THE REGULATION OF "BUY NOW, PAY LATER" SERVICES IN SOUTH CAROLINA IN THE ABSENCE OF FEDERAL CONSUMER PROTECTION LAWS

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I. BNPL OVERVIEW

The chances are that if you have been in college within the past seven years, you have heard of companies such as Afterpay, Klarna, or Affirm. These companies are a part of a larger industry called "Buy Now, Pay Later" (BNPL) services.[1] While there is no universal definition of BNPL, these services are primarily marketed as a four-installment, "no-interest" consumer loan.[2] The services normally require a 25% down payment with three remaining installments paid every two weeks.[3] Compared to normal layaway plans in which consumers receive their products only after completing all payments, consumers who utilize BNPL services receive their products immediately after completing the 25% down payment.[4]

BNPL services have grown exponentially with the increased use of e-commerce by consumers as a result of the COVID-19 pandemic.[5] The industry shows no signs of slowing down even after the pandemic. Information provided by the Consumer Financial Protection Bureau (CFPB) shows that the number of BNPL loans issued between 2019 and 2021 increased by almost tenfold.[6] The total dollar volume for these loans increased from $2 billion to $24.2 billion, which represented a growth rate of over 1,000%.[7] Along with the number of loans increasing, the average purchase amount increased from $121 in 2020 to $135 in 2021.[8] Consumer approval rates have also increased by 4% between 2020 and 2021.[9] While BNPL has provided consumers with increased purchasing power, not all borrowers experience the seamless process marketed to them. Nearly 11% of borrowers were charged at least one late fee in 2021[10] and 3.8% of

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1. CONSUMER FIN. PROT. BUREAU, BUY NOW, PAY LATER: MARKET TRENDS AND CONSUMER IMPACTS 6–8 (2022), https://files.consumerfinance.gov/f/documents/cfpb_buy-now-pay-later-market-trends-consumer-impacts_report_2022-09.pdf [https://perma.cc/Z2UT-67AN].
2. *Id.* at 3.
3. *Id.*
4. Rebecca Lake, *Buy Now, Pay Later vs. Layaway*, INVESTOPEDIA (July 28, 2023), https://www.investopedia.com/buy-now-pay-later-vs-layaway-5187822#:~:text=With [https://perma.cc/CG2V-26YK].
5. Kendrick Sands, *The Rapid Rise of Buy Now, Pay Later*, RETAIL DIVE: OPINION (Oct. 5, 2022), https://www.retaildive.com/news/rapid-rise-buy-now-pay-later/633302/ [https://perma.cc/S95D-PKN2].
6. CONSUMER FIN. PROT. BUREAU, CONSUMER USE OF BUY NOW, PAY LATER 2 (2023), https://files.consumerfinance.gov/f/documents/cfpb_consumer-use-of-buy-now-pay-later_2023-03.pdf [https://perma.cc/9WPX-BBJ2].
7. CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 3.
8. *Id.* at 4.
9. *See id.*
10. *Id.*

borrowers had at least one loan charged off.[11] To put these percentages into perspective, this would mean that 18.9 million users experienced a late fee, and 6.84 million users were unable to make further payments on their loan.[12] The negatives of BNPL loans have escalated with their overall growth. Due to escalating financial pressures from the ballooning cost of living and the heightened demand for cheap credit solutions, the BNPL industry is expected to grow to $437 billion by 2027[13]—a 1,700% increase from the amount on which the CFPB based its report.[14]

A. BNPL User Demographics

Using data derived from the CFPB's Making Ends Meet survey, the use of BNPL is most prevalent amongst consumers with an annual income between $20,000 and $50,000.[15] Additionally, women are more likely to use BNPL services as compared to men, and black consumers are more likely to use BNPL services compared to white and Hispanic consumers.[16] Alarmingly, the average BNPL user's credit score receives the label of "sub-prime" (580–669).[17] The lower creditworthiness of the average BNPL user compared to non-BNPL users is further shown by BNPL users being 157% more likely to have a delinquency on at least one credit product.[18] To account for the lower creditworthiness, BNPL lenders not only encourage autopay, but most require autopay before receiving the service.[19] Combining the fact that 89% of loan repayments were made on a debit card[20] with the delinquency rates of BNPL users on at least one credit product, consumers that enroll in autopay have difficulty accounting for other debt obligations and run the risk of being charged late fees and overdraft fees if their account does not contain sufficient funds for payment.[21]

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11. *Id.*
12. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 3–4.
13. Dominique Tetnowski, *Buy Now Pay Later Spend to Accelerate, Reaching Over $437 Billion Globally by 2027*, JUNIPER RSCH. (Oct. 25, 2022), https://www.juniperresearch.com/press/press-releases/buy-now-pay-later-spend-to-accelerate-reaching [https://perma.cc/HSS3-9N6G].
14. *Compare id. with* CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 3.
15. CONS. FIN. PROT. BUREAU, *supra* note 6, at 6.
16. *Id.* at 7.
17. *Id.* at 9.
18. *See id.* at 12.
19. CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 4.
20. *Id.* at 9.
21. *See id.* at 22.

B. BNPL Business Model/Loan Process

BNPL providers have positioned themselves in different ways to gain customers through the ease of their loan obtaining process.[22] The most prevalent way is through point-of-sale (POS) installment loans.[23] In this type of business model, BNPL providers sign contracts with online/in-store retailers to embed their services within their checkout process.[24] Consumers then purchase goods from participating stores (online and in-person) and opt for BNPL services at checkout.[25] Once approved, the consumer will normally make a 25% down payment and then pay three remaining interest-free installments.[26]

To personify POS installment loans, the following hypothetical would be an example of the process. Affirm (BNPL Lender) contacts Target (Retailer) to inquire about accepting Affirm BNPL loans. Target accepts the offer and implements Affirm as a payment method for in-store and online. Once the consumer completes their shopping, they approach the checkout counter or online checkout page. After this, the consumer selects Affirm as their payment method. Once they make this selection, they enter their name, email address, mobile phone number, date of birth, and the last four digits of their social security number.[27] Affirm then verifies the consumer's identity and makes an instant loan decision.[28] Once approved, the consumer then receives the goods they have purchased.

A number of BNPL providers are creating their own apps for direct consumer engagement.[29] In this model, consumers complete a credit application with the BNPL provider.[30] Once the consumer is approved, they are given an estimated credit limit to use on virtual shopping.[31] The application business model utilizes a single-use, bank-issued virtual card that

22. *See id.* at 12, 14.
23. *See* Rebecca Lake, *Buy Now, Pay Later (BNPL): What It Is, How It Works, Pros and Cons*, INVESTOPEDIA (FEB. 25, 2024), https://www.investopedia.com/buy-now-pay-later-5182291 [https://perma.cc/QF7S-QTD].
24. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 13.
25. Lake, *supra* note 23.
26. *Id.*
27. *See Financing Application Process & Affirm Overview*, OSIM, https://us.osim.com/pages/financing-application-process-affirm-overview [https://perma.cc/K2ZA-QDUM]; *Buy Now, Pay Later at Target*, AFFIRM, https://www.affirm.com/shopping/stores/target [https://perma.cc/ZLW5-VR4U].
28. *Financing Application Process & Affirm Overview*, *supra* note 27.
29. CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 14–15.
30. *Id.* at 14.
31. *Id.*

consumers use to complete their BNPL loan.[32] This card allows merchants who do not have a current contract with a BNPL provider to accept BNPL payment.[33] Additionally, this virtual card allows BNPL providers to increase revenue through a portion of the interchange fees that are collected from the virtual card transaction.[34]

II. FEDERAL REGULATORY AUTHORITY

The CFPB was created in 2010 after the Dodd-Frank Wall Street Reform and Consumer Protection Act was signed into effect.[35] The bureau was created "to increase accountability in government by consolidating consumer financial protection authorities that had existed across seven different federal agencies into one."[36] This singular entity was created due to these different agencies being unable to focus on consumer protection within the entirety of the market.[37] 12 U.S.C. §§ 5491 and 5492 provided the CFPB with sole rulemaking authority in regards to consumer protection.[38]

By proposing regulations, the CFPB would be acting under Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[39] Under the Act, the CFPB may regulate "nonbank covered persons."[40] This definition includes "[a]ny person that engages in offering or providing a consumer financial product or service."[41] Because of this, BNPL providers would fall under CFPB regulatory power. In addition, the CFPB may exercise authority over a "covered person."[42] A "covered person" is defined as "any person that engages in offering or providing a consumer financial product or service."[43] Again, BNPL providers would fall under this section of CFPB regulatory power. The CFPB bases its risk determination on complaints and outside information such as their own studies or studies from third-party participants.[44] After the decision to regulate nonbank covered persons, the

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32. *Id.* at 15.
33. *Id.*
34. *Id.*
35. *Building the CFPB*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/data-research/research-reports/building-the-cfpb/ [https://perma.cc/9PJ4-HL4T].
36. *Id.*
37. *See id.*
38. *See* 12 U.S.C. §§ 5491–5492.
39. *See* 12 U.S.C. §§ 5301–5641.
40. *See* 12 C.F.R. § 1091.101 (2023).
41. *Id.*
42. *See* 12 U.S.C. § 5481(6).
43. *Id.*
44. The provisions of this title apply:

CFPB must provide notice and a reasonable opportunity to respond before regulations are implemented.[45]

A. Current Federal Regulations for BNPL Industry

Currently there are no federal regulations or rules issued by U.S. agencies pertaining to BNPL services. However, the CFPB has conducted studies regarding its concerns over the BNPL industry.[46] These concerns include: accumulation of debt, regulatory arbitrage, and data harvesting within BNPL services.[47] While regulations are being discussed, the CFPB has not exercised its regulatory authority over BNPL services.

The Truth In Lending Act (TILA), implemented by Regulation Z,[48] requires lenders to provide borrowers with standardized disclosures that provide clear information on the costs and terms of a particular loan in which more than four repayment installments are made.[49] Additionally, these disclosures provide borrowers with cost-of-credit disclosures before

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> to any covered person who . . . the Bureau has reasonable cause to determine, by order, after notice to the covered person and a reasonable opportunity for such covered person to respond, based on complaints collected through the system under section 5493(b)(3) of this title or information from other sources, that such covered person is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services.

12 U.S.C. § 5514(a)(1)(C).

45. *See id.*

46. *See*, *e.g.*, CONSUMER FIN. PROT. BUREAU, *supra* note 1; CONSUMER FIN. PROT. BUREAU, *supra* note 6.

47. *See* Ashwin Vasan, *Our Public Inquiry on Buy Now, Pay Later*, CONSUMER FIN. PROT. BUREAU (Jan. 12, 2022), https://www.consumerfinance.gov/about-us/blog/our-public-inquiry-buy-now-pay-later/ [https://perma.cc/8W7J-K72H].

48. Will Kenton, *What Is Regulation Z (Truth in Lending)? Major Goals and History*, INVESTOPEDIA (Mar. 3, 2022), https://www.investopedia.com/terms/r/regulation_z.asp [https://perma.cc/CDA2-ARMY] ("Regulation Z is the Federal Reserve Board regulation that implemented the Truth in Lending Act of 1968 . . . . The act's major goals were to provide consumers with better information about the true costs of credit and to protect them from certain misleading practices by the lending industry. Under these rules, lenders must disclose interest rates in writing, give borrowers the chance to cancel certain types of loans within a specified period, use clear language about loan and credit terms, and respond to complaints, among other provisions.").

49. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 72; Regulation Z, 12 C.F.R. § 1026.1(c)(1) (2023) ("In general, this part applies to each individual or business that offers or extends credit . . . when four conditions are met: (i) The credit is offered or extended to consumers; (ii) The offering or extension of credit is done regularly; (iii) The credit is subject to a finance charge or is payable by a written agreement *in more than four installments*; and (iv) The credit is primarily for personal, family, or household purposes.") (emphasis added).

borrowers take a loan.[50] The CFPB considers "[t]ransparency [as] a bedrock principle in U.S. credit regulation."[51] Because of this, TILA's formulaic disclosures allow for consumers to make "apple to apple" comparisons of loan options.[52] However, BNPL providers are able to avoid TILA disclosures because they require consumers to pay in four or fewer payments.[53] This ability to avoid standardized disclosures including, but not limited to, "the amount financed, total number of payments, finance charge and annual percentage rate, and potential late fee disclosures,"[54] has resulted in consumers not clearly understanding the nature of what they agree to, which could increase the likelihood of fees being assessed. This danger is exactly what TILA seeks to prevent.[55]

The Federal Trade Commission (FTC) is also closely watching BNPL providers. While the FTC has not enacted particular regulations, it has issued a warning to caution the BNPL industry to adhere to the FTC Act.[56] While the FTC's cautions revolved around deceptively advertised "zero cost" payment plans, data harvesting, and unfair return policies,[57] this consumer alert could serve as a segue for states to consider their own ability to regulate BNPL providers to protect their consumers.

III. STATE REGULATORY AUTHORITY

South Carolina legislation created the Department of Consumer Affairs to enforce the rules promulgated in Title 37 (Consumer Protection Code).[58] The Department is "the administrator and enforcer of the Code, as well as other regulatory statutes outside the Code."[59] The Department helps modify consumer law and regulate the marketplace in order to ensure the protection

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50. CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 72.
51. *Id.*
52. *See id.*
53. *See id.* at 3; 12 C.F.R. § 1026.1(c)(1)(iii).
54. CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 72–73.
55. *See* 15 U.S.C. § 1601(a) (TILA's purpose is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.").
56. Helen Clark, *Buy Now, Pay Later – and Comply with the FTC Act Immediately*, FED. TRADE COMM'N: BUS. BLOG (Sept. 26, 2022), https://www.ftc.gov/business-guidance/blog/2022/09/buy-now-pay-later-and-comply-ftc-act-immediately [https://perma.cc/D286-W5JD].
57. *Id.*
58. S.C. CODE. ANN. tit. 37 (2015 & Supp. 2023).
59. *About Us*, S.C. DEP'T OF CONSUMER AFFS., https://consumer.sc.gov/about-us [https://perma.cc/HJ3E-6XMJ].

of South Carolina consumers.[60] By regulating the BNPL industry, the Department would be helping to protect consumers and acting under their statutory authority.[61]

A. State Regulations for BNPL Industry

In South Carolina, there are limited regulations pertaining to BNPL providers. However, two potential avenues could be utilized to justify regulation of the BNPL industry. First, the South Carolina Consumer Protection Code[62] could be modified to help better protect consumers. Second, the South Carolina Consumer Unfair Trade Practice Act[63] could be used to hold BNPL providers liable for unfair and deceptive acts.

South Carolina could change the language regarding late fees assessed. The current definition does not protect consumers from overdraft fees. This change would result in lower overdraft fees for consumers resulting from the required autopay when obtaining a BNPL loan.[64]

If South Carolina used the Consumer Unfair Trade Practice Act, it would not be the first state to hold BNPL providers liable for unfair practices. The California Department of Financial Protection and Innovation (DFPI) began holding BNPL providers liable in 2020.[65] The DFPI entered numerous settlements with different BNPL providers for providing services without a license after licensing changes.[66] Along with the civil penalties ensuing from the settlements, companies were required to refund or credit fees paid to them by California residents and were prohibited from providing loans until they met the licensing requirements.[67] South Carolina could help protect consumers through initiating litigation on behalf of consumers or by encouraging compliance with the Consumer Unfair Trade Practice Act.[68]

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60. *Id.*
61. *See* S.C. CODE ANN. §§ 37-6-104, -403, -506 (2015).
62. S.C. CODE. ANN. tit. 37 (2015 & Supp. 2023).
63. S.C. CODE. ANN. §39-5-10 to -730 (2023).
64. *See* discussion *infra* Section VI.
65. *See* Ellen Traupman Berge et al., *Buy-Now-Pay-Later: A 360 Degree Overview*, VENABLE LLP (Jan 25, 2022), https://www.venable.com/insights/publications/2022/01/buy-now-pay-later-bnpl-a-360-degree-overview [https://perma.cc/HL5P-LASA].
66. *Id.*
67. *Id.*
68. *See* discussion *infra* Section VI.

IV. ADVANTAGES OF BNPL

> *John is a South Carolina consumer.*[69] *He previously had a poor financial history resulting in a low credit score. This lower credit score has kept him from being approved for a credit card. John has educated himself and is looking for alternative credit options to increase his purchasing power. John is searching for a "zero-interest" financing option in order to purchase his wife a gift for their anniversary. John has found a BNPL provider that reports successful payments to credit bureaus. John purchases his wife's gift using BNPL. He makes all of his payments on time and surprises his wife with the gift. She loves the gift and John increases his credit score in the gift and John increases his credit score in the process.*[70]

While the use of BNPL services is not completely new, the market gained significant traction during the COVID-19 pandemic and has continued to grow exponentially over the past few years.[71] The pandemic impacted society's day-to-day life and accelerated the shift to online methods for any sort of purchase necessary. As a result of physical distancing, travel bans, and lockdown restrictions, e-commerce has been supercharged. This shift in the financial and banking industry created the opportunity for BNPL to rise rapidly.[72] The unpredictability of the economy as a result of the COVID-19 pandemic additionally caused consumers to gradually shift from credit cards and traditional lending and payment products toward more short-term payments plans, and low-interest digital experiences.[73] Some of the most popular reasons for using BNPL services,

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69. John is a fictional character used to personify positive and negative aspects of BNPL services. His character will be used throughout the remainder of this paper to help the reader understand different sections.

70. This example identifies some of the advantages further discussed in this section, including the following: convenience for those that cannot obtain alternative financing; increased purchasing power; zero-interest financing; and the potential to build credit if the BNPL provider reports successful payments.

71. *See* Sands, *supra* note 5.

72. *See*, *e.g.*, BENJAMIN ENSOR & SARAH KOCIANSKI, 11:FS, HOW THE COVID-19 PANDEMIC WILL ACCELERATE DIGITAL FINANCIAL SERVICES (2020), https://info.11fs.com/hubfs/How%20the%20COVID-19%20pandemic%20will%20accelerate%20digital%20financial%20services.pdf [https://perma.cc/B99R-RCNA]; Philip Bruno et al., *Global Payments 2021: Transformation amid Turbulent Undercurrents*, MCKINSEY & CO. (Oct. 7, 2021), https://www.mckinsey.com/industries/financial-services/our-insights/global-payments-2021-transformation-amid-turbulent-undercurrents [https://perma.cc/43MR-KHD8].

73. Bruno et al., *supra* note 72.

according to a survey of over 1,800 BNPL users include the following: to avoid paying credit card interest; to make purchases that otherwise wouldn't fit in their budget; to borrow money without a credit check; the overall disapproval of using credit cards; the user could not get approved for a credit card; or the user's credit cards are maxed out.[74]

The seamless and flexible experience of utilizing BNPL services is a large attractor for consumers.[75] The service allows for consumers to make purchases without paying the entire amount.[76] This increase in cash flow has allowed for consumers to have increased purchase power between pay periods. BNPL services can assist consumers in alleviating budget stress and increasing consumers' purchase power.[77] When utilized as promoted, BNPL services seem to differentiate themselves from legacy credit products as a consumer-friendly alternative. For example, one BNPL lender publicly labeled legacy credit products as "credit cards and other products with deferred interest" that "peddle toxic financial products and derive profit from their consumers' missteps."[78] When viewed through "rose-colored" lenses, BNPL products make purchases more accessible and provide sub-prime lenders with the ability to obtain credit products when traditional credit would not be available.[79]

BNPL services attempt to differentiate themselves from their traditional credit counterparts as evidenced by their "no-interest" offers.[80] Lenders are of the opinion that borrowers who miss BNPL payments may be "prohibited from future use until they repay or face late fees, but those fees are relatively low in absolute terms and do not compound as does credit card interest."[81] As stated in one lender's 2021 company annual report:

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74. *Disrupting The $8T Payment Card Business: The Outlook On 'Buy Now, Pay Later'*, CB INSIGHTS (Mar. 2, 2021), https://www.cbinsights.com/research/report/buy-now-pay-later-outlook/ [https://perma.cc/3WL3-7DP2].

75. *See id.*

76. Alex Lazarow & Vikas Raj, *Buy-Now-Pay-Later: A Force for Good or a Step Toward a Never-Ending Debt Spiral?*, FORBES (Aug. 3, 2023), https://www.forbes.com/sites/alexlazarow/2023/08/03/buy-now-pay-later-a-force-for-good-or-a-step-toward-a-never-ending-debt-spiral/?sh=7a3e1c37a8c1 [https://perma.cc/N4HD-RBLS].

77. *See How Much Am I Eligible to Spend?*, KLARNA, https://www.klarna.com/us/customer-service/how-much-am-i-eligible-to-spend/ [https://perma.cc/6DWY-4EU7].

78. U.S SEC. AND EXCH. COMM'N, *Form S-1 for Affirm Holdings, Inc.* (Jan. 11, 2021), https://www.sec.gov/Archives/edgar/data/1820953/000110465921002724/tm2026663-17_s1a.htm. [https://perma.cc/8BB7-3ZBT]; Jeff Kauflin, *Inside the Billion-Dollar Plan to Kill Credit Cards,* FORBES (Feb. 8, 2021), https://www.forbes.com/sites/jeffkauflin/2021/02/08/inside-the-billion-dollar-plan-to-kill-credit-cards/?sh=fa32f7f11d9d [https://perma.cc/T4D6-ZUBM].

79. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 6, at 9.

80. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 62.

81. *Id.*

> When a consumer chooses [BNPL lender] for the first time, we give consumers a small line of credit, usually around USD 100. Then we do a new assessment for each and every transaction they make. We see that consumers can use the product responsibly before we make small increases in the amount available to them. This is why 99% of our lending is repaid and our losses are below the card industry standard. This also means that on average a consumer in arrears will owe us USD 100 compared to a US consumer who on average will have an outstanding balance of over USD 5,000 on their traditional credit card.[82]

Another BNPL lender described their beliefs in a similar manner to the above lender:

> We believe that by making every transaction an explicit borrowing event, we don't just protect [BNPL lender] from excess risk, we protect our borrowers from overextending themselves.
>
> Every time you want to use [BNPL lender] to buy something, you *have* to ask (or *apply*, in credit lingo) to be approved for that specific transaction. Sure, we make it easy and convenient to ask, but we still look at your credit situation at that very moment and decide—and if we believe you won't be able to pay off your loan, we will, in fact, decline your application—with compassion and transparency—without fail.[83]

While lender's "rose-colored-lense" perceptions about their companies sound like they are consumer friendly, their statements fall short in reality and lead to the disadvantages of BNPL products.

V. DISADVANTAGES OF BNPL

A. Discrete Consumer Harms

> *John has never had a financial literacy class and does not really understand the basics of financial health. John has had a poor financial past and has consistently missed payments resulting in a*

82. KLARNA, FULL YEAR RESULTS 2021 (2022), https://www.klarna.com/assets/sites/15/2022/02/27195201/Klarna-Full-Year-Results-2021-EN.pdf [https://perma.cc/37YQ-KMEB].

83. Press Release, Max Levchin, Affirm, Underwrite or Lose (Money)! (June 3, 2022), https://investors.affirm.com/news-releases/news-release-details/underwrite-or-lose-money-by-max-levchin [https://perma.cc/BX5T-WPAS].

> *low credit score, but he still has a credit card. He saw an advertisement for "zero-interest" financing and he could not help but to get a brand-new watch to impress those around him. He does not fully understand what he is signing up for, but it's "zero-interest," so he believes that he could not receive any sort of fees. John obtains a BNPL loan with his debit card. The next week, John decides that he does not like his watch, but he is unable to figure out how to return it. In the meantime, John forgot about his loan. He does not currently have enough money in his checking account to cover the autopay that he unknowingly signed up for. John is assessed a late fee from his BNPL provider and an overdraft fee from his bank. Since the BNPL provider could not obtain payment they "re-present" the charge and report the missed payments to a credit bureau. John receives another overdraft fee from his bank and his credit score drops due to missed payments. Since John does not currently have the money to pay for his loan, he decides to pay for his loan using his credit card to solve his financial problem.*[84]

In 2021, nearly 11% of borrowers were charged at least one late fee.[85] That same year, nearly 4% of users had at least one loan "charged off."[86] To put these percentages into perspective, this would mean that 18.9 million users experienced a late fee and 6.84 million users were unable to make further payments on their loan.[87] To further put these numbers into perspective, the number of consumers who experienced a late fee is about 2.7 million people more than the total population of South Carolina and North Carolina combined.[88] The number of BNPL users who experience a late fee from companies who market themselves as "consumer-friendly," or "protecting consumers," is closely represented by the combined population

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84. This hypothetical situation covers the following: impact on lower sophisticated purchasers; lack of standardized disclosures; dispute resolution challenges; compulsory autopay; late fees; multiple payment re-presentments; "credit for credit"; and harm to credit score.

85. CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 4.

86. *Id.* at 4. "Each lender has a slightly different definition of charge off, but at a high level this metric should be thought of as the percent of borrowers who had a portion of their loan balance that was considered 'uncollectable' after significant time and collection efforts." *Id.* at 4 n.4.

87. *See id.* at 3–4.

88. *See Quick Facts: North Carolina; South Carolina*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/NC,SC/PST045223 [https://perma.cc/PAJ8-YFHG].

of the entire state of South Carolina, North Carolina, and also requires the population of the city of Chicago in order to have similar figures.[89]

On the surface of BNPL services, there are few harms, but after delving beneath the service, there are numerous discrete consumer harms. The harms may go largely unnoticed, but their impact on less sophisticated consumers is substantial. To begin, the lack of standardized disclosures harms the primary market of BNPL users.[90] The average BNPL user's credit score receives the label of "sub-prime" (580-669).[91] Additionally, non-BNPL users are 157% less likely to have a delinquency on at least one credit product as compared to BNPL users—this points to further evidence of lower creditworthiness among BNPL users.[92] While the extension of BNPL loans to sub-prime borrowers may not seem impactful, it cumulatively has a large impact on the United States economy. The extension of loans to sub-prime borrowers is something that South Carolina and United States citizens have seen before. The extension of loans to sub-prime borrowers is what caused the 2008 housing crisis.[93]

The lack of standardized disclosures has a direct impact on sub-prime borrowers. Sub-prime borrowers are generally "less financially knowledgeable and sophisticated and less comfortable dealing with banks."[94] Posted disclosures provide a significant material explanation about loan details and empowers consumers to make informed decisions about their borrowing habits.[95] The lack of transparency is exactly what U.S. credit regulation seeks to prevent.[96] The avenue through which the U.S. government seeks to prevent lack of transparency is through the Truth in Lending Act (TILA) as implemented by Regulation Z.[97]

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89. *See Quick Facts: Chicago City, Illinois; North Carolina; South Carolina*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/chicagocityillinois,NC,SC/PST045223 [https://perma.cc/G9YW-7B6X].

90. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 72–73.

91. CONSUMER FIN. PROT. BUREAU, *supra* note 6, at 9.

92. *See id.* at 12.

93. *See* John V. Duca, *Subprime Mortgage Crisis*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/subprime-mortgage-crisis [https://perma.cc/VZX7-LD4S] ("The subprime mortgage crisis of 2007–10 stemmed from an earlier expansion of mortgage credit, including to borrowers who previously would have had difficulty getting mortgages, which both contributed to and was facilitated by rapidly rising home prices. Historically, potential homebuyers found it difficult to obtain mortgages if they had below average credit histories, provided small down payments or sought high-payment loans.").

94. Lawrence L. Thompson, *Foreward* to KENNETH TEMKIN, ET AL., SUBPRIME MARKETS, THE ROLE OF GSES, AND RISK-BASED PRICING (2002).

95. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 72–73.

96. *Id*.

97. *See* 15 U.S.C. § 1601(a); Regulation Z, 12 C.F.R. § 1026.1 (2023).

Although TILA requires standardized disclosures, BNPL providers are not subject to these requirements due to BNPL services consisting of four or fewer installments. Where applicable, however, TILA requires lenders to provide disclosures that provide consumers detailed information about the costs and terms of their loan.[98] These disclosures provide consumers with a uniform set of clear cost-of-credit disclosures prior to the agreement of the consumer to take out a loan.[99] These standardized disclosures include, but are not limited to the following: "the amount financed, total number of payments, finance charge and annual percentage rate, and potential late fee disclosures."[100] Further, Regulation Z provides additional disclosures that include "disclos[ing] penalty rates, minimum interest charges, transaction charges, grace periods, requiring periodic statements, and providing special credit provisions such as consideration of the consumer's ability to pay."[101] However, since BNPL providers are not subject to the above regulations, they are allowed to operate with a reduced level of transparency in the U.S. credit industry.

Further under Regulation Z, lenders are required to provide billing dispute and overall error resolution rights.[102] Due to BNPL lenders not being required to follow Regulation Z, consumers experience a host of dispute resolution challenges. In fact, according to the CFPB, "[d]ispute resolution is the top-ranking BNPL-related complaint category in the CFPB's Consumer Complaint Database."[103] BNPL loans rose to prominence through the "ease of ecommerce".[104] Additionally, "apparel" and "beauty" combine to make 58.6% of BNPL's gross merchandise value in 2021.[105] Because the majority of BNPL loans pertain to online purchases, consumers are unable to easily return their BNPL purchases. When consumers want to return purchases through BNPL, they must maintain communication with the merchant for dispute resolution and continue to pay remaining installments when payments are taken out from the consumer's debit card.[106] The consumer must continue to make payments throughout the entirety of the dispute

98. *See* 15 U.S.C. §1601.
99. *See* 12 C.F.R. § 1026.17.
100. CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 72–73.
101. *Id.* at 73.
102. *Id.*; *see* 12 C.F.R. §§ 1026.12–1026.13.
103. CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 73.
104. *Id.* at 6.
105. *Id.* at 35.
106. *See id.* at 73.

resolution process.[107] This requirement causes consumer confusion regarding the process and the ability to make returns.[108]

Another strategy utilized by BNPL providers to make their process "seamless" for consumers is the compulsory use of autopay.[109] While federal law is conscious about consumer's choice to choose how to make payments on their debts, that consciousness does not translate to the BNPL industry.[110] This consciousness is represented through the Electronic Funds Transfer Act (EFTA).[111] This Act is a federal law that protects consumers engaged in a host of electronic fund transfers.[112] These protections extend to transferring funds through debit cards, automated teller machines, and most importantly—automatic withdrawals from bank accounts.[113] Under the current regulatory scheme, pre-authorized withdrawals from checking and savings accounts are encompassed under the Act's protections.[114] According to the CFPB, the following disclosures are a few required by financial institutions:

> contact information for the person(s) who should be notified in the event of an unauthorized transaction along with the procedure to file a claim[; t]he types of transfers you can make, fees associated with them, and any limitations that might exist[;] a summary of [consumer] rights, including the right to receive periodic statements and POS purchase receipts[;]and a summary of the institution's liability to [consumers] if it fails to make or stop certain transactions.[115]

However, just as BNPL providers are able to circumvent the requirements of the TILA, they are also able to circumvent the requirements of the EFTA.[116]

The EFTA defines an "account" as an "asset account," which excludes credit card accounts.[117] Because of this definition, the EFTA does not apply to BNPL providers. While it may seem as though the requirements still

107. *See id.*
108. *See id.*
109. *Id.*
110. *See* 12 C.F.R. § 1005.10(e) (2019).
111. *Id.*
112. Will Kenton, *Electronic Funds Transfer Act (EFTA): Definition and Requirements*, INVESTOPEDIA (Mar. 5, 2022), https://www.investopedia.com/terms/e/electronic-funds-transfer-act.asp [https://perma.cc/DH3J-W3J2].
113. *Id.*
114. *Id.*
115. *Id.*; *see* 12 C.F.R. § 1005.31 (2017).
116. *See* discussion *supra* Section II.A; 12 C.F.R. § 1005.
117. *See* 12 C.F.R. § 1005.2(b)(1).

apply because BNPL providers auto draft from debit cards, the providers do not expressly require the use of a debit card.[118] BNPL providers only require "some card" to be used for their transaction, thereby circumventing EFTA requirements.[119] The ability to use a debit or credit card results in BNPL providers not falling under the EFTA's scope.[120] This allows for potential consumer harms through late fees, overdraft fees, multiple payment re-presentments, and the use of "credit for credit."

Late fees are rather common among BNPL users. Around 11% of users experiences late fees in 2022.[121] On an average purchase of $135, the average late fee is $7 per missed payment.[122] However, this figure can range from $1 to $15 per missed payment depending on the BNPL provider.[123] The grace period for missed payments also differs between BNPL providers.[124] Some lenders charge a late fee at ten days past due, others reserve the ability to charge a late fee as soon as one day past due.[125] While one missed payment may not seem like an immense consumer harm, lenders reserve the right to charge multiple late fees for a single missed payment.[126] Additionally, because of auto drafts within BNPL schemes,[127] consumers can experience overdraft fees.[128] Overdraft fees vary from bank to bank, but on average they cost around $35 per transaction.[129] Alarmingly, users will experience these overdraft fees each time a BNPL provider re-presents[130] the transaction.[131]

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118. *See* Lake, *supra* note 4.

119. *See* Emily Cahill, *Can I Pay Off My BNPL Account with a Credit Card?*, EXPERIAN (Nov. 16, 2022), https://www.experian.com/blogs/ask-experian/can-i-pay-off-buy-now-pay-later-account-with-credit-card/#:~:text=You%20can%20pay%20off%20your,consumer%20credit%20and%20finance%20education. [https://perma.cc/DQQ4-EUQJ].

120. *See* 12 C.F.R. § 1005.2(b)(1).

121. CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 4.

122. *Id.* at 3.

123. Jackie Veling, *What Is Buy Now, Pay Later?*, NERDWALLET (Oct. 16, 2023), https://www.nerdwallet.com/article/loans/personal-loans/buy-now-pay-later [https://perma.cc/QR8C-RFHN].

124. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 73.

125. *Id.* at 23.

126. *Id.*

127. *Id.* at 22.

128. *Id.*

129. *Overdraft and Account Fees*, FDIC (Aug. 7, 2022), https://www.fdic.gov/resources/consumers/consumer-news/2021-12.html#:~:text=Overdraft%20fees%20occur%20when%20you,cost%20around%20%2435%20per%20transaction [https://perma.cc/E7P6-KJ8M].

130. A re-presentment is an attempt to collect a missed payment by processing a payment method multiple time. CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 28.

131. *Id.* at 74.

All BNPL lenders re-present missed payments.[132] This re-presentment results in users experiencing multiple overdraft fees from the account they used in BNPL's required autopay system.[133] BNPL providers have been found to re-present a missed payment up to eight times.[134] Combining this statistic with the average overdraft fee, a consumer's bank could charge $280 in overdraft fees when a consumer misses a payment.[135] Further, combining the number of consumers who had at least one loan charged off[136] (3.8%) with potential overdrafts and re-presentments, this would mean that almost seven million users could experience increased overdraft fees due to re-presentment.[137] Assuming the average overdraft fee of $35[138] and a conservative four re-presentments,[139] consumers would cumulatively be charged $980,000,000 in overdraft fees alone.

While allowing a credit card may allow BNPL providers to avoid EFTA requirements, it presents another danger for consumers—the use of "credit for credit."[140] According to CFPB surveys, around 10% of transactions in 2021 involved consumers using their credit card for their initial down payment.[141] Because of this, consumers run the risk of being subjected to credit card interest for their "zero-interest" BNPL loan.[142] The CFPB is concerned about consumers ability to use credit cards because of "'hidden interest' . . . borrowers will end up paying interest on BNPL purchases if they use a credit card on which they revolve, or do not pay the balance in full."[143] The allowance of "lower creditworthiness" consumers to use credit cards to pay for a loan permits consumers to have a revolving debt cycle that further harms them. Additionally, the difficulty in changing payment methods for BNPL loans allows these credit payments to bury the consumer in even more debt.[144] In the CFPB's survey, it found the following:

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132. *Id.*

133. *Id.*

134. *Id.*

135. *Compare id. with Overdraft and Account Fees*, *supra* note 129.

136. A charge-off occurs when a lender believes a borrower's account is not collectable after multiple failures to collect payment. CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 4.

137. *See id.*

138. *Overdraft and Account Fees*, *supra* note 129.

139. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 4, 74.

140. "Credit for credit" is known as allowing the use of a credit card to pay for another source of credit. *See id.* at 21–22.

141. *Id.*

142. *See id.* at 22.

143. *Id.*

144. *See id.*

> BNPL lenders have different operational policies concerning payment method removal (*i.e.*, removing autopay without adding a new payment method). One lender allows borrowers to do so on its self-service online portal. A second lender allows borrowers to do so by contacting customer service electronically or by phone, and a third allows it via phone-based customer service only. Two other lenders generally prohibit the practice, meaning that borrowers cannot turn autopay "off."[145]

Everyone has experienced the difficulty of going through a company's customer service process to get a matter resolved. BNPL providers are able to capitalize on the difficulty of changing information; that is, if they even allow a consumer to change information.[146] The troubles consumers face in changing payment information binds them to the information they initially provided.[147] Because of this relationship, consumers are facing a financial burden. In evaluating their financial obligations, consumers may be powerless in avoiding overdraft fees or even choosing how they wish to pay for other expenses.[148]

Not meeting financial obligations has a direct impact on one's credit score. While BNPL services may provide credit opportunities to those with a lower credit score,[149] the services furnish the opportunity for increased harm to consumer credit scores.[150] BNPL providers do not conduct a "hard inquiry"[151] when a consumer applies for a BNPL loan.[152] Since providers only conduct a "soft inquiry," it does not affect a consumer's credit score.[153] However, the vast majority of BNPL providers do not report payment information to credit bureaus.[154] BNPL provider websites normally contain a

145. *Id.*

146. *See id.*

147. *See id.*

148. *See id.*

149. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 6, at 3–4.

150. Rebecca Lake, *Does Buy Now, Pay Later Affect Your Credit Score?*, INVESTOPEDIA (Apr. 26, 2023), https://www.investopedia.com/does-bnpl-affect-credit-5188061 [https://perma.cc/D89D-HTUD].

151. Brianna McGurran, *What Is a Hard Inquiry and How Does It Affect Credit?*, EXPERIAN (May 11, 2023), https://www.experian.com/blogs/ask-experian/what-is-a-hard-inquiry/ [https://perma.cc/HB5N-575T] ("A hard inquiry, or a 'hard pull,' occurs when you apply for a new line of credit, such as a credit card or loan. It means that a creditor has requested to look at your credit file to determine how much risk you pose as a borrower. Hard inquiries show up on your credit report and can affect your credit score.").

152. *See* Lake, *supra* note 150.

153. *See id.*

154. *See id.*

version of the following language pertaining to inquiries from consumers about impacts to their credit score, "Afterpay does not affect your credit score or credit rating. Your credit score can be impacted . . . if you are reported as paying debts late; at Afterpay, we never . . . report late payments."[155] While the BNPL provider may not report late payments, in addition to late payments, the consumer may face the impact of their debt being turned over to a debt collector.[156]

According to Investopedia, "if the consumer fails to pay, and their account is turned over to a debt collector, that can do their score serious damage."[157] BNPL users receive no credit score benefit for successful payments, they are only receiving potential harm. BNPL providers should follow Sezzle's policies:

> Sezzle, for example, offers a buy now, pay later option that includes credit bureau reporting for consumers who opt into it. If they make all of their payments on time, that will help them build a good credit history, but if they're late in paying, it could damage their credit score.[158]

By following Sezzle, other BNPL providers are providing consumers with the ability to increase their credit score instead of only facing a potential negative impact to their credit score.

B. *Data Harvesting*

> *John obtains a BNPL loan and inputs personal information (including his social security number) as part of the application process. John has unknowingly consented to the share of his personal data. The BNPL provider that John used sold his data to a third-party advertising agency. This advertising agency has poor cybersecurity. After a cyberattack, John's name, address, email address, date of birth, and social security number are stolen from this*

155. *See, e.g.*, *Is Using Afterpay Bad for My Credit Score?*, AFTERPAY, https://help.afterpay.com/hc/en-au/articles/900003970646-Is-using-Afterpay-bad-for-my-credit-score [https://perma.cc/H4S8-W9BS].

156. *What Happens if I Can't Pay Back a Buy Now, Pay Later (BNPL) Loan?*, CONSUMER FIN. PROT. BUREAU (Dec. 2, 2021), https://www.consumerfinance.gov/ask-cfpb/what-happens-if-i-cant-pay-back-a-buy-now-pay-later-bnpl-loan-en-2116/ [https://perma.cc/827T-S3MV].

157. Lake, *supra* note 150.

158. *See id.*

> *advertising agency. John has had his identity stolen, but he is not sure how it happened, as he has only placed his social security number in his BNPL loan application.*[159]

Data harvesting represents another potential harm for BNPL users.[160] Data harvesting "is a process that copies datasets and their metadata between two or more data catalogs—a critical step in making data useful."[161] Essentially, data harvesting allows companies to utilize consumer information to narrow their marketing/business efforts to those most likely to utilize them. The majority of BNPL providers collect consumer information in order to narrow their customer acquisition or to monetize the sale of the data.[162] According to the CFPB, BNPL providers primarily collect the following information: "individual consumer demographic, psychographic, and behavioral data, leveraged to optimize the specific products and brands promoted to that consumer," and "aggregated data that modifies the general product experience . . . to drive consumer behavior in subtle ways toward a desired outcome."[163]

While this information can help BNPL users obtain certain discounts through targeted advertising, it can also serve as a means to decrease competition within the BNPL industry.[164] The CFPB is worried that this decrease in competition could "lead to a consolidation of market power in the hands of a few large tech platforms who own the largest volume of consumer data, reduce long-term innovation, choice, and price competition."[165] As well as the danger of decreased competition, there is the chance that consumers will not have equal access to BNPL services. In its report, the CFPB states: "Additionally, there is the risk that harvested data could be used to offer targeted discounts to some customers but not others, which could mean that different groups of consumers are paying different prices for the same goods at the same retailer."[166] The ability to curtail marketing efforts allows BNPL providers to find their perfect consumer and

159. This hypothetical situation illustrates the potential harms of data harvesting.

160. CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 75–76.

161. Alp Arslan Aziz, *Data Harvesting: What Is It, and How Can You Benefit?*, WORLD BANK BLOGS (Nov. 26, 2019), https://blogs.worldbank.org/opendata/data-harvesting-what-it-and-how-can-you-benefit [https://perma.cc/WS7W-YMN7].

162. CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 75.

163. *Id.*

164. *See id.* (discussing how BNPL providers who obtain the most consumer data can concentrate their marketing efforts).

165. *Id.*

166. *Id.*

encourage them to spend as much as possible—potentially even spending beyond the consumer's means.

Consumers run the risk of unknowingly consenting to their information being shared with third parties for the BNPL provider's own interests.[167] While the disclosure itself may not be burdensome to the consumer in the event they provide consent, BNPL users automatically "opt-in" to the disclosure of their data and cannot easily withdraw their consent.[168] The sharing of consumer data to third parties expands the likelihood of consumers' data being compromised.[169]

C. BNPL Loan Overextension and Encouragement of Excess Spending

> *John has been searching for a few gifts for his wife again. He is trying to go all out, but he does not have enough money currently. He is looking to finance the gifts. John obtains a BNPL loan from a provider, but it does not cover all the gifts the he wants to get. John notices that he can get another BNPL loan from a different provider, so he decides to obtain another BNPL loan to cover the rest. John is a BNPL veteran and has used the services for many years. Before his first payment, John has some unexpected repairs that need to be made to his car. After making these payments, John has run into a tough financial situation. John has to choose between making both of his BNPL payments in full or paying his monthly car payment. John decides to make both of his BNPL loan payments in full instead of his car payment. John regrets spending so much on gifts as his wife only wanted a few things and did not want him to spend as much because of their vacation plans for this year.*[170]

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167. *See e.g.*, *Afterpay Privacy Policy*, EIGHTH DAY (Jan. 20, 2021), https://eighthdayskin.com/pages/afterpay-privacy-policy [https://perma.cc/L29C-C8GX] (showing one of many examples where the fine print signs away information rights).

168. *See id.*

169. *See*, *e.g.*, *How SOC Reporting Can Help Assess Cybersecurity Risk Management in Third-Party Relationships—and Beyond*, PWC https://www.pwc.com/us/en/services/trust-solutions/digital-assurance-transparency/vendor-cybersecurity-risk.html [https://perma.cc/T4WM-YV5H] (discussing "Nth-party risks" of data breaches that may occur if cybersecurity measures of vendors' vendors (and so on) are inadequate).

170. This hypothetical situation covers the following topics: overextension, loan stacking, and sustained usage.

BNPL providers specifically market their services as those that increase consumer spending.[171] The CFPB found the following data to support BNPL provider's assertions, 85% higher merchant AOV (Average Order Value) compared to other payment methods, BNPL lender's omnichannel shoppers spend 72% more per transaction that online shoppers, 30% increase in conversion,80% increase in repeat customer rate.[172] This data supports the fact that BNPL users are not only seeing BNPL services as an alternative form of credit, but they are spending more than they normally would, even if they had an alternative form of credit.[173] The "seamless experience" of BNPL users is not only driving them to spend more, but these users are encouraging others to utilize the service. The CFPB quoted one BNPL provider stating, "customer loyalty drives [a] powerful network effect, securing the lifetime value of a customer."[174] While the repeated use of BNPL may not seem to be a problem, the easy access to BNPL loans can potentially lead to loan stacking and sustained usage.[175]

1. Loan Stacking

Loan stacking is when a "borrower takes out concurrent BNPL loans at different lenders and is unable to repay some or all of them."[176] The process BNPL providers utilize allows for borrowers to take out loans with multiple providers.[177] Unlike traditional credit options, BNPL providers only run "soft-credit" checks.[178] Because of these soft credit checks, BNPL providers are unable to see if consumers have an existing loan with another provider.[179] BNPL providers believe that offering lower credit balances to new borrowers acts as a form of consumer protection.[180] However, these consumer protections are futile provided that consumers can supplement their lower credit amount with another BNPL provider.[181] This danger is

171. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 64.
172. *Id.*
173. *See id.*
174. *Id.* at 65
175. *See id.*
176. *Id.*
177. *See* Emily Mason, *Regulator Homes In on 'Loan Stacking' Across Buy Now, Pay Later Firms*, FORBES (Sept. 21, 2022, 9:00 AM), https://www.forbes.com/sites/emilymason/2022/09/21/regulator-hones-in-on-loan-stacking-across-buy-now-pay-later-firms/?sh=1a821603747f [https://perma.cc/F4RK-CW4Q].
178. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 65.
179. *Id.*
180. *See id.*
181. *See id.*

evident through the fact that 4% of users across the five major BNPL providers have taken out ten or more BNPL loans.[182]

Nadine Chabrier, senior policy council for the Center for Responsible Lending, summarizes the dangers of loan stacking in the following way,

> There is a lack of consideration of any other financial obligations of that consumer. Imagine having 10 different due dates for payments all over the month, plus your regular bills. I think that's concerning for a consumer when, potentially, they didn't have enough money to buy that product up front.[183]

Loan-stacking has allowed consumers to have access to a large number of different loans without any real check on their ability to repay. Because of this, consumers are being harmed by the ability to circumvent any "protection" of BNPL provider's lower credit balances for first-time borrowers.[184] The reduction/removal of loan stacking within the BNPL industry would not only protect consumers, but it would also assist providers in lowering their credit losses through loan defaults.[185]

2. *Sustained Usage*

Sustained usage is defined as "the risk that frequent BNPL usage may threaten borrowers' ability to meet non-BNPL financial obligations."[186] Essentially, sustained usage represents a consumer's psychological decision to pay their personal loan over other loans/expenses they may have.[187] While sustained usage does not only apply to the BNPL industry, the practice of continually increasing a consumer's credit limit can lead to this problem.[188] Sustained usage is a problem that does not affect those who do not pay back their BNPL loan.[189] Borrowers who pay back their loan and become a return borrowers are affected most by sustained usage. The CFPB utilized the following findings in its discussion of sustained usage, "consumers with at

182. *See* Mason*, supra* note 177.
183. *Id.*
184. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 65.
185. *See id.* at 66.
186. *Id.*
187. *See id.*
188. *See id.*
189. *Id.* (discussing how delinquent borrowers are prevented from further loans with a specific lender until they repay their debt).

least one active personal loan, auto loan, mortgage, and credit card prioritized the personal loan payments above the other three."[190]

While this study was done on personal loans and not BNPL loans, there are numerous similarities between the two.[191] The two most important similarities are required autopay and lower average order values.[192] Both of these similarities are believed to explain why consumers prioritize their personal loan payments over other loan types.[193] First, autopay makes it nearly impossible to prioritize other loan obligations due to the funds automatically being withdrawn from one's account.[194] Next, consumers are likely to prefer making a full payment on a personal loan as compared to making partial payments on other loan types.[195] Since this study was done on personal loans and not BNPL loans specifically, it does not take into account other traits of BNPL loans that could exacerbate the problem of sustained usage. BNPL loans could potentially be worse than the findings for personal loans due to the marketing of BNPL services.[196] Some tactics utilized by BNPL providers such as "rewards programs, in-app discovery engines, and dark-pattern and individual-behavior-enhanced app features designed to maximize conversion and consumption" could serve to further entice consumers to become victims of a revolving cycle of BNPL loan usage.[197] BNPL providers are capitalizing on consumer psychology in more ways than just sustained usage.

BNPL providers are capitalizing on the overall lack of information and consumers' desires to purchase more than they can afford. 10% of BNPL users believe that their credit score would not be affected by a missed payment.[198] Even more alarming, according to Citizens Advice, "39% [of BNPL users in the last year] used it without realizing" and "42% didn't fully understand what they were signing up for."[199] Consumers are being deceived about BNPL's regulatory requirements as "43% of adults believe BNPL

190. *Id.*
191. *See id.* at 67.
192. *Id.*
193. *See id.*
194. *See id.*
195. *Id.*
196. *See id.*
197. *See id.*
198. *Barclays Calls for More Robust Regulation of All Buy-Now-Pay-Later Products*, BARCLAYS (Feb. 14, 2022), https://home.barclays/news/press-releases/2022/02/-barclays-calls-for-more-robust-regulation-of-all-buy-now-pay-la/ [https://perma.cc/3BVS-7WWM].
199. HANNA POLL & GEMMA BYRNE, CITIZENS ADVICE, BUY NOW . . . PAIN LATER? (2021), https://www.citizensadvice.org.uk/Global/CitizensAdvice/Debt%20and%20Money%20Publications/BNPL%20report%20(FINAL).pdf [https://perma.cc/DFG6-N5LS].

services are regulated like other types of borrowing."[200] Through BNPL advertising and lack of information, consumers are purchasing products when they normally would not. 26% of users have regretted using BNPL services.[201] BNPL providers are harming those that are financially vulnerable through their lack of information and structure. Almost half of the average BNPL users in the United Kingdom have had loans from different providers at the same time.[202] In Barclays' research, they also highlight that, "[m]ore than a third (35 per cent) of BNPL users admit that they chose to pay with BNPL because they had insufficient funds in their [checking] or savings account to pay for their purchase, and 10 per cent say it was because their applications for a credit card had been rejected."[203] Regulations must be advanced to protect all consumers from the lack of information that currently surrounds the BNPL industry. While the regulations should come from a federal level, states can act proactively to protect consumers while regulations are discussed and later implemented at the federal level.

VI. PROPOSED REGULATIONS TO PROTECT SOUTH CAROLINA CONSUMERS AT THE STATE LEVEL

The South Carolina Department of Consumer Affairs was established in 1974 through S.C. Code Ann. § 37-1-101 (Consumer Protection Code).[204] Its mission is "to protect consumers from inequities through advocacy, mediation, enforcement, and education."[205] The Department primarily accomplishes its goal through the enforcement of the South Carolina Consumer Protection Code.[206]

South Carolina Consumer Protection Code defines a consumer loan as

> a loan made by a person regularly engaged in the business of making loans in which: (a) the debtor is a person other than an organization; (b) the debt is incurred primarily for a personal, family, or household purpose; (c) either the debt is payable in installments or a loan finance charge is made; and (d) either the

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200. *See id.*
201. *Id.*
202. *See Barclays Calls for More Robust Regulation of All Buy-Now-Pay-Later Products*, *supra* note 198.
203. *Id.*
204. S.C. CODE ANN. § 37-1-101 (1976).
205. SENATE BANKING & INS. OVERSIGHT SUBCOMM., SUMMARY REPORT ON THE SOUTH CAROLINA DEPARTMENT OF CONSUMER AFFAIRS 2 (2016).
206. *See id.*

> principal does not exceed twenty-five thousand dollars or the debt is secured by an interest in land.[207]

In addition, Consumer Protection Code defines a loan as "the creation of debt by the lender's payment of or agreement to pay money to the debtor or to a third party for the account of the debtor."[208] Because of these definitions combined, South Carolina recognizes BNPL providers as engaging in consumer lending due to BNPL loans involving installment payments.[209] BNPL providers are unable to avoid the Consumer Protection Code as they are with TILA due to South Carolina's difference in their "payable in installments" definition.[210] The South Carolina Code defines "payable in installments" as including "two or more periodic payments with respect to a debt arising from a consumer loan."[211] This definition results in BNPL providers being subject to the South Carolina's consumer protection statutes.

South Carolina has acted preemptively to protect consumers from delinquency charges, but there are still improvements that could be made.[212] South Carolina provides consumers with ten days to make their payment before late fees are assessed.[213] While delinquency charges can only be collected once, there is nothing preventing BNPL providers from re-presenting delinquency charges that have not been made.[214] The South Carolina Code allows for delinquency charges to be as high as $23 per charge.[215] South Carolina is preventing consumers from being charged multiple late fees on the same loan, but the root of the problem still exists. BNPL providers are still able to re-present charges.[216] This failure to prevent re-presentments does not protect consumers from being charged overdraft fees due to the required autopay within BNPL loans.[217] Because of this gap

207. S.C. CODE ANN. § 37-3-104 (2015).

208. *Id.* § 37-3-106(1).

209. *See* Carri Grube Lybarker, Comment Letter on Buy-Now-Pay-Later (BNPL) Providers Docket No. CFPB-2022-0002 (Mar. 25, 2022), https://consumer.sc.gov/sites/consumer/files/Documents/Advocacy/CFPB_Inquiry_into_Buy_Now_Pay_Later_Companies.pdf [https://perma.cc/PLZ8-A3SY].

210. *Compare* 12 C.F.R. § 1026.1(c)(1) (covering "each individual or business that offers or extends credit . . . (i) . . . to consumers; (ii) . . . regularly; (iii) . . . subject to a finance charge or [] payable by written agreement in more than four installments; and (iv) . . . primarily for personal, family, or household purposes"); *with* S.C. CODE. ANN. § 37-1-301(19) (2015).

211. S.C. CODE. ANN. § 37-1-301(19).

212. *See id.* § 37-3-203 (2015).

213. *Id.* § 37-3-203(1).

214. *Id.* § 37-3-203(4).

215. *See id.* § 37-3-203(2) (dollar amount adjusted in accordance with § 37-1-109).

216. *See supra* text accompanying notes 130–137.

217. *Id.*

in the Consumer Protection Code, BNPL providers are still able to re-present a charge multiple times. The South Carolina Consumer Protection Code should be expanded to protect consumers from the harms of re-presentment, but this is not the only change that should be made.

BNPL loans are still being marketed as "zero-interest" loans to South Carolina consumers. S.C. Code Ann. § 37-3-304 provides that:

> A lender may not advertise, print, display, publish, distribute, broadcast, or cause to be advertised, printed, displayed, published, distributed, or broadcast in any matter any statement or representation with regard to the rates, terms, or conditions of credit with respect to a consumer loan that is false, misleading, or deceptive.[218]

In spite of this, BNPL loans are still marketed as "zero-interest" to consumers and prospective businesses.[219] These advertisements are still being published even though the South Carolina Department of Consumer Affairs stated in its comment regarding the CFPB's inquiry into BNPL providers that, "[t]he Department views certain fees imposed by a BNPL [provider] as interest."[220] South Carolina would not be the first state to hold BNPL providers responsible for the false advertising of their "zero-interest" payment plans.

The California Department of Financial Protection and Innovation (DFPI) began a series of settlements with major BNPL providers for providing loan services without a license.[221] These punishments primarily consisted of refunding or crediting fees paid to them by California residents and prohibiting services until the companies met licensing requirements.[222] However, there has been a wave of litigation regarding misrepresentations and deceptive advertising.[223]

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218. S.C. CODE ANN. § 37-3-304(1) (2015).

219. *See*, *e.g.*, *0% APR Financing*, AFFIRM, https://businesshub.affirm.com/hc/en-us/articles/4418104503060-0-APR-Financing [https://perma.cc/J2ZN-3YPY]; *Split the Cost, Pay in 4, Interest-Free*, KLARNA, https://www.klarna.com/us/pay-in-4/ [https://perma.cc/2WCY-JHW9].

220. Lybarker, *supra* note 209.

221. Traupman et al., *supra* note 65.

222. *See id.*

223. *See*, *e.g.*, Edwards v. Afterpay US, Inc., No. 2:22-cv-00118 (D. Me. filed Apr. 27, 2022); Sliwa v. Sezzle, Inc., No. 2:22-cv-06093 (C.D. Cal. filed Aug. 26, 2022); Hale v. Klarna, Inc., No. 3:20-cv-00598 (S.D. Cal. filed Apr. 28, 2022); Edmundson v. Klarna, Inc., No. 22-557-cv (2d Cir. 2023) (reversed due to consumer consent to mandatory arbitration).

These cases are class actions brought by individuals against BNPL providers.[224] They claim that consumers have been deceived into using the BNPL provider's services through misrepresentations and omissions in marketing.[225] The primary concern of consumers were that there were no warnings regarding the risk of multiple insufficient funds or overdraft fees assessed by one's bank after not having required funds for BNPL's automatic withdraws. The South Carolina Department of Consumer Affairs could follow others' example and bring an action against BNPL providers in the state to encourage compliance advertising requirements while also protecting South Carolina consumers.

VII. PROPOSED REGULATIONS TO PROTECT CONSUMERS AT THE FEDERAL LEVEL

There are three suggestions for BNPL regulation at the federal level: (1) expand TILA to include BNPL services; (2) create statutes for point-of-sale financing; or (3) create a system for delinquencies to be reported. These steps would serve to protect consumers through information disclosures and central reporting.

The first suggestion for expanding TILA would be accomplished through changing definitions within the Act. The purpose of TILA is:

> to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.[226]

Expanding TILA to include BNPL would not be a foreign idea, it would simply be adhering to the purpose of the Act. This expansion could be made by changing the current definition of a creditor. Under current federal regulation, TILA does not apply to "credit . . . payable by a written agreement in more than four installments."[227] The FTC could expand this definition to model South Carolina's qualifications for a creditor.[228] This

224. *See Edwards*, No. 2:22-cv-00118; *Sliwa*, No. 2:22-cv-06093; *Hale*, No. 3:20-cv-00598; *Edmundson*, No. 22-557-cv.

225. *See Edwards*, No. 2:22-cv-00118; *Sliwa*, No. 2:22-cv-06093; *Hale*, No. 3:20-cv-00598; *Edmundson*, No. 22-557-cv.

226. 15 U.S.C. § 1601(a).

227. *See* 12 C.F.R. § 1026.1(c)(1)(iii).

228. *See supra* text accompanying notes 210–11.

expansion would include BNPL providers under TILA disclosure and reporting requirements.

The next avenue that could be taken would be to create statutes for alternative point-of-sale financing companies. While this is undoubtedly a tedious task, it would allow for lawmakers to narrow regulations specifically for the BNPL industry. This would allow for BNPL companies to fully understand their obligations under the regulatory scheme. Additionally, it would prevent non-BNPL companies that fall under TILA from being burdened with regulatory change in their respective industries. These regulations could be largely motivated by the requirements of TILA disclosures. New regulations could require BNPL providers to register their companies under the regulatory scheme. This requirement could have registration fees as a part of it, which would allow for the program to have supplemental funding through such registration.

The last suggestion would be to create a system for BNPL providers to report delinquencies. Currently, there is no central reporting for BNPL loans. Because of this, consumers are able to obtain numerous loans from different BNPL providers.[229] Central reporting would help prevent consumers from overextension.[230]

These suggestions help promote the goal of the CFPB by providing information and protecting consumers from deceptive practices.[231] The disclosure requirements under TILA would increase consumer awareness of the details of their BNPL loan. This would better inform consumers regarding loan terms, fees, and data privacy. In addition, disclosure requirements could help promote more competition amongst BNPL providers by making them compete through offering better terms.

The second and third suggestion would help prevent the risk of overextension/loan stacking. If providers were required to report consumer delinquencies, it could prevent delinquent borrowers from obtaining another BNPL loan from a separate provider. By having the ability to see potential borrower's debt, providers would be able to make better informed decisions regarding loan extension to ensure that they will not sustain a loss due to the consumer's inability to pay and be able to protect the consumer from assuming more debt obligations in the process.

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229. *See supra* Section V.C.1.

230. *See supra* Section V.C.1.

231. *See The CFPB*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/about-us/the-bureau [https://perma.cc/EGC6-EVCF] ("We aim to make consumer financial markets work for consumers, responsible providers, and the economy as a whole. We protect consumers from unfair, deceptive, or abusive practices and take action against companies that break the law.").

Consumers could be potentially harmed by BNPL providers having access to their debt obligations. This could prevent consumers from obtaining financing for purchases when they do not have another credit alternative. However, the short-term denial of access could be beneficial as it would prevent the consumer from undergoing long-term financial pressures through potential late fees, overdraft fees, and increasing debt amounts. On the flip side, BNPL providers would not have the revenue originally received from these types of consumers. However, BNPL providers could benefit from the reduction in credit losses from extending to delinquent borrowers.

Federal regulations requiring disclosures could harm BNPL providers. They would have to change their advertisements, interfaces, and presentations at checkout. However, this burden is likely no different than state law requirements. Under South Carolina law, among other disclosures, BNPL providers must file a consumer credit grantor notification with the Department of Consumer Affairs pursuant to sections 37-6-201 through 203.[232] These state law disclosures are common amongst other states. Therefore, a common federal disclosure could help BNPL providers by synthesizing these different disclosures into one common federal disclosure.

BNPL providers may argue that these requirements and disclosures could encourage consumers to use another source of credit financing. However, this argument is likely futile due to the reasons that consumers choose BNPL services.[233] Consumers are choosing BNPL services due to the "zero-interest" when using BNPL properly.[234]

VIII. CONCLUSION

BNPL services are something that help consumers when used properly. They can provide credit options for those that normally would not have them. Regulations should take the form of protection and not outright prohibition. There are numerous steps that could advance consumer protection; but ultimately, the best source of protection is having the information to make an informed decision. This information should be truthful information and not deceptive or unfair to consumers. Regulations should encourage full honesty regarding the terms of BNPL. The best way to protect consumers is to provide them with the information necessary to protect themselves and to place safeguards for those that are unable to protect themselves.

232. S.C. CODE ANN. § 37-6-201 to -203 (2015).
233. *See supra* text accompanying note 74.
234. *See supra* text accompanying note 219.