typically exceed $500 billion each quarter.").

13. Kimberly Palmer, *Buy Now, Pay Later vs. Credit Cards: Which Is Right for You?*, NERDWALLET (Oct. 19, 2021), https://www.nerdwallet.com/article/credit-cards/buy-now-pay-later-vs-credit-cards-which-is-right-for-you [https://perma.cc/SP7Q-EH5Z] (reporting that 38% of BNPL users surveyed said BNPL "will eventually replace their credit cards").

14. *CFPB Study Details the Rapid Growth of "Buy Now, Pay Later" Lending*, CFPB (Sept. 15, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-study-details-the-rapid-growth-of-buy-now-pay-later-lending [https://perma.cc/J8EP-FXRR] (stating BNPL may leave borrowers with "uneven disclosures and protections").

same protections that they are accustomed to when working with banks and credit card companies.[15] Additionally, the precarious regulatory blueprint guiding BNPL actions allows those institutions to maximize their profits through other, less savory means, like harvesting and selling consumer data or charging exorbitant penalties for missed or late payments.[16]

While BNPLs may provide a service that some consumers prefer over more traditional consumer credit options, they also subject consumers to significantly more risk, which goes relatively unchecked under current regulatory systems. This Note will discuss those various regulatory schemes, how BNPLs operate to evade them, and how the government should regulate BNPLs in the future. Part II of this Note will discuss relevant consumer finance regulations, including the history of the Truth in Lending Act and the Dodd-Frank Act, and then a general explanation of the history and function of BNPLs, including the rise of Fintech in modern markets. Part III will discuss how BNPLs structure their terms to evade those established regulatory systems and what consequences this relative lack of regulation has on both consumers and host corporations. Finally, Part IV will propose multiple measures that, if enacted, would prevent BNPLs from continuing to skirt consumer finance regulations and effectively protect consumers from the various harms they pose.

II. BACKGROUND

Current consumer finance regulations are primarily guided by two foundational legislative enactments: the Truth in Lending Act of 1968 (TILA)[17] and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank).[18] While the world of consumer finance regulation is vast, these two enactments provided the vehicles necessary for mandatory disclosure of borrowing costs and the creation of the CFPB, concepts that are central to this Note.

A. Truth in Lending, Full Disclosure, and APR

When TILA, then called the Consumer Credit Labeling Bill, was introduced to a subcommittee of the Senate Committee on Banking and Currency, Senator Paul Douglas stated the goals of the bill simply, claiming that the "objective is, above all, to strip the disguises and camouflage which frequently hide or distort the true price of credit."[19] He continued by stating that "every borrower should have the right to full knowledge of the terms and contents of credit contracts, stated in a uniform and truthful manner."[20] TILA's

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15. *Id.*; *see infra* Part III.

16. *CFPB Study Details the Rapid Growth of "Buy Now, Pay Later" Lending*, *supra* note 14 (describing the risks to consumers arising from BNPL loans).

17. Truth in Lending Act (TILA) of 1968, 15 U.S.C. § 1601.

18. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), 12 U.S.C. § 5301 (2010).

19. *Consumer Credit Labeling Bill: Hearing on S. 2755 Before the Subcomm. on Prod. & Stabilization of the S. Comm. on Banking and Currency*, 86th Cong. 1 (1960) (statement of Sen. Paul Douglas, Chairman, Subcomm. on Prod. & Stabilization).

20. *Id.* at 2.

two original tenets required disclosure of the total finance charge[21] and the relation of that charge (then called the "simple annual rate") to the unpaid balance of the loan.[22] Douglas' "simple annual rate" went on to become known more popularly as "annual percentage rate," or "APR."[23] Though Senator Douglas' bill would not become law for another eight years, TILA was eventually passed and subsequently implemented by "Regulation Z." Regulation Z finally required "full disclosure of the terms and conditions of finance charges in credit transactions."[24]

APR succeeds at informing borrowers of the true financial burden they incur primarily through its ubiquity. APR is calculated by comparing the interest rate and fees—the "finance charge" or "cost of credit"—with the principal, considering the life of the loan, in terms of days.[25] The figure below presents a more exact representation of the APR calculation, solving for APR expressed as a percentage.

Figure 1. APR Calculation Equation[26]

$$\text{APR} = \left(\left(\frac{\frac{\text{Fees + Interest}}{\text{Principal}}}{n} \right) \text{X } 365 \right)$$

More importantly, simple algebra allows a consumer to use a known APR to find the amount of interest a consumer will pay over the life of the loan.[27]

Figure 2. APR Calculation—Solved for Interest

$$\text{Interest} = \left(\frac{\text{APR}}{365}\right) * n * \text{Principal} - \text{Fees}$$

For example, using the above calculation (including zero fees), a 5-year loan on a principal of $10,000 at 6% APR would result in $3000 in interest paid over the life of the loan. Though the average consumer might require a calculator to find the APR on their

21. Decades before TILA was brought to committee, the National Recovery Administration (NRA) fought for regulation and uniformity in calculating finance charges. This groundwork was necessary for TILA to even be feasible in the 1960s. Anne Fleming, *The Long History of "Truth in Lending*,*"* 30 J. POL'Y HIST. 236, 246 (2018).

22. *Id.* at 249.

23. *Id.* at 250.

24. Consumer Credit Protection Act, Pub. L. 90-321, 82 Stat. 146 (1968) (codified at 15 U.S.C. § 1601); 12 C.F.R. § 226 (1968). While the terms "Truth in Lending Act" and "Regulation Z" are often used interchangeably, TILA is the name of Title I of the Consumer Credit Protection Act of 1968. Regulation Z is the name of the regulation issued by the Board of Governors of the Federal Reserve System to implement TILA. 12 C.F.R. § 226.1(a) (2023).

25. Jason Fernando, *Annual Percentage Rate (APR): What it Means and How it Works*, INVESTOPEDIA (Feb. 9, 2023), https://www.investopedia.com/terms/a/apr.asp [https://perma.cc/N42B-BXJU].

26. *Id.*

27. *See* JOHN REDDEN, ELEMENTARY ALGEBRA 134–229 (2011) (explaining fundamentals of linear algebra).

own, the equation makes the true cost of the loan rather transparent (presuming all fees are included in the calculation of the finance charge).[28] While APR is perhaps a complicated concept, it is prevalent enough that modern consumers are able to compare APRs, allowing them to compare the favorability of loan terms without having to do the math themselves.[29]

B. Dodd-Frank and the Birth of the CFPB

TILA's passage in 1968 was not the end of the fight for transparency in consumer finance, however.[30] In fact, one of the primary issues that spurred Senator Douglas into action—the rising tide of consumer debt—has only gotten worse since TILA was enacted.[31] Credit cards, which did not begin to capture a large portion of the American debt market until well after TILA was enacted,[32] now account for over $16 billion of consumer debt in the United States (compared with $1.7 billion for student loans and $1.5 billion for motor vehicle loans).[33] This seemingly inconsistent result is likely caused in large part by exceptions to the APR standard that were promulgated by the Federal Reserve Board.[34] As the Board continues to devise exceptions to the rule, creditors continue to devise creative ways to get around transparent disclosure.[35]

Sweeping changes finally arrived on the consumer finance scene courtesy of the 2008 financial crisis through Dodd-Frank.[36] Dodd-Frank was a vast piece of legislation that

28. For a detailed discussion on hidden fees and how they impact the *true* cost of credit in many consumer credit transactions, see 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 REGUL. 181, 193–94 (2008) (listing various fees that credit card issuers charge, such as "annual, set-up, replacement card, late, over-limit, balance transfer, cash advance, phone payment convenience, expedited payment, foreign transaction, retuned check, wire, credit protection, and inactivity").

29. Admittedly, these simple APR calculations are only helpful if the consumer wishes to pay the loan over the full term. More complicated debt transactions, like a home mortgage with the intent to refinance later, require a more nuanced mathematical process. *See generally How to Calculate APR*, INDEED (July 31, 2023), https://www.indeed.com/career-advice/career-development/how-to-calculate-apr [https://perma.cc/P9LB-M2H9].

30. *See generally* Renuart & Thompson, *supra* note 28 (describing several other issues that persisted following the landmark passing of the TILA).

31. The total outstanding U.S. consumer debt in December 1968 was $113 billion. NAT'L BUREAU OF ECON. RSCH., M10092, U.S. TOTAL CONSUMER CREDIT OUTSTANDING, END OF MONTH 01/1929–02/1969 (1993). The total as of June 2023 was almost $5 trillion. BD. OF GOVERNORS OF THE FED. RSRV. SYS., G.19, CONSUMER CREDIT (Aug. 7, 2023) [hereinafter CONSUMER CREDIT].

32. Fleming, *supra* note 21, at 257.

33. CONSUMER CREDIT, *supra* note 31.

34. Renuart & Thompson, *supra* note 28, at 185. The primary method that credit card companies use to work around providing accurate APR is the implementation of fees. Most fees are excluded from the finance charge used in APR calculation. As a result, credit card companies that wish to gain large profits can entice unwary consumers with low APRs by structuring their agreements to charge low interest while also hammering consumers with fees. *Id.* at 192–94. Consumers who are struggling to make payments, thereby incurring late fees, are much more likely to only pay interest payments, rather than attempting to pay off the principal. *See* Momi Dahan & Udi Nisan, *Late Payments, Liquidity Constraints and the Mismatch Between Due Dates and Paydays*, WATER RES. RSCH., Jan. 2022, at 1, 2 ("The combination of household resources (i.e., liquidity constraints) and the mismatch between payday and multiple due dates might result in late bill payments and increase the poverty penalty, as late payments are associated with interest expenses . . . .").

35. Renuart & Thompson, *supra* note 28, at 185.

36. Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779, 1782–83 (2011).

tackled several different issues that cooperatively led to the crash in 2008.[37] Dodd-Frank regulated the types of investments that banking entities can make[38] and provided significant provisions that helped eliminate predatory lending, specifically within the mortgage industry.[39] Another of those issues, and most importantly here, was the lack of an agency dedicated to protecting consumers from predatory lending practices; thus, the CFPB was born.[40]

The purpose of the CFPB is to "regulate the offering and provision of consumer financial products and services under Federal consumer financial laws."[41] The purview of such regulation includes overseeing services such as BNPL.[42] CFPB does this by exercising its rulemaking authority[43] to "prohibit unfair, deceptive, or abusive acts or practices (UDAAP) under the Dodd-Frank Act."[44] Additionally, the CFPB has the ability to publish supervisory guidance—with questionable effectiveness[45]—or use targeted supervision to "subject selected BNPL providers to regulatory supervision."[46] The CFPB has authority to conduct such targeted supervision so long as it has "reasonable cause" to believe that the entity providing financial products or services is engaged in "conduct that poses risks to consumers."[47] The CFPB has been relatively quiet concerning BNPL thus far, but it has made efforts recently to engage in information gathering to potentially impose regulations on the BNPL industry in the future.[48]

C. The Rise of Fintech

Since the dawn of the internet age, and especially since Dodd-Frank and the 2008 financial crises, the technology industry has made a substantial impact on the consumer

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37. *See generally* Dodd-Frank Wall Street Reform and Consumer Protection Act, 111 Pub. L. 203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. § 5301) (outlining the mechanisms and goals of the Act as it pertains to the reform of targeted financial system sectors).

38. *See id.* Title VI (regulating financial institutions' ability to participate in swap markets).

39. *See id.* Title XIV (regulating mortgage lending through the Mortgage Reform and Anti-Predatory Lending Act).

40. *See id.* Title X (creating the Consumer Financial Protection Bureau).

41. CONSUMER FIN. PROT. BUREAU, CONSUMER FINANCIAL PROTECTION BUREAU STRATEGIC PLAN: FY 2022–2026, at 3 (2022).

42. *See* Brian Murphy & Hannah Winiarski, *Focus on Fintech: The CFPB Is Scrutinizing Buy Now Pay Later Products—Is Rulemaking Next?*, JD SUPRA (Jan. 25, 2022), https://www.jdsupra.com/legalnews/focus-on-fintech-the-cfpb-is-6337792 [https://perma.cc/4G3B-R3PY] (discussing how the CFPB impacted the BNPL market).

43. 12 U.S.C. § 5512.

44. Murphy & Winiarski, *supra* note 42 (internal quotation omitted).

45. *See* Role of Supervisory Guidance, 86 Fed. Reg. 9261, 9265 (2021) (codified at 12 C.F.R. pt. 1074) ("[T]he underlying legal principle of supervisory guidance is that it does not create[] binding legal obligation for either the public or an agency.").

46. Murphy & Winiarski, *supra* note 42.

47. 12 U.S.C. § 5514(a)(1)(c).

48. *See generally* CONSUMER FIN. PROT. BUREAU, *supra* note 2; CONSUMER FIN. PROT. BUREAU, OFF. OF RSCH. PUBL'N NO. 2023-1, CONSUMER USE OF BUY NOW, PAY LATER: INSIGHTS FROM THE CFPB MAKING ENDS MEET SURVEY (2023) [hereinafter CFPB INSIGHTS] (reporting on the information it gathered concerning BNPL consumer financial profiles).

finance industry.[49] Fintech, a portmanteau for "financial technology," is the popular name for the vast industry that encompasses everything from blockchain and cryptocurrency to online banking, payment processing, budgeting apps, and even the Automated Teller Machine (ATM).[50] While the name "Fintech" was not coined until the 1990s, the underlying concept—application of emerging technologies to the financial services industry—is deemed to have started near the mid-19th century, when the Atlantic Telegraph Company laid the first transatlantic cable in 1866.[51] Experts typically mark the first age of Fintech as starting with that cable and ending one hundred years later with the introduction of the very first ATM in 1967.[52] This era is marked most notably by the newfound ability to quickly communicate globally.[53]

The second age of Fintech is marked by the transition of the finance industry from analog to digital practices, starting in 1967 and ending with the Global Financial Crisis in 2008.[54] This era saw the establishment of the National Association of Securities Dealers Automated Quotations Stock Market (NASDAQ) in 1971 and the founding of one of the first Fintech startups, Bloomberg, in 1981.[55] The first instance of online consumer banking came in 1995, courtesy of Wells Fargo.[56] Then, following the 2008 crisis, the third age of Fintech began.

If the first era's primary question was, "how are financial services provided to consumers?" and the second era's question was, "where are these services offered to consumers?", then the third era's big question is, "who is providing these services?"[57] That is, now that financial markets have been globalized and most of the world has access to the internet, "*who* has the resources and legitimacy to provide financial services" to consumers?[58] In the wake of the 2008 crisis, confidence in banks plummeted to the point where consumers had more faith in tech companies handling their money than established financial institutions.[59] Dodd-Frank was one response to 2008 that made an impact, but the Jump Start Our Business Startups Act (JOBS Act) of 2012 also played a major role.[60] The

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49. *See generally* Christopher K. Odinet, *Predatory Fintech and the Politics of Banking*, 106 IOWA L. REV. 1739 (2021) (discussing why scholars and policymakers must discuss how to address Fintech issues that impact the consumer finance industry).

50. *See* Stephanie Walden, *What Is Fintech?*, FORBES ADVISOR (July 25, 2022), https://www.forbes.com/advisor/banking/what-is-fintech [https://perma.cc/C43U-E7SP] (defining Fintech).

51. Douglas W. Arner, Jànos Barberis & Ross P. Buckley, *The Evolution of Fintech: A New Post-Crisis Paradigm?*, 47 GEO. J. INT'L L. 1271, 1274 (2016).

52. *Id.*

53. This was also the year that Texas Instruments produced the world's first handheld financial calculator. *Id.* at 1279.

54. *Id.* at 1276–79.

55. *Id.* at 1281.

56. Arner, Barberis & Buckley, *supra* note 51, at 1283.

57. *See generally id.* (outlining the major issues posed by each "era" of Fintech).

58. *Id.* at 1286.

59. *See id.*

> A 2015 survey reported that American trust levels in technology firms handling their finances is not only on the rise, but exceeds their confidence in banks. For example, the level of trust Americans have in Citibank is thirty-seven percent, while trust in Amazon and Google is seventy-one percent and sixty-four percent respectively.

(footnote omitted).

60. *Id.* at 1288–89.

JOBS Act provided opportunities for Fintech "non-banks" to capitalize on the decreased trust in traditional financial institutions by providing peer-to-peer[61] lending to startup companies.[62] This is illustrated by the preamble of the Act, which aims"[t]o increase American job creation and economic growth by improving access to the public capital markets for emerging growth companies."[63] While consumer finance regulation wasn't a priority for the JOBS Act, it did have some remarkable effects in the securities regulation space.[64] The Act even legitimized "crowdfunding" as a means of accessing capital markets without the hassle of Securities and Exchange Commission (SEC) registration.[65]

D. Enter BNPL

Naturally, the third age of Fintech also encompasses services that offer loans exclusively over the internet: enter BNPL.[66] Described as "a short-term financing option that allows a customer to pay off the cost of a good or service in multiple installments at later dates,"[67] BNPL dates back to the 19th century when Singer sold its sewing machines for a "dollar down, dollar a week."[68] Early forms of "installment plans" were highly popular until they were eventually supplanted by credit cards in the 1950s.[69] Thus, the new wave of BNPL is not actually a novel product; rather, it is a reinvention of an old product that is making its way back into the consumer financial zeitgeist.

While many Fintech services are applauded for "extend[ing] financial inclusion, improv[ing] the daily lives of people and spur[ring] growth,"[70] Fintech is also rife with

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61. Peer-to-peer lending is a practice by which "lenders," often just individuals with capital, provide loans directly to borrowers through facilitating fintech companies. Julia Kagan, *What is Peer-to-Peer (P2P) Lending? Definition and How it Works*, INVESTOPEDIA (July 21, 2023), https://www.investopedia.com/terms/p/peer-to-peer-lending.asp [https://perma.cc/6KJ4-WTFV].

62. Arner, Barberis & Buckley *supra* note 51, at 1286.

63. Jumpstart Our Business Startups (JOBS) Act, Pub. Law 112-106, 126 Stat. 306 (2012).

64. *Id.*

65. JOBS Act §§ 310–305, 126 Stat. 315–23. In this context, "crowdfunding" refers to a type of registration-exempt, equity-based securities transaction. *Investor Alert: Crowdfunding and the Jobs Act: What Investors Should Know*, FINRA, https://www.finra.org/investors/alerts/crowdfunding-and-jobs-act [https://perma.cc/G8A4-XS69]. This type of crowdfunding is distinct from projects like "Star Citizen," which raise capital on platforms like Kickstarter without selling equity. Anthony Gallegos, *Chris Roberts' Star Citizen Launches Kickstarter*, IGN (Oct. 18, 2012), https://www.ign.com/articles/2012/10/18/chris-roberts-star-citizen-launches-kickstarter [https://perma.cc/BQ49-VEGQ]; *see also* Ryan Dinsdale, *Star Citizen Crowdfunds Half a Billion Dollars – and $100 Million in Less Than a Year*, IGN (Sept. 21, 2022), https://www.ign.com/articles/star-citizen-crowdfunds-half-billion-dollars [https://perma.cc/QN38-98QL].

66. Walden, *supra* note 50.

67. Kyle Peterdy, *BNPL (Buy Now, Pay Later)*, CORP. FIN. INST. (Jan. 18, 2023), https://corporatefinanceinstitute.com/resources/commercial-lending/bnpl-buy-now-pay-later [https://perma.cc/-C43N-XBY3].

68. James Boxell, *How Old-Style Buy Now, Pay Later Became Trendy "BNPL,"* WASH. POST (Nov. 30, 2021), https://www.washingtonpost.com/business/how-old-style-buy-now-pay-later-became-trendy-bnpl-quicktake/2021/11/30/089feec0-51ff-11ec-83d2-d9dab0e23b7e_story.html [https://perma.cc/E23S-LST2].

69. *See id.* (discussing early forms of installment plans); *see also* Arner, Barberis & Buckley *supra* note 51, at 1279 (discussing the introduction of credit cards).

70. Bassim Haidar, *COVID-19 Underlines the Importance of Fintech in Emerging Markets*, WORLD ECON. F. (May 15, 2020), https://www.weforum.org/agenda/2020/05/covid-19-importance-mobile-solutions-emerging-markets [https://perma.cc/3FJY-JRU7]; *see also* Kanika Saigal, *How Fintech Can Save Us from Covid-19*,

potential for those emerging markets to fall prey to predatory lending practices.[71] However, the technology being employed by Fintech is not necessarily the primary concern plaguing policymakers. Rather, who specifically employs that technology lends to greater concern.[72] That is, individual instances of predatory lending propagated by Fintech establishments are undesirable and should be mitigated; but, bigger, more systemic risks associated with the largely unregulated Fintech sector are even more worrying.[73] Historically, such systemic risks, like the widespread misuse of credit, have led to financial crises.[74] Though a large-scale financial crisis is not necessarily the most likely outcome of under-regulated BNPLs, it is certainly a concern.[75] The proper and timely regulation of BNPLs should be an utmost priority to the CFPB and other appropriate law-making bodies.

III. ANALYSIS

A. Why BNPLs Are Not Regulated Under TILA or Dodd-Frank

The typical BNPL transaction finances a small payment (from \$50 to \$1000), spread out over four equal payments due at two-week intervals.[76] The first payment, also known as the down payment, occurs at the time of the purchase.[77] Most BNPL lenders require consumers to use their personal debit or credit card for the down payment.[78] This allows BNPLs to automatically debit the card for future installments, which are typically subject to mandatory autopay requirements.[79] If the consumer meets their payments on time, there is typically no finance charge for the credit.[80] However, if a consumer misses a payment, or otherwise defaults on their contract, they may be subject to penalties.

This four-installment repayment structure is the key for BNPLS to provide a consumer credit product without subjecting themselves to the rigors of consumer credit regulation. TILA's requirement for disclosure of finance charges only applies to "creditors."[81] TILA defines "creditor" as a person (or organization)[82] who "regularly extends . . . consumer credit which is payable by agreement in *more than four installments*."[83] As such, BNPLs are not required to abide by the mandatory disclosure requirements of TILA. Additionally, BNPLs have evaded the purview of Dodd-Frank because they are primarily used for

EUROMONEY (May 5, 2020), https://www.euromoney.com/article/b1lhggklb7jbkw/how-fintech-can-save-us-from-covid-19 [https://perma.cc/XD72-NGQ].

71. Odinet, *supra* note 49, at 1741.

72. *See* Arner, Barberis & Buckley, *supra* note 51, at 1275 (explaining that "'policy-makers' and industry's current concerns arise . . . from *who* is applying the technology").

73. *See generally* William Magnuson, *Regulating Fintech*, 71 VAND. L. REV. 1167, 1167 (2018) (arguing for "wide-ranging reconceptualization of financial regulation in an era of technology-enabled finance").

74. ROBERT Z. ALIBER, CHARLES P. KINDLEBERGER & ROBERT N. ALIBER, MANIAS, PANICS, AND CRASHES: A HISTORY OF FINANCIAL CRISES 86–92 (8th ed. 2023).

75. Magnuson, *supra* note 73, at 1188.

76. CONSUMER FIN. PROT. BUREAU, *supra* note 2, at 3.

77. *Id.*

78. *Id.* at 21.

79. *Id.*

80. *Id.*

81. 15 U.S.C. § 1605(a).

82. *See* 15 U.S.C. § 1602(e) (incorporating an organization into the definition of "person").

83. 15 U.S.C. § 1602(g) (emphasis added).

consumer purchases, like apparel and beauty items.[84] Dodd-Frank focuses on regulating the mortgage industry, with carve-outs for securities and the creation of the CFPB.[85] Therefore, BNPLs, by definition, provide consumer credit without having to abide by consumer credit regulation standards.[86]

B. Effects of Regulation Differences

Differences in regulatory standards have contributed to BNPL's success by providing credit without requiring consumers to jump through hoops that traditional lenders require.[87] For example, so long as consumers abide by the terms of the loan, they are not subject to interest or fees, they can access credit quickly, and the repayment plan is easy to understand.[88] However, it is precisely these benefits of the BNPL model that pose the largest risks to consumers.[89] BNPLs must make a profit. If it isn't through traditional finance charges, it's through potentially massive penalties for consumers who default, oppressive transaction fees for merchants, or the harvesting and selling of consumer data.[90]

1. Penalties

The primary purpose of the mandatory disclosures set out in TILA are to inform consumers of the actual price of the credit they are using, expressed through APR.[91] However, once creditors (or BNPLs) introduce penalties, the cost of financing changes—sometimes drastically. This problem is worsened when lenders are not required to abide by standardized disclosure practices.[92]

In effect, BNPLs can charge exorbitant rates on the credit they provide simply through late fees. Take, for example, the "typical" BNPL transaction above.[93] The consumer finances a purchase of $135 (the average BNPL transaction amount[94]) on a four-installment payment plan. The consumer completes the down payment of $33.75, and then makes the next two payments on time. But if the fourth and final payment is late, the consumer incurs a $7 late fee.[95] Using the APR metric above[96] (finance charge of $7, principal at $135, term in days at 42 (six weeks)), the appropriate APR on this transaction is just over 45%.[97] A $7 late fee might not seem very harmful at first glance, but put in perspective with APR,

84. CONSUMER FIN. PROT. BUREAU, *supra* note 2, at 35.

85. *See generally* Dodd-Frank Wall Street Reform and Consumer Protection Act, *supra* note 37.

86. *See* 15 U.S.C. § 1602 (defining "consumer" and "credit," respectively, in TILA).

87. CONSUMER FIN. PROT. BUREAU, *supra* note 2, at 9–10.

88. *Id.*

89. *Id.*

90. *CFPB Study Details the Rapid Growth of "Buy Now, Pay Later" Lending*, *supra* note 14.

91. 12 C.F.R. § 1026.17 (2023).

92. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 2, at 73 ("The lack of clear, standardized disclosure language may obscure the true nature of the product as credit . . . .").

93. *See supra* Part III.A (describing the "typical" BNPL transaction per the CFPB); *see also* CONSUMER FIN. PROT. BUREAU, *supra* note 2, at 3.

94. CONSUMER FIN. PROT. BUREAU, *supra* note 2, at 3.

95. Seven dollars is a typical amount for a BNPL late fee. *Id.*

96. *Supra* Part II.A.

97. APR appears particularly large because of the proportion of the late fee to the principal and the relatively short term of the loan.

it is clear that these fees can be particularly harsh compared to the costs of more traditional consumer financing methods.

This problem compounds when we consider that consumers might incur multiple late fees, sometimes even on the same missed payment.[98] Under TILA, credit card companies are not allowed to assess multiple late fees for the same missed payment.[99] BNPLs have no such requirement, and, in fact, at least one of the five BNPL companies research by the CFPB reported it charges multiple late fees on the same missed payment.[100] Running the same calculation, if the consumer incurred late fees on two of their installments, the calculable APR extends to over 90%.[101] In 2021, over 10% of BNPL borrowers incurred one or more late fees.[102] The implication here is ominous, indeed; although many BNPL consumers are able to utilize these services without being subject to any traditional consumer credit costs,[103] many BNPL consumers are paying exponentially more for their credit through BNPL products than they would through more traditional consumer credit products. Overall, without the benefit of transparency provided by TILA, consumers are charged exorbitant rates for these credit services without their full knowledge beforehand.

2. Data Harvesting

Perhaps more concerning than extravagant late fees, however, is the common BNPL practice of harvesting and selling consumer data. At a time when tech privacy is getting more attention and mobile platforms are protecting user privacy,[104] BNPLs are able to circumvent these efforts.[105] In fact, the CFPB believes that the movement toward greater user protection and privacy could even increase the profitability of data harvesting by BNPLs.[106] Traditional creditors are required to inform consumers regarding their data sharing policies and consumers have the ability to opt out of most data sharing courtesy of the Gramm-Leach-Bliley Act of 1999 (GLBA).[107] However, GLBA only applies to financial institutions, so BNPLs are not affected by these restrictions on data harvesting.[108]

While the privacy concerns of BNPL data harvesting are certainly worrisome, there are also larger consequences associated with the practice. In the immortal words of Sir

98. CONSUMER FIN. PROT. BUREAU, *supra* note 2, at 74.
99. *Id.*
100. *Id.*
101. Calculated using $14 of fees, a $135 principal, and a 42-day term.
102. CONSUMER FIN. PROT. BUREAU, *supra* note 2, at 4.
103. *See infra* Part III.B.2.
104. *See* Laurel Wamsley, *Apple Rolls Out Major New Privacy Protections for iPhones and iPads*, NAT'L PUB. RADIO (Apr. 26, 2021), https://www.npr.org/2021/04/26/990943261/apple-rolls-out-major-new-privacy-protections-for-iphones-and-ipads [https://perma.cc/PC4M-FCBF] (discussing Apple's intention to implement privacy systems into future products); Anthony Chavez, *Introducing the Privacy Sandbox on Android*, GOOGLE (Feb. 16, 2022), https://blog.google/products/android/introducing-privacy-sandbox-android [https://perma.cc/N69B-CR8V] (discussing Google's intention to implement privacy systems into Android).
105. CONSUMER FIN. PROT. BUREAU, *supra* note 2, at 4.
106. *Id.*
107. Gramm-Leach-Bliley Act, Pub. L. No. 106-102, § 508, 113 Stat. 1338, 1443 (1999); *see also* 16 C.F.R. § 313.1 (2023).
108. *Id.*; *see also* 12 U.S.C. § 1843(k) (defining "financial institution" for purposes of GLBA).

Francis Bacon, "knowledge itself is a power."[109] In the context of consumer data, this knowledge allows BNPLs and their merchant partners to tailor marketing campaigns, create product features, and deploy new models that increase sales and maximize revenue.[110] In that sense, the rich get richer: the more consumer data BNPLs are able to collect, the more useful that data becomes and the more consumers there are, thereby cyclically increasing the efficacy of BNPL data collection efforts.[111] If market power consolidates in relatively few tech entities, it could lead to reduced innovation, consumer choice, and competition. This trend could also potentially lead to large-scale equitable problems, such as promotions being offered to different demographics: different prices for different groups of consumers.[112] If the idea of harvesting and selling consumer data without consent does not provoke the CFPB or Congress to provide further industry regulation, the very real possibility that consumers of different races or religions could be offered different prices for the same products should.

3. Overextension

The CFPB recognizes two types of overextension: loan stacking and sustained usage.[113] Loan stacking, when a consumer takes out multiple loans simultaneously, is more likely in BNPL because BNPLs do not typically run credit checks before extending credit.[114] This allows consumers to obtain BNPL financing from several different providers simultaneously, thus gaining access to multiple credit sources that are unavailable with traditional credit options.[115] Again, this overextension is a product of one of BNPL's best "features"—quick and easy credit.[116] The risk that consumers who have not been subject to credit checks might default could potentially be mitigated by BNPL's "low and grow" strategy (allowing new customers access to only small lines of credit until their relationship has "grown").[117] This mitigation is nullified, however, by the number of BNPL providers available for consumers to stack.[118] Loan stacking is not a prevalent issue for traditional creditors, because they typically have a more robust credit inquiry process that identifies existing credit obligations for consumers before extending credit.[119] Over 50% of BNPL users have reported paying off multiple BNPL plans simultaneously.[120]

Sustained usage is not a problem that is unique to BNPL lending, but it may be exacerbated by BNPL lending.[121] Conceptually, sustained usage occurs when a consumer uses a credit product too frequently, thereby creating tension between these credit products

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109. *See* 1 Francis Bacon, *Meditationes Sacrae* (1597), *reprinted in* 1 THE WORKS OF FRANCIS BACON 201, 219 (Basil Montagu ed. 1825).

110. CONSUMER FIN. PROT. BUREAU, *supra* note 2, at 75.

111. *Id.*

112. *Id.* at 76; *see also infra* Part III.B.3.

113. CONSUMER FIN. PROT. BUREAU, *supra* note 2, at 65–66.

114. Frankel, *supra* note 1.

115. CONSUMER FIN. PROT. BUREAU, *supra* note 2, at 65.

116. *Id.*

117. *Id.* at 19.

118. *Id.*

119. *Id.* at 15–16.

120. *Survey: Buy Now Pay Later Plans Fuel Debt Struggles*, DEBTHAMMER (Feb. 27, 2022), https://debthammer.org/buy-now-pay-later-survey [https://perma.cc/975T-4VLU].

121. CONSUMER FIN. PROT. BUREAU, *supra* note 2, at 66.

and the consumer's other financial obligations.[122] Statistically, when consumers are confronted with too many payments to make, they choose to pay off personal loans (and similar-in-concept BNPL loans) rather than their other obligations.[123] Though these personal and BNPL loans are unsecured and would likely have less of an effect in the event of a default, consumers generally prefer to make smaller, complete payments rather than larger, partial payments.[124] The real problem with sustained usage, then, is that consumers are required to choose which debts they are going to pay. 32% of BNPL users have reported skipping paying an essential bill to make a BNPL payment.[125] Overextension is a risk associated with every type of consumer credit product, but banks and credit card companies have put measures in place to mitigate overextension to some degree.[126] BNPLs should be required to provide at least the same level of protection as those other consumer credit products.

C. Effects on Host Corporations

BNPLs use two strategies for gaining clients: the merchant partner acquisition model and the app-driven acquisition model.[127] In the merchant partner acquisition model (Merchant Model), BNPLs contract with retailers to provide services directly through the host's checkout process.[128] For example, if shopping on Adidas.com, after selecting purchase items, the consumer can navigate to the checkout page where several BNPL providers are available to aid in the purchase. The following image shows the merchant model in action on Adidas.com.

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122. *Id.* at 10.

123. *Id.* at 66–67.

124. *See Consumers Place Personal Loans Atop the Credit Mountain*, TransUnion (May 17, 2017), https://newsroom.transunion.com/consumers-place-personal-loans-atop-the-credit-mountain [https://perma.cc/543Y-YSMF]. This is partially because personal loans and BNPL loans often require autopayment, and partially because these loans are usually comparatively small, making them easier to pay off.

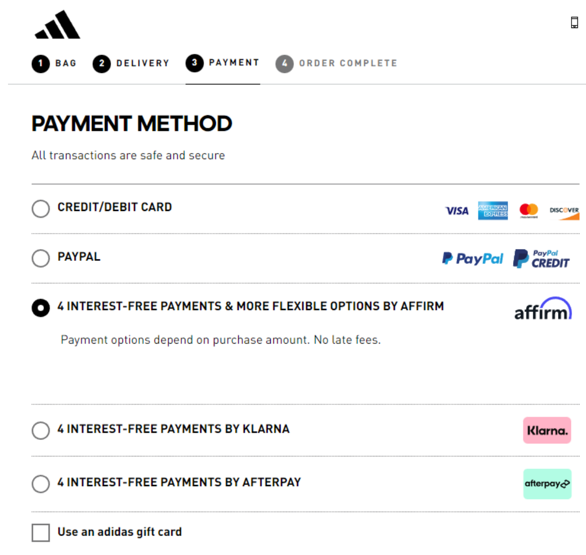
125. DebtHammer, *supra* note 120. Examples of essential bills include rent, utilities, and child support payments. *Id.*

126. Consumer Fin. Prot. Bureau, *supra* note 2, at 66.

127. *Id.* at 12–16.

128. *Id.* at 12.

Figure 3. Adidas.com Checkout Screen[129]



Some retailers that use the merchant model have multiple BNPL options available for consumers.[130] Adidas.com gives consumers the option to use Klarna, Afterpay, or Affirm for BNPL purchasing in addition to traditional credit/debit payments and PayPal offerings.[131]

The app-driven acquisition model (App Model) requires users to download the BNPL's app and complete a credit application.[132] Then, users can browse merchants using the BNPL's services.[133] Notably, the app model allows BNPLs to provide their services for almost all e-commerce merchants, not just those who are contracted with the BNPL.[134]

Merchants are charged transaction fees by BNPLs when consumers purchase goods through the merchant model.[135] Merchants are also charged interchange fees when consumers purchase via the app model.[136] Merchants are further charged with referral fees when purchases originate on the BNPL's app.[137] Theoretically, these fees could be countered by increased profits generated by BNPL-enabled sales. However, because the

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129. *Payment Method*, ADIDAS, https://www.adidas.com/us/payment [https://perma.cc/2DE5-UKBE] (after adding an item to your "Bag," these BNPL options are available on the "Payment" screen).

130. *See id.* (displaying BNPL options for Affirm, Klarna, and Afterpay along with credit/debit card and PayPal options).

131. *Id.*

132. CONSUMER FIN. PROT. BUREAU, *supra* note 2, at 14.

133. *Id.*

134. *Id.* at 15.

135. *Id.* at 81.

136. *Id.*

137. CONSUMER FIN. PROT. BUREAU, *supra* note 2, at 81. Referral fees are common in other forms of web-based advertising. *Id.*

majority of BNPL transactions are initiated through the merchant model, it stands to reason that these merchants would likely have made most of their BNPL sales without the possibility of the BNPL options, thus eliminating transaction fees.[138]

Merchants, particularly e-commerce merchants, have reported decreases in their number of abandoned "shopping carts,"[139] and larger average dollar amounts for purchases once they offer BNPL services on their online platforms.[140] Additionally, offering BNPL allows merchants to provide point-of-sale financing options without having to underwrite the risk themselves.[141] Collectively, this makes partnerships between BNPLs and merchants fairly risk-free for the merchants, so long as consumers do not project the consequences of their relationship with BNPLs onto the merchants who facilitated the relationship.

D. The "Typical" BNPL Consumer

These risks might seem ephemeral, having little effect on middle-to-high-income professionals. The average credit score for BNPL users from 2018 to 2022 was around 665, or 60 points lower than the average BNPL non-user.[142] Nearly 88% of BNPL users had access to a credit card during that time,[143] and were 11% more likely to have been delinquent on at least one consumer credit account than non-users.[144] Moreover, BNPL users were 9% more likely to be more than 30 days delinquent compared to only 3% for BNPL non-users.[145] This CFPB survey revealed that BNPL non-users have an average of four times the amount of non-retirement savings as BNPL users,[146] indicating that BNPL users have substantially lower levels of liquidity. Additionally, the number of BNPL users who have negative credit liquidity is double that of BNPL non-users.[147] Among the 88% of BNPL users who have access to open credit via a credit card, their credit card utilization rate was nearly 50% higher than BNPL non-users near the end of 2022, a number that is flattering compared to its recent history.[148]

These trends in BNPL usage statistics are troubling. It appears BNPLs target consumers who use more consumer credit, default on it more often, and have less cash available to help pay off their credit balances. Naturally, more defaults lead to more late fees, resulting in astronomical payments that remain undisclosed by TILA.

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138. *Id.* at 14.

139. Referring to the metaphorical "carts" used to facilitate online transactions of multiple items.

140. Peterdy, *supra* note 67.

141. *Id.*

142. CFPB INSIGHTS, *supra* note 48, at 10. The overall average FICO score, not considering BNPL usage, is 714 (50 points higher than the average BNPL user, but 10 points lower than the average BNPL non-user). *See* Liz Knueven, *The Average Credit Score by Age, State, and Year*, BUS. INSIDER: PERS. FIN. (Aug. 1, 2023), https://www.businessinsider.com/personal-finance/average-credit-score?op=1 [https://perma.cc/BF9M-VSN7] (providing a breakdown of the average American credit score by state and age).

143. CFPB INSIGHTS, *supra* note 48, at 11.

144. *Id.* at 3.

145. *Id.* at 11–12.

146. *Id.* at 13.

147. *Id.* at 14.

148. CFPB INSIGHTS, *supra* note 48, at 16. The CFPB, when measuring this statistic, found a high of almost 200% within the last three years. *Id.*

IV. RECOMMENDATION

As the above analysis explains, the primary reason BNPLs get away with data harvesting and astronomical APR (when accounting for fees) is because, despite clearly providing consumer credit, they are not regulated as creditors.[149] This Part explores three propositions: (1) amendment of TILA to include BNPLs as "creditors"; (2) amendment of TILA to require APR calculation for potential penalties; and (3) amendment of Dodd-Frank to expand protection of consumer financial data. These changes would ease, if not eliminate, the predatory practices of BNPLs. These amendments are not without their drawbacks, however, as they would likely stymie BNPLs to the point where they no longer have market advantages over traditional forms of consumer credit.

A. Amendment of TILA

There are two potential amendments to the TILA that may improve the Act, both of which are rather simple. First, Congress can amend the definition of "creditor" in TILA by removing the "more than four installments" language in section 1602(g).[150] This would include BNPLs as "creditors," thus requiring them to abide by the regulations of TILA. Most importantly, this would require BNPLs to abide by section 1631, requiring disclosure of the terms of the agreement between the BNPL and the consumer.[151]

This amendment alone would not mend the issue of APR, however. Because most BNPL transactions are "interest-free" (unless penalties are applied),[152] the disclosable APR at the time the transaction is commenced would be zero.[153] The APR of the transaction only rises above zero when penalties are applied. So, for these transactions, APR is only an adequate source of information if it reflects the possibility of penalties.

Therefore, Congress's second amendment to TILA should be additional language to section 1631 that requires creditors to calculate and report APR with penalties included. For example, using the typical transaction above,[154] the BNPL would have to report that one late payment would result in a rise of APR from 0% to 45%. This would increase the efficacy of mandatory reporting for "zero-interest" creditors that would otherwise be able to gouge consumers who are unaware of the terms of their credit.

The crux of this proposition, however, is where to draw the line. If the amendment were to require that creditors with four or fewer installments must supply this type of APR calculation, will BNPLs not simply amend their terms to make five installments, thereby navigating around the requirement? Probably. On the other end, requiring every consumer credit transaction to supply this information would create a significant amount of work for

149. *See supra* Part III.A (explaining why BNPLs are not regulated as creditors).

150. *See* 15 U.S.C. § 1602(g) (providing definitions and rules of construction for TILA).

151. *See* 15 U.S.C. § 1631 (providing requirements that "creditors" abide by reporting and disclosure procedures outlined throughout TILA).

152. CONSUMER FIN. PROT. BUREAU, *supra* note 2, at 3.

153. *See supra* Part II.A (explaining that, if no penalties are applied and no interest is present, the effective finance charge of a BNPL purchase is nonexistent).

154. *See supra* Part III.B.1. (describing the typical BNPL transaction); *see also* CONSUMER FIN. PROT. BUREAU, *supra* note 2, at 3.

creditors that provide more long-term credit.[155] This could possibly even reduce the efficacy of APR entirely.[156] Therefore, for the sake of simplicity, and reinforcing Senator Douglas' vision for APR as a disclosure mechanism, this Note draws the line at one missed payment for closed-end[157] credit transactions paid over no more than 12 installments, with a disclaimer that further missed payments could result in a higher APR.

The theory behind these particular requirements is that "closed-end" regulation would exclude credit cards and other similar open-end credit products from the consequences of these recommendations. While the open-end consumer credit industry might benefit from regulation changes as well, those credit products are not within the scope of this Note. The proposed change, "no more than 12 installments," would force BNPLs to either cooperate or change their terms to the point their product is no longer competitive in the consumer finance market. Additionally, it is unlikely that "one missed payment" would completely hamper BNPLs from being a desirable option for consumers. Once these protections are put in place, consumers could gain all the benefits of quick and easy consumer credit with full knowledge of the BNPL loan agreement, including potential consequences for late payments or delinquency. Combined, these requirements are specifically tailored to target BNPLs without affecting other forms of consumer credit or eliminating the BNPL industry.[158]

B. Amendment of Dodd-Frank

The third change should be amending Dodd-Frank to protect consumer financial data. Specifically, Congress can amend section 1033[159] to require creditors to provide details of their data harvesting practices before consumers complete a transaction and allow consumers to opt out of those data harvesting practices.[160] This amendment would share the proposed language in the TILA amendment above to specifically target BNPLs without placing an undue burden on other consumer credit products.[161]

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155. For example, if a bank were required to provide the APR consequences for every possible missed payment on a 30-year mortgage, the resulting disclosure would contain 360 different APRs.

156. The point of APR was to make financing charges simple and easy for the average consumer to understand. Fleming, *supra* note 21, at 249. This sort of complication to APR calculation would defeat that purpose.

157. Credit products can be split into "open-end" and "closed-end" types. Open-end credit allows consumers to borrow funds for multiple transactions, typically up to a certain outstanding amount. The most common example of this is a credit card. Close-end credit provides funds for only a limited number of transactions (typically one). A common example of this is a car note (or BNPL). Tim Maxwell, *What is Closed-End Credit?*, EXPERIAN (June 25, 2022), https://www.experian.com/blogs/ask-experian/what-is-closed-end-credit [https://perma.cc/5UB8-UL3F].

158. Despite the purpose of this Note (shedding light on an under-regulated and often predatory industry), the Author acknowledges that Fintech has the remarkable ability to provide consumer credit to people who are otherwise excluded from credit markets. *See* Odinet, *supra* note 49, at 1739 ("Scholars and supporters from both the public and private sector proclaim that innovations in financial technology will 'bank the unbanked' and open new channels to affordable credit.").

159. *See* 12 U.S.C. § 5533 (providing for consumer access to financial records).

160. The CFPB has already indicated its intention to amend § 1033 for this very purpose. However, it has not released details of what its proposed amendment would entail. CONSUMER FIN. PROT. BUREAU, THE CONVERGENCE OF PAYMENTS AND COMMERCE: IMPLICATIONS FOR CONSUMERS 19 (2022).

161. *See supra* Part IV.A (describing proposed language as, "one missed payment for closed-end credit transactions" with "no more than 12 installments").

This proposition would not require BNPLs to cease their data harvesting practices; rather, it would simply require that BNPLs provide information on their activities to consumers before they have access to consumer data. This would allow consumers to make a more informed decision regarding their choice of credit providers. As a result, this proposition would put BNPLs on more equal footing with other credit products—similar to the way this Note proposes amending TILA to increase consumer knowledge. Presuming that BNPLs continue to contract with merchants and earn commissions on sales made through their services, BNPLs could continue to operate as profitable businesses while still protecting the privacy and financial security of their customers. It is certainly possible, and perhaps likely, that BNPLs will push back against these proposed regulations. However, these incremental changes are designed to provide BNPLs with an opportunity to grow and prosper while limiting their ability to abuse consumers without their knowledge. Though BNPLs might argue they are providing "interest-free" credit, for a large portion of BNPL consumers, it is not "cost-free" credit. Many BNPL consumers are subject to steep finance charges, without the opportunity to know about the risks before they enter the agreement.[162]

V. CONCLUSION

The rise of Fintech has brought sweeping changes to the consumer credit industry. Some of those changes have been for the better. Expanded access to credit and financial inclusion, especially in the age of COVID-19, promotes market strength and increases options for consumers.[163] Online banking is a useful tool that promotes financial responsibility, and cryptocurrencies provide exciting investment opportunities. But with the good comes the bad: Fintech exposes vulnerable populations to predatory lending practices.[164] One such practice is BNPL. Though BNPL is not nearly as omnipresent as the almighty credit card, it is gaining traction and is expected to continue growing.[165] While this gain is certainly good for BNPLs wishing to expand their market, it has also brought their relative lack of regulation to light.[166] Lacking any meaningful regulation, BNPLs are free to exploit consumers by charging exorbitant rates through penalties and by selling consumers' financial data.[167]

Change is hard. Fundamental changes are difficult and complex.[168] Fortunately, all that is required to achieve meaningful results here are incremental changes.[169] This Note proposes three such incremental changes to existing law that would prevent further abuses perpetrated by BNPLs against their consumers. First, Congress can amend section 1602(g) of TILA to include BNPLs under the definition of "creditor," thus requiring them to abide

162. *See supra* Part III.
163. *See* sources cited *supra* note 70 (discussing various advantages provided by Fintech).
164. Odinet, *supra* note 49, at 1741.
165. CONSUMER FIN. PROT. BUREAU, *supra* note 2.
166. *See generally id.*
167. *See supra* Part III (discussing common pitfalls consumers face when conducting business with BNPLs).
168. Tamra Lynn Mitchell, Developing Teacher Leadership During Unprecedented Times of Change 40 (2021) (Ed.D. dissertation, Kansas State University), https://krex.k-state.edu/bitstream/handle/2097/41694/TamraLynnMitchell2021.pdf?sequence=1 [https://perma.cc/GQ4W-CCV5].
169. *See id.* (discussing the differences between "fundamental" and "incremental" change).

by TILA regulations.[170] Second, Congress can amend section 1631 of TILA to require disclosure of APR after the application of late fees.[171] And third, Congress can amend section 1055 of Dodd-Frank to require disclosure of BNPL data harvesting practices and allow consumers to opt out of such practices.[172]

Together, these three proposals would limit the ability of BNPLs to prey on unsophisticated consumers and reinforce the integrity of consumer credit relationships with merchants.[173]

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170. *See* 15 U.S.C. § 1602(g) (providing definitions for TILA).

171. *See* 15 U.S.C. § 1631 (providing requirements for disclosure in TILA).

172. *See* 12 U.S.C. § 1055 (providing access to consumer financial data in Dodd-Frank).

173. Though a deep discussion of securities regulation and investment is not within the purview of this Note, it is worth noting the potential risks involved in investing in BNPLs through securities markets. In June 2022, Klarna was valued at $6.7 billion, up 219% from 2018. Paul Sawers, *Klarna Confirms $800M Raise as Valuation Drops 85% to $6.7B*, TECHCRUNCH (July 11, 2022), https://techcrunch.com/2022/07/11/klarna-confirms-800m-raise-as-valuation-drops-85-to-6-7b [https://perma.cc/2PUJ-78Z5]. However, Klarna and Affirm both dropped from valuations of around $45 billion to around $6 billion from 2021 to 2022. *Id.* Regardless, the concept of multi-billion-dollar corporations whose only real assets are unsecured consumer debt seems inherently precarious.