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BUY NOW, PAY DEARLY LATER?: MINIMIZING CONSUMER HARM UNDER NEW MEXICO'S SMALL LOAN REGULATIONS

by Laura Creech*

ABSTRACT

American consumers are carrying record-breaking credit card debt. As prices remain high and wages remain stagnant, short-term borrowing is common practice for many and unavoidable for some. Meanwhile, borrowing has never been easier. Several years ago, few consumers could imagine the widespread availability of “zero-interest, no-credit-impact” lending. Now, consumers can quickly obtain these pay-in-four “Buy Now, Pay Later” (BNPL) loans to purchase just about anything. The BNPL companies offering these loans market themselves as the smart shopping credit alternative for responsible budget management, and Millennial and Generation Z shoppers have rapidly embraced this new lending option. Yet, BNPL companies insufficiently disclose the risks and negative financial consequences of their unsecured loans. And corrective federal oversight is unlikely. As a result, younger consumers of color are more likely to be on the wrong end of a bad deal, particularly in New Mexico where younger consumers struggle with some of the lowest wages and highest unemployment rates in the nation. This economic reality, combined with an uptick in BNPL lending for everyday purchases, creates a seemingly untenable situation.

Although New Mexico has express regulatory power over BNPL companies, its laws do not address BNPL-specific concerns that, if left unaddressed, will lead to long-lasting financial harm for vulnerable consumers. This Comment argues that New Mexico regulators have broad authority to act—and must act—under existing state law to strengthen BNPL company oversight and begin addressing these concerns. Swift government action, paired with a long-term solution, is the only way to ensure that vulnerable New Mexico consumers get the fair credit deal that they need.

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INTRODUCTION

When shopping for clothes, airfare, or groceries, you may have noticed a relatively new payment option at checkout: the “pay-in-four” option.¹ The premise seems straightforward—either pay in full today or pay in four (or more) smaller installments over time. The merchant’s website says the installment payment option’s quick application process will not hurt your credit score, the option charges no interest, and the option charges no or minimal fees.² The entire process takes no more than a few minutes, with an approval typically taking seconds.³ Plus, you will get your purchased item right away.⁴

For many budget-conscious consumers, it may make sense to spread out a purchase’s cost over multiple weeks or months. But what happens if you need to return your purchase? If you miss a payment? If you have an emergency expense and your checking account takes a hit? Unfortunately, these answers could include unforeseen costs, unexpected payment withdrawals, or a negative credit report.⁵ The process is only seamless if nothing goes wrong. Moreover, these pay-in-four options are not required to adequately disclose important terms, creating consumer confusion that could result in long-term financial consequences.⁶

1. See CONSUMER FIN. PROT. BUREAU, BUY NOW, PAY LATER: MARKET TRENDS AND CONSUMER IMPACTS 3, 6 (2022) [hereinafter CFPB BNPL MARKET TRENDS], https://files.consumerfinance.gov/f/documents/cfpb_buy-now-pay-later-market-trends-consumer-impacts_report_2022-09.pdf [<https://perma.cc/8B5M-D995>]; *What is a Buy Now, Pay Later (BNPL) Loan?*, CONSUMER FIN. PROT. BUREAU (May 21, 2024), <https://www.consumerfinance.gov/ask-cfpb/what-is-a-buy-now-pay-later-bnpl-loan-en-2119/> [<https://perma.cc/8WJV-3996>].

2. See, e.g., *Take Affirm Just About Everywhere*, AFFIRM, <https://www.affirm.com/how-it-works> [<https://perma.cc/SSJ7-FYVA>]; *Financial Wellness Is a Tap Away*, AFTERPAY, <https://www.afterpay.com/en-US/how-it-works> [<https://perma.cc/586H-3AF4>]; Jackie Veling, *What is Buy Now, Pay Later?*, NERDWALLET (Aug. 23, 2024), <https://www.nerdwallet.com/article/loans/personal-loans/buy-now-pay-later> [<https://perma.cc/U497-MM3C>].

3. Veling, *supra* note 2; see also CFPB BNPL MARKET TRENDS, *supra* note 1, at 15 (“[T]he application process is seamless, streamlined, and brief to reduce friction and shopping cart abandonment.”).

4. *Buy Now, Pay Later, Rent-to-Own, Lease-to-Own, and Layaway*, FED. TRADE COMM’N CONSUMER ADVICE (Mar. 2023), <https://consumer.ftc.gov/articles/buy-now-pay-later-rent-own-lease-own-and-layaway> [<https://perma.cc/FJ2Z-HVE3>].

5. See Ctr. for Responsible Lending, Comment Letter on Truth in Lending (Regulation Z); Use of Digital User Accounts to Access Buy Now, Pay Later Loans 2–3 (Aug. 1, 2024), https://downloads.regulations.gov/CFPB-2024-0017-0039/attachment_1.pdf [<https://perma.cc/Y2DN-AAMX>] (citing BNPL-related complaints filed with the CFPB Consumer Complaint Database); see also CFPB BNPL MARKET TRENDS, *supra* note 1, at 24–27 (discussing the relatively lengthy refund and dispute process, resulting in unexpected payments); Heidi Rivera & Denny Ceizyk, *Survey: 56% of Buy Now, Pay Later Users Have Experienced Issues like Overspending and Missing Payments*, BANKRATE (April 11, 2024), <https://www.bankrate.com/loans/personal-loans/buy-now-pay-later-survey/> [<https://perma.cc/866D-DWSF>]; *My Refund Amount Is Different to What I Was Expecting. Why?*, AFTERPAY, <https://help.afterpay.com/hc/en-us/articles/20250616348185-My-refund-amount-is-different-to-what-I-was-expecting-Why> [<https://perma.cc/X8WC-A5BV>].

6. See Truth in Lending (Regulation Z); Use of Digital User Accounts to Access Buy Now, Pay Later Loans, 89 Fed. Reg. 47068, 47069–70 (May 31, 2024) (to be codified at 12 C.F.R. pt. 1026), <https://www.govinfo.gov/content/pkg/FR-2024-05-31/pdf/2024-11800.pdf> [<https://perma.cc/ZEE7-J4KK>]; see generally Taylor Washington, Alexi Horowitz-Ghazi & Emma Peaslee, *Buy Now, Pay*

Although paying in installments is familiar to many people,⁷ the “Buy Now, Pay Later” (BNPL) companies offering the pay-in-four (or BNPL) loan⁸ are unfamiliar to most. BNPL companies primarily exist outside traditional credit and debit institutions and apply new technologies, consumer data collection methods, and profit-generating strategies to consumer financial services.⁹ Traditional credit and debit institutions are trying to catch up with BNPL’s popularity by offering similar pay-in-four options, albeit less successfully.¹⁰ Meanwhile, BNPL companies have experienced extraordinary growth, which some have projected to continue as BNPL loans become more mainstream.¹¹

Today, it feels like the option to “buy now, pay later” is everywhere. BNPL companies have extended from primarily luxury retailers into markets selling

Dearly?, NPR: PLANET MONEY (May 13, 2022, 8:45 PM), <https://www.npr.org/2022/05/10/1097885472/buy-now-pay-dearly> [<https://perma.cc/PW4R-DNW3>].

7. Many people remember layaway plans, which allow people to pay in installments by placing a deposit on an item and returning later to pick it up. Will Kenton, *What Is a Layaway Plan? History, and Which Companies Offer Them*, INVESTOPEDIA (Oct. 7, 2024), <https://www.investopedia.com/terms/l/layaway.asp> [<https://perma.cc/EBU7-J6F4>]. Created in the 1930s, the layaway plan declined in popularity in the 1980s due to the rise in credit cards. *Id.* Layaway plans differ from BNPL in that layaway plans typically require customers to pay for items in full before taking them home. *Id.*

8. While there is no single definition of BNPL loans, the Consumer Financial Protection Bureau (CFPB) defines them as:

[L]oans to consumers made by the BNPL loan provider that 1) are structured as closed-end installment loans, in which the consumer incurs debt and has the right to defer payment, 2) are made for the purchase of goods and services for the consumer’s personal, family, or household use, 3) are payable in four installments, and 4) do not incur interest or other finance charges.

CONSUMER FIN. PROT. BUREAU, BUY NOW, PAY LATER PRODUCT FAQs 2 (2024) [hereinafter CFPB BNPL FAQs] (emphasis added), https://files.consumerfinance.gov/f/documents/cfpb_BNPL-frequently-asked-questions.pdf [<https://perma.cc/JSB4-LTX2>] (providing a definition for regulatory compliance guidance).

Meanwhile, the Federal Deposit Insurance Corporation (FDIC) defines BNPL loans as “short-term loan[s] that allow[] consumers to split their payments on purchases over time, often without interest, with four equal payments over six weeks.” FED. DEPOSIT INS. CORP., 2023 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 12, 51 (2024) [hereinafter 2023 FDIC SURVEY] (emphasis added), <https://www.fdic.gov/household-survey/2023-fdic-national-survey-unbanked-and-underbanked-households-report> [<https://perma.cc/TGV7-FSUX>].

For the purposes of this Comment, this definitional variation is a distinction without a difference. Yet, it illustrates a root problem when it comes to BNPL loans: confusion.

9. Colleen E. Mandell & Morgan J. Lawrence, *Expanding Access for the Credit Invisible with Just Four Easy Payments? The Unregulated Rise of Buy Now, Pay Later*, 35 LOY. CONSUMER L. REV. 275, 283–88 (2023).

10. This landscape may shift as more established banks like Citibank and JPMorgan Chase direct existing customers to use their own BNPL loan options. See *Chase to Decline Credit Card Payments for Third-Party BNPL Plans*, PYMNTS (July 17, 2024), <https://www.pymnts.com/bnpl/2024/chase-to-decline-credit-card-payments-for-third-party-bnpl-plans/> [<https://perma.cc/KDH7-ZARH>].

11. *Compare Adobe Forecasts Record \$240.8 Billion U.S. Holiday Season Online with Black Friday Growth to Outpace Cyber Monday*, ADOBE (Sept. 24, 2024), <https://news.adobe.com/news/2024/09/092524-adi-holiday-forecast> [<https://perma.cc/Q48R-LQAK>] (predicting record-breaking use of BNPL loans in the 2024 holiday season), with CONG. RSCH. SERV., IF12734, RAPIDLY GROWING “BUY NOW, PAY LATER” (BNPL) FINANCING: MARKET DEVELOPMENTS AND POLICY ISSUES 1 (2024), <https://crsreports.congress.gov/product/pdf/IF/IF12734> [<https://perma.cc/HK9X-WNA9>] (implying tempered growth since BNPL companies have dropped in market valuation since 2021 and are facing increased regulatory scrutiny and market competition).

everyday and necessity purchases like groceries and medical care.¹² No longer only an online shopping “payment option,” BNPL loans can be taken out in just about any brick and mortar store where credit cards are accepted.¹³ And when borrowers apply for BNPL loans, they will most likely get them; approximately 70 percent of people who apply for a BNPL loan will be approved.¹⁴ This approval rate is almost twice as high as the approval rate for a credit card.¹⁵

Long-term access to affordable credit is essential. Conversely, understanding the risks and long-term impacts of unnecessary borrowing is also essential. Although taking out a BNPL loan can benefit consumers in need of affordable credit, consumer protection advocates and the Consumer Financial Protection Bureau (CFPB) have identified multiple areas of concern. Younger women of color who exhibit serious financial stress are more likely to take out these relatively frictionless BNPL loans, and BNPL loan agreements can come with unclear terms and conditions and hidden fees.¹⁶ There are also looming questions regarding how BNPL companies collect user information, target potential BNPL users, and share and sell their user data.¹⁷

Until recently, these BNPL companies have largely avoided federal regulatory oversight despite calls for agency action.¹⁸ Unfortunately, the CFPB’s May 2024 rule interpreting BNPL digital user accounts as “credit cards” (the BNPL Rule) has not definitively incorporated BNPL loans under CFPB oversight,¹⁹ and a trade association has already challenged the BNPL Rule in federal court.²⁰ As a

12. See CFPB BNPL MARKET TRENDS, *supra* note 1, at 35–36; see also *infra* notes 114–20 and accompanying text.

13. See Morgan E. Johnson, Comment, *Regulate Now or Pay Later: A Late Start on Regulating the BNPL Industry Endangers Consumers*, 27 N.C. BANK. INST. 454, 457–58 (2023); see also 2023 FDIC SURVEY, *supra* note 8, at 58; see, e.g., *Afterpay FAQ*, PETSMAST, <https://www.petsmart.com/help/payment-afterpay-H0004g.html> [<https://perma.cc/TD65-UJ8G>] (“Just shop online or at any PetSmart store location and check out as normal. At checkout, choose Afterpay as your payment method online or tap to pay in store with the Afterpay Card.”).

14. CFPB BNPL MARKET TRENDS, *supra* note 1, at 9.

15. Ivana Pino, *How to Choose Between Buy Now, Pay Later and a Credit Card at Checkout*, FORTUNE: FORTUNE RECOMMENDS (June 16, 2023, 7:47 AM), <https://fortune.com/recommends/credit-cards/buy-now-pay-later-vs-credit-card/> [<https://perma.cc/8JV2-U8C3>].

16. CONSUMER FIN. PROT. BUREAU, CONSUMER USE OF BUY NOW, PAY LATER 2–4 (2023) [hereinafter CFPB CONSUMER USE OF BNPL], https://files.consumerfinance.gov/f/documents/cfpb_consumer-use-of-buy-now-pay-later_2023-03.pdf [<https://perma.cc/93RM-ZCBD>].

17. CFPB BNPL MARKET TRENDS, *supra* note 1, at 75–76.

18. See Press Release, Consumer Fin. Prot. Bureau, CFPB Takes Action to Ensure Consumers Can Dispute Charges and Obtain Refunds on Buy Now, Pay Later Loans (May 22, 2024), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-ensure-consumers-can-dispute-charges-and-obtain-refunds-on-buy-now-pay-later-loans/> [<https://perma.cc/TN96-WFMD>]; see, e.g., Ctr. for Responsible Lending et al., Comment Letter on Notice and Request for Comment Regarding the CFPB’s Inquiry into Buy-Now-Pay-Later (BNPL) Providers 36–44 (Mar. 25, 2022), https://downloads.regulations.gov/CFPB-2022-0002-0031/attachment_1.pdf [<https://perma.cc/N2LH-U3W8>].

19. See *infra* Section IV.A.

20. Complaint at 2–3, *Fin. Tech. Ass’n v. CFPB*, No. 1:24-cv-02966 (D.D.C. Oct. 18, 2024); see also Hailey Konnath, *Fintech Group Challenges CFPB’s Buy Now, Pay Later Policy*, LAW360 (Oct. 18, 2024), <https://www.law360.com/articles/1891752/fintech-group-challenges-cfpb-s-buy-now-pay-later-policy> [<https://perma.cc/6488-8VK2>].

result, it is unclear whether and when federal regulations will adequately protect vulnerable consumers.²¹ This lack of protection can exacerbate borrowers' existing financial distress.²²

Even though New Mexico expressly regulates BNPL companies,²³ its laws do not address BNPL-specific concerns, and the BNPL landscape in the state remained largely unaffected after the legislature's 2022 effort to curb predatory lending.²⁴ And recent state-level information reveals concerning trends.²⁵ Fortunately, the 2022 legislation created an opportunity for New Mexico to take strategic, impactful regulatory action to protect its vulnerable consumers.

In this Comment, I explain how BNPL loans can disproportionately harm New Mexico borrowers. I argue that existing state law provides regulators with the authority to address shortcomings in federal BNPL regulation—shortcomings that urgently need to be addressed. Part I provides a brief overview of BNPL in the United States, focusing on what makes BNPL loans and companies unique. Part II discusses consumer protection concerns surrounding borrower confusion and lack of key disclosures, while Part III discusses how BNPL loans can disproportionately harm New Mexico consumers. Part IV describes the current federal and state regulatory framework, emphasizing how recent legislative efforts in New Mexico to curb predatory lending, while insufficient, lay the groundwork for future state regulatory action. Finally, Part V argues that New Mexico regulators can increase BNPL supervision under existing law and outlines specific reporting, disclosure, and outreach recommendations that would begin to address major areas of concern in New Mexico.

I. WHAT IS “BUY NOW, PAY LATER” AND HOW IS IT DIFFERENT?

Compared to other consumer financing options, BNPL loans are new to the United States. BNPL companies started targeting U.S. consumers around 2019.²⁶ In the first two years, the BNPL loan amount from the United States' largest BNPL companies grew by 970% to \$180 million,²⁷ and the value of BNPL loans grew from \$2 billion to \$24.2 billion.²⁸ Consumers abandoned their online shopping carts less often and spent more each purchase.²⁹ BNPL companies and online merchants took

21. *See infra* Section IV.A.

22. Nelson Akeredolu, Andrew Braden, Joshua Friedman & Laura Udis, *Should You Buy Now and Pay Later?* CONSUMER FIN. PROT. BUREAU (July 6, 2021), <https://www.consumerfinance.gov/about-us/blog/should-you-buy-now-and-pay-later> [<https://perma.cc/3WKX-VFBX>].

23. 2022 N.M. Laws 275–314.

24. *See infra* Section III.A.

25. *See infra* Section III.B.

26. *See* CFPB BNPL MARKET TRENDS, *supra* note 1, at 3.

27. The BNPL loan amount from the United States' largest BNPL companies increased from \$16.8 million to \$180 million. *Id.*

28. *Id.*

29. *See* Johnson, *supra* note 13, at 458–59.

note of the market and profit potential, and BNPL companies quickly expanded from retail fashion to everyday³⁰ purchases.³¹

Even though BNPL companies' total market value is hard to measure with precision, it has been estimated at \$256.54 billion globally—with 30% of the market in the United States alone—and market value is projected to reach up to \$3.9 trillion by 2031.³² To explain BNPL loans' explosive growth and the resulting concerns, it helps to first understand the BNPL lending process and common BNPL company characteristics.

A. A BNPL Loan Is Designed to Seem Incredibly Simple

Potential borrowers often encounter a BNPL loan when they view their online shopping cart. The “payment option”³³ is integrated into the retailer's checkout screen at the point of sale.³⁴ The application typically involves three short steps: creating an account with a name, phone number, and birth date; adding a credit/debit card for payment use; and viewing and confirming the payment schedule.³⁵ While the “account creation” step seems familiar and straightforward, creating an account also authorizes a BNPL company to check the borrower's eligibility using factors like age, history with the BNPL company, and income.³⁶ After creating an account and adding payment details, the loan is confirmed.³⁷ Once the borrower completes the purchase, the BNPL company generates its revenue by keeping a percentage of the merchant's profit.³⁸ The entire process takes no more than a few minutes, with BNPL loan approval typically taking seconds.³⁹

A borrower usually encounters BNPL at checkout, but BNPL companies are increasingly developing revenue streams that are less reliant on specific

30. The CFPB includes groceries, non-grocery food and drink, utilities, and automobile transportation purchases under “everyday” expenses. CFPB BNPL MARKET TRENDS, *supra* note 1, at 35 n.66.

31. In 2021, “everyday” or “necessary” purchases amounted to \$229.2 million in BNPL sales, up 434% from 2020's \$43.9 million. *Id.* at 10. In one 2024 survey, 8% of responders reported using BNPL loans for everyday necessities like groceries. Elizabeth Renter, 2024 *State of Consumer Credit Report*, NERDWALLET (May 28, 2024, 6:00 AM), <https://www.nerdwallet.com/article/credit-cards/2024-consumer-credit-report> [<https://perma.cc/8KZM-BQF8>].

32. *Buy Now Pay Later Market: Information by Channel Outlook (Online, PoS), Application (Retail Goods, Healthcare and Wellness), Enterprise Size (Large, SME), and Region – Forecast Till 2031*, STRAITS RSCH., <https://straitsresearch.com/report/buy-now-pay-later-market> [<https://perma.cc/29AP-GQAY>].

33. BNPL is not a payment option; it is a loan. But its placement is confusing. A study in Ireland found that 36% of those surveyed thought that BNPL was a payment method—not a form of credit. CENT. BANK OF IR., CONSUMER RESEARCH BULLETIN: BUY NOW PAY LATER 6 (2023), https://www.centralbank.ie/docs/default-source/publications/consumer-protection-research/consumer-research-bulletin-buy-now-pay-later.pdf?sfvrsn=7ed49d1d_6 [<https://perma.cc/4XUW-U4QX>].

34. See CFPB BNPL MARKET TRENDS, *supra* note 1, at 12–13 (demonstrating with screenshots of payment screens).

35. Veling, *supra* note 2; see also *A Smarter Way to Shop and Pay*, KLARNA, <https://www.klarna.com/us/what-is-klarna/> [<https://perma.cc/PM67-83HM>].

36. Veling, *supra* note 2.

37. CFPB BNPL MARKET TRENDS, *supra* note 1, at 12.

38. Mandell & Lawrence, *supra* note 9, at 281–82.

39. See Veling, *supra* note 2; see also CFPB BNPL MARKET TRENDS, *supra* note 1, at 15.

purchases and individual merchant relationships, like acquiring potential borrowers from the BNPL companies' applications (apps).⁴⁰ Here, a potential borrower begins the shopping journey with the BNPL company by first downloading the BNPL company's proprietary app at home or in store.⁴¹ The potential borrower creates a digital account and is granted an estimated spending limit.⁴² Then, the potential borrower shops within the app or enables the BNPL company's "virtual card," a "debit" card that allows them to shop "just about anywhere" credit cards are accepted.⁴³ Once the potential borrower selects the purchase, the BNPL company will display the loan schedule for review and acceptance.⁴⁴

For both BNPL loan acquisition points (point-of-sale and application) described above, the first installment is automatically deducted at the time of purchase, and the BNPL company will deduct payments from the borrower every two weeks for the remainder of the loan.⁴⁵ For many BNPL loan borrowers, this process happens without issue, and they can enjoy an interest-free loan.

This process is purposefully simple,⁴⁶ which is a major reason why a BNPL loan is so attractive. Breaking up \$30 or \$150 purchases⁴⁷ into smaller installments allows borrowers the convenience of paying over time without incurring interest. And the easier the process, the more likely that the borrower will complete the purchase, which benefits the BNPL companies that get a percentage of the profit and merchants that get the sale.⁴⁸ Yet, this simplified loan process often does not meaningfully assess the consumer's debt obligations.⁴⁹ The process also glosses over

40. Truth in Lending (Regulation Z); Use of Digital User Accounts to Access Buy Now, Pay Later Loans, 89 Fed. Reg. 47068, 47069 (May 31, 2024) (to be codified at 12 C.F.R. pt. 1026), <https://www.govinfo.gov/content/pkg/FR-2024-05-31/pdf/2024-11800.pdf> [<https://perma.cc/ZEE7-J4KK>].

41. See CFPB BNPL MARKET TRENDS, *supra* note 1, at 14.

42. Truth in Lending (Regulation Z); Use of Digital User Accounts to Access Buy Now, Pay Later Loans, 89 Fed. Reg. at 47069.

43. See, e.g., *Pay with Affirm, In-Store or Online, Just About Anywhere*, AFFIRM, <https://www.affirm.com/shopping/virtual-card> [<https://perma.cc/VM36-MCY6>]; CFPB BNPL MARKET TRENDS, *supra* note 1, at 14–15.

44. See, e.g., *Pay with Affirm, In-Store or Online, Just About Anywhere*, *supra* note 43.

45. Veling, *supra* note 2.

46. See Johnson, *supra* note 13, at 467 ("BNPL transactions intentionally lack friction to create seamless sales for merchants.").

47. Yes, a BNPL loan can be as little as \$30. Sezzle's minimum loan amount is \$20. *Is There a Minimum to Use Sezzle?*, SEZZLE, <https://shopper-help.sezzle.com/hc/en-us/articles/5543570588692-Is-there-a-minimum-to-use-Sezzle> [<https://perma.cc/6ZHM-HPJ4>]. PayPal's minimum loan amount is \$30. *How Pay Later Works*, Subheading to *Buy Now, Pay Later with PayPal*, PAYPAL, <https://www.paypal.com/us/digital-wallet/ways-to-pay/buy-now-pay-later> [<https://perma.cc/7HKR-ZEZJ>]. The average BNPL loan is around \$135. See CFPB BNPL MARKET TRENDS, *supra* note 1, at 9 (reporting an average of \$135 in 2021); see also Kim Le, *Making Buy Now, Pay Later Payments Visible*, EXPERIAN (Apr. 13, 2023), <https://www.experian.com/blogs/insights/buy-now-pay-later-payments/> [<https://perma.cc/MW6G-VLH5>] (reporting an average of \$132 in 2023).

48. See CFPB BNPL MARKET TRENDS, *supra* note 1, at 15 ("[T]he application process is seamless, streamlined, and brief to reduce friction and shopping cart abandonment.").

49. See State Att'ys Gen. of Ill., Cal., Colo. et al., Comment Letter on Notice and Request for Comment Regarding the CFPB's Inquiry into Buy-Now-Pay-Later (BNPL) Providers 4–5 (Mar. 24, 2022), https://downloads.regulations.gov/CFPB-2022-0002-0025/attachment_1.pdf [<https://perma.cc/Y6Y4-ZXVL>]; see also Ctr. for Responsible Lending et al., *supra* note 18, at 7–8.

the real chance of complications that can arise when borrowers have issues with payments or purchases, like late fees and negative impact to one's ability to obtain future credit.⁵⁰ BNPL companies pitch their loans as a "payment method" that can be used often and for anything—even groceries—but the loans provide insufficient disclosures. As Part II of this Comment will discuss, this current lack of transparency with loan terms and conditions prevents borrowers from assessing their credit options and making meaningful credit choices.

B. BNPL Companies Are Unlike Traditional Credit Lending Institutions

BNPL companies are a type of financial technology (fintech) company.⁵¹ These for-profit companies seek to provide a more efficient, seamless alternative to traditional lending institutions by harnessing new technologies like mobile apps and increasingly sophisticated data collection tools.⁵² They can quickly implement these innovations because they operate outside existing regulated financial service institutions.⁵³

First, BNPL companies' growth models differ from traditional credit institutions because of their reliance on merchant relationships.⁵⁴ As mentioned earlier, BNPL companies generate profit through a transaction fee charged to a merchant at each individual sale—a fee that could be twice as high as credit card transaction fees.⁵⁵ Relying on merchant fees has its own set of challenges,⁵⁶ and merchant fees tend to account for a smaller percentage of BNPL company profits today.⁵⁷ Because of these types of market forces at play, BNPL companies are continually looking for new ways to generate long-term profit. To that end, they have rolled out new services aimed towards repeat, frequent individual borrowing—

50. Rivera & Cezyk, *supra* note 5.

51. See Julia Kagan, *Financial Technology (Fintech): Its Uses and Impact on Our Lives*, INVESTOPEDIA (Mar. 25, 2024), <https://www.investopedia.com/terms/f/fintech.asp> [<https://perma.cc/3LC4-X2H6>]. Fintech services are highly promising and highly concerning. Scholars, consumer protection advocates, and policymakers recognize that fintech has the potential to reduce existing economic and racial inequities and increase access to financial services. See, e.g., Pamela Foohey & Nathalie Martin, *Fintech's Role in Exacerbating or Reducing the Wealth Gap*, 2021 U. ILL. L. REV. 459, 459 (2021); CONG. RSCH. SERV., R47475, CONSUMER FINANCE AND FINANCIAL TECHNOLOGY (FINTECH) 1 (2023), <https://crsreports.congress.gov/product/pdf/R/R47475> [<https://perma.cc/D6GT-QGE8>]. Yet, there is the real risk that fintech services may exacerbate existing wealth and racial disparities unless great care is taken to monitor fintech practices. See Foohey & Martin, *supra* note 51, at 488–98, 504–05.

52. Kagan, *supra* note 51.

53. *Id.*

54. See *The Convergence of Payments and Commerce: Implications for Consumers*, CONSUMER FIN. PROT. BUREAU 13–14 (Aug. 2022), https://files.consumerfinance.gov/f/documents/cfpb_convergence-payments-commerce-implications-consumers_report_2022-08.pdf [<https://perma.cc/E3E3-8ZQW>]; Johnson, *supra* note 13, at 458–62.

55. BNPL companies rely on merchants as a source of profit, charging them a rate of up to 8% of the transaction price, significantly higher than traditional credit card purchases with a rate of around 1–3%. See Alina Selyukh, *In a Year Marked by Inflation, 'Buy Now, Pay Later' Is the Hottest Holiday Trend*, NPR (Dec. 15, 2022), <https://www.npr.org/2022/12/15/1142469148/buy-now-pay-later-hottest-holiday-shopping-trend> [<https://perma.cc/B8FY-R22T>]; see also Mandell & Lawrence, *supra* note 9, at 281–82.

56. For example, in 2021, BNPL companies reduced these transaction fees following increased competition among BNPL companies. CFPB BNPL MARKET TRENDS, *supra* note 1, at 38–39.

57. See *id.*

services like digital “debit” cards connected to a consumer’s checking account that allow users the option to “pay” with BNPL loans anywhere that accepts debit cards.⁵⁸ As BNPL companies gather data on their customers’ behavior, they can more effectively advertise BNPL merchant partnerships and increase repeated customer use.⁵⁹

Second, BNPL companies set themselves apart from traditional credit providers by marketing their services as the “smarter way [for borrowers] to shop and pay”⁶⁰ using a tool for budget and spending management⁶¹ that “financially empower[s] the next generation.”⁶² Across the board, BNPL companies describe themselves as affordable, accessible financial services dedicated to the wellbeing of their customers.⁶³ They market themselves as a “solution” to those who have had problems with accessing credit or distrust of traditional credit.⁶⁴

Behind this slick advertising, one cannot forget that BNPL companies rely on highly engaged borrowers. Accordingly, BNPL companies have carefully designed a “seamless” lending process that encourages spending more money, both in amount and frequency.⁶⁵ Their targeted approaches are working. In multiple surveys, BNPL borrowers report that they spent more because a BNPL loan was available.⁶⁶ And the majority of BNPL borrowers report taking out more than one BNPL loan.⁶⁷ Repeated BNPL lending is even higher among New Mexico BNPL borrowers.⁶⁸

58. Johnson, *supra* note 13, at 465.

59. CFPB BNPL MARKET TRENDS, *supra* note 1, at 50–51.

60. *A Smarter Way to Shop and Pay*, *supra* note 35.

61. *Financial Wellness Is a Tap Away.*, *supra* note 2.

62. *Mission and Values*, SEZZLE, <https://sezzle.com/mission-and-values/> [https://perma.cc/J3JM-X85W].

63. *See, e.g., Why Affirm?*, AFFIRM, <https://www.affirm.com/how-it-works/why-affirm> [https://perma.cc/VCN7-BP4C].

64. *See* Foohey & Martin, *supra* note 51, at 505.

65. *See* HANNAH GDALMAN, MEGHAN GREENE & NECATI CELIK, FIN. HEALTH NETWORK, BUY NOW, PAY LATER: IMPLICATIONS FOR FINANCIAL HEALTH 7 (2022), <https://finhealthnetwork.org/wp-content/uploads/2022/03/Buy-Now-Pay-Later-Brief-2022.pdf> [https://perma.cc/CZ9W-WCJX].

66. *See id.* at 7 (30% reporting that “I spent more than I would have if BNPL were not available”); *see also* Rivera & Ceizyk, *supra* note 5 (29% reporting that they “[s]pent more than I should have”); Erika Giovanetti, *Survey: Shoppers Use BNPL for New Tech, Clothes – and Groceries*, U.S. NEWS (Mar. 1, 2023), <https://money.usnews.com/loans/personal-loans/articles/buy-now-pay-later-survey> [https://perma.cc/79K8-MEU6] (53% reporting that they would not have purchased the items if BNPL was unavailable).

67. *See* Felix Aidala, Daniel Mangrum & Wilbert van der Klaauw, *How and Why Do Consumers Use “Buy Now, Pay Later”?*, FED. RSRV. BANK N.Y.: LIBERTY ST. ECONS. (Feb. 14, 2024), <https://libertystreeteconomics.newyorkfed.org/2024/02/how-and-why-do-consumers-use-buy-now-pay-later/> [https://perma.cc/2VP9-HXU2]; 4 in 10 BNPL Shoppers Use It at Least Once a Month, PYMNTS (Nov. 10, 2023), <https://www.pymnts.com/buy-now-pay-later/2023/4-in-10-bnpl-shoppers-use-it-once-month/> [https://perma.cc/65TK-WMYQ]. In another survey, 46% of BNPL borrowers had taken out a BNPL loan at least three times in the prior year. GDALMAN ET AL., *supra* note 65, at 6. In 2021’s fourth quarter, 15.5% of BNPL users borrowed five or more loans while 4% of BNPL users borrowed ten or more BNPL loans. CFPB BNPL MARKET TRENDS, *supra* note 1, at 34.

68. *See infra* Section III.B.

II. CONSUMER PROTECTION CONCERNS AROUND FOLLOWING BNPL POPULARITY

Today, BNPL loans are more popular than ever. Meanwhile, scholars, consumer protection advocates, and policymakers have identified areas of concern, including undisclosed and underdisclosed late fees,⁶⁹ borrower risks from managing loans from multiple BNPL companies (loan stacking)⁷⁰ and overborrowing,⁷¹ BNPL loans' lack of dispute and fraud protections,⁷² and privacy concerns related to BNPL companies gathering and sharing website/app engagement data.⁷³

These concerns are amplified by surveys showing that BNPL loans are most popular with at-risk populations. BNPL borrowers are more likely to be younger Black or Hispanic women.⁷⁴ Spending habits at a young age have an enormous impact on one's ability to build long-term wealth—which is already difficult for individuals of color to accumulate due to lower earnings and homeownership rates and systemic racial barriers.⁷⁵ Younger borrowers are at particular risk since almost all BNPL loans have no impact—or only a negative impact—on a borrower's credit report,⁷⁶ which can impact their ability to rent an apartment, take out an automobile loan, and buy a home.⁷⁷

Recent surveys also consistently find that BNPL borrowers overwhelmingly exhibit markers of financial stress compared to borrowers who do not use BNPL loans. BNPL borrowers are more likely to have lower liquidity and

69. See *infra* notes 98–102 and accompanying text.

70. CFPB BNPL MARKET TRENDS, *supra* note 1, at 65–66.

71. *Id.* at 64–65.

72. Ctr. for Responsible Lending, *supra* note 5. The CFPB's BNPL Rule addressed this concern, but its future enforcement is unclear. See *infra* Section IV.A.

73. See CFPB BNPL MARKET TRENDS, *supra* note 1, at 75–76; Ctr. for Responsible Lending et al., *supra* note 18, at 16–17.

74. CFPB CONSUMER USE OF BNPL, *supra* note 16, at 6–7; see also GDALMAN ET AL., *supra* note 65, at 5; Felix Aidala, Daniel Mangrum & Wilbert van der Klaauw, *Who Uses "Buy Now, Pay Later"?*, FED. RSRV. BANK N.Y.: LIBERTY ST. ECONS. (Sept. 26, 2023), <https://libertystreeteconomics.newyorkfed.org/2023/09/who-uses-buy-now-pay-later/> [https://perma.cc/79RX-CAPP]; TOM AKANA & VALERIA ZEBALLOS DOUBINKO, FED. RSRV. BANK OF PHILA., 4-IN-6 PAYMENT PRODUCTS — BUY NOW, PAY LATER: INSIGHTS FROM NEW SURVEY DATA 6 (2024), <https://www.philadelphiafed.org/-/media/frbp/assets/consumer-finance/reports/bnpl-survey-insights.pdf> [https://perma.cc/Q5QG-GXWH].

75. Foohey & Martin, *supra* note 51, at 469–75.

76. See *Will a Buy Now, Pay Later (BNPL) Loan Impact My Credit Scores?*, CONSUMER FIN. PROT. BUREAU (Aug. 30, 2024), <https://www.consumerfinance.gov/ask-cfpb/will-a-buy-now-pay-later-bnpl-loan-impact-my-credit-scores-en-21117/> [https://perma.cc/Q2DT-KLBV].

77. See *Credit Scores*, FED. TRADE COMM'N CONSUMER ADVICE (Sept. 2024), <https://consumer.ftc.gov/articles/credit-scores> [https://perma.cc/YR8R-K6XW].

savings,⁷⁸ pay their credit card late,⁷⁹ have a credit application rejected,⁸⁰ carry a revolving credit card balance,⁸¹ overdraft a bank account,⁸² and rely on other high-interest alternative credit like payday loans.⁸³ Based on this information, it is unsurprising that a lower credit score is a strong predictor of BNPL borrowing.⁸⁴

As BNPL borrowing increases across all income levels, “financially fragile” BNPL borrowers are significantly more likely to take out five or more BNPL loans in the last year.⁸⁵ Sixty-two percent of financially fragile borrowers take out BNPL loans for purchases less than \$250, compared to 44 percent of all other borrowers.⁸⁶

Meanwhile, BNPL borrowers express concern about their short- and long-term financial stability at significantly higher rates than non-BNPL users.⁸⁷ One-third of BNPL borrowers have reported using a credit card to pay off their BNPL debt—a concerning finding.⁸⁸ Using a credit card to make BNPL loan payments indicates that the borrower does not have enough money (or is worried that they will not have enough money) in their checking account to cover the BNPL loan payments.⁸⁹

78. CFPB CONSUMER USE OF BNPL, *supra* note 16, at 13; JOANNA STAVINS, FED. RSRV. BANK OF BOS., BUY NOW, PAY LATER: WHO USES IT AND WHY 3 (2024), <https://www.bostonfed.org/-/media/Documents/Workingpapers/PDF/2024/cpp20240522.pdf> [<https://perma.cc/ES5R-YJVD>]. In one survey, 26% of survey participants who lived paycheck to paycheck reported that they were “very or extremely likely” to take out a BNPL loan within the next twelve months. *Paycheck-to-Paycheck Consumers More Than Twice as Likely to Use BNPL*, PYMTS (Aug. 2, 2024), <https://www.pymnts.com/buy-now-pay-later/2024/paycheck-consumers-more-than-twice-likely-bnpl/> [<https://perma.cc/M7ND-K94N>].

79. CFPB CONSUMER USE OF BNPL, *supra* note 16, at 11; *see also* Aidala et al., *supra* note 74.

80. Aidala et al., *supra* note 74.

81. CFPB CONSUMER USE OF BNPL, *supra* note 16, at 17; GDALMAN ET AL., *supra* note 65, at 6.

82. CFPB CONSUMER USE OF BNPL, *supra* note 16, at 20.

83. *Id.* at 20.

84. JOANNA STAVINS, *supra* note 78, at 4–5.

85. Aidala et al., *supra* note 67 (defining “financially fragile” respondents as “having a credit score below 620, having been declined for a credit application in the past year, or having fallen thirty or more days delinquent on a loan in the past year”).

86. *Id.*

87. Jaime Toplin, *BNPL Users Are Young, Well-Off and Amassing a Mountain of Debt*, MORNING CONSULT PRO (Sept. 26, 2023, 5:00 AM), <https://pro.morningconsult.com/analysis/bnpl-user-demographics-debt-prevention> [<https://perma.cc/H99J-CLKU>]. In another survey, only 50% of potential borrowers said they were “very confident” they could repay the loan without late or missed payments should their BNPL loan application be approved. Matt Schulz, *BNPL Tracker: 35% of Consumers Considering Applying for Buy Now, Pay Later Loan This Month*, LENDING TREE (Nov. 13, 2024), <https://www.lendingtree.com/personal/buy-now-pay-later-loan-statistics/> [<https://perma.cc/Y933-75BD>].

88. Toplin, *supra* note 87; *see also* *Consumers Rely on Buy Now, Pay Later Amid Record Inflation, Use Credit to Pay It Off*, CREDIT KARMA (Mar. 21, 2022), <https://www.creditkarma.com/about/commentary/consumers-rely-on-buy-now-pay-later-amid-record-inflation-use-credit-to-pay-it-off> [<https://perma.cc/57FX-UB9D>] (22% of survey respondents use credit cards to pay for BNPL loans). JPMorgan Chase and Capital One no longer allow their credit cards to be used as payment methods for BNPL loans. Ann Carrns, *Chase to Bar Customers from Using Credit Cards for ‘Pay Later’ Loans*, N.Y. TIMES (July 26, 2024), <https://www.nytimes.com/2024/07/26/your-money/chase-pay-later-loans-credit-cards.html> [<https://perma.cc/49HY-76JL>].

89. There are other reasons borrowers use credit cards, like to earn credit card rewards. But if the purpose is to earn credit card rewards, it makes “no sense” to use a credit card to pay for a BNPL loan.

These concerns are resulting in late or missed payments.⁹⁰ And the frequency of payment issues is not consistent across racial and economic lines.⁹¹ Importantly, late payments may not fully capture whether the BNPL borrower is meeting their other financial responsibilities. At least one survey has shown that small loan borrowers will prioritize paying off those loans over making their car, mortgage, and credit card payments.⁹² In the same survey, 32% of survey respondents “delay[ed] or skip[ped] paying an essential bill due to the payments on [their] BNPL plans.”⁹³

Considering the real possibility of issues resulting from BNPL loans, borrowers should be informed of terms related to preventing missed payments or consequences resulting from them. These terms currently vary across BNPL companies. If a borrower is concerned about a lack of sufficient funds, they may or may not be able to reschedule their next payment.⁹⁴ When a payment is late, the BNPL company may charge a fee,⁹⁵ or it may not.⁹⁶ A BNPL company may also reduce spending limits, prevent borrowers from future BNPL loans, or both;⁹⁷ it depends on the company. This type of variation in terms is not necessarily problematic, but considering this variation across BNPL companies, the current lack of clear disclosure of these terms at loan confirmation *is* problematic.

Despite the payment issues mentioned above, BNPL companies do not clearly disclose the financial consequences of late payments.⁹⁸ BNPL companies often advertise that they do not charge any fees associated with their “interest free”

Carns, *supra* note 88 (quoting Lauren Saunders, Associate Director of the National Consumer Law Center).

90. CFPB BNPL MARKET TRENDS, *supra* note 1, at 27; 2023 FDIC SURVEY, *supra* note 8, at 58–59.

91. GDALMAN ET AL., *supra* note 65, at 8 (“Late or missed payments, or difficulty making payments, were more frequently reported among Black households (13%), households with subprime credit (14%), and Financially Vulnerable households (24%).”).

92. CFPB BNPL MARKET TRENDS, *supra* note 1, at 66–69.

93. *Id.* at 69.

94. Although Afterpay advertises that borrowers can reschedule payments, it only allows rescheduling in specific circumstances. For example, rescheduling is unavailable for the first forty-two days of a customer’s relationship with Afterpay. Also, only 50% of payments are eligible for rescheduling—the first and last payment dates cannot be changed. *Can I Change the Due Date of a Payment?*, AFTERPAY, <https://help.afterpay.com/hc/en-us/articles/360044314071-Can-I-change-the-date-a-payment-is-due> [<https://perma.cc/Q4B4-CUYB>]; *see also How Do I Reschedule a Payment?*, SEZZLE, <https://shopper-help.sezzle.com/hc/en-us/articles/360045946992-How-do-I-reschedule-a-payment> [<https://perma.cc/A4C5-RW89>].

95. *See, e.g., What Happens if I Don’t Pay on Time?*, Subheading to *Afterpay Is Committed to Putting You in Control of Your Finances.*, AFTERPAY, <https://www.afterpay.com/en-US/responsible-spending> [<https://perma.cc/UDL3-9TJQ>] (“A late fee may be charged when an installment for an order is not paid after the applicable grace period (usually 10 days unless otherwise noted on your payment schedule).”).

96. *See, e.g., What Happens if I Make a Late Payment?*, AFFIRM, <https://helpcenter.affirm.com/s/article/late-payments> [<https://perma.cc/F6AD-E3QB>].

97. *See, e.g., How Many Orders Can I Have with Afterpay?*, AFTERPAY, <https://help.afterpay.com/hc/en-us/articles/115005762006-How-many-orders-can-I-have-with-Afterpay> [<https://perma.cc/YAD3-C56F>]; *Why Did My Estimated Spending Power Change?*, SEZZLE, <https://shopper-help.sezzle.com/hc/en-us/articles/10351835628180-Why-is-my-spending-power-lower-than-before> [<https://perma.cc/9BXT-BDLM>].

98. *See* Schultz, *supra* note 87; *see also* GDALMAN ET AL., *supra* note 65, at 8.

loans.⁹⁹ Or they may state there are no fees for on-time payments.¹⁰⁰ However, even if the BNPL company mentions that a late fee will be charged, it may not disclose the actual late fee amount.¹⁰¹ And, across the board, BNPL companies do not clearly disclose other loan-related fees that may be incurred, like an overdraft or insufficient funds (NSF) fee.¹⁰² As a result, the BNPL borrower does not have a clear sense of the amount and frequency of loan-related fees when they apply for a BNPL loan.

BNPL companies also downplay BNPL loans' potential impact to borrowers' credit scores. A BNPL loan may improve, harm, or have no impact on a borrower's credit score; it depends on the BNPL lender.¹⁰³ Some BNPL companies will "charge off"¹⁰⁴ the BNPL loan and report the charge-off to a credit bureau if the payment is unpaid 90 to 120 days after its due date.¹⁰⁵ And a low credit score can prevent someone from being able to rent or buy a home or take out a car loan at a low interest rate.¹⁰⁶ Over seven years, a low credit score can cost a borrower tens of thousands of dollars.¹⁰⁷ Furthermore, the potential for a negative credit impact is not readily visible in a BNPL's loan's terms—and BNPL companies advertise that

99. *How Payment Plans Work*, AFFIRM, <https://www.affirm.com/how-it-works> [<https://perma.cc/SSJ7-FYVA>].

100. *Financial Wellness is a Tap Away*, *supra* note 2 ("No fees when you pay on time.").

101. *See* Image of Payment Schedule, *in* AFTERPAY (Nov. 25, 2024), <https://portal.afterpay.com/v2/checkout/en-US/summary> [<https://perma.cc/6M95-ZWA6>] ("I understand a late fee of up to 5% may apply to a late payment.").

102. *See* Alex Hamilton, *Afterpay User Files US Class Action Lawsuit Over "Huge Undisclosed Fees"*, FINTECH FUTURES (June 7, 2021), <https://www.fintechfutures.com/2021/06/afterpay-user-files-us-class-action-lawsuit-over-huge-undisclosed-fees/> [<https://perma.cc/YAE9-KVA8>] (Afterpay claiming no fault for plaintiff's NSF fees, disclaiming need to warn consumers because the charges are from the bank, not Afterpay).

103. *See* Trina Paul, *'Buy Now, Pay Later' Loans Can Decrease Your Credit Score Even if You Pay On Time—Here's What You Need to Know*, CNBC: SELECT (Oct. 30, 2024), <https://www.cnbc.com/select/how-buy-now-pay-later-loans-can-decrease-your-credit-score/> [<https://perma.cc/8LJ5-2MPQ>]; *see also* Beth Deyo, *How Does 'Buy Now, Pay Later' Affect Your Credit Score?*, BANKRATE (Oct. 3, 2024), <https://www.bankrate.com/credit-cards/advice/buy-now-pay-later-credit-score/> [<https://perma.cc/V4X8-FSHN>].

104. When a lender charges off a loan, it has determined that there is a "very low expectation" of loan repayment. CFPB BNPL MARKET TRENDS, *supra* note 1, at 28; *see also* Tim Maxwell, *What Is a Charge-Off?*, EXPERIAN (May 29, 2024), <https://www.experian.com/blogs/ask-experian/what-is-a-charge-off/> [<https://perma.cc/2BT5-LTRU>].

105. *See* *What Is a "Charge-Off" and Why Do I Still See a Balance with My Sezzle Account After My Account Was Charged-Off?*, SEZZLE, <https://shopper-help.sezzle.com/hc/en-us/articles/14964153221780-What-is-a-charge-off-and-why-do-I-still-see-a-balance-with-my-Sezzle-account-after-my-account-was-charged-off> [<https://perma.cc/29FE-TSNE>] (charge-off after ninety days that can remain on the credit report for up to seven years); *see also* *Collections and Charged-Off Loans*, AFFIRM, <https://helpcenter.affirm.com/s/article/collections-and-charged-off-loans> [<https://perma.cc/6Z3M-X874>] (potential charge-off after 120 days that may appear on the borrower's credit report). A borrower still must pay off a charged-off loan, and if reported, the missed payments and charge-off will remain on someone's credit report for up to seven years, negatively impacting the borrower's credit score. Maxwell, *supra* note 104.

106. Jim Akin, *6 Reasons You Want a Good Credit Score*, EXPERIAN (July 21, 2023), <https://www.experian.com/blogs/ask-experian/why-would-you-want-a-good-credit-score/> [<https://perma.cc/XEN2-7E3N>].

107. *See id.*

taking out a BNPL loan does not negatively affect one's credit score.¹⁰⁸ To BNPL borrowers, it is unclear that the promise of “no impact on your credit score” may only refer to the initial eligibility check.

In 2021, 3.79% of BNPL borrowers had loans charged off.¹⁰⁹ Younger BNPL borrowers were almost twice as likely to have BNPL loans in delinquent status than older borrowers.¹¹⁰ At first glance, it appears that relatively few people are harmed by charge-offs. However, this still translates to millions of borrowers affected.¹¹¹ If BNPL companies did not downplay that BNPL loans can impact one's credit score, they may not appear as attractive—and fewer at-risk borrowers would seek them out.

Many of the issues described above could be minimized if BNPL loans appeared less “seamless” and alerted borrowers to potential risks, which could be achieved with the disclosure of important terms and conditions at BNPL loan offer and confirmation. Additionally, a clearer display of terms would visually indicate to the borrower that this is a form of credit, not just a payment option. Currently, these terms are accessible via a small link at loan confirmation¹¹² or buried within the “help” documentation on the website.¹¹³ But without increased government oversight, there is little incentive to make these terms and conditions more visible.

Meanwhile, BNPL companies are rapidly extending from merchants selling apparel and beauty products to merchants selling essential and everyday goods.¹¹⁴

108. Although Affirm mentions on its website that there may be a “credit impact” if a loan is delinquent, it states there is “[n]o impact on your credit score” when the borrower applies for a BNPL loan—where many potential borrowers only ever encounter BNPL loans. *Compare Credit Impact with a Loan?*, Subheading to *How Payment Plans Work*, AFFIRM, <https://www.affirm.com/how-it-works> [<https://perma.cc/SSJ7-FYVA>] (“May impact if delinquent”), and *Late Payments*, AFFIRM, <https://helpcenter.affirm.com/s/article/late-payments> [<https://perma.cc/9GCQ-Q4G9>] (“We don’t charge late fees, but partial payments or late payments can hurt your credit score, affecting your chances of getting another loan with us.”), with *Checkout*, AMAZON, <https://www.amazon.com/gp/cart/view.html> [<https://perma.cc/2GGC-XWKR>] log in; add at least \$50 worth of items to “Your Amazon Cart”; click “Proceed to checkout”; select “Pay over time with Affirm” under “Choose a payment method”; then click “Continue to application” (“No impact on your credit score.”).

109. CFPB BNPL MARKET TRENDS, *supra* note 1, at 28.

110. *Id.* at 29 (5.7% of BNPL borrowers ages 18–24 had loans either in default or charged off).

111. In the CFPB’s market trends report, BNPL companies reported 180 million loans in 2021. *Id.* at 3. If the average user took out 2.8 BNPL loans a quarter, *id.* at 33, that amounts to about 64.3 million borrowers. If 3.79% of borrowers had their loans charged off, *id.* at 28, that equals approximately 2.4 million borrowers.

112. See Image of Summary, in AFTERPAY (Nov. 25, 2024), <https://portal.afterpay.com/v2/checkout/en-US-summary> [<https://perma.cc/MFY7-VPM8>]; *Checkout*, *supra* note 108.

113. The author combed through the “help” documents of BNPL companies Affirm, Afterpay, PayPal, Sezzle, Uplift, and Zip.

114. See CFPB BNPL MARKET TRENDS, *supra* note 1, at 35–36. From 2019 to 2021, apparel dropped from 66.1% of BNPL loans (\$1.34 billion) to 50.5% (\$12.43 billion) of BNPL loans. *Id.* at 35. Meanwhile, everyday purchases grew from \$3 million to \$230 million. *Id.* In one survey, 14% of respondents (out of 889 BNPL users) had purchased groceries with a BNPL loan. Schulz, *supra* note 87; see also Renter, *supra* note 31 (reporting that 8% of respondents had used a BNPL loan to pay for necessities from April 2023 to April 2024).

U.S. consumers can now use BNPL loans to pay for groceries,¹¹⁵ medical care,¹¹⁶ prescription eyeglasses,¹¹⁷ and other household and personal goods.¹¹⁸ Sezzle has partnered with Dollar General,¹¹⁹ a retailer that rural, low-income communities of color are increasingly reliant upon for food purchases.¹²⁰ Affirm and Afterpay have both partnered with discount third-party travel companies that target travelers looking to save money by necessity or preference.¹²¹

Despite recent data showing that financially vulnerable, at-risk consumers are most attracted to BNPL loans, BNPL companies are unabashedly marketing to these potential borrowers without disclosing consequential BNPL-related terms that vary across BNPL companies. Since recent market changes indicate that BNPL loans are increasingly being used to pay for everyday expenses, these companies must be examined with more scrutiny.

III. BNPL LOANS CAN DISPROPORTIONATELY HARM NEW MEXICO BORROWERS

Up to this point, this Comment has focused on BNPL loans' usage and impact nationally. As discussed, BNPL loan availability is increasingly widespread.¹²² And BNPL loans are particularly attractive to younger Black or Hispanic women whose annual household income is under \$50,000 and who exhibit

115. *Consumers Embrace BNPL for Groceries Amid Rising Food Costs*, PYMNTS (June 12, 2024), <https://www.pymnts.com/buy-now-pay-later/2024/consumers-embrace-bnpl-groceries-amid-rising-food-costs/> [https://perma.cc/H8GY-H6R3].

116. *See Welcome to the Easy Way to Pay Your Medical Bill*, WELLNOW URGENT CARE, <https://www.wellnow.com/sezzle/> [https://perma.cc/WMU2-MJW7] (advertising how WellNow's patients can pay for their urgent care visits with a Sezzle BNPL loan).

117. *See How to Use Afterpay: The Easiest Way to Pay for Eyewear*, EYEBUYDIRECT, <https://www.eyebuydirect.com/blog/how-to-use-afterpay-the-easiest-way-to-pay-for-eyewear> [https://perma.cc/T8EB-ECJC].

118. *See, e.g., Buy Now, Pay Later at Walmart*, AFFIRM, <https://www.affirm.com/shopping/stores/walmart> [https://perma.cc/U9XZ-EWFD]; *Add Extra Convenience to Holiday Shopping with These 'Buy Now, Pay Later' Options at Target*, TARGET CORP. (Oct. 6, 2021), <https://corporate.target.com/news-features/article/2021/10/buy-now-pay-later> [https://perma.cc/JK4B-KJ7G].

119. *Buy Now, Pay Later at Dollar General*, SEZZLE, <https://sezzle.com/shop/dollar-general> [https://perma.cc/XT2V-K5JZ]; *see also Dollar General Adds Enhanced Financial Services*, DOLLAR GEN. (Mar. 8, 2022), <https://newscenter.dollargeneral.com/news/dollar-general-adds-enhanced-financial-services/98997b36-1a9a-432a-a4e0-eb8a869bb947/> [https://perma.cc/7CPF-QU92].

120. *See Dollar Stores Are Growing as Food Retailers in the U.S.*, TUFTS UNIV. SCH. OF MED. (Jan. 19, 2023), <https://medicine.tufts.edu/news-events/news/dollar-stores-are-growing-food-retailers-us> [https://perma.cc/N79Z-E925]; *see also Dominick Reuter, Meet the Typical Dollar General Customer: An Older Rural Worker with a High School Education and an Income of Less than \$40,000*, BUS. INSIDER (Mar. 16, 2023), <https://www.businessinsider.com/typical-dollar-general-shopper-demographic-older-worker-earning-lower-income-2021-8> [https://perma.cc/JEN3-ZQYW].

121. Press Release, Affirm, Affirm Partners with Booking.com to Offer Travelers Increased Flexible Payment Options (Sept. 7, 2023), <https://investors.affirm.com/news-releases/news-release-details/affirm-partners-bookingcom-offer-travelers-increased-flexible> [https://perma.cc/8YJG-668N]; Press Release, Afterpay, Expedia Group Partners with Afterpay to Provide Flexible Spending to Millions of US Travelers (Nov. 21, 2022), <https://newsroom.afterpay.com/updates/expedia-group-partners-with-afterpay-to-provide-flexible-spending-to-millions-of-us-travelers/> [https://perma.cc/JF2K-AXLR].

122. *See supra* notes 114–21 and accompanying text.

signs of serious financial distress.¹²³ However, BNPL loans' terms and their lack of transparency have attracted the criticism of many consumer protection advocates.¹²⁴ These concerns take on new significance and urgency when one considers New Mexico's population demographics, its residents' relationship with banking and lending, and 2023 state-level lending data incorporating BNPL loans.

A. New Mexico Consumers Are Particularly Susceptible to BNPL Loans' Potential Harm

Many New Mexico residents fit the profile of those who are most attracted to BNPL loans. Approximately 50% of people in the state identify as Hispanic, 36% identify as Non-Hispanic White, 12% identify as American Indian, 3% identify as Black, and 3% identify as Asian or Pacific Islander.¹²⁵ New Mexico's Generation Z residents, who are 13 to 28 years old, are even more racially diverse.¹²⁶

New Mexico also has the highest poverty rate in the country¹²⁷ with about 17% of its residents (or about 360,000 people) living in poverty in 2022.¹²⁸ The poverty rate is even higher among young adults 18 to 24 years old, with almost 25% of them earning incomes below the federal poverty level.¹²⁹ And a majority of 18 to 24 year olds reported difficulty paying for basic expenses like rent, car payments, and medical bills.¹³⁰ Meanwhile, 50% of New Mexico's Generation Z residents live in "low-income" families earning below 200% of the federal poverty level.¹³¹

123. See *supra* Section I.C.

124. See *supra* Part II.

125. Am. Cmty. Survey, *ACS Demographic and Housing Estimates: 2018-2022 ACS 5-Year Data Profile*, U.S. CENSUS BUREAU, <https://data.census.gov/table/ACSDP5Y2022.DP05?q=DP05&g=040XX00US35> [<https://perma.cc/Y2KD-DZ7S>].

126. Fifty-nine percent of those born between 1997 and 2012 identify as Hispanic or Latine, 13% identify as American Indian, 3% identify as Black, 2% identify as Asian and Pacific Islander, and 25% identify as Non-Hispanic White. KIDS COUNT Data Center, *Population by Birth Cohort Generation and Race and Ethnicity in New Mexico*, ANNIE E. CASEY FOUND., <https://datacenter.aecf.org/data/tables/11504-population-by-birth-cohort-generation-and-race-and-ethnicity> [<https://perma.cc/E3LH-7AU8>] (select "By State" under "Location"; click "Uncheck All"; check "New Mexico"; and scroll to 2023).

127. N.M. LEGIS. FIN. COMM., *DESPITE BENEFITS, POVERTY PERSISTS 1* (Dec. 11, 2023), https://www.nmlegis.gov/Entity/LFC/Documents/Program_Evaluation_Reports/Progress%20Report%20-%20Costs%20and%20Stacking%20Income%20Support.pdf [<https://perma.cc/KXT7-DCRD>].

128. Small Area Income & Poverty Estimates (SAIPE) Program, *Small Area Income and Poverty Estimates (SAIPE)*, U.S. CENSUS BUREAU, <https://www.census.gov/data-tools/demo/saipe/> [<https://perma.cc/3453-CENM>].

129. KIDS COUNT Data Center, *Population by Birth Cohort Generation and Race and Ethnicity in New Mexico*, ANNIE E. CASEY FOUND., <https://datacenter.aecf.org/data/tables/51-young-adults-ages-18-to-24-in-poverty> [<https://perma.cc/4A59-UQAR>] (select "By State" under "Location"; click "Uncheck All"; and check "New Mexico").

130. *A National Profile of Youth and Young Adults*, ANNIE E. CASEY FOUND. (Oct. 3, 2024), <https://www.aecf.org/blog/a-national-profile-of-youth-and-young-adults> [<https://perma.cc/3SLY-RWNW>] (reporting 53% of respondents 18 to 24 years old—the highest in the nation with data).

131. *What the Statistics Say About Generation Z*, ANNIE E. CASEY FOUND. (Nov. 1, 2023), <https://www.aecf.org/blog/generation-z-statistics> [<https://perma.cc/TD2Z-YFQJ>]. According to the study, "low-income" families made below 200% of the federal poverty line, or below \$54,958 annually for a family comprised of two adults and two children. *Id.*

Since New Mexico is a large, rural state,¹³² access to traditional banks has historically been challenging. New Mexico residents have some of the worst access to banks in the country today.¹³³ Partially as a result, New Mexico has a higher-than-average population of unbanked and underbanked households.¹³⁴

In fact, New Mexico has the highest percentage of underbanked households in the nation; 20.8% of the state's households have used "nonbank financial services," like nonbank check cashing or payday loan services, in the last twelve months despite having a checking or saving account.¹³⁵ Meanwhile, 5.3% of New Mexico households are unbanked households without a checking or savings account.¹³⁶ Although the rate of unbanked households is a significant improvement since before the COVID-19 pandemic, New Mexico still has the 11th worst unbanked rate in the country.¹³⁷

Generally, these unbanked and underbanked individuals are highly susceptible to predatory, risky lending schemes since the individuals do not have a traditional bank account or cannot access traditional credit due to their poor or short credit history.¹³⁸ As a result, they turn to nonbank financial services¹³⁹ for credit, which is usually the service that is most conveniently available.¹⁴⁰ High-cost, short-term lending by unbanked and underbanked individuals does not harm equally across

132. *QuickFacts: United States; New Mexico*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US,NM/PST045222> [<https://perma.cc/848H-NQU2>] (reporting approximately 18 people per mile compared to 94 people per mile nationally).

133. Sarah Brady, *States with the Best and Worst Banking Access*, FORBES ADVISOR (Oct. 19, 2023, 9:00 AM), <https://www.forbes.com/advisor/banking/best-and-worst-states-for-banking/> [<https://perma.cc/FAN6-9QNM>] (ranking New Mexico as the third worst state for banking access).

134. See KRISTINA G. FISHER & FRED NATHAN, JR., THINK N.M., HOW PREDATORY LENDING SWALLOWED NEW MEXICO AND WHAT WE CAN DO ABOUT IT 26 (2020), <https://www.thinknewmexico.org/wp-content/uploads/PredatoryLending-web.pdf> [<https://perma.cc/F8CZ-LY4N>]; see also 2023 FDIC SURVEY, *supra* note 8, at 1 ("A household is unbanked if no one in the household had a checking or savings account at a bank or credit union . . ."); *id.* at 15 ("A household is considered underbanked if it had a checking or savings account at a bank or credit union but in the past 12 months had used at least one of eight nonbank financial services (NBFs).").

135. FED. DEPOSIT INS. CORP., 2023 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS APPENDIX TABLES 73–74 (2024) [hereinafter 2023 FDIC SURVEY APPENDIX TABLES], <https://www.fdic.gov/household-survey/2023-fdic-national-survey-unbanked-and-underbanked-households-appendix-tables> [<https://perma.cc/KWX2-WYKK>].

136. *Id.* at 5.

137. *Id.* at 73. From 2017 to 2023, unbanked households made up 11.4%, 8.7%, 7%, and 5.3% of New Mexico households in 2017, 2019, 2021, and 2023 respectively. FED. DEPOSIT INS. CORP., 2021 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS: APPENDIX TABLES 5 (2022) [hereinafter 2021 FDIC SURVEY APPENDIX TABLES], <https://www.fdic.gov/analysis/household-survey/2021appendix.pdf> [<https://perma.cc/FPF6-DXYS>]; 2023 FDIC SURVEY APPENDIX TABLES, *supra* note 135, at 5.

138. See FISHER & NATHAN, *supra* note 134, at 10.

139. Nonbank financial services offer banking services, like lending, without a banking license. James Chen, *Nonbank Financial Institutions: What They Are and How They Work*, INVESTOPEDIA (June 5, 2024), <https://www.investopedia.com/terms/n/nbfcs.asp> [<https://perma.cc/8PRK-4S5Q>]. Payday, pawn shop, auto title, and tax refund anticipation loans are forms of nonbank credit. 2023 FDIC SURVEY, *supra* note 8, at 12.

140. Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563, 613 (2010).

racial lines, as communities of color are less likely to have access to affordable credit than their White counterparts.¹⁴¹

Because of their lack of familiarity with traditional credit, New Mexico's unbanked and underbanked individuals are skeptical or distrusting of it—but they also tend to misunderstand how credit cards and interest rates work, particularly with regards to assessing how much they will have to pay back.¹⁴² This attitude is the result of a lack of financial literacy education among these individuals. Until recently, New Mexico was one of the few states that had not integrated financial literacy into its core K-12 school curriculum.¹⁴³ Previously, only about 10% of high school students would learn how to budget, save, and calculate interest payments in a given school year, and low-income students were less likely to have access to classes that teach these important skills.¹⁴⁴ Unsurprisingly, New Mexico has one of the lowest financial literacy rates in the nation.¹⁴⁵

The combination of mistrust of traditional credit, a lack of financial literacy possessed by the borrower, and readily available, highly marketed nonbank credit has drawn individuals to disfavor using credit cards in favor of other high-cost nonbank credit and services.¹⁴⁶ In 2021, New Mexico households were almost twice as likely to use nonbank credit (like payday loans) than the average household nationwide.¹⁴⁷ New Mexico also had the second-highest rate of households using rent-to-own services¹⁴⁸—a cousin to BNPL loans—in the nation.¹⁴⁹ This was a slight

141. See Foohey & Martin, *supra* note 51, at 484 (“The demographics of payday loan customers reflect the demographics of income inequality in America . . . Single women with children, Black Americans, Latinx Americans, and recent immigrants are more likely to use payday loans and other fringe products than other groups.” (footnotes omitted)).

142. Professor Nathalie Martin's qualitative study of payday borrowers illustrates this well. In her 2009 to 2010 study, survey participants who had credit cards had negative perceptions of credit cards, thought that they were to be reserved for emergencies, or incorrectly viewed them as more expensive and insidious than payday loans. Martin, *supra* note 140, at 605–08.

143. See *infra* Section V.D.

144. See FISHER & NATHAN, *supra* note 134, at 26.

145. See *id.*

146. Researchers are starting to link BNPL use with low financial literacy. In an Australian study, “financial literacy was associated with lower perceived benefits of both products and higher perceived risks of BNPL [loans].” Paul Gerrans, Dirk G. Baur & Shane Lavagna-Slater, *Fintech and Responsibility: Buy-Now-Pay-Later Arrangements*, 47(3) AUSTRALIAN J. MGMT., 474, 496 (2022). Those with budgeting skills and saving goals were likely to view BNPL loans as higher risk. *Id.*

147. 2021 FDIC SURVEY APPENDIX TABLES, *supra* note 137, at 67 (New Mexico: 8.1%; national average: 4.4%).

148. Like BNPL loans, rent-to-own services are higher-cost installment loans offered by stores to help potential customers buy items like furniture. *Buy Now, Pay Later, Rent-to-Own, Lease-to-Own, and Layaway*, *supra* note 4. They also tend to advertise that there is no credit check involved. *Id.*

149. 2021 FDIC SURVEY APPENDIX TABLES, *supra* note 137, at 67–68. New Mexico, at 3.2%, was ranked second to Mississippi at 3.8%. *Id.* Meanwhile, the national average was 1.2%. *Id.*

uptick in usage,¹⁵⁰ even though total use of alternative nonbank credit decreased statewide during the same year.¹⁵¹

B. Early Data Provides a Glimpse into New Mexico’s BNPL Lending Habits and Potential Risks

In July 2024, the New Mexico Financial Institutions Division released its first small loan annual report that included BNPL loan activity.¹⁵² Although the 2023 data does not fully disaggregate BNPL loans from other unsecured small installment loans, it illustrates that New Mexico residents are using BNPL loans along with the rest of the nation, and repeated BNPL use by younger borrowers is meeting or outpacing reported use in other national and regional surveys.

In 2023, small loan lenders like Affirm and Afterpay reported three times as many unsecured loans than they did in 2022.¹⁵³ “Traditional” BNPL loans¹⁵⁴ accounted for 96.9%, or 774,309, of all unsecured installment loans issued in 2023.¹⁵⁵ Out of the 176,392 small loan borrowers, 15.5% of them took out two loans while 38.57% of them took out three or more loans.¹⁵⁶ Younger consumers appear to be driving BNPL borrowing.¹⁵⁷ And despite a reduction in the interest rate cap from 175% to 36%, the total amount of charged delinquency or late payment fees barely budged.¹⁵⁸

Even though state-specific data on BNPL borrowing habits is early and limited, considering the above discussion, it is reasonable to think that New Mexico borrowers will be at a higher risk of negative financial consequences caused by BNPL loans. The average New Mexico consumer is precisely the type of borrower attracted to and targeted by BNPL companies. And New Mexico consumers appear

150. See FED. DEPOSIT INS. CORP., 2019 FDIC SURVEY OF HOUSEHOLD USE OF BANKING AND FINANCIAL SERVICES APPENDIX TABLES 90 (2020), <https://www.fdic.gov/analysis/household-survey/2019/2019appendix.pdf> [<https://perma.cc/G73R-CYTM>]. New Mexico, at 3%, was ranked second to Arkansas at 3.4%. *Id.* Meanwhile, the national average was 1.2%. *Id.*

151. Total usage of nonbank credit dropped from 9.4% to 8.1%. See *id.*; 2021 FDIC SURVEY APPENDIX TABLES, *supra* note 137, at 67–68.

152. See *infra* Section IV.B.2 (discussing the 2022 legislation that imposed reporting requirements on BNPL companies beginning in 2023).

153. NM FID’s 2022 annual report only reported 86,650 unsecured small installment loans by 58,054 individual borrowers. N.M. FIN. INSTS. DIV., 2022 NEW MEXICO SMALL LOAN ACT ANNUAL REPORT 1 (2023) [hereinafter 2022 SLA REPORT]. In 2023, that number skyrocketed to 799,113 unsecured small installment loans by 176,392 individual borrowers. N.M. FIN. INSTS. DIV., 2023 NEW MEXICO SMALL LOAN ACT ANNUAL REPORT 2 (2024) [hereinafter 2023 SLA REPORT].

154. BNPL loans are identified in the report as unsecured small loans payable in fewer than 120 days. 2023 SLA REPORT, *supra* note 153, at 4. BNPL loans paid every two weeks accounted for 99.9% of all unsecured small loans paid in fewer than 120 days. *Id.*

155. *Id.*

156. *Id.* at 5.

157. In 2023, the *percentage* of unsecured small loan borrowers ages 65 and older dropped by about 50% compared 2022 even though the *number* of borrowers ages 65 and older increased by 52%. Compare *id.* at 7 (11,215 borrowers equaling 6.4% of total borrowers), with 2022 SLA REPORT, *supra* note 153, at 7 (7,376 borrowers equaling 13% of total borrowers).

158. In 2023, unsecured small installment loan borrowers paid \$164,944 in fees compared to \$188,352 in fees in 2022. Compare 2023 SLA REPORT, *supra* note 153, at 3, with 2022 SLA REPORT, *supra* note 153, at 3. See a discussion of the interest rate cap in *infra* Section IV.B.

to be quickly adopting BNPL usage. As New Mexico legislators, scholars, and consumer advocates have learned, there is a serious need to access affordable credit. As a result, New Mexico consumers need more BNPL safeguards under existing state and federal law. To create them, New Mexico regulators need more BNPL-specific data.¹⁵⁹

IV. SHORTCOMINGS IN REGULATIONS LEAVE BNPL BORROWERS WITHOUT IMPORTANT PROTECTIONS

Currently, a patchwork of federal and state laws aims to protect borrowers from predatory lending practices. This Part describes these existing regulations as they apply to BNPL companies, beginning with a brief description of applicable federal law in Section IV.A. Although imperfect, New Mexico has some of the strongest consumer protections in the United States, and BNPL companies are already regulated under state law. As its laws could be useful for other states seeking to implement their own regulatory schemes, Section IV.B describes New Mexico's laws governing installment loans.

A. The Future of Federal BNPL Loan Regulation Is Unclear

Consumer credit borrowers have certain baseline protections under federal law. The Truth in Lending Act (TILA),¹⁶⁰ as implemented by Regulation Z,¹⁶¹ requires “a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various [available] credit terms . . . and avoid the uninformed use of credit.”¹⁶² Depending on the type of credit, Regulation Z requires creditors to disclose fees “clearly and conspicuously,”¹⁶³ assess a consumer's ability to repay the loan by evaluating the existing debt obligations,¹⁶⁴ and provide certain rights to dispute charges (known as chargebacks)¹⁶⁵ and resolve billing issues.¹⁶⁶ Since 2010, the Consumer Financial Protection Bureau (CFPB) has the rulemaking and enforcement authority to prevent “any unfair, deceptive, or abusive act or

159. See *infra* Section V.B for a discussion of BNPL-specific data that could be gathered under the New Mexico Small Loan Act of 1955.

160. 15 U.S.C. §§ 1601–1667f.

161. 12 C.F.R. § 1026 (2024). TILA, enacted and amended by Congress, is implemented by Regulation Z, which can be amended through rules promulgated by the CFPB. For more background information, see CONSUMER FIN. PROTECTION BUREAU, LAWS AND REGULATIONS: TILA (2015), https://files.consumerfinance.gov/f/201503_cfpb_truth-in-lending-act.pdf [https://perma.cc/Q9WQ-7DPM] and CONG. RSCH. SERV., IF12769, OVERVIEW OF THE TRUTH IN LENDING ACT (2024), <https://crsreports.congress.gov/product/pdf/IF/IF12769> [https://perma.cc/EE87-SKYX].

162. Truth in Lending; Determination of Effect on State Laws (California, New York, Utah, and Virginia), 88 Fed. Reg. 19214, 19215 (Mar. 31, 2023) (to be codified at 12 C.F.R. pt. 1026), <https://www.govinfo.gov/content/pkg/FR-2023-03-31/pdf/2023-06719.pdf> [https://perma.cc/T5T3-AZZF] (quoting TILA § 102(a), 15 U.S.C. § 1601(a)); see also JAMES PANNABECKER, 1 TRUTH-IN-LENDING MANUAL: TEXT AND FORMS § 1.03 (A.S. Pratt, coverage through November 2024).

163. 15 U.S.C. § 1632(a); Reg. Z, 12 C.F.R. § 1026.17(a)(1) (closed-end credit); Reg. Z, 12 C.F.R. § 1026.5(a)(1)(i) (open-end credit).

164. See 15 U.S.C. § 1665e; Reg. Z, 12 C.F.R. § 1026.51(a)(1)(i) (open-end credit card accounts).

165. 15 U.S.C. § 1666i; Reg. Z, 12 C.F.R. § 1026.12(c) (open-end credit cards).

166. 15 U.S.C. § 1666; Reg. Z, 12 C.F.R. § 1026.13 (open-end credit).

practice” in consumer finance and regulate credit disclosure rules under Regulation Z.¹⁶⁷

Until May 2024, the CFPB had not clarified whether and how BNPL loans fit within existing federal regulations.¹⁶⁸ After indications that it would increase BNPL regulation and supervision,¹⁶⁹ the CFPB issued an anticipated rule (BNPL Rule) interpreting Regulation Z to include BNPL loans and lenders.¹⁷⁰ The BNPL Rule rests on the agency’s conclusion that BNPL digital user accounts are “credit cards” as defined by Regulation Z.¹⁷¹ Because BNPL digital user accounts are created and used for the purpose of providing consumers with access to credit for purchases from time to time, they are “other credit devices” and “other single credit devices” under TILA and Regulation Z’s broad and flexible definitions of “credit cards” as intended by Congress.¹⁷² Since BNPL companies issue credit cards and extend credit, they are “card issuers” under Regulation Z and “creditors” under Subparts A, B, and D of Regulation Z.¹⁷³ Therefore, they must disclose certain terms, provide periodic billing statements, and provide dispute and fraud protections.¹⁷⁴

Perhaps unsurprisingly, the BNPL Rule has received mixed responses from industry and consumer groups. Consumer advocates overwhelmingly support the BNPL Rule, but they are quick to note that the rule does not require BNPL companies to meaningfully assess a consumer’s ability to repay the loan, require reporting of BNPL loans to credit agencies, or impose reasonable and proportional fees—leaving significant gaps in consumer protection.¹⁷⁵ Meanwhile, BNPL companies and trade

167. Truth in Lending; Determination of Effect on State Laws (California, New York, Utah, and Virginia), 88 Fed. Reg. at 19215.

168. See Truth in Lending (Regulation Z); Use of Digital User Accounts to Access Buy Now, Pay Later Loans, 89 Fed. Reg. 47068, 47070 (May 31, 2024) (to be codified at 12 C.F.R. pt. 1026), <https://www.govinfo.gov/content/pkg/FR-2024-05-31/pdf/2024-11800.pdf> [<https://perma.cc/ZEE7-J4KK>]; see also Johnson, *supra* note 13, at 454 (presuming that BNPL loans evade TILA).

169. In anticipation of increased its supervision of fintech companies, in 2022 the CFPB promulgated a procedural rule that would provide more transparency to the public on how it determines “risky conduct” by nonbanks to consumers. See Press Release, Consumer Fin. Prot. Bureau, CFPB Invokes Dormant Authority to Examine Nonbank Companies Posing Risks to Consumers (Apr. 25, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-invokes-dormant-authority-to-examine-nonbank-companies-posing-risks-to-consumers/> [<https://perma.cc/H7L6-QM6A>]. Additionally, the industry was put on high alert in December 2021 when the CFPB issued a market monitoring order to the largest five BNPL companies to “provide information necessary to conduct such analysis in compliance with Congress’ mandate that the Bureau monitor for risks to consumers in the offering or provision of consumer financial products or services.” Press Release, Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau Opens Inquiry into “Buy Now, Pay Later” Credit (Dec. 16, 2021), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-opens-inquiry-into-buy-now-pay-later-credit/> [<https://perma.cc/53SJ-67AF>].

170. Truth in Lending (Regulation Z); Use of Digital User Accounts to Access Buy Now, Pay Later Loans, 89 Fed. Reg. at 47069.

171. See *id.* at 47071–72.

172. *Id.*

173. *Id.*

174. *Id.*; see also CFPB BNPL FAQs, *supra* note 8, at 7–9 (providing a full list of applicable Regulation Z provisions for compliance guidance).

175. See Press Release, Consumer Fed. of Am., Nearly 100 Groups Support the CFPB’s “Buy Now Pay Later” Proposal, Which Will Protect Consumers from Harmful Practices (Aug. 2, 2024),

associations have asked for more clarity in the BNPL Rule and more time for compliance.¹⁷⁶ Some of them have asserted that the CFPB inappropriately issued the BNPL Rule without going through the notice and comment process, a procedure that allows for the public and affected parties to weigh in on proposed rules before they are finalized.¹⁷⁷ And at least one commenter has criticized the CFPB's interpretation that BNPL's digital user accounts are credit cards under Regulation Z.¹⁷⁸

Despite an effective date of July 30, 2024, it is unclear whether and when consumers will benefit from the BNPL Rule. In August 2024, the CFPB delayed enforcement of the Rule's compliance to an unspecified date.¹⁷⁹ Before a new date was issued, the Financial Technology Association (FTA) challenged the BNPL Rule in the District of Columbia, asking the court to strike down the BNPL Rule because the CFPB failed to follow procedural requirements, the BNPL Rule exceeds the CFPB's statutory authority, and the BNPL Rule is arbitrary and capricious and an abuse of the CFPB's discretion.¹⁸⁰ Industry experts, including the BNPL Rule's supporters, have acknowledged that BNPL loans do not neatly fit within Regulation Z's protections and required disclosures.¹⁸¹ Considering recent Supreme Court rulings, it is unclear whether the BNPL Rule will withstand judicial review.¹⁸²

https://consumerfed.org/press_release/nearly-100-groups-support-the-cfpbs-buy-now-pay-later-proposal-which-will-protect-consumers-from-harmful-practices/ [https://perma.cc/RCH7-YBZT].

176. See, e.g., Am. Fintech Council, Comment Letter on Truth in Lending (Regulation Z); Use of Digital User Accounts to Access Buy Now, Pay Later Loans (July 1, 2024), https://downloads.regulations.gov/CFPB-2024-0017-0009/attachment_1.pdf [https://perma.cc/D7C7-T4KE]; Affirm, Inc., Comment Letter on Truth in Lending (Regulation Z); Use of Digital User Accounts to Access Buy Now, Pay Later Loans (July 25, 2024), https://downloads.regulations.gov/CFPB-2024-0017-0015/attachment_1.pdf [https://perma.cc/HQY3-VRLC].

177. See ABA, *U.S. Chamber Question CFPB Process for Implementing Buy Now, Pay Later Rule*, ABA BANKING J. (Aug. 8, 2024), <https://bankingjournal.aba.com/2024/08/aba-u-s-chamber-question-cfpb-process-for-implementing-buy-now-pay-later-rule/> [https://perma.cc/UUP2-6FWW]. Under the Administrative Procedure Act (APA), an agency rule is required to undergo notice and comment, subject to certain exceptions like the issuance of an interpretive rule. See 5 U.S.C. § 553(b). Interpretative rules do not impose new regulatory requirements and cannot provide an independent basis for a noncompliance action. Admin. Conf. of the U.S., Recommendation 2019-1, Agency Guidance Through Interpretive Rules, 84 Fed. Reg. 38927, 38929 (Aug. 8, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-08-08/pdf/2019-16946.pdf> [https://perma.cc/5WSX-26N3].

178. See Fin. Tech. Ass'n, Comment Letter on Truth in Lending (Regulation Z); Use of Digital User Accounts to Access Buy Now, Pay Later Loans (August 1, 2024), https://downloads.regulations.gov/CFPB-2024-0017-0038/attachment_1.pdf [https://perma.cc/5WDW-MLU6].

179. See Rohit Chopra, *What Buy Now, Pay Later Lenders Are Doing to be Upfront with Borrowers*, CONSUMER FIN. PROTECTION BUREAU (Aug. 16, 2024), <https://www.consumerfinance.gov/about-us/blog/what-buy-now-pay-later-lenders-are-doing-to-be-upfront-with-borrowers/> [https://perma.cc/7WKK-M3GG].

180. Complaint, *supra* note 20, at 24–31.

181. Ctr. for Responsible Lending, *supra* note 5, at 4–5.

182. In June 2024, the Supreme Court discarded the judicial doctrine known as *Chevron* deference, where courts defer to agencies' permissible interpretations of ambiguous statutes. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412–31 (2024). Considering *Loper Bright's* holding, CFPB rules—like the BNPL Rule—relying on arguably expansive definitions of TILA may be less likely to withstand judicial review. On the other hand, the BNPL Rule also relies on definitions within Regulation Z. In 2019, the Court upheld *Auer* deference, where a court will defer to an agency's "reasonable readings of genuinely ambiguous regulations." *Kisor v. Wilkie*, 588 U.S. 558, 563 (2019) (citing *Auer v. Robbins*,

Additionally, current legislators, former CFPB officials, and consumer advocates anticipate that the CFPB will favor deregulation in its rulemaking and enforcement actions under the new presidential administration.¹⁸³

In anticipation of the BNPL Rule, or more likely because it is good (i.e., profitable) business, a few BNPL companies have already adopted certain protective measures.¹⁸⁴ For instance, BNPL companies are increasingly strengthening their underwriting standards so that they meaningfully assess a potential borrower's ability to repay the BNPL loan.¹⁸⁵ However, these changes are motivated by the companies' desire to reduce nonrepayment losses, not necessarily for the benefit of the borrower, and underwriting standards still differ among BNPL companies.¹⁸⁶ Many BNPL companies also offer "hardship" options under which people can reach out to BNPL companies individually to reschedule or pause payments, but these options are not widely advertised.¹⁸⁷ Without federal regulation, there is little incentive to raise the "floor," and these types of piecemeal protections only create further confusion within the BNPL lending landscape.

Federal regulation would be most effective in protecting vulnerable consumers and reducing BNPL borrower confusion nationwide. However, meaningful near-term federal action is unlikely. Even if the BNPL Rule is enforced, states like New Mexico, where BNPL can uniquely harm their residents, should take action to protect their consumers in the long term.

B. In the Absence of Clear Federal Regulations, New Mexico Regulations Can Serve as a Model for Other States

In New Mexico, BNPL companies are required to obtain licenses to do business in the state and can be penalized for not complying with New Mexico's consumer protections.¹⁸⁸ What follows is a description of New Mexico's statutory

519 U.S. 452 (1997)). If a reviewing court finds that the BNPL Rule is based on a "genuine" ambiguity in Regulation Z, the court may defer to the CFPB's reasoning and uphold the BNPL Rule. If the court strikes down the BNPL Rule, the CFPB may have to issue a new rule that provides BNPL loan protections or wait for Congress to amend TILA to include BNPL loans.

183. See Tony Romm, *Trump and GOP Eye New Limits on Consumer Financial Protection Bureau*, WASH. POST (Nov. 23, 2024), <https://www.washingtonpost.com/business/2024/11/23/trump-republicans-cfpb/> [https://perma.cc/PSN6-LD9W]; J.J. McCorvey, *Trump Could Dismantle Newly Built Guardrails Around Your Wallet, Consumer Groups Warn*, NBC NEWS (Dec. 2, 2024, 3:00 AM), <https://www.nbcnews.com/business/personal-finance/cfpb-biden-trump-consumer-protection-rcna180342> [https://perma.cc/ZGM7-PXSQ].

184. See Press Release, Am. Fintech Council, Federal: American Fintech Council Publishes BNPL Policy Standards (Aug. 12, 2022), <https://www.fintechcouncil.org/press-releases/american-fintech-council-publishes-bnpl-policy-standards> [https://perma.cc/PR67-TQHY].

185. See CFPB BNPL MARKET TRENDS, *supra* note 1, at 10.

186. *Id.* at 10, 45.

187. See, e.g., *What is Financial Hardship?*, AFTERPAY, <https://help.afterpay.com/hc/en-us/articles/900003021786-What-is-financial-hardship> [https://perma.cc/48VE-L4S7].

188. Not every state's licensing regime regulates consumer loans paid in four installments with zero interest or finance charges (the defining characteristics of a BNPL loan). See, e.g., KAN. STAT. ANN. § 16a-1-301(21) (2024); IND. CODE ANN. § 24-4.5-1-301.5(9), (32) (2024). This lack of explicit BNPL regulation prevents states from monitoring BNPL companies' practices and investigating and fining BNPL companies when they engage in predatory practices, even if the states can use these measures to regulate other installment loan lenders.

framework¹⁸⁹ and the state’s most recent effort to curb predatory lending, including the state’s inclusion of BNPL companies under its regulatory scheme.

1. *SLA and BILA Lay the Groundwork in New Mexico*

The New Mexico Legislature passed the Small Loan Act of 1955 (SLA) in response to the “widespread demand for small loans,” economic and financial situations driving predatory lending, and the resulting exploitation of the borrowers.¹⁹⁰ The legislature intended the SLA to protect vulnerable New Mexico borrowers “to insure more rigid public regulation and supervision of those engaging in the business of making small loans . . . to facilitate the elimination of abuse of borrowers; and to establish a system which will more adequately provide honest and efficient small loan service and stimulate competitive reductions in charges.”¹⁹¹ It further recognized that “without regulations, borrowers of small sums are often exploited by charges generally exorbitant in relation to those necessary to conduct a small loan business.”¹⁹² Four years later, the legislature passed the New Mexico Bank Installment Loan Act of 1959 (BILA),¹⁹³ which further specified requirements for installment loans, loans to be repaid in a minimum of four equal payments that included principal and interest.¹⁹⁴

In the following decades, multiple amendments were made to both Acts in an attempt to curb predatory lending, with major reforms in 2017 that included a 175% interest rate cap and inclusion of online lenders under SLA regulation.¹⁹⁵ While the cap was far above what some legislators desired, lowering the cap to 175% saved New Mexico households up to \$250 million annually¹⁹⁶—illustrating the scale of the financial harm caused by existing predatory, nonbank small loan lenders in the state. More amendments followed, which are described below.

2. *A Hard-Won Effort Leaves BNPL Concerns Unaddressed*

In 2022, the New Mexico Legislature passed House Bill 132 after a decades-long effort to curb predatory small loan practices, particularly their interest rates that continued to trap borrowers in a cycle of debt.¹⁹⁷ This Act, known as House

189. This Comment focuses on the New Mexico Small Loan Act of 1955 (SLA), N.M. STAT. ANN. §§ 58-15-1 to -42 (2022), and the New Mexico Bank Installment Loan Act of 1959 (BILA), N.M. STAT. ANN. §§ 58-7-1 to -11 (2022). BNPL borrowers may also have a remedy for violations of the Unfair Practices Act (UPA), which provides a cause of action for those likely to be harmed from unfair, deceptive, or unconscionable trade practices. See N.M. STAT. ANN. §§ 57-12-1 to -26 (2019).

190. § 58-15-1(A)–(C) (1955). For a history of predatory lending practices that led to the SLA, see FISHER & NATHAN, *supra* note 134, at 11–13.

191. § 58-15-1(D); see also S.I.C. Finance-Loans of Menaul, Inc. v. Upton, 1966-NMSC-012, ¶ 6, 75 N.M. 780, 411 P.2d 755 (“Unquestionably, the general welfare of the public is the primary concern of the legislature in providing for the regulation and control of small loan businesses.”).

192. § 58-15-1(C).

193. §§ 58-7-1 to -11.

194. § 58-7-3.

195. FISHER & NATHAN, *supra* note 134, at 11–15.

196. *Id.* at 15.

197. Press Release, Ctr. on L. & Poverty, Bill Capping Small Loan Interest Rates Passes the Legislature (Feb. 16, 2022), <https://www.nmpovertylaw.org/2022/02/16/bill-capping-small-loan-interest-rates-passes-the-legislature/> [<https://perma.cc/QN3J-EHPZ>].

Bill 132 (HB 132), limited a loan’s interest rate cap to 36%, raised the small loan amount to \$10,000, and sought to prevent regulatory evasion tactics.¹⁹⁸

HB 132 also enacted a few measures applicable to BNPL companies. First, HB 132 changed the statutory definition of “installment loan” to include BNPL loans. Specifically, it expanded the scopes of the SLA and BILA to include installment loans “in any number of payments and with any initial stated days to maturity that bears no finance charge as disclosed pursuant to . . . [Regulation Z] and with respect to which no other fees or charges of any kind are imposed at any time.”¹⁹⁹ Prior to HB 132’s enactment, BNPL companies existed in a regulatory grey area.²⁰⁰

Second, HB 132 also implemented a cap of a 5% or \$10 late fee (whichever is lower) that could only be levied once per late installment.²⁰¹ The late fee could not be imposed until ten days past the loan’s due date.²⁰² This new fee limit was lower than what some BNPL companies charged at the time, and was likely met with resistance during the legislative process.²⁰³ Although HB 132 did not require that BNPL companies report payment activity to credit agencies, if a BNPL company reported to credit agencies, it was required to report both positive and negative activity.²⁰⁴

Since HB 132’s definition of “installment loans” unequivocally included BNPL loans, and an exception for credit reporting for BNPL loans was included, it is evident that there was some recognized need for BNPL company regulation. However, given that no other BNPL-specific protective measures were included, one can conclude that legislators did not intend for the bill to minimize harms specific to BNPL loans. This issue is discussed in the next subsection.

3. *House Bill 132 Has Little Effect on BNPL Companies*

Just before HB 132’s enactment date, Afterpay announced that it was no longer offering BNPL loans in New Mexico.²⁰⁵ Afterpay noted that its BNPL loan’s minimum \$8 late fee violated HB 132’s 5% late fee cap.²⁰⁶ However, about one

198. 2022 N.M. Laws 275–314.

199. 2022 N.M. Laws 286–87.

200. Prior to HB 132, an installment loan required “a minimum of four substantially equal payments of principal and interest to pay off a loan in its entirety with an initial stated maturity of not less than one hundred twenty days to maturity.” N.M. STAT. ANN. § 58-15-2 (F) (2019). BNPL loans did not clearly fit the definition since they did not charge interest and were typically paid in fewer than 120 days.

201. 2022 N.M. Laws 276.

202. *Id.*

203. For example, see Afterpay’s temporary departure in response to the late fee change *infra* notes 205–08 and accompanying text.

204. 2022 N.M. Laws 305.

205. Alaina Mencinger, ‘Buy Now, Pay Later’ Company Afterpay Quits in New Mexico, ALBUQUERQUE J. (Dec. 31, 2022), https://www.abqjournal.com/news/local/buy-now-pay-later-company-afterpay-quits-in-new-mexico/article_58363e14-a251-5190-84ea-3903bb80dd5e.html [<https://perma.cc/YN8T-TA4K>].

206. *Id.*

month after its departure, Afterpay received a Small Loan Company License.²⁰⁷ It announced its return to the state in March 2023.²⁰⁸ Afterpay's quick adjustment of its terms to comply with HB 132 illustrates the agility of BNPL companies to modify their services in order to comply with, and potentially evade, state regulations. And Afterpay's willingness to comply with the new regulations also indicates that it recognized that leaving the state, and losing that customer base, is not in the company's financial interest.

Since the passage of HB 132, BNPL loan offerings have expanded. Currently, at least five BNPL companies operate in the state, including Affirm,²⁰⁹ Afterpay,²¹⁰ Uplift/Upgrade,²¹¹ Sezzle,²¹² and PayPal.²¹³ Although BNPL companies are required to comply with the interest rate and late fee cap, the limits provided by the provisions within SLA and BILA have not led to their departure from the state. However, a few BNPL companies, such as Klarna, are unavailable in New Mexico, likely due to state regulations.²¹⁴ While HB 132 resulted in restrictions in the fees BNPL companies can impose, the industry appears to be unaffected by the new regulations, helping to demonstrate how difficult it is to implement long-lasting, impactful consumer protections.

V. NEW MEXICO REGULATORS MUST ACT NOW TO MINIMIZE CONSUMER HARM

As the previous section discusses, New Mexico borrowers are seeing some benefits from HB 132's protective measures, like the 36% interest rate cap. There is an indication of some self-correction happening within BNPL companies, like an increase in underwriting practices²¹⁵ and new "hardship" options.²¹⁶ Considering these developments, why should New Mexico take further action?

207. N.M. REGUL. LICENSING DEP'T FIN. INSTS. DIV., SMALL LOAN COMPANY DIRECTORY AS OF OCTOBER 4, 2024, <https://www.rld.nm.gov/wp-content/uploads/2024/10/Small-Loan-Directory-as-of-October-4-2024.pdf> [<https://perma.cc/B8GH-DHA5>] (license number 2396 approved on February 2, 2023).

208. Alaina Mencinger, *Afterpay Back in New Mexico*, ALBUQUERQUE J. (Mar. 6, 2023), https://www.abqjournal.com/news/local/afterpay-back-in-new-mexico/article_93e0b2c6-6043-58fc-8d03-f99142db35df.html [<https://perma.cc/S2FG-KXRN>].

209. N.M. REGUL. LICENSING DEP'T FIN. INSTS. DIV., *supra* note 207 (license number 2113).

210. *Id.* (license numbers 2396 and 2446).

211. *Id.* (license numbers 2078, 2384, and 2457).

212. Sezzle is not listed in the most recent small loan licensing list, but it includes New Mexico borrowers in its merchant agreement. *See Sezzle Merchant Agreement*, SEZZLE (Sept. 26, 2024), <https://legal.sezzle.com/merchant/en-ca> [<https://perma.cc/63Z3-CYR5>].

213. N.M. REGUL. LICENSING DEP'T FIN. INSTS. DIV., *supra* note 207 (license number 2410).

214. *See* Alaina Mencinger, *Afterpay's Out. What's Next for 'Buy Now, Pay Later' in NM?*, ALBUQUERQUE J. (Jan. 14, 2023), https://www.abqjournal.com/news/local/afterpays-out-whats-next-for-buy-now-pay-later-in-nm/article_43513ec6-0dd2-5ae8-a3a3-34c89cdd34e5.html [<https://perma.cc/D76J-76HD>]; *see also* *Where Can I Pay in 4 with Klarna?*, Subheading to *Questions?*, KLARNA, <https://www.klarna.com/us/pay-in-4/> [<https://perma.cc/MHR8-BQ8Z>].

215. CFPB BNPL MARKET TRENDS, *supra* note 1, at 45.

216. Companies like Afterpay, Sezzle, and Affirm tell their customers that they can adjust payment due dates on a case-by-case basis during times of "hardship." However, the available relief is not disclosed. *See, e.g., What is Financial Hardship?*, *supra* note 187.

First, even with self-correction, BNPL companies will continue to pick and choose which consumer-benefiting measures they will implement. One BNPL company may allow new lenders to reschedule loan payments, another may not.²¹⁷ One BNPL company may impose a late fee after ten days, another may not impose a late fee at all.²¹⁸ This can create widespread confusion among consumers. While variation among loan providers is normal—and there is nothing inherently wrong with variation—there needs to be an easier way for potential customers to find essential BNPL loan-specific terms and conditions.

Second, even the most optimistic person will acknowledge that not every business has its customers' wellbeing in mind. BNPL companies need to generate profit from increasing consumer usage and reliance, and business decisions will ultimately be driven by obligations to BNPL company investors. Although not all BNPL companies may be bad marketplace actors, creating a higher "floor" for BNPL loans will allow New Mexico to keep predatory practices out of the state, especially considering the state's history with predatory lending.

Third, and most importantly, BNPL loans raise unique consumer protection concerns, which are not addressed under existing federal and state law, including HB 132. BNPL companies provide loans that are easy to obtain—and arguably encourage impulsivity and spending beyond one's means.²¹⁹ And new technologies relying on advanced algorithms allow them to identify which populations will be most attracted to these loans.²²⁰ When an industry markets directly to vulnerable populations, it needs to be examined with more scrutiny. Although some predatory practices, like 175% interest rates, are prohibited in New Mexico, the law does not address how to minimize or prevent consumer confusion, overextension, loan stacking, and the potential disparate impact on underserved and underbanked customers, especially among younger, female consumers of color. Current regulations only get New Mexico consumers partway there.

A. New Mexico Regulators Have Broad Authority to Act

In the absence of enforced CFPB regulations, New Mexico needs to take quick regulatory action to begin addressing BNPL loan concerns. New Mexico's high poverty levels and the vulnerability of its underbanked residents to predatory lending schemes underscore the need for action to happen sooner rather than later.

217. *Compare How Do I Reschedule a Payment?*, SEZZLE, <https://shopper-help.sezzle.com/hc/en-us/articles/360045946992-How-do-I-reschedule-a-payment> [<https://perma.cc/MWZ5-MK5A>] (can reschedule one repayment date for free, per loan), with *Can I Change the Due Date of a Payment?*, *supra* note 94 (no rescheduling option for first forty-two days after account creation).

218. *Compare What Happens if I Don't Pay on Time?*, Subheading to *Afterpay Is Committed to Putting You in Control of Your Finances.*, AFTERPAY, <https://www.afterpay.com/en-US/responsible-spending> [<https://perma.cc/44UE-MAEX>] (A late fee may be charged after ten days of nonpayment), with *What Happens if I Make a Late Payment?*, *supra* note 96 (no late fee).

219. *See supra* Section I.A.

220. Ctr. for Responsible Lending et al., *supra* note 18, at 16–17.

Without state action, there are few avenues for consumers to pursue since mandatory arbitration clauses can prevent individual and class action suits.²²¹

New Mexico has the authority to expand its consumer protections and regulation of BNPL companies.²²² Under New Mexico law, the SLA²²³ grants the Financial Institutions Division (FID) director broad authority to regulate BNPL companies for the purpose of preventing abusive lending practices and promoting an “honest” small loan lending environment.²²⁴ Specifically, the law provides that the director has the “authority to make reasonable regulations and orders for the administration and enforcement of [the SLA].”²²⁵ The FID director is also authorized to issue “interpretative regulations to effectuate the purposes of the Bank Installment Loan Act of 1959.”²²⁶ Furthermore, the FID director is “expressly authorized to make regulations and orders” in all areas of consumer loans, such as licensee compliance, loan disclosures to consumers, and loan terms and fees.²²⁷ Using this authority, New Mexico has the ability to begin tailoring its regulation to address BNPL-specific concerns and lay the groundwork for more comprehensive long-term efforts.

B. Minor Adjustments to Reporting Requirements Would Reveal a Clearer Picture of BNPL-Specific Harms

While one-off surveys can reveal potentially concerning issues, regular data gathering is required to identify discrete harms, keep regulated entities accountable, and protect New Mexico borrowers. Officials from other states see warning signs ahead for BNPL borrowers, particularly for individuals already having trouble meeting their financial obligations.²²⁸ Following recent state-level data, New Mexico regulators should also be concerned. And, unlike some other states, New Mexico regulators already have the authority to immediately act, beginning with changes to BNPL loan reporting requirements.

Under the SLA, the FID director has broad authority to gather information on BNPL companies’ loan services at least annually by either performing a one-time

221. In November 2023, the Second Circuit reversed the trial court’s decision denying BNPL company Klarna’s motion to compel arbitration, provided in the mandatory arbitration clause, in a class action alleging that Klarna “misrepresents and conceals the risk of bank-overdraft fees that consumers face when using its pay-over-time service” under the Connecticut Unfair Trade Practice Act. *Edmundson v. Klarna, Inc.*, 85 F.4th 695, 709 (2d Cir. 2023). Although this topic is outside the Comment’s scope, borrowers may have more success overcoming mandatory arbitration clauses under New Mexico law, where arbitration agreements can be invalidated under the common law defense of unconscionability. *See Cordova v. World Fin. Corp. of NM*, 2009-NMSC-021, ¶¶ 21–24, 146 N.M. 256, 208 P.3d 901; *see also* N.M. STAT. ANN. § 44-7A-7 (2001).

222. States are free to enact laws to protect consumers from abusive lending practices unless the laws “prevent[] or significantly interfere[] with the exercise” of lenders or if they are preempted by another provision of federal law. 12 U.S.C. § 25b(b)(1).

223. Rather confusingly, many SLA provisions apply to BILA. To avoid saying “SLA and BILA” at each instance, the following section will simply use “SLA” to apply to BNPL loans regulated under SLA and BILA.

224. *See* N.M. STAT. ANN. § 58-15-1(D) (1955).

225. § 58-15-11(A).

226. N.M. STAT. ANN. § 58-7-9(E) (2022).

227. § 58-15-11(A).

228. *See* State Att’y’s Gen. of Ill., Cal., Colo. et. al., *supra* note 49, at 4–5.

inspection or increasing the information required in yearly reporting. First, the SLA grants the FID director the authority to inspect each licensee’s “loans, transactions, books, papers and records of the licensee insofar as they pertain to the business licensed under the [SLA] as the director may deem necessary” at least once a year.²²⁹ This authority extends to what information the director can inspect.²³⁰ Second, each licensed BNPL company must submit an annual report to the FID director with “such relevant information as he may reasonably require” during the prior calendar year.²³¹ While the SLA lists the minimum information that must be included in the report, the FID director determines the full extent of what must be reported by BNPL companies.²³²

Considering BNPL loans’ novel lending structure, their potentially harmful impact to vulnerable borrowers, and potential early warning signs in the FID’s 2023 annual report, state regulators should pay special attention to BNPL loan usage. Strategically gathered administrative data can be a powerful tool in improving state decision-making to create lasting, impactful change.²³³ The FID is already gathering data that will help identify future regulatory actions and inform state policymakers—data like the number of borrowers taking out repeat loans, being charged a late fee, and extending loan payments. Although HB 132 amended the reporting requirements to reflect changes in the law,²³⁴ some additional data points would help identify and anticipate new areas of concern.

For instance, the FID director could require BNPL companies to report approval rates; the number of borrowers by age range (not just those sixty-five and older) and income range; the number of payments denied for lack of funds; and the number of payments made with a debit card, credit card, and checking account.²³⁵ The FID could request that BNPL companies quantify the number of unique borrowers per zip code, which would allow the FID to cross-reference existing

229. § 58-15-9(A); *see also* N.M. Att’y Gen., No. 88-29 (May 3, 1988).

230.

The director shall prescribe rules of procedure for all hearings, examinations or investigations provided for in the New Mexico Small Loan Act of 1955. The director is not bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure or pleading and specification of charges other than as specifically provided in the New Mexico Small Loan Act of 1955 but may conduct hearings, examinations and investigations in the manner best calculated to ascertain the substantial rights of the parties interested.

§ 58-15-9(G).

231. § 58-15-10(E).

232. § 58-15-10.1(A) (“Licensees shall file with the director each year reports containing *at least* the following information for the preceding calendar year.” (emphasis added)).

233. *How States Use Data to Inform Decisions*, PEW CHARITABLE TRUSTS (Feb. 2018), https://www.pewtrusts.org/-/media/assets/2018/02/dasa_how_states_use_data_report_v5.pdf [<https://perma.cc/WW2L-HQM3>].

234. 2022 N.M. Laws 298–304.

235. The CFPB required this information from BNPL companies in its marketing order. *See* Consumer Fin. Prot. Bureau, *supra* note 169. Under Section 58-15-9(A), the FID director has a strong argument that the division has the authority to make a one-time request. However, if the state wanted to expand the annual reporting requirements, the legislature may need to amend Section 58-15-10.1, even though the provision specifies that, at a minimum, the companies must provide the listed information.

demographic data with BNPL usage to better understand statewide BNPL user characteristics.

Since the majority of BNPL loans are still taken out for a specific purchase with a particular merchant, the FID director could also require companies to provide loan amounts per spending category, where available, to identify whether borrowers are increasingly relying on BNPL loans for everyday and necessary purchases. These data points would help confirm or dispel national-level data indicating that younger, low-income consumers of color are at risk of serious financial consequences from BNPL use and determine whether those concerns are realized. This information may also point to areas of concern unique to New Mexico borrowers.

When existing data is paired with BNPL-specific data, regulators can get a comprehensive picture of BNPL loans' impact on New Mexico borrowers. Since the 2023 annual report shows a sharp increase in unsecured installment loans—and that the vast majority of these loans are BNPL loans—the FID director should use their authority to issue a one-time reporting order, and in conjunction, add new data metrics to SLA licensees' annual reporting requirements. Detailed BNPL-specific data could form the foundation for future targeted efforts, including financial literacy outreach, to reach vulnerable potential and current BNPL borrowers.

C. Improved Disclosures Would Address Some BNPL-Related Concerns

In the absence of enforced federal disclosure requirements, the FID director could impose state-level disclosure requirements that would match, or add to, what must be displayed by the BNPL Rule.²³⁶ Under the SLA, “[a] licensee or other person subject to the [SLA] shall not advertise, display, distribute or broadcast or cause or permit to be advertised, displayed, distributed or broadcast in any manner whatsoever a false, misleading or deceptive statement or representation with regard to the *charges, terms or conditions* for loans in the amount or of the value of ten thousand dollars (\$10,000) or less.”²³⁷

As discussed in Part II, many BNPL-specific concerns are rooted in borrower confusion created by a lack of disclosure. The BNPL lending process takes three steps on three web screens with little displayed information; this is a design choice created to minimize borrower friction so that purchases (and company profits) remain high.²³⁸ However, potential costs are not clearly disclosed at loan confirmation. Plus, these potential costs vary across BNPL companies. As a result, a BNPL loan's no- to low-friction application can mislead a borrower as to their BNPL loan's terms and conditions at the time of borrowing.

236. Consumer finance laws are preempted by TILA only if the disclosure laws are “inconsistent” with the Act and “only to the extent of the inconsistency.” 12 U.S.C. § 5551(a)(1); Truth in Lending; Determination of Effect on State Laws (California, New York, Utah, and Virginia), 88 Fed. Reg. 19214, 19214–15 (Mar. 31, 2023) (to be codified at 12 C.F.R. pt. 1026) <https://www.govinfo.gov/content/pkg/FR-2023-03-31/pdf/2023-06719.pdf> [<https://perma.cc/E4D5-LEBV>]. The “inconsistency” standard is the equivalent with conflict preemption, so a state law will be preempted by TILA only if it is (1) impossible for a creditor to “comply with both the [f]ederal law and the [s]tate law” or (2) the state law “stands as an obstacle to the accomplishment and execution of the full purposes of the [f]ederal law” that seeks to meaningfully protect consumers from predatory lending practices. *Id.* at 19216.

237. § 58-15-12 (emphasis added).

238. See *supra* Section I.A.

BNPL companies advertise that BNPL loans do not affect a borrower's credit score, and yet the loans can be charged off and reported to credit agencies. Also, when a BNPL company charges late fees on its loan, the visible fee disclosure may simply be the words "I understand that a late fee of 5% may apply to a late payment" in small, grey font above the loan confirmation button.²³⁹ Conversely, credit cards are required by Regulation Z to "clearly and conspicuously"²⁴⁰ present certain disclosures like interest rates, penalty fees, and late payment fees in "tabular format"²⁴¹ before the first transaction is made.²⁴² Even so, that disclosure may still be hidden behind a hyperlink.²⁴³

Under the SLA, the FID could promulgate a rule requiring BNPL companies to disclose key BNPL-specific terms²⁴⁴—one that complies with or expands upon the BNPL Rule's requirements. Such a disclosure, appearing onscreen below the payment schedule, could include payment rescheduling options, the frequency and amount of late fees, consolidated payment options, charge-off dates, and credit impact from late payment. By requiring specific disclosures that do not conflict with Regulation Z, the FID director can further the SLA's goal of establishing an honest and efficient small loan lending system while staying consistent with the purpose of TILA.

There are several advantages to requiring BNPL companies to display a table disclosing key terms and conditions onscreen just below the loan's payment schedule. Disclosures would make it clearer to borrowers that BNPL is a form of credit, not a payment option. Disclosures would add transparency to a process that, while easy, has potential risks if a payment is late or a checking account has insufficient funds. Disclosures—and the time it takes to read them—also add slightly more friction to the lending process, which may address impulsivity concerns.

A new disclosure requirement for BNPL companies will likely encounter pushback from the industry, particularly since onscreen, visible placement is not currently standard practice or required by the BNPL Rule. To that end, the FID could explore creating a pilot program with BNPL companies willing to work with the state as BNPL companies transition to disclosures required under Regulation Z. Furthermore, as discussed in Part I, BNPL companies promote themselves as a "transparent"²⁴⁵ credit option dedicated to helping young people manage their

239. See Image of Payment Schedule, *supra* note 101.

240. 12 C.F.R. § 1026.5(a)(1)(i).

241. *Id.* § 1026.5(a)(3)(i).

242. *Id.* § 1026.5(b)(1)(i).

243. See Image of Payment Schedule, *supra* note 101.

244. See N.M. STAT. ANN. § 58-15-11(B) (2007) ("Such regulations [of consumer loans] . . . shall specifically address: . . . (3) required disclosure to consumers."). Although Sections 58-15-32 through 58-15-38, referenced in the provision, have since been repealed, the remainder of the section remains intact under Laws 2007, Chapter 86, Section 23.

This recommendation may require legislative action. While the FID promulgated a rule requiring that small loan businesses display a New Mexico Annual Percentage Rate (APR) in addition to the TILA APR, 12.18.3.8 NMAC, this rule was promulgated to clarify a new provision to Section 58-15-17(J) of the SLA under HB 132.

245. *Why Affirm?*, *supra* note 63 ("With Affirm, you'll never owe more than you agree to up front. Instead, you'll always get a flexible, transparent, and convenient way to pay over time.").

budget²⁴⁶ and obtain “financial freedom.”²⁴⁷ As more consumer advocates and states identify BNPL-specific concerns, BNPL companies would benefit from participating in a program promoting consumer lending transparency and financial responsibility. A state-level program could also serve as a testing ground for future CFPB rulemaking.

D. It Is Time for the State to Fulfill Its Statutory Duty to Provide Adult Financial Literacy Education

Importantly, increasing BNPL regulation does not address one of the underlying reasons why New Mexico borrowers turn to nonbank credit like BNPL loans: low financial literacy rates. Consumers make better financial decisions when they are taught the skills necessary to evaluate credit options, calculate interest rates, build good credit habits, invest, and accurately budget their financial resources.²⁴⁸ Although New Mexico recently integrated these skills into its social studies curriculum and added a financial literacy elective to its graduation requirements,²⁴⁹ the state has not made financial literacy education a standalone graduation requirement.²⁵⁰ Furthermore, New Mexico has so far failed in its duty to provide adult financial literacy education to all its residents.²⁵¹

246. *Financial Wellness is a Tap Away*, *supra* note 2 (“Manage your spending while getting what you need—the app makes it easy.”).

247. SEZZLE, <https://sezzle.com/> [<https://perma.cc/2R3M-B2U9>] (“Financial freedom is a right, not a privilege. We’re here to help you achieve financial freedom and take control over your finances so you can build your future.”).

248. FISHER & NATHAN, *supra* note 134, at 28.

249. In 2022, the New Mexico Public Education Department added financial literacy to the social studies curriculum. Claudia L. Silva, *New Mexico Schools Prepare to Implement New Social Studies Curriculum*, CARLSBAD CURRENT ARGUS (Feb. 24, 2022) [<https://perma.cc/SA2Q-EWLY>]. In 2024, the New Mexico Legislature amended the state’s graduation requirements to require that high schools include a financial literacy component in social studies classes and offer a financial literacy elective course that counts towards a math requirement. *See* 2024 N.M. Laws, ch. 33, § 5; N.M. LEGIS. EDUC. COMM., LEGISLATIVE EDUCATION STUDY COMMITTEE BILL ANALYSIS OF H.B. 171, 56th Leg., 2nd Sess. 5–6 (2022), <https://www.nmlegis.gov/Sessions/24%20Regular/LESCAnalysis/HB0171.pdf> [<https://perma.cc/G4R6-QQA6>]. The new graduation requirements will be implemented in the 2025–2026 academic year. 2024 N.M. Laws, ch. 33, § 5.

250. *See Financial Literacy*, THINK N.M., <https://www.thinknewmexico.org/financial-literacy/> [<https://perma.cc/M98R-YA85>] (discussing the unsuccessful 2024 effort to make financial literacy a standalone graduation requirement); *see also* Danielle Prokop, *New High School Graduation Requirements Head to the Governor’s Desk*, SOURCE NM (Feb. 8, 2024), <https://sourcenn.com/2024/02/08/graduation-requirements-head-to-govs-desk/> [<https://perma.cc/GJ4D-QE9T>].

251.

The division *shall* . . . develop and implement curriculum for a financial literacy program with elements that shall include a basic understanding of budgets, checking and savings accounts, credit and interest and considerations in deciding how and when to use financial services, including installment loans and refund anticipation loans. The financial literacy program developed pursuant to this subsection may be implemented through the adult basic education division of the higher education department and nonprofit public interest organizations.

N.M. STAT. ANN. § 58-15-39(C) (2019) (emphasis added). The use of “shall” denotes a “duty, obligation[, or] requirement” under New Mexico law. N.M. STAT. ANN. § 12-2A-4(A) (1997).

Financial literacy skills are not inherent—they must be taught.²⁵² Until recently, only about one in ten students learned financial literacy skills in any given school year.²⁵³ As a result, New Mexico has been consistently ranked as one of the least financially literate states in the nation.²⁵⁴ Although teaching these skills to K–12 students often ends up helping their entire households,²⁵⁵ recent high school graduates and college students will not benefit from the curriculum changes. Meanwhile, BNPL companies specifically target these new borrowers and build long-term lending relationships with them.

New Mexico policymakers have already recognized the value in financial literacy education. When the legislature added adult financial literacy education to the SLA, it created a dedicated fund for coordinated educational efforts.²⁵⁶ And yet there is an absence of a coordinated adult literacy education effort in the state.²⁵⁷ In 2020, a report noted that the New Mexico Regulation and Licensing Department (NM RLD) had plans to “launch an online course, podcast, and other educational materials that will be available through its website.”²⁵⁸ As of December 2024, NM RLD had added a “Native American Outreach” webpage, which includes a Native-focused financial journal teaching basic financial literacy concepts.²⁵⁹ Other than this page, no basic financial literacy resources were present on the FID website, nor were there any other references to educational efforts in the state.²⁶⁰ In fiscal year 2023, the FID held a mere ten “financial literacy sessions conducted on a quarterly basis, targeting vulnerable populations,” exceeding its goal by two sessions.²⁶¹ It did not report any plans to increase its number of financial literacy sessions in 2024.²⁶²

252. If financial literacy skills were inherent, studies would show lukewarm outcomes at best. This isn't the case. See FISHER & NATHAN, *supra* note 134, at 28.

253. *See id.* at 26.

254. *See id.*; see also Fred Nathan, *Celebrate Financial Literacy Month by Making it a High School Graduation Requirement*, RIO GRANDE SUN (May 1, 2024), https://www.riograndesun.com/celebrate-financial-literacy-month-by-making-it-a-high-school-graduation-requirement/article_d0d0493e-07de-11ef-9779-73e9917487c2.html [<https://perma.cc/5G6N-RYHV>].

255. FISHER & NATHAN, *supra* note 134, at 27.

256. 2017 N.M. Laws 1152–53.

257. Although the NM RLD website states “[t]he staff also is available for presentations,” there are not any scheduling request details or information about past or upcoming adult literacy programs. See *Consumer Protection*, N.M. REG. & LICENSING DEP'T, <https://www.rld.nm.gov/about-us/public-information-hub/consumer-protection/> [<https://perma.cc/5UAK-H2UM>].

258. FISHER & NATHAN, *supra* note 134, at 28.

259. *Native American Outreach*, N.M. REGUL. & LICENSING DEP'T, <https://www.rld.nm.gov/native-american-outreach/> [<https://perma.cc/V722-CK7J>].

260. While the NM RLD's website includes some information about investing and protecting oneself from scams, none of the resources teach basic financial literacy concepts like budgeting, managing credit and debt, or saving. See N.M. REG. & LICENSING DEP'T, *supra* note 257.

261. N.M. REGUL. & LICENSING DEP'T, 2024 STRATEGIC PLAN | 2023 ANNUAL REPORT 58 (2024), <https://www.rld.nm.gov/wp-content/uploads/2024/04/NMRLD-2024-Strategic-Plan.pdf> [<https://perma.cc/673Q-ZUYV>].

262. *Id.*

Nationally, Hispanic, Native, and Black populations have significantly lower financial literacy rates than their White (Non-Hispanic) counterparts.²⁶³ It is reasonable to assume that New Mexico's financial literacy rates are statistically similar. It is already expensive to be a low-income Hispanic, Native, or Black person; it is incredibly expensive to also have little access to affordable credit.²⁶⁴ Add in poor financial literacy skills, and the borrower is destined to suffer from serious, long-lasting harm. Although New Mexico law is ahead of other states in its consumer protections, it has not yet addressed one of the reasons why vulnerable New Mexico borrowers have been historically attracted to risky, high-cost creditors. With financial literacy education, New Mexico borrowers will be less likely to jump to the next new, attractive lending option, like BNPL loans, without meaningfully assessing their credit options. It is past time for the state to fulfill its statutory duty to provide statewide adult financial literacy education.

CONCLUSION

“Buy Now, Pay Later” companies offer consumers attractive, no interest short-term loans, and younger consumers of color have been quick to embrace this seamless lending experience. As awareness and use of BNPL loans have skyrocketed, so have concerns about risks to vulnerable consumers. The borrowing process disguises negative financial consequences, overuse can lead to unmanageable debt, and the majority of BNPL loans can only hurt credit scores if the BNPL loan activity is reported to credit agencies at all.

Recent surveys show that consumers with low credit scores exhibiting financial distress are most attracted to BNPL loans. Without quick regulatory action, these vulnerable consumers will once again be cut off from an “affordable” credit solution—accumulating late fees and other negative financial consequences in the process. As they exist now, BNPL loans are not the answer to a consumer's credit access issues.

As a minority-majority state with a population earning less than average nationally, New Mexico consumers are at particular risk of long-term financial harm from BNPL loans. Moreover, New Mexico has long struggled with how to best protect vulnerable consumers stuck in a cycle of debt caused by predatory lending practices.

Recent state legislative efforts opened the door for further regulation of BNPL companies, and the FID already has a path to make strategically effective reporting adjustments to better identify concerning trends and inform future legislative and regulatory efforts. Improving disclosures of unclear terms and conditions would help reduce confusion and the potential to mislead consumers. And requiring state-level disclosures would resolve the uncertainty surrounding

263. See Marco Angrisani, Sergio Barrera, Luisa R. Blanco & Salvador Contreras, *The Racial/Ethnic Gap in Financial Literacy in the Population and by Income*, CONTEMP. ECON. POL'Y 524, 524, 526–27 (2021); see also Daniel Thomas Mollenkamp, *The Racial Gap in Financial Literacy*, INVESTOPEDIA (May 2, 2024), <https://www.investopedia.com/the-racial-gap-in-financial-literacy-5119258> [<https://perma.cc/36UQ-BN96>].

264. See Foohey & Martin, *supra* note 51, at 476; see also Mya Frazier, *The High Cost of Bad Credit*, N.Y. TIMES MAG. (June 7, 2023), <https://www.nytimes.com/2023/06/07/magazine/bad-credit-repair.html> [<https://perma.cc/RPX6-QW2G>].

implementation of the CFPB's BNPL Rule. Importantly, implementing statewide adult literacy education would start addressing a root cause of financial insecurity driving people to high-risk nonbank credit like BNPL loans. Adopting a combination of short- and long-term solutions is the only way to minimize real financial harm—harm that will cost a new generation of borrowers thousands of dollars and further widen the wealth gap along racial lines.

Today, New Mexico has an opportunity to serve as a model for other states. But one cannot forget that the state is only “ahead of the curve” in consumer protections because of the serious harms already suffered by vulnerable borrowers, and the enormous profits lenders reaped from them. New Mexico cannot wait until this pattern is repeated to increase its oversight of BNPL companies.