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THE AFTERPAY HANGOVER

Nathalie Martin and David Lynn***

Buy Now Pay Later (BNPL) companies such as Afterpay, Klarna, Affirm, and Zilch, have grown faster than any other payment method during the pandemic and the BNPL payment method is expected to continue to grow exponentially well into the future. Under BNPL arrangements, consumers buy relatively moderately-priced items online and pay for them in installments, typically without interest. BNPL companies earn revenues from merchant fees and late fees assessed to consumers, rather than traditional interest. Because consumers do not pay fees or interest if the scheduled installments are paid on time, these companies argue that they do not fall within the classic definition of “credit.” As a result, the companies claim that they fall outside the reach of all federal consumer credit regulation, including the Truth in Lending Act, the Fair Creditor Reporting Act, and the Fair Debt Collection Practices Act, among others.

Leaving aside the question of whether BNPL constitutes credit in the conventional sense, how best to regulate BNPL has become a global question. Like the U.S., other countries are grappling with this question. Regulating credit based exclusively on whether consumers pay what we traditionally think of as ‘interest’ has become an antiquated approach.

There is little scholarship on BNPL to date. Most of what there is focuses on whether BNPL is good or bad for consumers and on whether consumers overuse the product and make impulse purchases that they

* Frederick M. Hart Chair, University of New Mexico School of Law. The author thanks Creola Johnson for her wonderful conference comments. She also thanks Ernesto Longa, Irving Valadez, and Miguel Quintana, as well as her coauthor David Lynn. We both express our deep gratitude to the editors of the Loyola Consumer Law Journal, and particularly to Sean Linehan, Anna Kennelly, and Alexandra Golota. We also thank the participants of the symposium for their insightful comments and critiques.

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later regret. The answer to the first question is surely both. Not paying interest on what is essentially a loan is surely a benefit. Forgetting to pay the installments on time, however, is not so beneficial, particularly when late fees can be more expensive than most other forms of credit. Regarding the second question, consumers, particularly young ones, already shows signs of overusing BNPL by having many of these seemingly-free installment arrangements going at one time. Using BNPL regularly can make it difficult to make ends meet, particularly given how easy it is to buy things with BNPL. This essay explores this BNPL regulatory conundrum, but ultimately asks more questions than it answers.

I. INTRODUCTION

If you talk to people in their 50s and 60s, most are unaware of the current BNPL financing model. They do know about buying now and paying later in the form of classic credit in which one borrows money and pays interest on that borrowing.¹ We all know about the age-old buy now pay later models, which include mortgages and car loans, student loans, credit card debt, and installment loans.² The new fintech BNPL model,³ however, in which one pays for relatively small ticket items in four installments without interest, is completely foreign to many baby boomers. For example, a 50- something friend and financial literacy trainer sent this text recently, in disbelief about how quickly BNPL has infiltrated U.S. Markets:

I have identified another fascinating “spend-more” trick. I helped my daughter look at her spending patterns again. In the process she mentioned that she uses payment plans to make some of her purchases. I

¹ Rozaimah Zainudin & Nurul Shahnaz Mahdzan, *Determinants of credit card misuse among Gen Y consumers in urban Malaysia*, 37 INTERNATIONAL JOURNAL OF BANK MARKETING 1350, 1352-53 (2019) (discussing how credit card use is a buy now pay later method of payment).

² *Id.*

³ One conference participant said “this is not fintech, just regulatory arbitrage.” Katja Langenbucher.

Regulatory Arbitrage: What’s Law Got To Do With It?, Accounting, Economics, and Law: A Convivium, viable at <https://www.degruyter.com/document/doi/10.1515/ael-2019-0054/html?lang=en> (defining regulatory arbitrage).

thought they were with companies directly. They are not.

Yet again, companies are making it way too easy to spend. They are doing a modern-day layaway in which you get your item immediately, but are put in a payment plan. You can have a low bank balance, have run-up your credit cards, and yet there is still another way to buy now...pay-later. If you have wants, you can buy almost anything with a little shuffling. Unbelievable.⁴

BNPL is growing faster than any other form of consumer financial service. In the first quarter of 2020, the Australian company Afterpay posted an increase in underlying global sales, measured by transactions, of 112% over the same quarter the previous year.⁵ Sales also doubled from \$5.2 billion to \$11.1 billion.⁶ Afterpay also saw a 116 % increase in active customers in the same time frame, reaching 9.9 million from 4.6 million.⁷ Starting in Australia and quickly moving to many emerging markets, these products have changed society markedly in places like Indonesia⁸ and Bangladesh,⁹ where credit cards are used by only a small percentage of the population.¹⁰ In nearby

⁴ Email on file with author, Nathalie Martin.

⁵ Afterpay, *Afterpay Announces Full Year Results*, PRNewsWire.com (Dec. 7, 2021, 4:20pm) <https://www.prnewswire.com/news-releases/afterpay-announces-full-year-results-301119541.html>.

⁶ *Id.*

⁷ *Id.*

⁸ Yeyen Pratika, Salahudin Salahudin, Dicky Wisnu Usdek Riyanto, Titiek Ambarwat, *Analysis of Pay Later Payment System on Online Shopping in Indonesia*, 23 JOURNAL OF ECONOMICS, BUSINESS, AND ACCOUNTANCY VENTURA 329, 331 (2020-2021); Della Ayu Zonna Lia & Salsabilla Lu'ay Natswa, *Buy-Now-Pay-Later (BNPL): Generation Z's Dilemma on Impulsive Buying and Overconsumption Intention*, ADVANCES IN ECONOMICS, BUSINESS AND MANAGEMENT RESEARCH, VOLUME 193 PROCEEDINGS OF THE BISTIC BUSINESS INNOVATION SUSTAINABILITY AND TECHNOLOGY INTERNATIONAL CONFERENCE (BISTIC 2021).

⁹ Madiha Khan & Shejuti Haque, *Impact of Buy Now-Pay Later Mechanism Through Installment Payment Facility and Credit Card Usage on the Impulsive Purchase Decision of Consumers: Evidence From Dhaka City*, 3 SOUTHEAST UNIVERSITY JOURNAL OF ARTS AND SOCIAL SCIENCES 40, 54-56 (2020).

¹⁰ Bangladesh, .2%, Indonesia, 2.2%, Malaysia 17.79. THE GLOBAL ECONOMY, https://www.theglobaleconomy.com/Bangladesh/people_with_credit_cards/.

Singapore, 38% of the population has used BNPL.¹¹

For necessities that cannot be obtained any other way, these fintech payment systems can be an incredibly important innovation for consumers.¹² For discretionary items, BNPL may be less valuable for consumers and also might encourage impulse buying and impact future wealth.¹³ Thus, the value of BNPL differs by society and country. Scholars and governments across the United Kingdom, Australia, Norway, Sweden, the United States, Singapore, Indonesia, and Bangladesh, are all beginning to examine BNPL, to weigh its pros and cons, and to assess how best to regulate it.

Right now, because most BNPL companies do not charge consumers traditional interest, most of the companies offering these products claim that BNPL falls outside the global definition of credit and thus outside most existing consumer credit regulation.¹⁴ This, however, is not necessarily true. In her comments, conference participant Professor Creola Johnson suggested that we need not allow Afterpay and other BNPL companies to frame how we think about these credit products from a legal perspective.

We can reframe the debate by calling them what they are at their essence, what she calls “borrow now, pay later” like all other credit, or perhaps even “borrow now, regret later.” Professor Johnson likens the entire debate about BNPL not being “credit” to the arguments initially made by payday lenders who derive all revenues from “fees” rather than “interest.”¹⁵ Despite the fact that payday loans incur fees rather than interest, payday loans have always been deemed credit and payday lenders are bound by all consumer credit regulation, including the Truth in Lending Act, which requires that those fees be stated as an

¹¹ Allen Sng Kiat Peng and Christy Tan Muki, *Buy Now Pay Later In Singapore: Regulatory Gaps And Reform*, draft on file with author, 2 (2022).

¹² Yeyen Pratika et. al., *supra* note 8, at 331-32.

¹³ *Id.*

¹⁴ Di Johnson, John Rodwell, and Thomas Hendry, *Analyzing the Impacts of Financial Services Regulation to Make the Case That Buy-Now-Pay-Later Regulation Is Failing*, 1992 SUSTAINABILITY 1, 13 (2021). The U.S., Canada, and New Zealand do not statutorily regulate BNPL. *Id.* at 5-6.

¹⁵ Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 12 (2002)

annual percentage rate.¹⁶

Indeed, the Attorneys General of over 20 states recently submitted a letter to the Consumer Financial Protection Bureau (CFPB) challenging head-on the industry claim that BNPL is not credit.¹⁷ As the letter states:

Regardless of what some BNPL providers and advocates may claim, BNPL financing is credit. Credit is defined by law as “the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.” While state laws vary as to the precise definition, terms, and allowable charges on various credit products, we are no less concerned that BNPL providers are frequently failing to provide consumers with clear and conspicuous disclosures, including total costs, payments, fees, and to fully describe available dispute resolution mechanisms. If some BNPL products were to fall outside the scope of certain federal laws or regulations, it would be even more important that the CFPB pay special attention to whether and how providers ensure the same levels of consumer rights and protections for their customers. We urge the CFPB to analyze whether and how BNPL providers ensure consumer rights and protections, disclosure of fees, charges, and other essential terms to consumers, as well as how they comply with general requirements to refrain from unfair, deceptive, and abusive acts and

¹⁶ *Id.* at 14.

¹⁷ See letter of the Attorneys General of Illinois, California, Colorado, Connecticut, Delaware, Hawaii, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington, as well as the Hawaii Office of Consumer Protection submit this letter in response to the Consumer Financial Protection Bureau’s (“CFPB”) “Notice and Request for Comment Regarding the CFPB’s Inquiry into Buy- Now-Pay-Later Providers,” commenting on CFPB-2022-0002; 87 Fed. Reg. 3511, available at <https://oag.ca.gov/system/files/attachments/press-docs/2022.3.25%20CFPB%20-%20State%20AG%20Comment%20Letter%20on%20BNPL%20Providers%20%2082022-0002%2087%20Fed.%20Reg.%203511%29%20.pdf>.

practices.¹⁸

Perhaps all consumer credit regulation already applies to BNPL. Whether BNPL products do or do not constitute credit is not the focus of this essay. Rather, this essay examines how we might begin to think about future BNPL regulation, based upon the reasons we regulate consumer credit in the first place. Because countries around the world are considering this issue simultaneously, the question presents unique comparative law opportunities.

II. GLOBAL GROWTH OF BUY NOW PAY LATER COMPANIES AND TYPICAL BNPL BUSINESS MODELS

Before considering how to regulate BNPL, it is helpful to understand the basic BNPL business models. While BNPL made a brief foray in to the marketplace in 2005, its real genesis was in 2015 with the formation of Australian-Based Afterpay. Afterpay, which we think of as the founder of father of modern-day BNPL, quickly spread from Australia through Southeast Asia and eventually to U.S. and Europe.¹⁹ While there are actually six main BNPL business models, we focus here on the terms and conditions of the top three major players by size,²⁰ Afterpay, Klarna, and Affirm.²¹ We will also take a look at one

¹⁸ *Id.*, citing Truth in Lending Act, 15 U.S.C. §1602(f); see also 815 ILCS 123/15-1-10 (The Illinois Predatory Loan Prevention Act defines “loan” as money or credit provided to a consumer in exchange for the consumer’s agreement to a certain set of terms, including, but not limited to, any finance charges, interest, or other conditions, and includes transactions conducted over the internet.)

¹⁹ Peng and Muki, *supra* note 11, at 1.

²⁰ Fredrick Bussler, *Buy Now, Pay Later: The Ultimate Research Guide*, FINGERPRINTJS.COM, <https://fingerprintjs.com/blog/buy-now-pay-later-bnpl/#top-buy-now-pay-later-companies-by-transaction-volume>, last visited on March 29, 2022.

²¹ For a much more detailed review of all BNPL models as of 2021, see Andres Santiago Garcia Alvarez, *Buy-now Pay-later: Business Models and Market Overview*, Masters Thesis in Management Engineering, Politecnico Milano, 2021-22. This Masters thesis focuses on the identification, assessment, and classification of the BNPL products available on the market, aiming at spotting and describing the main business models embraced by providers. Through product census and analysis, the author identifies six business models: short-term merchant subsidized credit, industry-specialized BNPL products, BNPL Marketplaces, and merchant-managed BNPL

of the up and coming names in the BNPL space, Zilch, which uses a unique business model that distinguishes it from its competitors.²² All companies discussed here require purchasers to be 18 years of age or older, to have a debt or credit card, and to agree to resolve disputes in arbitration.²³ Presumably all companies can send a consumer to collections and report late payments to credit reporting agencies.²⁴ Other than that, each company's terms vary slightly.

A. Basic BNPL Business Models

The terms of Australian-based Afterpay vary by jurisdiction, but generally purchases are split among four bi-weekly payments.²⁵ While no interest is charged, if a consumer is late on a payment, for each order below \$40, a maximum of one \$10 late fee may be applied plus an additional \$7 if the payment is not made within 7 days.²⁶ If the order is \$40 or above but less than \$273, late fees are capped at 25 percent of the original order value. For original order value above \$272, late fees are capped at \$68.²⁷

Swedish-based Klarna was founded in 2005 and has 90 million active customers, works with 250 thousand merchants, handles 2 million transactions per day, and operates in 17 countries around the globe. Customers undergo a soft credit check before being allowed to use Klarna.²⁸ Unlike Afterpay, Klarna offers three different payment

solutions. The characteristics and peculiarities of each business model are discussed and some remarks for future investigations are done. *Id.*

²² *Id.*

²³ For Afterpay, for example, if a legal dispute arises out of the relationship between the consumer and Afterpay, then Afterpay has provided that the laws under the State of Delaware, or New South Wales if in Australia, will govern. *Id.* If the dispute arises in the United States, then Afterpay has incorporated a Binding Arbitration Clause within its terms. A consumer may opt out of Binding Arbitration, but they must write to Afterpay after creating an account to do so. *Id.*

²⁴ For example, if a consumer defaults on their loan, then Klarna reserves the right to forward the debt to a debt collection agency and report the default to credit reporting companies

²⁵ Afterpay, *Terms of Service - Australia*, AFTERPAY, <https://www.afterpay.com/en-AU/terms-of-service>. last visited on Nov. 10, 2021.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Does Klarna Perform a Credit Check?*, KLARNA <https://www.klarna.com/us/customer-service/klarna-perform-credit-check/> last visited on Nov. 10, 2012.

options, (1) four interest-free installments, with the first one due upon purchase,²⁹ (2) ‘preferring to pay in 30 days,’ which is essentially a ‘try before you buy’ model,³⁰ and (3) borrowing the money with interest, similar to a credit card arrangement. As with Afterpay, Klarna currently limits its own fees. If a consumer lets a payment go unpaid for 10 days after its due date, then Klarna charges a late fee of up to \$7³¹ but according to Klarna’s current terms, the fee never exceeds 25 percent of the installment payment. Nevertheless, this could be a very significant fee compared to the cost of the purchase. Additionally, if a consumer uses payment by check or ACH and the payment is returned or insufficient funds, Klarna will charge a Returned Payment Fee of up to \$25.³² However, the terms provide that the returned payment fee will never exceed the installment payment amount. These fees, stated as annual percentage rates, are quite huge. For example, this last fee could be 100 percent interest over an extremely short time, if stated as interest.³³

Though Afterpay still seems to be the most common household name in BNPL in the U.S., the San Francisco-based Affirm now maintains a slight market lead over its foreign competitors in the U.S. BNPL market.³⁴ Founded in 2012, Affirm allows its customers to prequalify through its mobile app then use the same interface at checkout to charge a purchase.³⁵ Affirm then offers the choice of two payment options. Customers can make 4 interest-free payments every 2 weeks or

. A soft credit check is when a company uses a credit reporting agency, such as Experian or Transunion, to check a consumer’s credit score. A soft credit check, however, will not affect a consumer’s credit score and will not be visible to others who view the consumer’s credit score. The terms and conditions of Klarna simply notes that they use the information from the credit score to determine the credibility of an applicant. *Id.*

²⁹ *Pay in 4*, KLARNA, <https://www.klarna.com/us/pay-in-4/>, last visited on Nov. 10, 2021.

³⁰ *Let customers try before they buy*, KLARNA, <https://www.klarna.com/us/business/products/pay-in-30-days/>, last visited on Nov. 10, 2021.

³¹ *Terms and Conditions*, KLARNA, https://cdn.klarna.com/1.0/shared/content/legal/terms/0/en_us/sliceitinx., last visited on Nov. 10, 2021.

³² *Id.* or an amount permitted by law in a particular jurisdiction)

³³ *Id.*

³⁴ Riyado Sofian, *Affirm: BNPL And Beyond*, Seekingalpha.com, <https://seekingalpha.com/article/4486979-affirm-bnpl-and-beyond>, last visited on Mar. 29, 2022.

³⁵ *How-it-works*, AFFIRM, <https://www.affirm.com/how-it-works>, last visited on Mar. 29, 2022.

to pay off a purchase in monthly installments,³⁶ and for merchants not partnered with Affirm, the app also provides customers the ability to request a virtual credit card upon which to charge their purchases.³⁷ Affirm's already-existing partnerships with big domestic names like Target and Walmart were bolstered further when it partnered with Amazon in late 2021.³⁸ This Amazon partnership solidified Affirm's position as the premier American BNPL option, though Americans can use any and all of them simultaneously seemingly as much as they like.

Finally, we briefly examine London-based Zilch, which is looking to expand into the United States after recently being valued at \$2 billion, an increase from just \$500 million eight months ago.³⁹ Zilch received \$110 million in its latest funding campaign and plans to use that cash to enter the U.S. market.⁴⁰ Unlike the other companies, once Zilch approves an account, Zilch gives each person who registers a virtual Zilch Mastercard.⁴¹ To use the card, a consumer is required to select a participating store and then activate the card for that store.⁴² Once an item is purchased, repayment is similar to Afterpay. Zilch requires 25 percent of the cost of the transaction to be paid up front.⁴³ The remaining balance is taken from the consumer's bank account every two weeks thereafter,⁴⁴ and payment in full occurs over six weeks at 25% per payment with no interest if all goes well. Some purchases provide

³⁶ *Id.*

³⁷ *Id.*

³⁸ Reuters, *Affirm expands Amazon partnership as buy now, pay later surge lifts revenue*, REUTERS.COM, <https://www.reuters.com/business/finance/affirm-revenue-rises-55-bnpl-volumes-users-jump-2021-11-10/>. Last visited on Mar. 29, 2022.

³⁹ Ryan Browne, *UK Buy now, pay later start-up quadruples valuation to \$2 billion, plans U.S. Expansion*, CNBC Tech, <https://www.cnbctech.com/2021/11/10/uk-buy-now-pay-later-start-up-zilch-raises-funds-for-us-expansion.html>, last visited on Nov. 11, 2021.

⁴⁰ *Terms of Use*, ZILCH, <https://www.payzilch.com/terms-of-use/>. last visited on November 11, 2021. It currently has an office in Miami and employs 10 people to work on the U.S. expansion.

⁴¹ *How it works*, ZILCH, <https://www.payzilch.com/how-zilch-works/>, last visited on Nov. 11, 2021.

⁴² Amelia Glean, *Zilch Review: Buy it using your virtual card, pay for it later*, finder.com, <https://www.finder.com/uk/zilch-review>, last visited on Nov. 11, 2021

⁴³ *Id.*

⁴⁴ *Id.*

small cash-back benefits.⁴⁵ Interestingly, if a consumer fails to make a payment, Zilch will not charge a late fee. Zilch also allows qualified consumers to snooze payments for an additional four days to come up with payment.⁴⁶

B. What Consumers and Merchants Like about BNPL

For consumers, BNPL can be enticing. As set out above, unlike credit cards and traditional loan terms, most BNPL companies do not charge interest. Instead, companies charge merchants who partner with their platform 2 to 8 percent of the price paid by the consumer,⁴⁷ along with a small transaction fee.⁴⁸ In turn, BNPL companies can offer consumers a service without interest. Some consumers, especially younger ones, may prefer the transparency of a four-installment payment plan over interest, which can be hard to calculate, resulting in more sales for merchants.⁴⁹ Some consumers also prefer to avoid financial institutions if possible.⁵⁰

Merchants also enjoy benefits from offering BNPL. They can sell more goods through BNPL because BNPL allows more consumers to buy more things. Indeed, when consumers are given a BNPL option, the amount of a single sale increases.⁵¹ Consumers also more often follow through on making the purchase.⁵² Thus, some merchants are willing to pay a higher percent of the consumer's purchase price in exchange

⁴⁵ *Terms of Use*, ZILCH, <https://www.payzilch.com/terms-of-use/>, last visited on Nov. 11, 2021.

⁴⁶ *How it works*, ZILCH, <https://www.payzilch.com/how-zilch-works/>, last visited on Nov. 11, 2021.

⁴⁷ Mike Eckler, *What Merchants Should Know about 'Buy Now, Pay Later,'* Practical Ecommerce, <https://www.practicalecommerce.com/what-merchants-should-know-about-buy-now-pay-later/>, last visited on Dec. 7, 2021.

⁴⁸ *Id.*

⁴⁹ Julian Alcazar and Terri Bradford, *The Appeal and Proliferation of Buy Now Pay Later: Consumer and Merchant Perspectives*, FEDERAL RESERVE BANK OF KANSAS CITY, Nov. 10, 2021, <https://www.kansascityfed.org/Payments%20Systems%20Research%20Briefings/documents/8504/psrb21alcazarbradford1110.pdf>; Peng and Muki, *supra* note 11, at 5.

⁵⁰ Julian Alcazar and Terri Bradford, *supra* note 49, at 1; Pratika, et. al. *supra* note 8, at 331.

⁵¹ Julian Alcazar and Terri Bradford, *supra* note 49, at 4.

⁵² *Id.*

for greater sales.⁵³ Finally, unlike credit card companies, many BNPL companies assume fraud and chargeback risks, which can significantly impact a company's bottom line.⁵⁴

III. HOW AND WHY WE REGULATE CONSUMER CREDIT AND WHAT TO DO ABOUT BNPL: A GLOBAL PERSPECTIVE

A. Why We Regulate Consumer Credit

First, we turn briefly to the question of *why* we regulate consumer credit in the first place. With all consumer products, including consumer credit, we want to preclude or at least discourage fraud and misrepresentation.⁵⁵ Focusing exclusively on credit, most societies want creditors to be transparent in their offers of credit and want to limit those offerings to what a consumer can reasonably be expected to repay.⁵⁶ Additionally, we may regulate to overcome various consumer and market weaknesses. For example, consumers may suffer from behavioral biases, including information asymmetry and optimism bias.⁵⁷ These conditions can cloud judgment and can be exacerbated by excessive lending that creates large fees for financial institutions, but risks for consumers.⁵⁸ These same consumers may assume that financial institutions will not lend to those who cannot repay, that they have the consumers' best interests in mind, or both.⁵⁹

B. How we Regulate Consumer Credit

Now we turn to *how* consumer credit is regulated around the world.

⁵³ *Id.*

⁵⁴ Randa Kriss, *What is a Chargeback? What Business Owners Need to Know*, Nerdwallet.com (Dec. 7, 2021, 2:00pm) <https://www.nerdwallet.com/article/small-business/chargeback>.

⁵⁵ U.S. states enact so-called "unfair practices acts or unfair and deceptive practices acts (UPAs or UDAPs) for this purpose. *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws*, NATIONAL CONSUMER LAW CENTER, March 2018, <https://www.nclc.org/images/pdf/udap/udap-report.pdf>.

⁵⁶ Peng and Muki, *supra* note 11, at 6-7.

⁵⁷ *Id.* at 7.

⁵⁸ *Id.*

⁵⁹ Christopher Woolard, *The Woolard Review - A review of change and innovation in the unsecured credit market*, Financial Conduct Authority, Feb. 21, 2021, 47-49, <https://www.fca.org.uk/publication/corporate/woolard-review-report.pdf>.

With all credit products, we typically require disclosures and sometimes also limit the amount of interest and fees that can be charged. Many societies also have laws governing how debts can be collected, how past due debt are reported, and how various forms of credit can be advertised and marketed. Because BNPL products are new and have thus far avoided most regulation across the globe, and because they are used in both developing and emerging markets, we can watch regulation of BNPL companies develop globally in real time, based upon each country's political and legal system and each's perceived societal needs.

BNPL has caught the eye of regulators around the world, including in Ireland, Germany, and the EU.⁶⁰ Sweden already has a BNPL law that requires merchants to first present consumer options that do not contribute to debt and last year, the United Kingdom signaled plans for greater regulation.⁶¹ Australia has been working on regulating these issues for the longest period of time, and has now passed a law forbidding BNPL companies from baring merchants from passing on BNPL surcharges for their services.⁶² Finally, scholars in many developing countries are wondering how to regulate BNPL.⁶³ By looking at proposed and passed regulations from these other countries, we can gain insight into each country's highest priorities in consumer credit regulation. We can also begin thinking about how U.S. regulation might play out and why. We have chosen to discuss BNPL scholarship and developments in the United Kingdom, Australia, various parts of Asia, and the U.S., because scholars and governments have written about BNPL in these places.

1. BNPL in The United Kingdom

A recent U.K. news article notes that Swedish based Klarna 'has led the UK boom' in BNPL services in the past few years, and that

⁶⁰ Ashwin Vasana, *Our public inquiry on buy now, pay later*, CFPB.gov, Jan. 12, 2022, available at <https://www.consumerfinance.gov/about-us/blog/our-public-inquiry-buy-now-pay-later/>.

⁶¹ Ashwin Vasana, *Our public inquiry on buy now, pay later*, CFPB.gov, Jan. 12, 2022, available at <https://www.consumerfinance.gov/about-us/blog/our-public-inquiry-buy-now-pay-later/>.

⁶² *Id.*

⁶³ See *infra* notes 101-13 and accompanying text.

according to a study by Creditspring, more people took out BNPL schemes than traditional loans from mainstream lenders in 2021. The same study noted that younger adults are among the most frequent users.⁶⁴ The study also showed that consumers were sorely misinformed about BNPL, including a belief by some that it is impossible to get into debt using BNPL.⁶⁵ Moreover, almost half the respondents did not know that late fees were even a possibility, and, again, BNPL was found to make impulse spending easier and tracking expenses harder.⁶⁶ Consumer groups in the U.K. are very concerned about BNPL and have been calling for regulation. For example, the U.K. citizens watch group and charity, Citizen's Advice, has done extensive analyses of BNPL and recently commissioned a 6,000 person nationally representative poll of UK adults that showed that 1,124 people had used BNPL in the past 12 months.⁶⁷ The poll ran from 6-24 January 2022.⁶⁸ Citizen's Advice also interviewed a nationally representative sample of 1,641 Universal Credit (a government payment for those who are out of work or low income)⁶⁹ recipients over the same timeframe.⁷⁰ These data showed that twelve percent of consumer were using BNPL

⁶⁴ Julia O'Driscoll, *The pros and cons of 'buy now, pay later' schemes: Payment schemes are booming in popularity but some warn of potential financial risks*, *The Week U.K.* Edition April 13, 2022, available at <https://www.theweek.co.uk/business/economy/956431/the-pros-and-cons-of-buy-now-pay-later-schemes>.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *One in 12 now using Buy Now Pay Later to cover essentials*, CITIZEN'S ADVICE.ORG, Mar. 11, 2022, available at <https://www.citizensadvice.org.uk/about-us/about-us1/media/press-releases/one-in-12-now-using-buy-now-pay-later-to-cover-essentials/>. Citizens Advice is made up of the national charity Citizens Advice; the network of independent local Citizens Advice charities across England and Wales; the Citizens Advice consumer service; and the Witness Service. Their network of charities offers impartial advice online, over the phone, and in person, for free. They helped 2.4 million consumers face to face, over the phone, by email, and by webchat in 2020-21, and 40 million people visited their website. Citizens Advice service staff is supported by more than 21,000 trained volunteers, working at over 2,600 service outlets across England and Wales. *Id.*

⁶⁸ *Id.*

⁶⁹ *Universal Credit*, UK.GOV, available at <https://www.gov.uk/universal-credit>, last visited on Apr. 24, 2022.

⁷⁰ *One in 12 now using Buy Now Pay Later to cover essentials*, CITIZEN'S ADVICE.ORG, Mar. 11, 2022, available at <https://www.citizensadvice.org.uk/about-us/about-us1/media/press-releases/one-in-12-now-using-buy-now-pay-later-to-cover-essentials/>.

to buy food and toiletries.⁷¹ One customer with very little means reported being offered £100 credit and even £500, after borrowing £40, all while simultaneously being constantly harassed for repayments.⁷² The availability of BNPL is causing some consumer to use BNPL rather than asking the charity for food or fuel, inadvertently getting into an unnecessary debt trap to avoid the embarrassment of asking for help.⁷³ Citizens Advice claims that the government is not keeping pace with the BNPL industry and has called for urgent regulation, including underwriting and better disclosures of what happens when things go wrong.⁷⁴

While there has been little U.K. regulatory action thus far, the government has begun to take an interest in BNPL. The United Kingdom's Financial Credit Authority (FCA) recently commissioned a report of the state of unsecured credit in the U.K. which covered BNPL.⁷⁵ BNPL in the U.K. currently operates within an exemption from regulation by the FCA.⁷⁶ The resulting report, known as the Woolard Report, suggested that the FCA begin regulating BNPL and also made the following recommendation:

There has been significant growth in unregulated BNPL products in recent years. The products and business models in the market, as well as those which may be developed in the future, can lead to harm. Regulatory oversight is appropriate to ensure that the product develops in a way which is beneficial to the end consumer. As a matter of urgency, the FCA should work with the Treasury to ensure the necessary amendments to legislation are made to bring BNPL products within the scope of regulation. Once the necessary powers are obtained the FCA will need to develop a proportionate regulatory framework including addressing how credit information should work within this market. In defining the regulatory framework for BNPL, the FCA and the

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Woolard, *supra* note 59, at 1.

⁷⁶ Woolard, *supra* note 59, at 43.

Treasury should take care not to include other non-financial organisations that rely on the current exemption, including healthcare services and sport clubs.⁷⁷

Another U.K. government report published in October of 2021 highlighted some of the concerns raised by BNPL, which had been operating within the FCA exemption because BNPLs do not charge traditional interest.⁷⁸ These BNPL concerns read like a laundry list of consumer credit regulation around the world. The report notes that due to the exemption, no formal contract is required for the BNPL arrangement and no creditworthiness assessment (underwriting) is done.⁷⁹ Additionally, there are no rules about reporting to a credit bureau,⁸⁰ or about how a provider must treat a consumer after default.⁸¹ Nor are there many restrictions on advertising, which appear to set up BNPL as the default method of payment, which sells a particular lifestyle, and which downplays the cost and play into behavioral biases that encourage impulse buying.⁸²

As a result of these findings, the U.K. government announced in November of 2021 that BNPL shopping services would now come under the supervision of the FCA, which is tasked with regulating financial service firms and markets in the U.K.⁸³ The news article announcing the U. K.'s decision describes concerns from consumer groups about BNPL. One consumer group noted that it is concerned that young

⁷⁷ *Id.* at 52, recommendation 18.

⁷⁸ *Regulation of Buy-Now-Pay-Later, Consultation*, Oct. 2021, HM TREASURY, <https://www.gov.uk/government/consultations/regulation-of-buy-now-pay-later-consultation>. In particular, this includes an exemption for interest-free credit. The conditions that must be met in order for an agreement to fall within this exemption's scope include:

the agreement is a borrower-lender-supplier agreement for fixed-sum credit; the number of payments to be made by the borrower is not more than 12; those payments are required to be made within a period of 12 months or less; and the credit is provided without interest or other charges.

Id. at 4.

⁷⁹ *Id.* at 22.

⁸⁰ *Id.* at 22-23.

⁸¹ *Id.* at 23.

⁸² *Id.* at 18.

⁸³ Ryan Browne, *Britain is cracking down on the \$3.7 billion 'buy now, pay later' industry*, 9:00pm) <https://www.cnn.com/2021/02/02/uk-to-regulate-buy-now-pay-later-bnpl-firms-like-klarna-and-clearpay.html>, last visited on Nov. 11, 2021.

people in particular are at risk of being lured into a debt trap.⁸⁴ The consumer group noted that BNPL companies may encourage young people to spend more than they can afford.⁸⁵

The October 2021 government report noted that more than 5 million Brits were using BNPL financial products since the start of the pandemic and that more than one in ten customers of a major bank using BNPL were already in arrears.⁸⁶ The FCA brought BNPL under its supervision because it wanted to “[make] sure people are treated fairly and only offered agreements they can afford – the same protections [one would] expect with other loans.”⁸⁷

2. BNPL in Australia

Australia has had its eye on BNPL for many years. In November 2020, the Australian Securities and Investments Commission (ASIC) published a report (the ASIC Report) that described the evolution of the Australian retail credit market and the increase in demand for BNPL.⁸⁸ It reported that in June 2019, there were 6.1 million open accounts, representing 30% of the Australian adult population. The number of transactions increased from 1.9 million in June 2018 to 3.4 million in June 2019, representing a 75% increase. The total value of all transactions increased in the same period by 79%.⁸⁹

The ASIC Report also found that 21 percent of BNPL users surveyed had missed a payment in the prior twelve months.⁹⁰ Of those who missed a payment, 47 percent were between 18-29, 34 percent made at least six BNPL purchases in the prior six months, and 55 percent had at least two different BNPL arrangements in the prior six months.⁹¹ The ASIC Report also found that 20 percent of those surveyed also cut

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Regulation of Buy-Now-Pay-Later, Consultation, Oct. 2021*, HM TREASURY, at 5, <https://www.gov.uk/government/consultations/regulation-of-buy-now-pay-later-consultation>.

⁸⁷ Ryan Browne, *supra* note 83.

⁸⁸ *Buy now pay later: An industry update, Report 672* | November 2020, Australian Securities and Investment Commission, at 1, <https://download.asic.gov.au/media/5852803/rep672-published-16-november-2020-2.pdf>

⁸⁹ *Id.* at 3.

⁹⁰ *Id.* at 12.

⁹¹ *Id.*

back or went without essentials, such as meals, and 15 percent of those surveyed had taken out an additional loan as a result of the consumer's obligations to the BNPL repayment program.⁹² The report noted that those who had more than one BNPL arrangement had more often cut back on essentials and had taken out an additional loan.⁹³

Australian scholars in non-legal fields have tied BNPL to impulse buying, overconsumption on non-essentials, and a detrimental effect on the environment, despite those same users' support of environmental activism and conservation.⁹⁴ One study of females between the ages of 18-25 found that among this demographic, "BNPL users have a higher online impulse buying tendency than those who do not use BNPL, and the study found a clear link between online impulse buying and sales conversion tool sensitivity, thus promoting overconsumption in this setting."⁹⁵ Another article concluded that regulatory capture has led to a lack of regulation in Australia, which in turn has led to overuse of BNPL and to lasting, harmful financial conditions for consumers.⁹⁶ Rereferring to the lack of underwriting in BNPL, another Australian study noted that the lack of regulation means that the current market relies upon "responsible spending" rather than "responsible lending" to curb misuse of BNPL.⁹⁷

Acknowledging that when used responsibly BNPL can be a useful tool for consumers, the ASIC Report expressed concern about the costs to consumers of missed payments.⁹⁸ In 2018-19 missed payment fee revenue across all BNPL providers totaled 43 million Australian dollars,

⁹² *Id.* at 15.

⁹³ *Id.* at 16.

⁹⁴ Lauren Ah Fook & Lisa McNeill, *Click to Buy: The Impact of Retail Credit on Over-Consumption in the Online Environment*, 12 *Sustainability* 7322, at 2 (2020).

⁹⁵ *Id.* at 1.

⁹⁶ Di Johnson, John Rodwell, and Thomas Hendry, *supra* note 14, at 7.

⁹⁷ Paul Gerrans, Dirk G. Baur, and Shane Lavagna-Slater, *Fintech and Responsibility: Buy-Now-Pay-Later Arrangements*, *AUSTRALIAN JOURNAL OF MANAGEMENT*, 7 (2021). For more industry-focused response to BNPL in Australia, see Chay Fisher, *Cara Holland and Tim West, Developments in the Buy Now, Pay Later Market*, RESERVE BANK OF AUSTRALIA, Mar. 2021, [developments-in-the-buy-now-pay-later-market.pdf](https://www.rba.gov.au/publications/developments-in-the-buy-now-pay-later-market.pdf).

⁹⁸ *Buy now pay later: An industry update, Report 672* | Nov. 2020, Australian Securities and Investment Commission, 51, <https://download.asic.gov.au/media/5852803/rep672-published-16-november-2020-2.pdf>.

a growth of 38% compared to the previous financial year.⁹⁹ As a reaction to the exponential growth in BNPL in Australia, a new law known as the Product Regulation Act was enacted and designed to give ASIC the power to address significant consumer harm from BNPL arrangements.¹⁰⁰

3. BNPL in Select Asian Markets

Emerging credit markets are the most interesting playing fields for BNPL analysis because they show how consumers in markets without credit cards use and benefit from BNPL, as well as how consumers might be hindered by BNPL in the future. In Bangladesh, unlike western markets, higher income people are more likely to use BNPL than lower income people.¹⁰¹ Education and a demand for luxury goods and an improved standard of living are associated with BNPL purchases.¹⁰² While participants in one Bangladesh study unquestionably benefited from using BNPL, they also demonstrated impulse buying that could hinder future personal savings, causing the authors claim that there is an overwhelming need for a much better outcome for consumers and for rational regulation.¹⁰³ The authors also recommend a better banking infrastructure in Bangladesh as well as proper information regarding payment modes, rates, and methods for BNPL, among other things.¹⁰⁴

In Indonesia, BNPL plays a special role in helping people travel. The Indonesian company Traveloka led the way for BNPL in Indonesia by offering BNPL in the context of airline tickets, hotels and entertainment.¹⁰⁵ Indonesia has the fourth largest population in the world, with over 259 million people,¹⁰⁶ but of that population only 1.3% have

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 23.

¹⁰¹ Khan and Haque, *supra* note 9, at 55.

¹⁰² *Id.* at 40. This study collected survey data in Bangladesh's capital city of Dhaka from 418 people from different socio-economic backgrounds, from October to December of 2019 cluster sample of various locations and a cross-sectional survey structured questionnaire containing both closed-end and open-end questions. *Id.* at 56.

¹⁰³ *Id.* at 56.

¹⁰⁴ *Id.*

¹⁰⁵ Pratika et al., *supra* note 8, at 331. The authors suggest that BNPL will likely surpass credit card use in Indonesia. *Id.*

¹⁰⁶ Lia and Natswa, *supra* note 8.

credit cards, compared to 20.2% in Malaysia, 35.4% in Singapore,¹⁰⁷ and 79% in the U.S.¹⁰⁸ A 2021 study of Indonesian consumers examined the relationship of impulsive buying and overconsumption of Generation Z, which is 30% of Indonesia's population. While acknowledging that BNPL is handy and easy, this study found that BNPL makes people more consumptive, especially members of Generation Z, who may not have much or any income.¹⁰⁹ Another Indonesian study reported that 78.8% of BNPL users would not have bought the item without BNPL, suggesting a high level of discretionary spending as opposed to need-based spending.¹¹⁰ Overall the authors suggest financial education about the future benefits of savings.¹¹¹ They also allude to the need for increased underwriting rules.¹¹²

Another Indonesian study predicts that BNPL will surpass credit card use in places like Indonesia.¹¹³ Using news stories as the dataset, economists conclude that today's Indonesian consumers prefer to avoid banks and enjoy the convenience of BNPL and that BNPL has grown as a result. They also find that BNPL encourages consumptive behavior, and thus recommend underwriting to ensure fewer defaults, as well as a limit on total purchases made through BNPL.¹¹⁴

As in Indonesia, BNPL is growing astronomically in Singapore, the regional hub for financial technology.¹¹⁵ Noting that BNPL is growing rapidly but is not currently regulated in Singapore, two scholars in Singapore have developed the most detailed analysis of BNPL thus far. They note that BNPL caters to millennials and the underbanked.¹¹⁶ After an extensive discussion of why we regulate consumer credit in society,¹¹⁷ they propose that regulators take a functional approach and regulate BNPL like credit, even if it is technically not credit because

¹⁰⁷ *Id.* at 5. These data are from 2016, however.

¹⁰⁸ Evangelina Chapkanovska, *21+ Cash vs Credit Card Spending Statistics to Know in 2021*, SPENDMENOT, Feb. 8, 2022, <https://spendmenot.com/blog/cash-vs-credit-card-spending-statistics/>.

¹⁰⁹ Lia and Natswa, *supra* note 8.

¹¹⁰ Fook and McNeill, *supra* note 94, at 7322 (discussing New Zealand data).

¹¹¹ *Id.* at 6.

¹¹² *Id.* at 2 ("The primary contrast between BNPL stage and bank credit is that banks are accused of social obligation to offer what borrower can reimburse).

¹¹³ Pratika et al. *supra* note 8, at 331.

¹¹⁴ *Id.* at 337.

¹¹⁵ Peng and Muki, *supra* note 11, at 1.

¹¹⁶ *Id.* at 5.

¹¹⁷ *Id.* at 6-8.

no interest is charged.¹¹⁸ Specifically, they propose licensing requirements, maximum credit limits (though no minimum income requirements), and credit reporting.¹¹⁹ Calling for the most substantive regulation of BNPL so far, they also suggest limits on interest rates, fees, and total charges.¹²⁰

More specifically, because non-business unsecured loans in Singapore already carry limits on interest rates, fees, and total charges, under the Moneylenders Act (MLA), in order to avoid debt traps, these scholars propose that the same limits apply to BNPL.¹²¹ Moreover, they request an inquiry into whether these limits are sufficient, given the extensive use of BNPL due to Covid-19.¹²² They also suggest that all disclosures applicable to non-business loans be applicable to BNPL as well.¹²³ They conclude that regulation is necessary because all fintech must be “directed at improving people’s lives.”¹²⁴ They conclude that:

BNPL arrangements have the potential to bring significant advantages to the market. BNPL arrangements provide cheap and less risky credit to consumers, catering to the demands of risk adverse millennials, allowing access to credit to the underbanked, and improving the sales of merchants. Nevertheless, as we explained in this article, BNPL arrangements may not be subject to consumer credit regulation, and may pose potential consumer harms which need to be addressed as soon as possible. Regulatory oversight is necessary to ensure that the BNPL market develops in a way which is beneficial to the consumers. To this end, we propose adopting a functional approach towards consumer credit in Singapore. Under this approach, all consumer credit products should be subject to a minimum level of consumer credit regulation. Additional requirements may be imposed to address additional risks posed by particular products, and consumer credit products which pose

¹¹⁸ *Id.* at 19.

¹¹⁹ *Id.* at 21-22.

¹²⁰ *Id.* at 24.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 24-25.

¹²⁴ *Id.* at 25.

little risk may be exempt from such regulation.¹²⁵

4. BNPL in the U.S.

BNPL was entirely unregulated in the U.S. as of Spring of 2022. However, in Spring of 2022, the CFPB opened an inquiry into BNPL, citing concerns about “accumulating debt, regulatory arbitrage, and data harvesting in a consumer credit market already quickly changing with technology.”¹²⁶ The CFPB’s job is to make consumer financial markets

¹²⁵ *Id.* at 25-26. The authors add:

With respect to BNPL arrangements in particular, we attempt to outline in broad brushes four key reforms that could be undertaken in Singapore, given the specific characteristics of BNPL arrangements. BNPL arrangements should: a. Not be subject to licensing requirements; b. Not be subject to minimum income requirements, but be subject to maximum credit limits and credit reporting; c. Be subject to interest rate, fees and total charge restrictions; and d. Be subject to standardised information disclosure requirements.

¹²⁶ *Consumer Financial Protection Bureau Opens Inquiry into “Buy Now, Pay Later” Credit: Buy Now, Pay Later Expected to Set New Records for Lending this Holiday Season*, DEC 16, 2021, CFPB.GOV, available at <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-opens-inquiry-into-buy-now-pay-later-credit/>.

Specifically, the Bureau is concerned about:

Accumulating debt: Whereas the old-style layaway installment loans were typically used for the occasional big purchase, people can quickly become regular users of BNPL for everyday discretionary buying, especially if they download the easy-to-use apps or install the web browser plugins. If a consumer has multiple purchases on multiple schedules with multiple companies, it may be hard to keep track of when payments are scheduled. And when there is not enough money in a consumer’s bank account, this can potentially result in charges by both the consumer’s bank and the BNPL provider. Because of the ease of getting these loans, consumers can end up spending more than anticipated.

Regulatory arbitrage: Some BNPL companies may not be adequately evaluating what consumer protection laws apply to their products. For example, some BNPL products do not provide certain disclosures, which could be required by some laws. And while the BNPL application may look similar to a standard checkout with a credit card, protections that apply to credit cards may not apply to BNPL products. Many BNPL companies do not provide dispute resolution protections available to users of other forms of credit, like credit cards. And finally, depending on what rules the lender is following, different late fees and policies apply.

Data harvesting: BNPL lenders have access to the valuable payment histories of their customers. Some have used this collected data to create closed loop shopping apps

work for consumers, responsible providers, and the overall economy.¹²⁷ As the CFPB's recent inquiry explains, the law requires that the CFPB monitor consumer financial markets and allows the agency to obtain information from market players.¹²⁸ Although the CFPB has opened an inquiry into BNPL, BNPL is not currently being regulated in the U.S. because BNPL companies argue that they do not issue credit because they do not charge interest. This means that currently, but perhaps not for much longer, BNPL arguably falls outside the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, the Truth in Lending Act, the Equal Credit Opportunity Act.¹²⁹

This is not to say that U.S. governmental agencies other than the CFBP are not concerned about BNPL. The Federal Reserve Bank of Kansas City (Federal Reserve Bank) has issued two reports on BNPL that contain some of the best data on BNPL in the U.S.¹³⁰ Similar to the rest of the world, the Federal Reserve Bank found that BNPL is marketed to and used primarily by millennials and Gen Zs.¹³¹ As in most of the developed world, the Federal Reserve Bank found that the products are

with partner merchants, pushing specific brands and products, often geared toward younger audiences. As competitive forces pressure the merchant discount, lenders will need to find other sources of revenue to maintain growth and profitability. The Bureau would like to better understand practices around data collection, behavioral targeting, data monetization and the risks they may create for consumers.

Id.

¹²⁷ In the U.S., the Consumer Financial Protection Bureau (CFPB) is charged with enforcing Federal consumer financial law and ensuring that markets for consumer financial products are fair, transparent, and competitive. *About Us*, CONSUMER FINANCIAL PROTECTION AGENCY, <https://www.consumerfinance.gov/about-us/>. The CFPB's scope is not limited to regulating and enforcing laws regarding "credit." *Id.* As the CFPB web site explains, "in a market that works, the prices, risks, and terms of the deal are clear upfront so that consumers can understand their options and comparison shop." *Id.* Companies all play by the same consumer protection rules and compete fairly on providing quality and service." *Id.* As might be expected in a mature, market-based economy, the focus is on the workings of the market.

¹²⁸ *Id.*

¹²⁹ Nathalie Martin and Lydia Pizzonia, *Shadow Credit and the Devolution of Consumer Credit Regulation*, 24 LEWIS & CLARK L. REV. 1349, 1349-50 (2021).

¹³⁰ Julian Alcazar and Terri Bradford, *supra* note 49, at 1; Julian Alcazar and Terri Bradford, *The Rise of Buy Now, Pay Later: Bank and Payment Network Perspectives and Regulatory Considerations*, FEDERAL RESERVE BANK OF KANSAS CITY, Dec. 1, 2021, https://www.kansascityfed.org/Payments%20Systems%20Research%20Briefings/documents/8536/PaymentsSystemResearchBriefing21AlcazarBradford1201_gIx89QT.pdf.

¹³¹ Julian Alcazar and Terri Bradford, *supra* note 49, at 1.

marketed to and primarily used by consumers with no or bad credit.¹³² The Federal Reserve Bank of Kansas City also found that 14% of users had missed a payment and 12% had missed more than one, and also that missed payments can adversely affect credit scores.¹³³ The Federal Reserve Bank also found that BNPL could ultimately replace credit cards for millennials and Gen Z's who prefer transparent, interest-free transactions.¹³⁴

One study by U.S. scholars, one of the few, found that despite the desire of consumers to use BNPL in order to avoid credit cards, many BNPL purchases may ultimately be carried as credit card debt.¹³⁵ In an anatomized data set obtained from credit card companies, researchers found that 19% of credit card bills included BNPL charges.¹³⁶

While systematic Federal statutory regulation is currently stymied in the U.S., the California Department of Financial Protection and Innovation recently settled lawsuits with BNPL companies, ViaBill, Sezzle, QuadPay (now Zip), Klarna, and Afterpay, resulting in nearly \$1.9 million in refunds to California consumers.¹³⁷

IV. FUTURE REGULATORY FRAMEWORKS: NO RULES JUST RIGHT?

While not all consumers have the same needs, some consumer protection needs cross continents and cultures.¹³⁸ This essay has explored global perspectives on BNPL. Taking a global perspective allows us to see differences in needs across various populations, as well as differences in the use, policies, practices, and politics of BNPL. More data

¹³² *Id.* at 1.

¹³³ *Id.* at 3.

¹³⁴ Julian Alcazar and Terri Bradford, *The Rise of Buy Now, Pay Later: Bank and Payment Network Perspectives and Regulatory Considerations*, *supra* note 130, at 1.

¹³⁵ Benedict Guttman-Kenney, Chris Firth, and John Gathergood, *Buy Now, Pay Later (BNPL)...On Your Credit Card*, draft March 10, 2022, available at file:///C:/Users/martinn/AppData/Local/Temp/SSRN-id4001909.pdf.

¹³⁶ *Id.* at 10.

¹³⁷ Julian Alcazar and Terri Bradford, *supra* note 130, at 3.

¹³⁸ For example, in Bangladesh it is high-end consumers who use BNPL but in Singapore and the U.S., BNPL is primarily used by the underbanked and other who may not qualify for mainstream credit. Peng and Muki, *supra* note 11, at 6; Julian Alcazar and Terri Bradford, *The Rise of Buy Now, Pay Later: Bank and Payment Network Perspectives and Regulatory Considerations*, *supra* note 130, at 1.

on BNPL use is needed in order to fully appreciate these differences and to regulate appropriately in light of them.

Regulating consumer credit in the U.S. is especially tricky because of the large number of consumers and the existence of the largest wealth gap among the world's largest economies.¹³⁹ The U.S. has both the poorest and the richest consumers, all under one legal roof. We rely on consumer choice of product or sorting to regulate around this enormous wealth gap. In affluent societies with active market economies and large wealth gaps, lower income consumers will likely use BNPL the way they use credit cards, by not paying all at once, not paying on time, and carrying a balance.¹⁴⁰ With these observations in mind, we can contemplate what meaningful BNPL regulations might look like based upon the problems identified above.

A. Overconsumption and the Environment

Our individual choices as consumers effect the environment, whether the choice is to buy solar or an electric car, to stop using plastic bottles, or to reduce consumption overall. Several scholars have suggested that the ease of BNPL purchasing leads to overconsumption of non-essentials. The environment should be of deep concern for all people, but especially for Americans who use 20% or more of the world's resources, but constitute just 5% of the world's population.¹⁴¹ It would be wise for consumer credit regulation to align with environmental goals, just as other areas of the law have done. If credit, tax, and other

¹³⁹ The United States has the highest level of income inequality among those countries with the largest economies in the world including India, the land of the untouchables and the caste system. Pamela Foohey and Nathalie Martin, *Fintech's Role In Exacerbating or Reducing The Wealth Gap*, 2021 UNIVERSITY OF ILLINOIS LAW REVIEW 459, 467 (2021).

¹⁴⁰ Khan and Haque, *supra* note 9, at 44-45.

¹⁴¹ One study estimates it would take five earths to support the human population if everyone around the world consumed similar to the average American. *U.S. Environmental Footprint Factsheet Center for Sustainable Systems*, UNIVERSITY OF MICHIGAN., 2021, at 1, available at https://css.umich.edu/sites/default/files/U.S.%20Environmental%20Footprint_CSS08-08_e2021.pdf. A decade ago, Scientific American concluded that "with less than 5 percent of world population, the U.S. uses one-third of the world's paper, a quarter of the world's oil, 23 percent of the coal, 27 percent of the aluminum, and 19 percent of the copper." *Use It and Lose It: The Outsize Effect of U.S. Consumption on the Environment*, SCIENTIFIC AMERICAN, Sept. 14, 2012, available at <https://www.scientificamerican.com/article/american-consumption-habits/>.

economic and legal policies can align with environmental goals, as has been done with rebates and tax breaks for efficient appliances, electric cars and solar power, these consumer law alliances could help slow the degradation of the earth.

We favor any consumer credit law that can reduce negative impacts on the environment, but want to make sure these laws fall first on consumers who can make the most difference. While we are all connected and the environment is everyone's problem, consumers in developing economies have contributed less to world's carbon footprint and may have less of a duty to reduce personal consumption. European and U.S. consumers from affluent societies who use BNPL are from affluent societies but are not the most affluent *of those* societies. The most affluent of those societies, who have no need for BNPL, have no doubt contributed far more to the carbon footprint than those using BNPL. While every bit of environmental degradation counts, it could be classist and racist in a multicultural society like the U.S. to ask BNPL users to stop polluting the earth, when those with more cash likely pollute more. There is, however, a much more personal reason to avoid the AfterPay hangover that applies to all races, classes, and nationalities, namely the effects of overspending on wealth building.

B. Mindless Spending as an Impediment to Wealth-Building

BNPL is often used for discretionary purchases. Because of their very simple and quick fintech delivery systems and a lack of underwriting on the part of sellers and BNPL providers, scholars from other fields worry that too many consumers are getting in over their heads. As a result, a large swath of the non-legal scholarship published about BNPL on or before of Spring of 2022 focuses on the issue of overconsumption.¹⁴² Consumers can buy many items at one time without credit card availability or room in their budgets.¹⁴³ Like any form of credit, use of BNPL services has the capacity to eat into future income and impair wealth building.

Although this new industry can be seen as a democratization of credit, there have been reports that consumers are being negatively impacted

¹⁴² Fook and McNeill, *supra* note 94, at 7322; Julian Alcazar and Terri Bradford, *supra* note 130, at 3; Lia and Natswa, *supra* note 8, at 1-3; Khan and Haque, *supra* note 9, at 55-56.

¹⁴³ Julian Alcazar and Terri Bradford, *supra* note 130, at 3 (noting that consumers may use multiple BNPL products in addition to other credit products).

by using this payment method.¹⁴⁴ If a consumer misses a payment, the consumer will not only have to pay a late fee, but using BNPL could subject the consumer to having the missed payment recorded on that person's credit report and also to aggressive debt collection. Consumers are not always warned of these consequences when they use BNPL.

Although the BNPL payment method has grown in popularity and offers consumers a new way to pay that spreads the impact of purchasing costly products over time, there is a concern that consumers may be uninformed about how BNPL works and may also be taking on more debt than they can to carry.¹⁴⁵ Currently, BNPL companies are not required to determine a consumer's ability to make each of the installment payments or to run a credit check.¹⁴⁶

¹⁴⁴ Di Johnson, John Rodwell, and Thomas Hendry, *supra* note 14, at 3. Back in 2017 one of us did a study of community action in local payday loan ordinances. The study was conducted in three locations with very different political proclivities. One was Dallas Texas, where local Dallas religious groups, the AAPR and others wished to curb high-cost lending but state regulators did not. One such group was a Black church called Friendship-West Baptist Church, which noticed people coming in for benevolence, i.e., help with the rent, far more often once they took out a high cost loan. Nathalie Martin and Robert Mayer, *The Power of Community Action: Anti-Payday Loan Ordinances in Three Metropolitan Areas*, 79 (2017) (co-authored with Robert Mayer). Full Document and Executive Summary, available at: UNM-DR.

¹⁴⁵ *One in 12 now using Buy Now Pay Later to cover essentials*, CITIZEN'S ADVICE.ORG, Mar. 11, 2022, available at <https://www.citizensadvice.org.uk/about-us/about-us1/media/press-releases/one-in-12-now-using-buy-now-pay-later-to-cover-essentials/>; *Buy now pay later: An industry update, Report 672* | November 2020, Australian Securities and Investment Commission, at 15, <https://download.asic.gov.au/media/5852803/rep672-published-16-november-2020-2.pdf>.

¹⁴⁶ Buy Now Pay Later companies are not regulated because many fall outside of the regulations designed to prevent financial companies from preying on consumers. For example, in the United States, the Truth in Lending Act (TILA) defines 'creditor' as a person who (1) regularly extends consumer credit which is payable in more than four monthly installment payments 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 consumer credit transaction is payable. See Adam Levitin, *What is "Credit"? AfterPay, Earnin', and ISAs*, (Dec. 7, 2021, 3:00 pm) <https://www.creditslips.org/creditslips/2019/07/what-is-credit-afterpay-earnin-and-isas.html>. If TILA applied to BNPL companies, then BNPL companies would be required to disclose the costs associated with using their services. This, however, is tricky because of how BNPL companies define fees. Most BNPL companies do not charge 'interest.' Rather, BNPL companies charge late fees. But if these late fees were to be calculated as interest, then the resulting APR could be as high as 100percent. Further, other regulations not applicable to BNPL companies would prevent those companies from

Recall that the Australian ASIC Report found that 21 percent of BNPL users surveyed had missed a payment in the prior twelve months¹⁴⁷ and that 20 percent of those surveyed cut back or went without essentials, such as meals, as a result of BNPL obligations.¹⁴⁸ Fifteen percent of those surveyed had taken out an additional loan as a result of the consumer's obligations to the BNPL repayment program.¹⁴⁹ Finally, people who use BNPL and also use credit cards are more likely to pay interest on their credit cards than people who use credit cards but not BNPL.¹⁵⁰ This confirms the rather obvious assumption that BNPL users are credit constrained and income-strapped.¹⁵¹ Almost all consumer credit, except perhaps credit used for home and car purchases and education, is wealth-diminishing. BNPL's ease of use, along with the lack of underwriting, makes it particularly susceptible to "buy now, regret later," "our own name for impulse buying that is later regretted.

Cooling-off periods such as the mandatory 12 month waiting period between 401(k) loans¹⁵² or "remorse escapes" such as the 3-day revocation on consumer contracts in the U.S.,¹⁵³ could be built in to BNPL contracts, which would help consumers but no doubt be opposed by BNPL providers. After all, this impulse spending is what makes BNPL so profitable. Because BNPL is mostly used for discretionary purposes, cooling off periods could be very helpful.

C. Basic Transparency in Disclosures and Fairness in Terms

In addition to concerns about overconsumption and overspending, we

permitting customers from using their services if they had a poor credit rating. For example, the CARD Act requires financial institutions to consider a consumer's ability to pay before opening a new account or increasing anyone's credit limit. See Bill Fay, *Truth in Lending Act – Consumer Rights and Protections*, (Dec. 7, 2021, 3:42pm) <https://www.debt.org/credit/your-consumer-rights/truth-lending-act/>.

¹⁴⁷ Australian Securities & Investments Commission, *BUY NOW PAY LATER: AN INDUSTRY UPDATE*, 12 (2020).

¹⁴⁸ *Id.* at 15.

¹⁴⁹ *Id.* at 15.

¹⁵⁰ *Id.* at 17.

¹⁵¹ *Id.* at 16.

¹⁵² *When can I take another 401k loan?* BEAGLE last visited on March 29, 2022.

¹⁵³ *Buyer's Remorse: The FTC's Cooling-Off Rule May Help*, FTC.GOV, <https://consumer.ftc.gov/articles/buyers-remorse-ftcs-cooling-rule-may-help>.

also want credit offers to be fair and to contain transparent disclosures. These concerns are no less relevant to BNPL than any other credit offer, despite the possibility of not paying interest or fees. Fees are functionally no different than interest as they are both transaction costs.¹⁵⁴ Since BNPL will replace credit cards for some users,¹⁵⁵ at minimum it would make sense to regulate BNPL like credit cards, by limiting fees, requiring basic disclosure of costs, and setting rules consistent with the Fair Debt Collection Practices Act and the Fair Credit Reporting Act.

V. CONCLUSION

The new BNPL model is taking the consumer credit world by storm. BNPL companies claim to be unregulated throughout most of the world because the BNPL model does not charge consumers' traditional interest. Because these consumer finance products are popular and new across the globe, we can watch how other countries address the concerns raised by BNPL and determine what might work best for our own population.

Regardless of what happens next, one thing seems clear. Regulating consumer finance products based upon whether the transaction involves interest is outdated. Fees and interest are functionally the same for consumers and if either cost to consumers are possible, regulation is needed. This regulation could involve underwriting, caps on charges, disclosures, and rules about collections and credit reporting. If BNPL use is likely to replace credit card use among consumers of certain demographics, regulation similar to that provided for credit cards should be the minimum regulation provided. We say "minimum" because BNPL has additional traps for consumers that credit cards do not, namely the desire for immediate gratification and convenient technology to make impulse spending easier.

Speaking of demographics, much more research is needed to understand who uses these products and why, and what these consumers understand about the products. Since revenues raised from consumers take the form of late fees, it would also be useful to determine more about how often consumers pay late fees and what this costs consumers

¹⁵⁴ Peng and Muki, *supra* note 11, at 2.

¹⁵⁵ Julian Alcazar and Terri Bradford, *The Rise of Buy Now, Pay Later: Bank and Network Perspectives and Regulatory Considerations*, *supra* note 130, at 1.

as a percentage of what they bought, over what time period. It would also be highly instructive to determine what percentage of revenues of BNPL companies derive from consumer late fees rather than merchant fees.

Finally, it is time to stop using the phrase “democratization” of credit, unless the democratization involves true credit democratization. True credit democratization is credit offered to the underserved at reasonable rates. In the past “democratization of credit” has usually meant providing more credit to those without credit, at wildly expensive rates. There is nothing democratic about this form of credit.

BNPL is making credit available to more people than any other consumer finance product. Because BNPL is used primarily for non-essentials, and because it is easy, perhaps too easy, to use, BNPL presents a unique regulatory moment, a moment to consider not just how best to regulate BNPL, but also how we might rethink our entire system for regulating consumer credit.