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Expanding Access for the Credit Invisible with Just Four Easy Payments? The Unregulated Rise of Buy Now, Pay Later

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EXPANDING ACCESS FOR THE CREDIT INVISIBLE WITH JUST FOUR EASY PAYMENTS? THE UNREGULATED RISE OF BUY NOW, PAY LATER

Colleen E. Mandell¹ and Morgan J. Lawrence²

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INTRODUCTION

While online shopping for jeans these days, you can choose to pay full price (\$44.96) or “4 interest-free installments of \$11.24.”³ Whether this option is provided by Afterpay, Klarna, or Paypal, among many others, it is popping up at seemingly every checkout browser window and cash register, implicitly persuading consumers to split the payments up into four installments for items like clothing, groceries, and even pet supplies.⁴ The temptation to break up a pair of jeans into just a few small payments is tempting, but is it too good to be true?

These companies that offer interest-free installments, among other expanding financing options, are collectively referred to as Buy Now, Pay Later (“BNPL”) lenders. During the COVID-19 pandemic, BNPL lenders saw massive growth in revenue with more consumers purchasing products using its “4 interest-free installments.” The rise of BNPL relies heavily on its use of technology and its role as a financial technology (“fintech”) product. The technology, while increasing financing options, is not without downsides—there are growing concerns that these products use technology to collect and monetize consumer data and further exploit its users, who have less protections than traditional credit card users. These concerns are more pronounced for financially insecure people, who are more likely to belong to a marginalized community, because they are the largest users of BNPL. Such problems have drawn attention from legislators in Congress and regulators at the Consumer Financial Protection Bureau (“CFPB”), who have started to investigate the use and role of BNPL in the United States. However, these investigations have focused on credit visible populations, largely in part because of the difficulty in finding and determining the impact on credit invisible populations. The inherent problem with considering data based on those with credit records is that it excludes approximately 11% of Americans who are considered credit invisible, and this group largely consists of people that face marginalization. As legislators and regulators consider the next steps

³ *AE Strigid Highest Waist Baggy Straight Jean*, AM. EAGLE, https://www.ae.com/us/en/p/women/straight-leg-jeans/baggy-straight-jeans/ae-strigid-highest-waist-baggy-straight-jean/0437_4500_445?menu=cat4840004 (last visited Mar. 9, 2023).

⁴ Even physical stores have signs advertising the ability to buy in four installments with QR codes to immediately direct consumers to the lender’s credit application. Stores are also starting to advertise the ability to use BNPL digital cards on their websites. See *Afterpay FAQ*, PETSMART, <https://www.petsmart.com/help/payment-afterpay-H0004g.html> (last visited Apr. 24, 2023).

forward, they must consider those who are credit invisible, in order to create legislation that protects *all* Americans, regardless of their use of credit.

Section I explains what BNPL is and why consumers are using it. It also discusses how BNPL incorporates aspects of traditional layaway plans into the expanding fintech market, while shifting costs from the consumer to the merchant. Section II elaborates on the CFPB's concerns with BNPL and discusses how BNPL falls outside of the Truth in Lending Act ("TILA") with a focus on consumer protections, or the lack thereof. Section III identifies the demographics of those who are more likely to use BNPL loans and examines their financial situations. Then, Section IV discusses the intersection between the demographics of BNPL users and the credit invisible and explains why additional studies must be conducted to better protect the credit invisible.

I. BUY NOW, PAY LATER: THE MODERN LAYAWAY PLAN

BNPL and its interest-free installment payments are a form of short-term financing that mimics the once popular layaway plan, while modernizing the format with its technological components. These technological components cement BNPL's role as a form of fintech, which relies on digital data consumers generate through daily internet use, from surfing the web to utilizing social media, to target consumers and generate additional revenue.

II. WHAT IS BUY NOW, PAY LATER? AND WHAT'S ITS APPEAL?

BNPL generally refers to a "pay-in-four" model, where the consumer buys a good or service and pays for it over the course of four installments, although "[t]here is no single definition."⁵ It is a form of short-term financing, used predominantly online,⁶ that allows the consumer to break up the total purchase,⁷ often without paying any

⁵ *Buy Now, Pay Later: Market Trends and Consumer Impacts*, CONSUMER FIN. PROT. BUREAU 6 (Sept. 2022), https://files.consumerfinance.gov/f/documents/cfpb_buy-now-pay-later-market-trends-consumer-impacts_report_2022-09.pdf.

⁶ However, BNPL is starting to expand to physical stores. See PETSMAST, *supra* note 4.

⁷ See Becky Pokora, *Survey: Buy Now, Pay Later is Popular with Online Shoppers*, FORBES (Dec. 8, 2022), <https://www.forbes.com/advisor/credit-cards/buy->

interest.⁸ Upon checking out, the consumer pays the first installment, usually around 25% of the total price, and immediately receives the good or service.⁹ The consumer then pays the remaining three installments in two-week intervals.¹⁰

From the consumer angle, the pay-in-four model is highly attractive and carries essentially no upfront costs—the consumer simply puts down 25% of the purchase price and does not worry about revolving credit or compounding interest.¹¹ And, it provides incredibly easy access to credit by providing these small loans based on only a soft credit check with nearly instantaneous approval.¹² On average, the approval rates for BNPL loans are incredibly high with 73% of applicants being approved for credit in 2021.¹³ Further, the loans are often interest free with most programs only assessing a standardized fee for a late payment.¹⁴ And because many programs require autopay, many consumers will never see late fees (as these fees will only arise if the linked account has insufficient funds or expires).¹⁵ Perhaps, this

now-pay-later-popular-with-online-shoppers; see also Ann Carrns, *The Downsides of Using 'Buy Now, Pay Later,'* N.Y. TIMES (Dec. 29, 2022), <https://www.nytimes.com/2022/12/29/your-money/buy-now-pay-later-loans.html>.

⁸ CFPB Study Details the Rapid Growth of “Buy Now, Pay Later” Lending, CONSUMER FIN. PROT. BUREAU (Sept. 15, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-study-details-the-rapid-growth-of-buy-now-pay-later-lending>.

⁹ Jackie Veling, *What is Buy Now, Pay Later?*, NERDWALLET, <https://www.nerdwallet.com/article/loans/personal-loans/buy-now-pay-later> (last visited Mar. 9, 2023).

¹⁰ CONSUMER FIN. PROT. BUREAU, *supra* note 8.

¹¹ Marco Di Maggio et al., *Buy Now, Pay Later Credit: User Characteristics and Effects on Spending Patterns* 6 (Nat’l Bureau Econ. Rsch., Working Paper No. 30508, 2022), https://www.nber.org/system/files/working_papers/w30508/w30508.pdf; *What is a Buy Now, Pay Later (BNPL) Loan*, CONSUMER FIN. PROT. BUREAU (Dec. 2, 2021), <https://www.consumerfinance.gov/ask-cfpb/what-is-a-buy-now-pay-later-bnpl-loan-en-2119>.

¹² Kyle Peterdy, *BNPL (Buy Now, Pay Later)*, CORP. FIN. INST. (Jan. 18, 2023), <https://corporatefinanceinstitute.com/resources/commercial-lending/bnpl-buy-now-pay-later>; Trina Paul, *Everything You Need to Know about the Most Popular Buy Now, Pay Later Apps*, CNBC (Mar. 1, 2023), <https://www.cnn.com/select/best-buy-now-pay-later-apps>.

¹³ This is a small, but significant rise, from 69% in 2021. CONSUMER FIN. PROT. BUREAU, *supra* note 8.

¹⁴ Veling, *supra* note 9.

¹⁵ Ann Carrns, *The Downsides of Using 'Buy Now, Pay Later,'* N.Y. TIMES, <https://www.nytimes.com/2022/12/29/your-money/buy-now-pay-later-loans.html> (Dec. 29, 2022).

is the biggest attraction for consumers, because unlike credit cards, there is no compounding interest for making the minimum payment as late fees are assessed only once and do not continue to compound.¹⁶

The CFPB has identified five big players in the BNPL sphere: Affirm, Afterpay, Klarna, Paypal, and Zip,¹⁷ although there are other smaller players in the U.S. like Sezzle.¹⁸ Each program has its own specific terms and payment plan options, and a savvy consumer can choose a BNPL lender that best serves their needs. For example, a consumer can weigh factors such as

- built in protections to reduce financial overextension
- large, single time purchases
- flexibility with plan terms
- ability to use widely
- brand name trust and recognition, and
- company dedicated to financial empowerment

to determine which lender best fits their needs.¹⁹ Choosing a BNPL lender is similar to choosing a credit card—there is no singular right

¹⁶ See Alicia Doniger, *The Benefits and Risks When Using Buy Now, Pay Later for Holiday Shopping: Credit Experts*, CNBC (Oct. 31, 2021), <https://www.cnbc.com/2021/10/31/the-risks-in-buy-now-pay-later-holiday-purchases-credit-experts.html>.

¹⁷ These five providers make up more than 95% of the BNPL market. Di Maggio, *supra* note 11.

¹⁸ Sezzle, LINKEDIN, <https://www.linkedin.com/company/sezzle> (last visited Apr. 24, 2023) (providing the size of the company is between 201 and 500 employees).

¹⁹ Afterpay is a good option for first time BNPL users as it follows the most standard pay-in-four plan and it has built-in protections (e.g., pausing account after a missed payment and not sending defaults to collections) that reduce the likelihood of users overextending themselves financially. Affirm, on the other hand, is best for large purchases because it operates to more traditional credit products with longer terms and negotiating interest rates with each retailer. Another enticing option is Apple Pay Later that follows the standard pay-in-four but does not impose any interest, fees, or penalties for late payments. Klarna provides users with three payment plans, including the pay-in-four, its own pay-in-30, and a monthly financing option with the ability to earn rewards for every dollar spent. If a user wants to be able to use their BNPL product anywhere, Zip is the best option as it is available anywhere Visa is accepted. Next up, Paypal provides a user with brand name trust and recognition, along with its purchase protection program. For those who want to

answer for *all*, rather the choice hinges on what type of features the consumer desires.

Consumers' reasons for using BNPL include simple convenience, the ability to afford items outside their budget, and even financial distress. More than 52% of respondents in a June 2022 consumer survey reported convenience as the primary force driving their usage, and another 43.8% cited an increased ability to manage finances for large purchases.²⁰ A smaller, but still significant 32.7% of respondents cited issues with receiving other forms of credit to finance purchases, and this group is more likely to be considered a "heavy user," relying on BNPL financing more than once a month.²¹ BNPL is used largely to finance beauty and clothing products, along with other non-essential goods.²² However, with the unsettlingly high rates of inflation in the US during 2022 and 2023,²³ many consumers are turning to BNPL to finance everyday purchases including groceries.²⁴

vote with their dollar, Sezzle is a certified B Corp with the goal of financially empowering the next generation. 7 *Buy Now, Pay Later Apps in 2023*, NERDWALLET (Apr. 19, 2023), <https://www.nerdwallet.com/article/loans/personal-loans/buy-now-pay-later-apps>.

²⁰ Tom Akana, *Buy Now, Pay Later: Survey Evidence of Consumer Adoption and Attitudes*, FED. RESRV. BANK PHILA. 8 (June 2022), <https://www.philadelphiafed.org/-/media/frbp/assets/consumer-finance/discussion-papers/dp22-02.pdf>.

²¹ *Id.* at 7.

²² Heidi Rivera, *Buy Now, Pay Later Statistics*, BANKRATE (Jan. 20, 2023), <https://www.bankrate.com/loans/personal-loans/buy-now-pay-later-statistics> (noting that "clothing, electronics and furniture were the top three items financed using BNPL services during the COVID-19 pandemic, accounting for 47%, 44% and 32% of all financed purchases, respectively.").

²³ Christopher Rugaber, *U.S. Inflation at 9.1 Percent, a Record High*, PBS NEWSHOUR (July 13, 2022), <https://www.pbs.org/newshour/economy/u-s-inflation-at-9-1-percent-a-record-high>; Drew Desilver, *In the U.S. and Around the World, Inflation is High and Getting Higher*, PEW RSCH. CTR. (June 15, 2022), <https://www.pewresearch.org/fact-tank/2022/06/15/in-the-u-s-and-around-the-world-inflation-is-high-and-getting-higher>; Akshat Goel, et. al., *U.S Weekly Economic Commentary: Stubborn Inflation Clouds the Outlook*, S&P GLOB. MKT. INTEL. (Feb. 27, 2023), <https://www.spglobal.com/marketintelligence/en/mi/research-analysis/us-weekly-economic-commentary-stubborn-inflation-clouds-the-ou.html>; The Editorial Board, *Inflation Stays Stubbornly High*, WALL ST. J. (Feb. 15, 2023), <https://www.wsj.com/articles/inflation-january-prices-federal-reserve-jerome-powell-money-supply-8f963787>.

²⁴ Inflation is influencing more consumers to use BNPL, as nearly 60% of consumers say that inflation a driving factor in their decision to use BNPL. See *Consumer Rely on Buy Now, Pay Later Amid Record Inflation, Use Credit to Pay it Off*, CREDIT KARMA (Mar. 21, 2022),

This is demonstrated by the fact that the apparel and beauty loan originations decreased from 80.1% in 2019 to 58.6% in 2021, as consumers increasingly turn to BNPL to finance travel, pet care, and even groceries and gas.²⁵ And what's more, there are BNPL programs for healthcare and dentistry.²⁶

As many BNPL loans are structured to be interest free, this model relies heavily on merchants who then foot the bill in the form of high service fees. This is especially poignant because the lender bears the risk of the consumers' failure to pay.²⁷ Instead of relying on generating revenue through interest charges, BNPL lenders use merchants or service providers to help meet their bottom line. For most BNPL lenders, the merchants bear a large portion of the cost, paying a relatively high service fee of up to eight percent on a transaction compared to credit cards which generally charge about two percent of a transaction total.²⁸

<https://www.creditkarma.com/about/commentary/consumers-rely-on-buy-now-pay-later-amid-record-inflation-use-credit-to-pay-it-off>. Further, while consumers continue to use BNPL to purchase clothing and other non-necessities at much higher rates than other goods and services, inflation is pushing many users, nearly 53%, to purchase items out of necessity rather than mindless shopping. *Id.*

²⁵ CONSUMER FIN. PROT. BUREAU, *supra* note 8; Alina Selyukh, *In a Year Marked by Inflation, "Buy Now, Pay Later" is the Hottest Holiday Trend*, NAT'L PUB. RADIO (Dec. 15, 2022), <https://www.npr.org/2022/12/15/1142469148/buy-now-pay-later-hottest-holiday-shopping-trend>.

²⁶ See Stuart Condie, *Buy Now, Pay Later Looks to Healthcare for Shot in the Arm*, WALL ST. J. (July 22, 2022), <https://www.wsj.com/articles/buy-now-pay-later-looks-to-healthcare-for-shot-in-the-arm-11658491200>. See, e.g., SUNBIT, <https://sunbit.com/> (last visited Apr. 24, 2023) (providing a "pay-over-time" program for auto repair, dental care, and eye care); CARECREDIT, <https://www.carecredit.com> (last visited Apr. 24, 2023) (allowing consumers to "get the health and wellness treatments you want and need today, for you, your family, and your pets; WALNUT, <https://www.hellowalnut.com/about> (last visited Apr. 24, 2023) (providing payment plan options for healthcare patients). The CFPB recently published new guidance regarding these companies' medical loans and associated credit card options, noting concerns that patients who are unable to pay off the debt during the deferred interest period are left with ballooned interest and possible lawsuits; meanwhile, these patients never received adequate guidance on the financial arrangement in the first place. *CFPB Report Highlights Costly Credit Cards and Loans Pushed on Patients*, Con. Fin. Prot. Bureau, <https://www.consumerfinance.gov/about-us/newsroom/cfpb-report-highlights-costly-credit-cards-and-loans-pushed-on-patients/> (May 4, 2023). See also Con. Fin. Prot. Bureau, *Medical Credit Cards and Financing Plans* (May 2023), available at <https://www.consumerfinance.gov/data-research/research-reports/medical-credit-cards-and-financing-plans/>.

²⁷ Peterdy, *supra* note 12.

²⁸ Di Maggio, *supra* note 11, at 2. BNPL represents a growing share of sales compared to credit cards. As of 2021, U.S. BNPL had a gross merchandise volume

With such a high service fee, it initially seems hard to understand why a merchant would consider providing BNPL as an option; however, the large increases in conversion and average order value make up for the initial cost.²⁹ Through offering BNPL as a payment option, merchants see a worthwhile return because consumers are more likely to complete the purchase and even purchase and spend more than they would otherwise.³⁰ For example, merchants using Afterpay can increase basket size by 17%, website traffic by 16%, new customers by 13%, and sales revenue by 12%.³¹ Beyond this, Afterpay touts that merchants who use its services benefit from increased brand relevance and customer engagement and will see more repeat purchases.³² So, a merchant is motivated to provide BNPL financing because the benefits further increase the merchant's bottom line,³³ such that the initial high cost is a rather attractive burden.

Although BNPL first came to the U.S. in the mid-2010s,³⁴ the COVID-19 pandemic and accompanying stay at home orders helped fuel the rise of BNPL lenders in the United States.³⁵ With consumers staying at home, e-commerce increased by 25% from \$516 billion, accounting for 11.1% of total retail sales, to \$644 billion, accounting for 14.2% of retail sales.³⁶ The pandemic's effects on increased online

of \$43 billion, compared to credit cards with a gross merchandise volume of \$4,600 billion. *U.S. Buy Now Pay Later Challenged by Rising Credit and Funding Costs*, FITCHRATINGS (July 28, 2022), <https://www.fitchratings.com/research/banks/us-buy-now-pay-later-challenged-by-rising-credit-funding-costs-28-07-2022>.

²⁹ *Why You Should Use Buy Now, Pay Later (BNPL) Payment Methods For Your Business*, STRIPE, <https://stripe.com/guides/buy-now-pay-later> (last visited Apr. 24, 2023); *The Economic Impact in the US*, AFTERPAY 33 (Sept. 2021), <https://afterpay-corporate.yourcreative.com.au/wp-content/uploads/2021/10/Economic-Impact-of-BNPL-in-the-US-vF.pdf>.

³⁰ STRIPE, *supra* note 28; AFTERPAY, *supra* note 28.

³¹ AFTERPAY, *supra* note 28.

³² *Id.* at 32.

³³ *Id.*

³⁴ CONSUMER FIN. PROT. BUREAU, *supra* note 5, at 7.

³⁵ Kate Fitzgerald, *The Rapid Evolution of Buy Now/Pay Later Loans*, AM. BANKER (Dec. 27, 2022), <https://www.americanbanker.com/payments/list/the-rapid-evolution-of-buy-now-pay-later-loans>; Ryan Browne, *How Buy Now, Pay Later Became a \$100 billion Industry*, CNBC (Sept. 21, 2021), <https://www.cnn.com/2021/09/21/how-buy-now-pay-later-became-a-100-billion-industry.html>.

³⁶ Cynthia Cox et al., *The End of the Covid-19 Public Health Emergency: Details on Health Coverage and Access*, KAISER FAMILY FOUND. (Feb. 2023), <https://www.kff.org/policy-watch/the-end-of-the-covid-19-public-health-emergency-details-on-health-coverage-and-access>. See also Mayumi Brewster, *Annual Retail Trade Survey Shows Impact of Online Shopping on Retail Sales*

shopping directly benefited BNPL lenders, with BNPL transactions seeing marked increases as a result.³⁷ Take Peloton for example: in Q3 of 2020, “Peloton drove 30% of Affirm’s total revenue by enabling lower income households to access an otherwise unattainable product.”³⁸ Even now, as the U.S. reaches the end of the COVID-19 public health emergency³⁹ and stay-at-home orders are, generally, a thing of the past, consumers have remained engaged in online shopping, seeming to prefer it to traditional brick and mortar stores, and BNPL lenders have continued to profit of these learned habits.⁴⁰

III. BUY NOW, PAY LATER’S RELATIONSHIP WITH TECHNOLOGY

Although the movement of consumers to online markets in the wake of the COVID-19 pandemic caused BNPL’s popularity to skyrocket, BNPL has always been deeply connected to technology as a form of fintech. BNPL’s increasing relevance has stemmed from its ability to evolve as a financial product with the growing role of technology, social media, and general internet use by society. As it has grown in popularity, BNPL lenders have created browser extension and phone apps to increase consumer engagement. These integrative

During COVID-19 Pandemic, U.S. CENSUS BUREAU (Apr. 27, 2022), <https://www.census.gov/library/stories/2022/04/ecommerce-sales-surged-during-pandemic.html> (discussing the boom in retail ecommerce); *Impact of Covid Pandemic on eCommerce*, INT’L TRADE ASS’N, <https://www.trade.gov/impact-covid-pandemic-ecommerce> (last visited Apr. 24, 2023) (stating that there is an expected 8% growth in retail ecommerce sales worldwide through 2024).

³⁷ Ryan Tuttle, *Three Trends Shaping the Buy Now Pay Later Landscape*, EUROMONITOR INT’L (Nov. 17, 2022), <https://www.euromonitor.com/article/three-trends-shaping-the-buy-now-pay-later-landscape>.

³⁸ Marshall Lux & Bryan Epps, *Grow Now, Regulate Later? Regulation Urgently Needed to Support Transparency and Sustainable Growth for Buy-Now, Pay-Later* 10 (Harv. Kennedy Sch. Mossavar-Rahmini Ctr. for Bus. & Gov’t., Working Paper No. 182, 2022), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/182_AWP_final.pdf (citing Affirm Holdings, Inc. Form 10-Q, 20 September 2021).

³⁹ Norman Shaw et al., *Online Shopping Continuance After COVID-19: A Comparison of Canada, Germany, and the United States*, 69 J. RETAILING AND CONSUMER SERVS. 1 (2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9379614/pdf/main.pdf>.

⁴⁰ “Of the 1424 individuals who responded, 423 (29.7%) were very frequent online shoppers prior to the pandemic. During the pandemic, 688 (48.3%) reported that they shopped very frequently. Once shopping is back to ‘normal’, 601 (42.2%) plan to be very frequent online shoppers.” *Id.* at 9.

aspects of BNPL give regulators pause, as a hidden yet probable side effect of using BNPL is data collection and monetization to drive targeted advertising.

It is important to emphasize the “fintech” nature of BNPL. Fintech, or financial technology, refers to the latest innovations in financial activities made possible by technological advances.⁴¹ These advances include “increased capability in data collection, storage, and processing; development of algorithmic decision-making; and increasingly widespread, easy access to the internet”⁴² and arise from the financial industry’s attempts to modernize and provide traditional products in new ways.⁴³ Although the term is new, fintech is not a new concept—for example, ATMs and credit cards are all examples of the financial industry evolving to meet demands of a continuously developing market.⁴⁴ However, BNPL is a fintech product advanced by lenders looking to eschew the traditional banking model and use different technological modalities, including incorporating alternative data in its underwriting process, phone apps, physical cards, and browser extensions, to increase consumer access in a market that demands technological accessibility.⁴⁵

BNPL lenders and other fintech platforms set themselves apart from traditional credit lenders by using alternative data to improve underwriting capabilities, reduce risk, and expand credit access. The term “alternative data” is defined as “information that is used to evaluate creditworthiness that is not usually part of a credit report.”⁴⁶ So, unlike a traditional lender that solely relies on a person’s credit

⁴¹ *Overseeing the Fintech Revolution: Domestic and International Perspectives on Fintech Regulation*: Hearing Before the Comm. on Fin. Servs., 116th Congress (2019).

⁴² *Id.*

⁴³ Stephanie Walden, *What is Fintech*, FORBES (July 25, 2022), <https://www.forbes.com/advisor/banking/what-is-fintech>; Julia Kagan, *Financial Technology (Fintech): Its Uses and Impact on Our Lives*, INVESTOPEDIA (June 30, 2022), <https://www.investopedia.com/terms/f/fintech.asp>.

⁴⁴ Walden, *supra* note 42.

⁴⁵ *Fintech Series: Buy Now Pay Later*, PWC (Jan. 11, 2023), <https://www.pwc.com/ml/en/media-centre/articles/fintech-series-buy-now-pay-later.html>. See, e.g., Klarna Comment: *The Traditional Retail Banking Model is Broken*, KLARNA (Sept. 22, 2022), <https://www.klarna.com/international/press/klarna-comment-the-traditional-retail-banking-model-is-broken>.

⁴⁶ Brian Kreiswirth et al., *Using Alternative Data to Evaluate Creditworthiness*, CONSUMER FIN. PROT. BUREAU (Feb. 16, 2017), <https://www.consumerfinance.gov/about-us/blog/using-alternative-data-evaluate-creditworthiness>.

score, BNPL may expand its credit analysis to include monthly payment obligations like rent and cell phone bills to assess a person's creditworthiness.⁴⁷ Take Affirm for example: it considers "data beyond just traditional credit scores, including transaction history and credit usage" to assess a consumer's ability to repay.⁴⁸ Using this type of data allows BNPL lenders to differentiate themselves from traditional banks by expanding access through including those who have been excluded from the traditional lending industry.

Armed with alternative data and accessible applications, BNPL is the modern, technological version of a layaway plan.⁴⁹ But BNPL flips the script on old notions. Generally, layaway plans require a consumer to pay a transaction fee and make installment payments over time prior to receiving the good.⁵⁰ BNPL, on the other hand, does not require the consumer to pay a transaction fee or wait to receive the merchandise.

Building upon its role in fintech and its efforts to modernize the layaway plan, BNPL lenders use browser extensions and phone apps to increase accessibility and usage with the goal of matching consumers' technology habits, shifting their role from lender to marketplace. Because 32% of all online shopping occurs on a desktop computer,⁵¹ the lender specific BNPL browser extensions entices this corner of the market by adding features and functionality in an

⁴⁷ *Credit Invisibility and Alternative Data: Promises and Perils*, NAT'L CONSUMER L. CTR. 1 (July 2019), <https://www.nclc.org/wp-content/uploads/2022/08/ib-credit-invisib-alt-data-july19-1.pdf>.

⁴⁸ *Investor FAQs: Credit Performance and Underwriting*, 6.) *How Does Affirm's Underwriting Work? How Does the Company Manage Delinquencies and Credit?*, AFFIRM, <https://investors.affirm.com/shareholder-services/investor-faqs> (last visited Apr. 24, 2023).

⁴⁹ CFPB Director Rohit Chopra explains that "[b]uy now, pay later is the new version of the old layaway plan, but with modern faster twists where the consumer gets the product immediately but gets the debt immediately too." *Consumer Financial Protection Bureau Opens Inquiry into "Buy Now, Pay Later" Credit*, CONSUMER FIN. PROT. BUREAU (Dec. 16, 2021), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-opens-inquiry-into-buy-now-pay-later-credit>.

⁵⁰ See Creola Johnson, *Welfare Reform and Asset Accumulation: First We Need a Bed and a Car*, 2000 Wis. L. Rev. 1221.

⁵¹ *Klarna Launches Browser Extension Allowing Consumers to Pay Later Across All Online Stores*, KLARNA (Dec. 9, 2021), <https://www.klarna.com/international/press/klarna-launches-browser-extension-allowing-consumers-to-pay-later-across-all-online-stores> (citing Casey Turnbull, *Why are Mobile Conversion Rates Behind Desktop?*, SALECYCLE (Mar. 6, 2023), <https://www.salecycle.com/blog/strategies/mobile-conversion-rates-lower-desktop>).

accessible place.⁵² By downloading their preferred BNPL lender's extension, like Klarna for example, consumers can access one-time virtual Visa cards to shop "seamlessly" with Klarna at any online retailer, create collections of "favorite" items with price drop notifications, implement automatic couponing at checkout, and receive cashback rewards.⁵³ The phone apps provide similar features, creating mobile accessibility for the 68% of ecommerce traffic and 56% of online sales.⁵⁴ Unlike the traditional model of layaway, the BNPL lender takes on the role of providing the marketplace through the app, as opposed to merely providing a merchant-specific financing option. Each respective BNPL lender has their own app that gives a user access to any partnered merchants;⁵⁵ it is essentially a digital department store that houses many different brands and retailers under one accessible roof. Here, the "lenders' primary role is as a marketing platform to 'push' customers to retailers via referral clicks."⁵⁶ These apps have a large reach—of Klarna's 150 million active global consumers, 70 million have downloaded its app, and 26 million actively use the app each month.⁵⁷ Although there are not clear figures on the exact number of consumers using apps provided by BNPL lenders, the top 4 competitors show 11.586 million downloads in the 4th quarter of 2022 alone.⁵⁸ These numbers show the clear incentive BNPL lenders have to continually evolve their technology to capture the most consumers possible by becoming more than just a lender, but a marketplace as well, which in turn demonstrates BNPL's growing role as a fintech product.

⁵² See Adrian Bridgwater, *How Browser Extensions Work*, FORBES (Apr. 16, 2019), <https://www.forbes.com/sites/adrianbridgwater/2019/04/16/how-browser-extensions-work/?sh=1dec6470674c>.

⁵³ KLARNA, *supra* note 50. Affirm, Paypal, and Zip provides a similar browser extension product. See *Bring the Power of Affirm to Your Browser*, AFFIRM, <https://www.affirm.com/shopping/browser-extension> (last visited Apr. 24, 2023); see *What is the PayPal Honey Mobile Safari Extension?*, PAYPAL, https://www.paypal.com/us/cshelp/article/what-is-the-paypal-honey-mobile-safari-extension-help593?locale.x=en_US (last visited Apr. 24, 2023); see *Zip for Chrome. Pay Later Anywhere on Your Desktop*, ZIP, <https://zip.co/us/chrome> (last visited Apr. 24, 2023).

⁵⁴ Turnbull, *supra* note 50.

⁵⁵ CONSUMER FIN. PROT. BUREAU, *supra* note 5, at 46.

⁵⁶ *Id.*

⁵⁷ KLARNA, <https://www.klarna.com/international/klarna-in-society> (last visited Apr. 24, 2023).

⁵⁸ Interim Report January – June 2022, Klarna, at 7, available at <https://www.klarna.com/international/about-us/corporate-governance/investor-relations/>.

A large part of BNPL's role as fintech is the companies' use of targeted advertising as part of a larger marketing strategy to obtain new users. Through digital media, BNPL targets consumers using the roadmap first pioneered by Google, Meta, and other online marketing companies—"they are 'relying heavily on social media' marketing, including purchasing ads generating millions of views."⁵⁹ Targeted ads are a form of behavior-based advertising that curate a message based on digital data,⁶⁰ generated by consumers' use of the internet from social media to "web cookies tracking every click,"⁶¹ which means that merchants see a better return on marketing dollars.⁶² Accessing a user's physical location, browser history, and social media information creates a profile that allows advertisers to better understand current and future spending habits,⁶³ while maximizing the merchant's return.⁶⁴ BNPL programs use targeted advertising for the same reason as all other businesses—"to generate higher sales volumes."⁶⁵

Further, the growing role of targeted advertisement in marketing plays directly into one of the CFPB's biggest concerns with BNPL lenders: data harvesting and the associated monetization.⁶⁶ As BNPL lenders nudge consumers into using their proprietary applications, the CFPB notes significant possible harm to consumers from the monetization of data harvesting.⁶⁷ Consumers' use of the respective BNPL lender's app allows the lender to build a digital profile of their shopping preferences and behaviors, which the lender

⁵⁹ Comment from U.S. Public Interest Research Group (Comment ID CFPB-2022-0002-0038), CONSUMER FIN. PROT. BUREAU (Mar. 27, 2022), <https://www.regulations.gov/comment/CFPB-2022-0002-0038>.

⁶⁰ Nic Froehlich, *The Truth in User Privacy and Targeted Ads*, FORBES (Feb. 24, 2022), <https://www.forbes.com/sites/forbestechcouncil/2022/02/24/the-truth-in-user-privacy-and-targeted-ads/?sh=4a947bee355e>.

⁶¹ Lesli K. John et al., *Ads that Don't Overstep*, HARV. BUS. REV. (Jan-Feb 2018), <https://hbr.org/2018/01/ads-that-dont-overstep> (citing Avi Goldfarb & Catherine E. Tucker, *Privacy Regulation and Online Advertising*, Mgmt. Sci. 71 (2010), <https://pubsonline.informs.org/doi/epdf/10.1287/mnsc.1100.1246>).

⁶² *Id.*

⁶³ *What is Sponsored Content; Lesson 21*, GFC GLOBAL, <https://edu.gcfglobal.org/en/thenow/what-is-targeted-advertising/1/#> (last visited Apr. 24, 2023).

⁶⁴ John, *supra* note 60.

⁶⁵ See AFTERPAY, *supra* note 28, at 37 (discussing Afterpay's support mechanisms for small businesses includes targeted marketing which clearly suggests its larger use of targeted advertising for the entire business enterprise).

⁶⁶ CONSUMER FIN. PROT. BUREAU, *supra* note 8.

⁶⁷ *Id.*

can then sell.⁶⁸ One of the comments to the CFPB's regulation request, stated "The BNPL model combines consumer surveillance, AI-driven data analytics, personalization, deep integration across platforms, retailers and applications, and real-time effects."⁶⁹ This practice "may threaten consumers' privacy, security, and autonomy" and risks a competitive free-market by placing power in the hands of whichever tech platform owns the most consumer data.⁷⁰

The harms from data collection and monetization demonstrate BNPL's entrenched role in fintech. As continued use of technology and financial products rise in popularity, regulators must carefully consider the role that these products should be allowed to have in American society.

IV. BUY NOW, PAY LATER'S LACK OF REGULATION IMPACTS FINANCIALLY UNSTABLE COMMUNITIES

From the time of its arrival in the United States, including its rapid rise during the of the pandemic, BNPL was left to its own devices and allowed to expand its market with limited governmental oversight; however, the CFPB, concerned about the impacts on BNPL users, stepped in and ordered BNPL lenders to provide information about their practices and consumer base in December 2021.⁷¹ These impacts, which include increased debt accumulation, are problematic and compounded by the fact that BNPL lenders are not required to comply with the Truth in Lending Act, such that consumers lack adequate protections regarding BNPL loans.⁷² These concerns are even more

⁶⁸ *Id.*

⁶⁹ CONSUMER FIN. PROT. BUREAU, *supra* note 58.

⁷⁰ CONSUMER FIN. PROT. BUREAU, *supra* note 8.

⁷¹ *See* CONSUMER FIN. PROT. BUREAU, *supra* note 48.

⁷² *See generally* Nathalie Martin & David Lynn, *The Afterpay Hangover*, 34 *Loy. Con. L. Rev.* 529 (2023) (discussing how the lack of regulation around the world, including the U.S., poses large concerns for consumers and advocating for implementation of regulation that considers more than just interest based credit transactions). For a discussion of additional federal and state regulations in the BNPL context, *see* Elaine Lee, *Buy Now, Pay Later: No Fees. No Credit Check*, 13 *Seattle J. Env't L.* 1, Section III (2023).

Another concern, although outside the scope of this article, that is worth noting is the impact of BNPL loans on consumers' ability to file for bankruptcy. BNPL complicates bankruptcy filings, creating potential quagmires in dischargeability under 11 U.S.C. § 523 and executory contracts, all because the property is owned by the consumer and there is no collateral for the lender. *See* Michael P. Gaughan et al., *Consumer: Buy Here/Pay Here, Buy Now/Pay Later, and Missing Collateral*,

pronounced considering BNPL's target demographic—users in marginalized and financially insecure communities.

V. GROWING CONCERNS WITH BUY NOW, PAY LATER & THE LACK OF PROTECTIONS

BNPL's "Gilded Age" of self-regulation and limited oversight ended in 2021, when the CFPB issued orders to the five biggest BNPL companies (Affirm, Afterpay, Klarna, PayPal, and Zip), asking them to provide information about the risks and benefits of these types of credit transactions.⁷³ Debt accumulation ranked especially high as a consideration for the CFPB, which worries that, without the protections of the Truth in Lending Act, consumers will be unable to manage their loans and lenders will allow consumers to incur more debt than they can afford.⁷⁴

The Truth in Lending Act ("TILA") provides beneficial protections for consumers who engage in credit transactions, two of which require periodic statements and an ability to repay analysis:⁷⁵ TILA, enacted in 1968 under the Consumer Credit Protection Act, is a federal statute that ensures that credit lenders are providing consumers with adequate amounts of information and instilling safeguards in their lending to protect the consumer's financial wellbeing.⁷⁶ One of TILA's protections is requiring credit lenders to provide consumers with periodic statements that combine all debts owed into one amount and identify the transactions that resulted in that debt.⁷⁷ This helps the consumer understand how much they owe, rather than having them attempt to calculate the figure themselves, which may lead to inconsistencies and additional late fee charges. Further, these periodic statements give consumers one due date that is clearly identified, simplifying the process for consumers who can then ensure that they are able to pay on that specific date.⁷⁸ Another protection for consumers is requiring the lender to conduct an ability to repay analysis ("ATR"), where lenders examine a consumer's income, assets, and obligations to determine if a consumer could realistically

ABI/UMKC MIDWESTERN BANKR. INST. (Oct. 6–7, 2022). As such, best practice at this point is to advise clients to complete the payment plan prior to filing. *Id.*

⁷³ See CONSUMER FIN. PROT. BUREAU, *supra* note 48.

⁷⁴ See *id.*

⁷⁵ 1 TRUTH-IN-LENDING MANUAL: TEXT AND FORMS § 1.01 (2023).

⁷⁶ See generally 1 TRUTH-IN-LENDING MANUAL: TEXT AND FORMS § 1.01 (2023).

⁷⁷ 12 C.F.R. § 1026.7(b) (2023).

⁷⁸ *Id.*

pay the minimum monthly payment.⁷⁹ This must be done before the lender approves the credit transaction and it protects the consumer from incurring too many obligations that they cannot realistically afford.⁸⁰

However, BNPL users are not receiving these TILA protections because of a statutory exception⁸¹ that allows BNPL lenders to evade TILA's regulatory scope. For instance, for a credit-based transaction to fall under TILA,⁸² it must, among other things, be "subject to a finance charge or . . . payable by written agreement in *more than four installments*."⁸³ Because BNPL lenders largely rely on transactions that are completed within four installments,⁸⁴ they do not have to comply with TILA. This leaves consumers exposed to harms that they would not otherwise face in TILA-regulated credit transactions.

In the absence of TILA regulation, consumers may struggle to manage their BNPL loans without the consolidated periodic statements and risk financial overexertion.⁸⁵ Without the periodic disclosures that combine amounts owed and due dates, consumers, especially those juggling multiple BNPL loans, may fall behind on payments. Often,

⁷⁹ 12 C.F.R. § 1026.51(a)(1)(i); *see also* 1 TRUTH-IN-LENDING MANUAL: TEXT AND FORMS § 4.03 (2023).

⁸⁰ *See* 12 C.F.R. § 1026.51(a)(1)(i) (2023).

⁸¹ The statutory exception can be found in Regulation Z, the implementing regulation of TILA. 12 C.F.R. § 1026.1(c) (2023); *see also* 1 TRUTH-IN-LENDING MANUAL: TEXT AND FORMS § 1.01 (2023). TILA and Regulation Z became the CFPB's responsibility after the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 was enacted. *Id.* The statutory exception that allows BNPL lenders to evade TILA regulation is found in § 1026.1(c) of Regulation Z, which provides four conditions that must be met for the credit transaction to fall under TILA. 12 C.F.R. §§ 1026.1(c)(1)(i)-(iv) (2023).

⁸² There are three other conditions that must apply for a creditor to be subject to TILA. They are: (i) credit must be offered or extended to consumers, (ii) the offering or extension of credit is done regularly, and (iv) the credit is primarily for personal, family, or household use. 12 C.F.R. §§ 1026.1(c)(1)(i), (ii), (iv) (2023).

⁸³ 12 C.F.R. § 1206.1(c)(1)(iii) (2023) (emphasis added).

⁸⁴ Some BNPL lenders, Klarna for example, offer other types of financing, like monthly financing, that would fall under TILA. *See generally* KLARNA, <https://www.klarna.com/us/what-is-klarna> (last visited Apr. 24, 2023) (offering monthly financing on larger purchases).

⁸⁵ Comment from the State Attorneys General of IL, CA, CO, CT, DE, HI (AG & OCP), IA, ME, MD, MA, MI, NV, NJ, NY, NC, OR, PA, RI, VT, WA, CONSUMER FIN. PROT. BUREAU 5 (Mar. 24, 2022), <https://www.regulations.gov/comment/CFPB-2022-0002-0025>; *see also* CONSUMER FIN. PROT. BUREAU, *supra* note 5, at 16.

BNPL loans require payments every two weeks,⁸⁶ and if a consumer is lucky, payments on different loans with different providers coincide; however, as is most likely, when payments do not align, the consumer must remember to make separate payments at separate times. The ambiguity that results from the absence of TILA-compliant periodic statements leads to confusion and, perhaps, missed payments, as a recent survey found that 34% of users have fallen behind on payments.⁸⁷ In addition, as BNPL lenders are not required to assess the consumer's ATR, consumers may overexert themselves financially and accumulate more debt than they otherwise would.⁸⁸ This may also harm the lender because, without an ATR analysis, BNPL lenders do not get the full picture of the consumer's financial status, meaning that the consumer's other debt obligations go largely unnoticed.⁸⁹ And, generally, BNPL users are in more debt than non-users. In fact, BNPL users are more likely to have "higher levels of credit card debt and rates of credit card utilization,"⁹⁰ and are more likely to have high-interest loan products like payday loans than non-users.⁹¹ However, BNPL lenders do not have to take this into consideration before approving the credit application, leaving consumers able to borrow to their financial detriment.

Without the protections of TILA, BNPL users, unlike traditional credit card users, are subject to additional hardships, like confusing payment schedules and increased debt accumulation. These

⁸⁶ See CONSUMER FIN. PROT. BUREAU, *supra* note 8.

⁸⁷ *Buy Now, Pay More Later? Investigating Risks and Benefits of BNPL and Other Emerging Fintech Cash Flow Products: Hearing Before the Task Force on Fin. Tech., H. Comm. on Fin. Servs., 117th Cong. 51 (2021)* (statement of Lauren Saunders, Nat'l Consumer L. Ctr.) [hereinafter *Hearing*] (quoting *Buy Now Pay Later Surges Throughout Pandemic, Consumers' Credit Takes a Hit*, CREDIT KARMA (Sept. 9, 2021), <https://www.creditkarma.com/about/commentary/buy-now-pay-later-surges-throughout-pandemic-consumers-credit-takes-a-hit>).

⁸⁸ See generally *id.* at 50; see also Weizhen Tan, *The 'Buy Now, Pay Later' Trend Could be the Next Hidden Source of Consumer Debt, Analysts Warn*, CNBC (Aug. 10, 2021), <https://www.cnbc.com/2021/08/10/buy-now-pay-later-installment-plans-may-cause-consumer-credit-card-debt-to-rise.html>. In fact, BNPL use is associated with increase spending after the initial usage with users spending, on average, "\$130 at the time of the first BNPL use and remains elevated over the 24 weeks following the initial use." Di Maggio, *supra* note 11, at 2.

⁸⁹ See generally *Hearing*, *supra* note 86, at 50.

⁹⁰ *Consumer Use of Buy Now, Pay Later: Insights from the CFPB Making Ends Meet Survey*, Cortnie Shupe et al., CONSUMER FIN. PROT. BUREAU 15 (Mar. 2023), https://files.consumerfinance.gov/f/documents/cfpb_consumer-use-of-buy-now-pay-later_2023-03.pdf.

⁹¹ *Id.* at 20.

hardships are more pronounced for users who juggle multiple BNPL loans, and often, are left to their own financial devices without any TILA protections.

VI. BUY NOW, PAY LATER ATTRACTS GROUPS WHO ARE LESS FINANCIALLY SECURE

Concerned with the lack of protections and the likelihood of resulting harms, the CFPB released a study, the “Consumer Use Survey,” looking into BNPL’s user characteristics in March 2023 that demonstrates that BNPL appeals to the young, people of color, and lower-income consumers;⁹² this study also found that these groups are, overall, less financially stable with higher amounts of debt and credit utilization than non-users.

The Consumer Use Survey explored the appeal of BNPL by identifying groups that are more likely to use BNPL and comparing the financial situations of users with non-users.⁹³ The consumer sample for the Consumer Use Survey came from the CFPB Consumer Credit Panel, which is comprised of consumers with a credit record maintained by one of the national credit reporting agencies (“NCRAs”).⁹⁴ Using this data, the CFPB identified groups across race, age, and income which were more likely to use BNPL and analyzed BNPL users’ and non-users’ credit scores, credit accessibility, and usage of other types of credit.

While BNPL usage is increasing for all consumers, three groups are using BNPL at significantly higher rates: the young, lower income,⁹⁵ and people of color.⁹⁶ BNPL usage is more prevalent for consumers younger than 65 years old, with nearly 22% of BNPL users below the age of 35 years old.⁹⁷ Additionally, consumers earning less

⁹² It is important to note that consumers may fall into more than one of these categories, e.g., they may be a young, Black person. For our purposes, we will discuss these groups (people of color, lower income, and young consumers) separately, but often, these groups intersect.

⁹³ Shupe, *supra* note 89, at 2.

⁹⁴ *Id.*

⁹⁵ In this report, the CFPB categorized “lower income” as consumers with income “above \$20,000, but less than \$50,000 annually.” *Id.* at 6.

⁹⁶ It is important to note that while we may discuss these groups individually, many of the consumers who use BNPL may fall into two or more of these identified groups.

⁹⁷ Shupe, *supra* note 89, at 7. Further, in a separate but related study, the CFPB found that, across all five major BNPL lenders, borrowers under the age of 33 years old comprise of half of the total BNPL borrower-base, and the youngest borrowers,

than \$50,000 annually are more likely to use BNPL than consumers making \$200,000 annually by nearly 14 percentage points.⁹⁸ Further, BNPL users are predominately Black or Hispanic with 26% of Black consumers and 24% of Hispanic consumers purchasing a product through BNPL compared to only 16% of White consumers and 15% of non-Hispanic consumers.⁹⁹

Users from these three groups are more likely to have lower credit scores, more open credit accounts, less liquidity and savings, and higher credit card debt than non-users. Non-users' credit scores are consistently higher than users' scores. Non-users' average credit score range between 670 to 739, classified as near-prime, while users score between 580 to 669, classified as sub-prime.¹⁰⁰ Additionally, BNPL users have more open credit accounts (excluding home mortgage loans) than non-users. BNPL users have 19% more personal loan accounts, 18% more retail card accounts, and 16% more student loan accounts open than non-users.¹⁰¹ Users' increase in open credit accounts is directly tied to an increased likelihood in being delinquent on at least one account in the past year; the Consumer Use Survey showed non-users are 11% less likely to be delinquent on any credit accounts than users.¹⁰²

Further, BNPL users are significantly less likely to have savings, while also being more likely to carry larger debts, than non-users. Roughly 25% of users reported having no savings or an emergency fund, outside of retirement plan, compared to 16% of non-users.¹⁰³ Additionally, users are more likely to highly utilize their credit cards than non-users, which shows that users carry more debt and are in more financial distress than non-users.¹⁰⁴ For example, users maintained a credit card utilization rate between 40 to 50% compared to non-users who maintained a utilization rate of 30%.¹⁰⁵ Utilization rates of above 30% may be a sign of financial distress,¹⁰⁶ and with rates

between the ages of 18 to 24 years old, accounted for 16.8% of that base. CONSUMER FIN. PROT. BUREAU, *supra* note 5, at 16.

⁹⁸ Shupe, *supra* note 89, at 7.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 10. The CFPB also notes that the large difference in credit scores could be due to BNPL using more than just a consumer's credit score as BNPL lenders also look at the consumer's purchase and repayment history as well as other factors when evaluating a credit worthiness. *Id.*

¹⁰¹ *Id.* at 11.

¹⁰² *Id.*

¹⁰³ *Id.* at 13.

¹⁰⁴ *Id.* at 15.

¹⁰⁵ *Id.* at 15.

¹⁰⁶ *Id.*

between 40 to 50%, users appear to be in more financial distress than non-users.

BNPL users, who are mainly young, low-income, and people of color, are exposed to BNPL's unregulated transactions as they do not receive the same TILA protections as other credit consumers. These groups are at risk of falling behind on payments and accumulating more debt without TILA's protections, which is especially concerning given that BNPL users are also more likely to experience some form of financial distress like higher debt balances, higher credit utilizations, lower credit scores, and lower savings and liquidity. Thus, these at-risk consumers are left with limited protections.

VII. CURRENT EFFORTS TO REGULATE MUST ACCOUNT FOR THOSE WHO ARE CREDIT INVISIBLE

Although the Consumer Use Survey shed immense light on BNPL users' demographics and financial stability, it did not consider the 11% of Americans who are categorized as "credit invisible," which refers to a person who lacks a credit history with one of the three NCRAs.¹⁰⁷ While it is important to note it would be challenging to survey the credit invisible population, it is absolutely necessary to embark on this challenge for two reasons: (1) there is substantial overlap in characteristics between BNPL users and the credit invisible, showing that users are likely to be credit invisible, and (2) the substantial overlap is likely due to BNPL's lenient underwriting policies that appeal to and, in some cases, explicitly target the credit invisible under the guise of expanding access to credit. In other words, while the authors are not directly equating BNPL users to the credit invisible, the correlation between the two groups appears to be the "smoking gun" that suggests BNPL lenders specifically target the credit invisible. Therefore, the credit invisible cannot be ignored, and, despite the difficulty, more studies must be done to fully understand BNPL's impacts on this group and adequately protect them in upcoming legislation.

VIII. THE UNMISTAKABLE SIMILARITIES BETWEEN THE

¹⁰⁷ See Kenneth P. Brevoort et al., *Data Point: Credit Invisibles*, CONSUMER FIN. PROT. BUREAU 4 (May 2015), https://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf. Generally, the three NCRAs are Equifax, Experian, and TransUnion. *Id.* at 4 n.1.

CREDIT INVISIBLE AND BNPL USERS

BNPL users and the credit invisible share more similarities than differences, and one of those similarities is that both BNPL users and the credit invisible are more likely to be young, lower-income, and people of color. As discussed in Section II.B, the Consumer Use Survey found that BNPL users are more likely to be young, lower-income, and people of color,¹⁰⁸ but concluded that BNPL users have access to traditional forms of credit, contrary to the previously popular belief of major organizations including the CFPB itself.¹⁰⁹ This conclusion is due to the Survey's scope, which used a random sample of consumers with a *credit record* maintained by the NCRAs.¹¹⁰ So, at first glance, it may appear that many BNPL users have access to traditional forms of credit.¹¹¹ However, this sample and conclusion is limited, as it did not account for those who are credit invisible. Considering the stark overlap between BNPL users and the credit invisible, this group cannot be overlooked, and more studies are required to examine how BNPL is impacting them.

Just as younger consumers are more likely to use BNPL, younger consumers are more likely to be credit invisible.¹¹² Generally, those between the ages of 18 and 24 have the highest rates of credit invisibility compared to older groups.¹¹³ For example, 5.8 million people between the ages of 18- to 19-year-olds are credit invisible,¹¹⁴ and, although the rate of credit invisibility is much lower for 20- to 24-year-olds, 4.3 million young adults in this age group continue to be credit invisible.¹¹⁵ Although credit invisibility for these age groups is high compared to older groups, younger people, like those in the 18- to 24-year-old range, comprise a large part of BNPL's borrower base. Nearly half of the BNPL borrower base is 33 years old or younger, with 18- to 24-year-olds comprising of 12.1% to 19% of the overall borrower base,¹¹⁶ which is more than any other age range. And BNPL lenders have a high credit approval rate for this age group, with 69%

¹⁰⁸ Shupe, *supra* note 89, at 22.

¹⁰⁹ *Id.*

¹¹⁰ *See generally id.* at 5.

¹¹¹ *Id.* at 22.

¹¹² Brevoort, *supra* note 106, at 12-14.

¹¹³ *Id.* at 12.

¹¹⁴ *Id.* at 31-32. Data shows that 64.5% of 18- to 19-year-olds are credit invisible.

¹¹⁵ *Id.* Additionally, data shows that 20.2% of 20 to 24 year olds remain credit invisible.

¹¹⁶ CONSUMER FIN. PROT. BUREAU, *supra* note 5, at 17.

of transactions receiving approval,¹¹⁷ showing that this age range is, somehow, receiving credit even though they are more likely to be credit invisible.

Further, like BNPL users are more likely to be lower-income, so are the credit invisible. Consumers who are credit invisible are more likely to be lower-income or live in a low-to moderate-income (“LMI”) census tract,¹¹⁸ with approximately 12 million low income or LMI consumers falling under the dome of credit invisibility.¹¹⁹ These numbers closely correlate with the statistics for BNPL users, who are more likely to be low income.¹²⁰ These low-income users are 15% more likely to use BNPL than consumers with annual incomes of \$200,000.¹²¹ The similarities point to a clear possibility that some portion of lower-income BNPL users fall under the cloak of credit invisibility.

Finally, people of color, specifically Black and Hispanic people¹²² are more likely to be credit invisible,¹²³ and the same holds true for BNPL users. Specifically, 4 million Black consumers and 5.3 million Hispanic consumers are credit invisible, more than any other race.¹²⁴ For BNPL users, there is a similar trend, as Black and Hispanic

¹¹⁷ *Id.*

¹¹⁸ Brevoort, *supra* note 106, at 31-32. A low-income census tract is an area where the median family income of that tract is less than 50% of the decennial metropolitan statistical area (MSA) median family income, based on the 2010 census of population and housing. See *Community Reinvestment Act NI-Explanation of Notes*, FFIEC (Mar. 30, 2007), <https://www.ffiec.gov/craadweb/cranote.htm>. In contrast, a moderate-income area is at least 50% but less than 80% of the decennial MSA median family income, and so on. To put this into perspective, let’s use Kansas as an example. The 2022 MSA in Kansas was estimated to be \$97,300, so a census tract would be considered low-income if its residents made less than 48,650 annually. See *Census Demographic Data for Kansas*, FFIEC, <https://geomap.ffiec.gov/ffiecgeomap/> (last visited Mar. 10, 2023).

¹¹⁹ Brevoort, *supra* note 106, at 31-32.

¹²⁰ Nearly 57% of BNPL users earn less than \$50,000 per year. Akana, *supra* note 19, at 6.

¹²¹ See *id.*

¹²² Asian people have the lowest number of credit invisible, with only 9.8% being credit invisible. See Brevoort, *supra* note 106, at 32-33. Further, 13.7% of people in the “Other” category, which include Native American or Native Persons, Native Hawaiians, or other Pacific Islands, or multi-racial groups, are credit invisible. *Id.* However, for purposes of this article, we will only discuss Black and Hispanic consumers as they have the highest rate of credit invisibility.

¹²³ Brevoort, *supra* note 106, at 33.

¹²⁴ *Id.* In percentages, 14.8% of Black consumers and 15.8% of Hispanic consumers are credit invisible, compared to only 9.8% of White consumers. *Id.* White Americans are the largest racial group in the United States, and at the time of

consumers are more likely to use BNPL and be “heavy” users, using more than once a month,¹²⁵ compared to White and non-Hispanic consumers.¹²⁶ The racial similarities between users and the credit invisible are incredibly apparent, and there is likely a substantial overlap between the credit invisible and BNPL users.

IX. BNPL APPEALS TO AND TARGETS THE CREDIT INVISIBLE

The stark similarities seen in comparing the demographics of BNPL users and the credit invisible lead to the conclusion that a portion of credit invisible people are, in fact, using BNPL. The exact numbers are difficult to determine, but additional consideration is needed to understand how the credit invisible use BNPL and feel its impacts. One of the likely causes of the substantial overlap in characteristics between BNPL users and the credit invisible is BNPL’s underwriting process that appeals to and targets the credit invisible. The appeal of BNPL’s process lies in its nontraditional underwriting practices that consider other types of information rather just a consumer’s credit score.¹²⁷ Although this approach is a staple of fintech lenders as previously discussed in Section I. B., BNPL’s wide accessibility from its rising popularity and expansion is unprecedented, leaving the credit invisible unprotected and overlooked.

BNPL’s underwriting practices, favoring soft credit checks and alternative data, are promoted as a way to expand access to credit and set themselves apart from traditional credit lenders.¹²⁸ In general, when a consumer submits an application for new credit, the credit

the Data Point Survey (2015), this racial group comprised of 235.4 million of the population. See *United States of America*, DATA COMMONS, <https://datacommons.org/place/country/USA?category=Demographics#Population-by-race> (last visited Apr. 15, 2023). So, the resulting population of 14.7 million credit invisible White consumers is higher than other racial groups because of White consumers higher population. However, for Black and Hispanic people, with 4 million and 5.3 million credit invisible, are over-represented in the credit invisible determination compared to their overall share of the population, which 40.21 million and 57.78 million in 2015. See *id.*

¹²⁵ Akana, *supra* note 19, at 7.

¹²⁶ Shupe, *supra* note 89, at 11-12.

¹²⁷ Matthew A. Bruckner, *The Promise and Perils of Algorithmic Lenders’ Use of Big Data*, 93 CHI.-KENT. L. REV. 3, 18 (2018). (“Without a traditional credit score, these so-called ‘credit invisibles’ are unable to ‘access traditional forms of credit.’”). Further, because of these alternative measures of creditworthiness, lenders may be more willing to lend to the credit invisible. *Id.*

¹²⁸ *Id.* at 6.

issuer runs a “hard inquiry,” which gathers payment history and credit balances and impacts your credit score.¹²⁹ However, BNPL lenders prefer a “soft credit check,” noting that it “won’t affect your score, it just helps us confirm that you pay your bills on time.”¹³⁰ For applicants with “low credit scores or scant credit history,” BNPL lenders use alternative data to supplement its soft credit check,¹³¹ which may include information like monthly bill payments¹³² or even requiring applicants to verify the funds in their checking accounts.¹³³ In incorporating soft credit checks and alternative data into its underwriting process, BNPL lenders appeal to groups with insufficient credit history and the credit invisible.

In fact, this underwriting process often helps BNPL lenders promote their loans to the credit invisible, making the loans appear more accessible by relying on a model of underwriting that “set[s] them[] apart from mainstream providers” of traditional credit.¹³⁴ For example, Affirm explains that these practices allow it to expand credit access to a “wide segment of consumers, including those whose traditional credit scores may not fully represent their creditworthiness as a borrower.”¹³⁵ Similarly, Afterpay claims that the “class of customers for which Afterpay has been designed,”¹³⁶ includes consumers who “may not have an established credit history and may have other liabilities.”¹³⁷ This targeted marketing directed towards the credit invisible, or those who do not have an “established credit history,” is blatant.

And it works, as many of BNPL’s users are likely to be credit invisible. While the process is not unique, BNPL requires more consideration; rising popularity coupled with rapid expansion has increased its accessibility, and more credit invisible people are likely

¹²⁹ Brianna McGurran, *What Is a Hard Inquiry and How Does it Affect Credit?*, EXPERIAN (Nov. 5, 2019), <https://www.experian.com/blogs/ask-experian/what-is-a-hard-inquiry>.

¹³⁰ *What is Klarna*, at *Your Questions Regarding Credit Score, Does Klarna impact my credit score?*, KLARNA, <https://www.klarna.com/us/what-is-klarna/> (last visited Mar. 11, 2023).

¹³¹ CONSUMER FIN. PROT. BUREAU, *supra* note 5, at 16.

¹³² AFFIRM, *supra* note 47.

¹³³ CONSUMER FIN. PROT. BUREAU, *supra* note 5, at 16.

¹³⁴ Bruckner, *supra* note 126, at 6.

¹³⁵ *Id.*

¹³⁶ *Target Market Determination*, AFTERPAY 1, <https://www.moneybyafterpay.com/target-market-determination> (scroll to bottom; then click “Afterpay BNPL Target Market Determination” hyperlink) (last visited Apr. 24, 2023).

¹³⁷ *Id.* at 2.

to be drawn to these loans as BNPL offers alternative data analysis and less intrusive credit pulls.

The concerns that consumer advocates and the CFPB have expressed are more pressing for the credit invisible as this group is more likely to use BNPL than those with credit records and lack sophistication with using credit. Further, without more information about the credit invisible's BNPL use, Congress and the CFPB cannot adequately protect this group in future legislation as we do not yet understand how BNPL is impacting them. As such, Congress and the CFPB should work to identify the potential impacts BNPL loans may have on the credit invisible populations to determine how to best protect this population's interests in coming legislation.

CONCLUSION

The rapid growth of the fintech product, BNPL, in the United States rightly deserves attention from legislators and regulators at the federal level. As these figures consider the best path forward, they must take into account all marginalized people, including those who are credit invisible—because they represent a small but significant portion of this country. Doing so will be a step towards ensuring legislation and regulation protects *all* Americans, regardless of their use of credit.