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BUY NOW, BUT PAY FOR IT LATER: HOW BNPLS ALLOW UNSECURED CONSUMER DEBT TO ACCUMULATE WITHOUT REGULATION

❖ Note ❖

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I. INTRODUCTION

Buy Now, Pay Later ("BNPL") has taken consumer shopping by storm. Businesses have emerged with the BNPL model as its primary operation, offering repayment plans, typically in four equal payments across six weeks, at no interest.[1] A financial movement that ostensibly began only a couple of years ago is now playing a role in over 200 billion dollars' worth of transactions.[2] Consumers have accelerated BNPL's use during the pandemic; BNPL's usage increased by 230% in 2020 and 400% during the same year's Black Friday holiday.[3] These businesses, however, have grown at such an exponential rate that regulators are now playing catch up.[4] The balancing act for regulators is to permit wide-usage of the service without taking away its redeeming qualities.

In some instances, this service allows financially precarious households to balance their expenditures by spacing out payments without interest.[5] This is particularly helpful for consumers that do not have access to bank-issued credit cards or other providers that run credit checks prior to credit approval.[6] The ramifications for missing a BNPL payment can often carry a greater burden than credit cards. Typically, consumers overuse BNPLs resulting in missed payment penalties, immense debt accumulation, and unintended creditors; this is a peak source of income for BNPLs.[7]

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[1] Eversheds Sutherland, *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/.

[2] Julia Gray, *The Evolution of Buy Now, Pay Later*, MORNING BREW (Dec. 27, 2021), https://www.morningbrew.com/retail/stories/2021/12/27/the-evolution-of-buy-now-pay-later.

[3] *Id.*

[4] *Consumer Financial Protection Bureau Opens Inquiry Into "Buy Now, Pay Later" Credit*, CONSUMER FIN. PROT. BUREAU (Dec. 16, 2021), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-opens-inquiry-into-buy-now-pay-later-credit.

[5] Jessica Dickler, *Now You Can Buy Now, Pay Later for Just About Everything*, CNBC (Oct. 22, 2021, 10:27 AM), https://www.cnbc.com/2021/10/22/now-you-can-buy-now-pay-later-for-just-about-everything.html.

[6] Lauren Aratani, *Buy Now, Pay Later Schemes Are Catching the Eye of Consumers, and of Federal Regulators*, GUARDIAN (Jan. 27, 2022, 3:00 PM), https://www.theguardian.com/money/2022/jan/27/buy-now-pay-later-schemes-entice-consumers-spend-more.

[7] *Id.*

Nonetheless, many believe BNPLs are a safer alternative to credit cards for consumers.[8] Additionally, BNPLs reported that consumers spend more when using a BNPL, boosting the seller's revenue.[9] Because it seems too good to be true, and mathematically impossible for consumers to be in less debt but also spend more, this note will explore how the Consumer Financial Protection Bureau ("CFPB") can effectively regulate this service.

BNPLs should not be regulated identically to credit cards. Part II provides necessary background of the regulators and parties involved. Part III then analyzes how BNPLs impact consumers and draws on credit card statutory regulations as a comparison. Even though the two operate almost identically, there is a tangible benefit by allowing consumers to make purchases without interest.[10] Instead, the CFPB's credit card regulations will act as a maximum guidepost for legislative scrutiny. From this, BNPLs need to be accountable for tracking consumer debt accumulation across platforms, increase transparency about the service's business practices or consumer literacy regarding BNPL, and limits on BNPL's monetary penalties for missing payments to discourage BNPL from preying on low-income families. Part IV uses the findings from Part III to form practical responses to ultimately bolster the benefits and minimize the negatives to protect consumers.

II. BACKGROUND

A. Regulators

The CFPB is an independent bureau, created by the Dodd-Frank Act, that enacts regulations to empower consumers to financially protect themselves and their families.[11] The CFPB is responsible for BNPL regulation.[12]

BNPL companies started operations as early as 2012 and continued to multiple in the following years.[13] The Covid pandemic seems to have accelerated BNPL's popularity as consumers sheltered at home and lived with financial uncertainty.[14] This increase in popularity caught the CFPB's attention, inciting an investigation into the top four BNPL providers: Affirm, Afterpay, Klarna, PayPal, and Zip.[15] The investigation orders the companies to submit information pertaining to various business practices to enlighten CFPB on, among other things, consumer risk.[16] The CFPB will also work with other countries performing similar investigations or that have already enacted regulations over BNPLs.[17]

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[8] *Consumer Financial Protection Bureau Opens Inquiry Into "Buy Now, Pay Later" Credit*, *supra* note 4.

[9] *How rue21 Upped its AOV by 73% With Klarna*, KLARNA (May 6, 2021), https://www.klarna.com/us/blog/rue21-aov-coversion-increase-klarna/#.; *see also Deep Dive: How Buy Now Pay Later is Revitalizing Retail and the Economy*, PYMNTS (Nov. 10, 2021), https://www.pymnts.com/bnpl/2021/deep-dive-how-buy-now-pay-later-is-revitalizing-retail-and-the-economy.

[10] ACCENTURE, THE ECONOMIC IMPACT OF BUY NOW, PAY LATER IN THE US 6 (Sept. 2021), https://afterpay-corporate.yourcreative.com.au/wp-content/uploads/2021/10/Economic-Impact-of-BNPL-in-the-US-vF.pdf.

[11] *Consumer Financial Protection Bureau*, FED. REG. (Last visited April 15, 2022), https://www.federalregister.gov/agencies/consumer-financial-protection-bureau.

[12] *Consumer Financial Protection Bureau Opens Inquiry Into "Buy Now, Pay Later" Credit*, *supra* note 4.

[13] Gray, *supra* note 2.

[14] *How COVID Has Turned Buy Now, Pay Later Upside Down*, CONSUMER REPS. (Feb. 18, 2022), https://www.consumerreports.org/shopping-retail/how-covid-has-turned-buy-now-pay-later-upside-down-a4434659796/.

[15] *Consumer Financial Protection Bureau Opens Inquiry Into "Buy Now, Pay Later" Credit*, *supra* note 4.

[16] *Id.*

[17] *Id.*

As such, BNPL's popularity is not isolated in the United States. Afterpay and Zip are Australian BNPLs,[18] and Klarna is Swedish.[19] As a preliminary step towards regulation, Britain's Financial Conduct Authority urged BNPLs to change their contracts, and Britain's finance ministry intends to enact legislation in late 2022.[20] One report referred to as "The Woolard Review" identifies several areas of concern that sparked British government to pursue legislative regulations.[21] Other countries have been less forgiving and imposed stricter rules.[22]

While British authorities, and others abroad, dive into how best to approach BNPL for their countries, the United States remains without much regulatory authority.[23] The CFPB has a difficult task ahead as BNPL has positives for both consumers and businesses. Left unregulated, however, BNPL has the potential to make consumers more indebted than ever before.

B. Consumers

BNPLs have tangible benefits to responsible users.[24] One of two revenue generating practices for credit cards is to charge interest on unpaid credit.[25] After going through the credit card screening process, submitting annual income and running a credit check, an interest rate is created based on one's default risk.[26] This is usually expressed as an annual percentage rate.[27] As the consumer uses their available credit, any unpaid balance following the billing cycle, typically monthly, the credit card provider charges that interest rate against the remaining balance and adds that fee as a charge.[28] BNPLs disregard that entire process by forgoing interest charges. Instead, BNPLs are generally applied to one transaction, with the first of four installments due at checkout.[29] Where credit cards pre-approve a consumer for a credit limit, BNPLs are unregulated and are not required to track an individual's debt accumulation.[30]

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[18] *Buy Now Pay Later Companies in Australia: Provider Comparisons, How to Sign Up and Tips to Manage a BNPL Account*, MOZO (Feb. 4, 2022), https://mozo.com.au/buy-now-pay-later.

[19] Nikita Divissenko, *Buy Now, Pay Later: The Role of EU Regulation in Shaping the 'New Normal,'* EUIDEAS (Dec. 17, 2020), https://euideas.eui.eu/2020/12/17/buy-now-pay-later-the-role-of-eu-regulation-in-shaping-the-new-normal/.

[20] Huw Jones, *Britain Crack Down on 'Buy Now Pay Later' Firms*, THOMSON REUTERS (Feb. 14, 2022, 9:36 AM), https://www.reuters.com/world/uk/britains-financial-watchdog-tells-buy-now-pay-later-firms-amend-contracts-2022-02-14/.

[21] FIN. CONDUCT AUTH., THE WOOLARD REVIEW – A REVIEW OF CHANGE AND INNOVATION IN THE UNSECURED CREDIT MARKET 3 (2021), https://www.fca.org.uk/publication/corporate/woolard-review-report.pdf.

[22] *See BNPL Under Global Regulatory Scrutiny, With UK as Likely Frontrunner*, PYMNTS (Dec. 9, 2021), https://www.pymnts.com/buy-now-pay-later/2021/bnpl-under-global-regulatory-scrutiny-with-uk-as-likely-frontrunner/ ("[T]he central bank [of Australia] adopted a decision in October [2021] ordering BNPL firms to remove their no-surcharge rules. This means that merchants are permitted to apply a surcharge to customers for using this method of payment if they wish to offset fees paid to the BNPL providers.").

[23] *Id.*

[24] ACCENTURE, *supra* note 10, at 6.

[25] *Understanding Credit Card Interest,* INVESTOPEDIA (Jan. 29, 2022), https://www.investopedia.com/articles/01/061301.asp.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] Jackie Veling, *What is Buy Now, Pay Later?*, NERD WALLET (Dec. 22, 2021), https://www.nerdwallet.com/article/loans/personal-loans/buy-now-pay-later.

[30] *CFPB Probes Big Five Buy Now, Pay Later Providers Over Data Use, Debt Accumulation*, PYMNTS (Dec. 17, 2021), https://www.pymnts.com/bnpl/2021/cfpb-probes-big-five-buy-now-pay-later-providers-over-data-use-debt-accumulation/.

Additionally, BNPLs typically arrange a four-installment payment plan,[31] whereas credit cards typically invoke a monthly minimum.[32] That means that a consumer approaching an online checkout may opt for the BNPL option, and in lieu of paying the company directly, the consumer will be redirected to the BNPL's website, provide a debit or credit card, or link their bank account, and only pay one-fourth of their shopping cart.[33] When using credit cards for purchases, the seller seeks approval from the credit card provider for that transaction, essentially inquiring if the buyer has enough credit.[34] This action happens instantly after a swipe, insert, or tap.[35] That means BNPLs are not providing an individual limit based on each consumer giving full reign to the individual to purchase as much as they want.

Even if a consumer misses a payment with one BNPL company, that consumer can freely use another BNPL service.[36] Conversely, credit card lenders can rely on credit reports to justify whether a consumer can take on additional credit.[37] Generally, BNPLs neglect to run a credit score which increases convenience and accessibility to the consumer. Taken in isolation, this appears to be a great solution to individuals with low credit scores. But this entire structure relies on the consumer to track their spending with all BNPL services they use.

C. Businesses

Nearly forty-five million consumers are active BNPL users.[38] This magnitude of users amounts to more than twenty billion dollars in spending.[39] Of this multi-billion-dollar spending, BNPLs take a cut from each transaction.[40] Afterpay reported that businesses received over four billion dollars in net benefits from BNPLs in 2021.[41] This figure is the summation of BNPL's ability to cut costs, lower merchant fees, increase cost efficiencies.[42] Additionally, Afterpay found that consumers are spending seventeen percent more by using BNPL.[43]

From a business perspective, BNPL seems like a great way to increase profit. Klarna performed a case study to show a retail clothing brand, rue21, the impact of providing BNPL to their consumers.[44] The results showed that the average order value increased by seventy-three percent.[45] Maybe its these results that make up for the one to two percent fee BNPL charges per transaction.[46]

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31 Veling, *supra* note 29.

32 INVESTOPEDIA, *supra* note 25.

33 *Id.*

34 *How Do Credit Cards Work?*, INVESTOPEDIA (Dec. 28, 2021), https://www.investopedia.com/how-do-credit-cards-work-5025119.

35 *Id.*

36 Evan Weinberger, *Behind 'Buy Now, Pay Later' U.S. Boom, Federal Regulator Looms*, BLOOMBERG L. (Nov. 23, 2021, 5:00 AM), https://news.bloomberglaw.com/banking-law/behind-buy-now-pay-later-u-s-boom-federal-regulator-looms.

37 *Credit Score*, INVESTOPEDIA (March 11, 2021), https://www.investopedia.com/terms/c/credit_score.asp.

38 ACCENTURE, *supra* note 10, at 2.

39 *Id.*

40 Rahil Sheikh, *Buy Now Pay Later: How Does it Work?*, BBC NEWS (Dec. 13, 2021), https://www.bbc.com/news/explainers-59582188.

41 ACCENTURE, *supra* note 10, at 2.

42 *Id.*

43 *Id.* at 15.

44 KLARNA, *supra* note 9.

45 *Id.*

46 Gene Marks, *'Buy Now Pay Later' Services Could Be a Great Way for Small Retailers to Increase Sales*, PHILA. INQUIRER (Jan 10, 2022), https://www.inquirer.com/business/small-business/buy-now-pay-later-sales-retail-small-business-20220110.html.

Historically, businesses have not had the same welcoming arms for credit cards despite charging similar, and sometimes lower, rates.[47] Credit cards create unnecessary challenges with complex monthly statements and an ultra-competitive market, confusing businesses about their terminal and credit card rates.

Nonetheless, businesses have an opportunity to succeed with BNPL where credit cards faltered. BNPL makes the transaction streamlined for businesses and despite taking a portion of the transaction, the offset revenue increase from larger purchases makes this a win-win.

D. An Antedated Concept Innovated to be the Future of Unsecured Consumer Debt

Conceptually, BNPLs are not new.[48] Point-of-sale financing services have been available for decades[49] and often took shape in various forms.[50] As noted above, the pandemic is presumably a, if not *the*, catalyst for BNPL's success. But, as many people are eager for pre-pandemic life to return, will that spell the end of BNPL? The quick answer: probably not. That is because BNPLs are different from the previous point-of-sale financing services and are equipped to handle uncertainty surrounding future shopping.[51]

BNPLs can track a consumer's spending and sell that data to various marketing agencies.[52] This unregulated data jackpot can do many things. Assuming a consumer uses BNPL for all purchases, BNPL has untenable access to what the individual wants, likes, purchases, and how much money they spend over a six-week period.[53]

Quantitatively, consumers are trending towards wide acceptance.[54] Of the following— unsecured lending,[55] specifically point of sale financing (effectively, BNPL), personal loans, private-label credit cards, and general-purpose credit cards— all but one are projected to decrease in usage: BNPL.[56] Total unsecured lending is not positioned to decrease, however.[57] Reason being, BNPLs' popularity is catapulting growth and consumers seem to love it.[58]

III. ANALYSIS

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47 *Id.*

48 *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.

49 *Id.*

50 Marks, *supra* note 46.

51 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#toggle-gdpr.

52 *Id.*

53 *Id.*

54 *Buy Now, Pay Later: Five Business Models to Compete*, *supra* note 48.

55 *See Unsecured Loan*, INVESTOPEDIA (Feb. 22, 2021), https://www.investopedia.com/terms/u/unsecuredloan.asp. ("An unsecured loan is a loan that doesn't require any type of collateral. Instead of relying on a borrower's assets as security, lenders approve unsecured loans based on a borrower's creditworthiness"; however, BNPLs typically do not require credit checks prior to issuing a plan).

56 *Buy Now, Pay Later: Five Business Models to Compete*, *supra* note 48.

57 *Id.*

58 *Id.*

There is much to analyze from BNPLs' many benefits, both for consumers and businesses, but also balance against the potential consumer ramifications of debt accumulation across platforms, increase transparency or consumer literacy regarding BNPL, limit BNPL's monetary penalties for missing payments to discourage BNPL from preying on low-income families, and adequately disclose exactly what privacy data is being sold to other parties.

A. Consumer Debt Accumulation

As BNPLs remain unregulated, a major concern is the ease of extraordinary consumer debt accumulation.[59] From unchecked and unsupervised usage of BNPL, to late fees increasing total amount due, consumers can quickly find themselves in greater debt than credit cards.[60] While BNPL providers may not welcome total removal of late fees, striking a balance between monitoring consumer debt accumulation and lowering late fees can solidify a legitimate alternative to credit cards.[61]

The CFPB defines creditors as:

> A person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement. Notwithstanding the preceding sentence, in the case of an open-end credit plan involving a credit card, the card issuer and any person who honors the credit card and offers a discount which is a finance charge are creditors.[62]

Meanwhile, a 'card issuer' is defined as "any person who issues a credit card, or the agent of such person with respect to such card."[63] Congress enacted the Consumer Credit Protection Act and specifically codified that a "card issuer" may not open any credit card account for any consumer under an open-end consumer credit plan, or increase any credit limit . . . unless the card issuer considers the ability of the consumer to make the required payments."[64] Even a cursory review will show that BNPLs structured their typical installments to avoid being defined as a creditor and card issuer.

BNPLs' typical installment plan is just outside the Consumer Credit Protection's Act's definition of creditor, thus entering an unregulated, unsecured credit field. Even though 'consumer' and various other definitions are applicable to BNPLs transactions, BNPL providers are not categorized, necessarily, under the current Consumer Credit Protection Act. Despite consumer risks running parallel between BNPL and credit cards, BNPL cannot operate under these regulations.

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[59] Testimony of Lauren Saunders, *Buy Now, Pay Later? Investigating Risks and Benefits of BNPL and Other Emerging Fintech Cash Flow Products*, NAT'L CONSUMER L. CTR. 6 (Nov. 2, 2021), https://www.nclc.org/images/pdf/banking_and_payment_systems/fintech/Fintech-task-force-liquidity-testimony-Lauren-Saunders-2021-11-2-FINAL.pdf.

[60] *Id.*

[61] *Id.*

[62] 15 U.S.C. §1602 (2020).

[63] 15 U.S.C. §1602(n) (2020).

[64] 15 U.S.C. §1665(e) (2020).

Importantly, without being a card issuer, BNPL need not consider consumers ability to "make required payments."[65] Practically, BNPLs can let consumers increase their debt without hesitation.

Further, BNPLs do not track consumer usage across platforms. If a consumer uses Affirm for their one purchase, but Afterpay for another, the two companies are ignorant to the consumer's total debt accumulation. Thus, consumers can accumulate debt and not only do BNPLs need not inquire before providing consumers the service, but also do not communicate amongst other BNPLs how much debt an individual accumulated.

Credit card issuers remedied this issue by checking credit scores, which determines an individual's ability to pay back a debt.[66] Because a credit score is associated with an individual's social security number and can be widely accessed regardless of bank, provider, or lender, any creditor can assess an individual's ability to pay back debt by issuing a credit report.[67] Creditors are tasked with the legal responsibility to assess a consumer's ability to pay back the loan *and* credit reports make it easier[68] to accomplish this goal.[69]

Regulating how much debt an individual accumulates is central to the Consumer Credit Protection Act statutes and the same purpose is applicable to BNPL. While the credit vehicle may appear different, the risks are the same.

The CFPB must consider the debt accumulation BNPL poses to consumers by monitoring not only an individual within one company but across all platforms similar to the functionality of a credit score.[70]

B. Increase Transparency and Financial Literacy

BNPLs must increase transparency about their business practices to allow consumers to make well-informed to decisions before accepting the service. One in five BNPL users are unsure how the service works.[71] Without making an informed decision, users may find themselves incurring disproportionately high late fees[72] or inadvertently selling purchasing data to unintended businesses.[73]

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[65] *Id.*

[66] *When Did Credit Scores Start?*, CREDIT.COM (Nov. 29, 2018), https://www.credit.com/blog/when-did-credit-scores-start-152354/.

[67] *Id.*

[68] *See* Sarah Ludwig, *Credit Scores in America Perpetuate Racial Injustice. Here's How*, GUARDIAN (Oct. 13, 2015), https://www.theguardian.com/commentisfree/2015/oct/13/your-credit-score-is-racist-heres-why. (Explaining how credit scores have historical complications rendering it ineffective. The principle, however, of any creditor being able to assess an individual's ability to repay a loan is pertinent to discussion. Whether credit scores are calculated effectively is beyond this analysis).

[69] CREDIT.COM, *supra* note 66.

[70] Recently, private credit reporting companies have taken initiative to include BNPL purchases to their credit score calculations. *See* Robin Saks Frankel, *TransUnion Follows Equifax's Move to Include Buy Now, Pay Later Data in Credit Reports*, FORBES (March 7, 2022), https://www.forbes.com/advisor/personal-finance/transunion-equifax-buy-now-pay-later-credit-report/.

[71] Elizabeth Aldrich, *How Does Buy Now, Pay Later Work?*, ASCENT (March 8, 2022), https://www.fool.com/the-ascent/credit-cards/how-does-buy-now-pay-later-work.

[72] *Id.*

[73] CONG. RSCH. SERV., RAPIDLY GROWING "BUY NOW, PAY LATER" (BNPL) FINANCING: MARKET DEVELOPMENTS AND POLICY ISSUES 2—3 (Nov. 1, 2021), https://crsreports.congress.gov/product/pdf/IN/IN11784/3.

Choosing BNPL to avoid credit card interest is one of its best features.[74] Arguably, however, late fees tacked onto missed payments within two weeks of purchase can replace interest charges and often times, summate to a larger fee.[75] A recent study found that twenty-six percent of respondents answered that their BNPL payments are less than fifty dollars a month.[76] While missed payment fees vary per service, generally, fees are greater than five dollars or ten percent.[77] If a consumer misses two payments, incurring an additional minimum fee of five dollars or ten percent, BNPLs begin to look a lot like credit card interest. What can be said about missed payments and BNPLs secret interest is that BNPLs reward those that can afford the payments, as opposed to those that might be using BNPL out of necessity.

BNPLs also lack transparency to consumers about how their credit scores will be impacted by the service.[78] When consumers first use the service for a purchase, their credit score typically remains unharmed.[79] Again, the problems begin to rise when users miss payments.[80] While some services simply ban consumers from using the service again,[81] others send default payments to collectors, which is reported to the credit bureaus.[82] BNPL users that miss payments could face major, negative impacts on their credit score as a result.[83]

In some instances, missing a BNPL payment is worse than missing a credit card payment.[84] Yet, consumers are accepting BNPL with open arms.[85] The CFPB must recognize that even though BNPL has redeeming qualities that should be maintained, its lack of transparency can make consumers financially worse off.

The perverse financial implications that arise from lack of transparency are not alone. Lack of transparency also reaches consumer data, leaving consumers woefully unaware.

Consumers provide important data when using BNPL such as shopping habits and bi-weekly expenses.[86] BNPLs also function as phone apps, allowing consumers to purchase directly through the app.[87] In the CFPB's inquiry into BNPL practices, the organization highlights how

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[74] AFTERPAY, THE ECONOMIC IMPACT OF BUY NOW, PAY LATER IN THE US 17 (2021), https://afterpay-corporate.yourcreative.com.au/wp-content/uploads/2021/10/Economic-Impact-of-BNPL-in-the-US-vF.pdf.

[75] *The Risks of Buy Now, Pay Later Programs* , CONSUMER REPS. (Nov. 30, 2021), https://www.consumerreports.org/shopping-retail/risks-of-buy-now-pay-later-programs-a1000664957/.

[76] *Buy Now, Pay Later Statistics and User Habits*, C + R RSCH. (last visited April 15, 2022), https://www.crresearch.com/blog/buy_now_pay_later_statistics.

[77] Trina Paul, *Everything You Need to Know About the Most Popular Buy Now, Pay Later Apps*, CNBC (March 1, 2022), https://www.cnbc.com/select/best-buy-now-pay-later-apps/.

[78] Gaby Lapera, *72% of Americans Saw Their Credit Scores Drop After Missing a 'Buy Now, Pay Later' Payment, Survey Finds*, CREDIT KARMA (Feb. 8, 2021), https://www.creditkarma.com/insights/i/buy-now-pay-later-missed-payments.

[79] *Id.*

[80] Dawn Papandrea, *How Does 'Buy Now, Pay Later Affect Your Credit Score?*, BANKRATE (Jan. 3, 2022), https://www.bankrate.com/finance/credit-cards/buy-now-pay-later-credit-score/.

[81] Lapera, *supra* note 78.

[82] Papandrea, *supra* note 80.

[83] Clint Proctor, *What Should I Know if I Have Debts in Collections*, CREDIT KARMA (Jan. 20, 2022), https://www.creditkarma.com/advice/i/accounts-in-collections?

[84] *Compare Collections - How to Manage Them and What They Do to Your Credit*, MYFICO (last visited May 26, 2022), https://www.myfico.com/credit-education/faq/negative-reasons/should-i-pay-my-collections., (explaining how a debt sent to collections will impact a credit score), *with* Credit Karma Staff, *How Late Payments Can Affect Your Credit*, Credit Karma (Feb. 7, 2022), https://www.creditkarma.com/credit-cards/i/late-payments-affect-credit-score. (Explaining how a missed credit card payment will impact a credit score).

[85] *Study Confirms Love Match Between BNPL and 'Second-Chance Consumers'*, PYMNTS (Sept. 24, 2021), https://www.pymnts.com/buy-now-pay-later/2021/study-confirms-match-bnpl-second-chance-consumers/.

[86] *Consumer Financial Protection Bureau Opens Inquiry Into "Buy Now, Pay Later" Credit*, *supra* note 4.

[87] Maurie Backman, *Study: Buy Now, Pay Later Services Continue Explosive Growth*, ASCENT (March 22, 2021), https://www.fool.com/the-ascent/research/buy-now-pay-later-statistics/.

BNPLs' profits will marginalize with competition, forcing alternative revenue streams to continue growing.[88] The easy inference is to monetize consumer data to create more targeted ads and tailored shopping experiences.[89] These companies keep this information tight to the chest, hence opening an investigation. This investigation, however, is not inconsistent with other financial institutions[90] and will open large spells of regulatory practices to prevent predatory business antics against consumers.

BNPLs' lack of transparency coupled with missed payments are thus working double time by increasing consumer spending, while advertising as interest-free. Meanwhile, BNPLs hide their fees to give consumers a false sense of security. In effect, these companies are taking advantage of consumers that may need to spread large payments to soften financial burdens across multiple paychecks by charging disproportionately high missed payments.

Additionally, the lack of transparency evolves into a second revenue stream. BNPLs captivate a larger audience now, but later, will be able to sell consumer data at a premium.

Both issues must be considered by the CFPB when formulating the regulatory basis for BNPL. With most of the concerns above, there is a silver lining. Efforts to keep those benefits intact are worthwhile, thus providing consumers and businesses a well-struck balance.

IV. RECOMMENDATION

The CFPB should implement a governing agency to track consumer debt accumulation without impacting credit scores. One of BNPLs' best characteristics is that it allows individuals with low income or bad credit to spread out large payments.[91] But, that incentive quickly dissipates as users miss payments. BNPL ostensibly prays on impulse purchases. Indeed, some BNPLs market their product's ability to capitalize on buyers' impulses and to induce larger purchases.[92]

For regulators, a keen eye should watch consumer debt accumulation. As seen above, if the CFPB incorrectly deems BNPL as a credit card and groups its lending within credit scores, then BNPL might as well disappear with layaway. The task is to find a way to regulate BNPL independent from other forms of unsecured lending.

The CFPB should put the impetus on the BNPL companies. Creating another government agency as a watch dog will only create more inefficiency. Because these are fintech companies, a fintech solution should be workable.

BNPLs should be regulated to assign a BNPL number to its customers. This number can be tied either to a consumer's phone number or credit card number to avoid duplicative accounts. That number is then registered with an agency that independently monitors consumer spending. From there, BNPL will notify an individual prior to purchase of their total BNPL payments, and how much those payments will cost in the credit's six-week period.

This approach will work in two ways: first, consumers will be less impulsive, seeing how much they will owe that day and in the coming weeks. Second, more discretion will be given to both

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88 *Consumer Financial Protection Bureau Opens Inquiry Into "Buy Now, Pay Later" Credit*, *supra* note 4.

89 *Id.*

90 Michelle Price & Katanga Johnson, *U.S. Consumer Watchdog Orders Tech Giants to Turn Over Information on Payment Data*, THOMSON REUTERS (Oct. 21, 2021, 10:19 AM), https://www.reuters.com/article/ctech-us-usa-cfpb-bigtech-idCAKBN2HB1WG-OCATC.

91 Aldrich, *supra* note 71.

92 *See* ACCENTURE, *supra* note 10, at 6 marketing consumer checkout baskets are larger due to BNPL; *see also* KLARNA, *supra* note 9, finding from rue21 case study that consumers make larger purchases because of BNPL; *but see* C + R RSCH., *supra* note 76, finding that 59% of respondents said they purchased an unnecessary item because of BNPL.

the BNPL company and customer. With this information readily available, BNPL will have the option to review a customer's ability to pay the debt. This will remove the need to review eligibility imposed on the Consumer Credit Protection statutes but will give companies no excuse not to review.[93]

CFPB must require greater transparency with BNPLs impact on credit score and fess associated with missed payments. The requirement should go beyond a terms and condition sheet. Customers shopping online noted that BNPL are favored because of its ease of use and speed.[94] Likewise, when a consumer is shopping in-person, it is not conceivable for a shopper to step aside, read the fine print, and then proceed with their purchase.

The CFPB can approach online and traditional, in-person shopping identically. Online can require consumers to initial two sentences: one, briefly explaining what happens if a payment is missed and the second, that explains what happens with the consumer's data. In-person shoppers can initial the same two sentences but on the app from their phone. While this may seem over simplistic, the principle is sound: give consumers the true and correct information instead of using misleading sentences such as "there are no upfront fees charged or any interest incurred."[95]

Combining these two recommendations, the CFPB will effectively target and impede consumer debt accumulation and permit BNPL users to identify their financial bandwidth.

V. CONCLUSION

BNPL has the potential to assist many consumers by decreasing large payments and segmenting payments in smaller increments over a two-month period. Ahead of the CFPB's finding from their investigation of BNPL, factors such as consumer debt accumulation and lack of transparency must be balanced to allow BNPL's benefits to remain but protect consumers. By implementing a governing body to monitor individual debt across platforms and asking BNPLs to inform users how much debt they have accumulated is both reasonable and beneficial to both parties. Disseminating information about the realities of an individual's credit score and data will not prohibit BNPL from benefiting consumers, and in fact, will allow consumers to adequately determine if BNPL is right for them.

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[93] *See* 15 U.S.C. §1665(e) (2020).

[94] C + R RSCH., *supra* note 76.

[95] *See Is There a Cost to Using Afterpay?*, AFTERPAY (last visited March 18, 2022), https://help.afterpay.com/hc/en-us/articles/218320423-Is-there-a-cost-to-using-Afterpay-. (Deciding regulation should consider this type of language. BNPLs, instead, should be required to be blunt and avoid deceptive practices).