BORROW NOW, PROTECT LATER

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ABSTRACT

The consumer finance industry frequently develops new types of loans and business models, such as buy now, pay later and earned wage access. While these products may help consumers, they also pose risks. To take only one example, consumers may unwittingly assume more debt than they can repay. Appropriate regulation may ameliorate these problems and others. But existing consumer protection laws may not apply to these new products, and Congress may take years to pass legislation establishing proper guardrails that do.

While we may not know when or even whether lawmakers will provide the needed protections, we can anticipate what those protections will look like. That's because the consumer protection toolbox is already well-stocked, with measures like mandated disclosure, ability-to-repay requirements, dispute resolution and enforcement mechanisms, penalty fee regulation, and prohibitions on odious discrimination. When Congress creates safeguards for new products, it is likely to draw on those protections. But then the industry will create new products and the cycle will repeat.

Congress should therefore take a different course. Rather than leaving new products inadequately regulated until it can take them up, Congress should enact a statute giving the Consumer Financial Protection Bureau (CFPB) clear authority to draw upon the existing consumer protection toolkit to regulate new products as needed. Because the methods in that toolkit have already been applied to other consumer financial products, we can have confidence that they would supply at least some needed protections and cause few unintended consequences.

This Article describes what such a statute, dubbed the Consumer Universal Financial Protection Act or CUFPA, might look like and then "tests" it by examining what results it might produce if applied to buy now, pay later transactions (BNPL). BNPL loans typically provide that consumers will pay the loans off in four equal payments, spread over six

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weeks. BNPL providers specifically adopted this format to avoid application of certain federal Truth in Lending Act protections. While many consumers benefit from BNPL transactions, it has caused problems for others, problems CUFPA would enable the CFPB to address. The Article also compares the version of BNPL regulation CUFPA might produce to the results under current law.

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INTRODUCTION

Consumer financial transactions and business models evolve constantly as providers find new ways to serve consumers. But sometimes new products, like their predecessors, cause problems for consumers. For example, according to a 2025 Bankrate study, 49% of consumers who tried one such new transaction form, buy now, pay later (BNPL), have encountered issues.[1] BNPL enables consumers to pay for purchases over time with interest-free loans, an enticing prospect for many consumers.[2] But some consumers use BNPL to buy more than they can afford.[3] Because BNPL providers usually arrange for payment by automatic withdrawals from their customers' bank accounts, the BNPL providers themselves rarely bear the consequences of customer overextension.[4] Instead, once their bank accounts have been depleted by BNPL payments, some BNPL consumers may default on other obligations.[5] As a result, BNPL providers can afford to make risky loans because other lenders—and consumers themselves—will bear much of the risk.[6] Unfortunately, existing laws may not permit federal regulators to address many of the problems BNPL creates. It is no surprise then that one study reported that 48% of BNPL users regretted using it to finance a purchase.[7]

Another new product, earned wage access (EWA),[8] charges consumers extraordinarily high interest rates of 300% or more.[9] Additionally, the use of artificial intelligence in loan underwriting[10] and personalized pricing[11] is on the horizon, if not already here. And, of course, a variety of then-new methods in combination—including securitization

1. *See* Lauren Nowacki, *Survey: About Half of Buy Now, Pay Later Users Have Experienced Issues Like Overspending and Missing Payments*, BANKRATE (May 5, 2025), https://www.bankrate.com/loans/personal-loans/buy-now-pay-later-survey/.

2. *See infra* Section III.A.

3. *See* Nowacki, *supra* note 1 (noting nearly one in four BNPL users reported that they had spent more than they should have on BNPL transactions).

4. *See infra* Section III.A.

5. *See infra* Section III.A.

6. *See infra* Section III.A.

7. *See* Matt Schulz, *BNPL Tracker: 41% of Users Late in Past Year, More Using Loans for Groceries*, LENDINGTREE (Dec. 19, 2025), https://www.lendingtree.com/personal/buy-now-pay-later-loan-statistics/.

8. Earned Wage Access provides employees access to their salary before the employees would otherwise receive payment, sometime for a fee or tip. In 2024, the CFPB proposed an interpretive rule governing EWA. *See* Truth in Lending (Regulation Z); Consumer Credit Offered to Borrowers in Advance of Expected Receipt of Compensation for Work, 89 Fed. Reg. 61358 (proposed July 31, 2024); Truth in Lending (Regulation Z); Consumer Credit Offered to Borrowers in Advance of Expected Receipt of Compensation for Work, 90 Fed. Reg. 3622 (Jan. 15, 2025). However, the Trump administration rescinded it. *See* Interpretive Rules, Policy Statements, and Advisory Opinions; Withdrawal, 90 Fed. Reg. 20084 (May 12, 2025).

9. *See* CAL. DEP'T OF FIN. PROT. AND INNOVATION, 2021 EARNED WAGE ACCESS DATA FINDINGS 1 (2023), https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/03/2021-Earned-Wage-Access-Data-Findings-Cited-in-ISOR.pdf?emrc=08148f (stating the average annual APR was 334% for tip companies and 331% for non-tip companies).

10. *See CFPB Issues Guidance on Credit Denials by Lenders Using Artificial Intelligence*, CFPB (Sept. 19, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-guidance-on-credit-denials-by-lenders-using-artificial-intelligence/.

11. *See* Haggai Porat, *Algorithmic Personalized Pricing in the United States: A Legal Void*, *in* CAMBRIDGE HANDBOOK ON ALGORITHMIC PRICE PERSONALIZATION AND THE LAW 300 (Fabrizio Esposito & Mateusz Grochowski eds., 2025).

and subprime loans like NINJA loans—led to millions of consumers defaulting on their mortgages, and ultimately, the Great Recession.[12]

That doesn't mean new consumer financial products are inherently bad. After all, the same 2025 Bankrate survey cited above reported that 51% of BNPL users did not have a problem with their experience.[13] But new consumer financial products, just like their older cousins, sometimes require regulation to protect consumers and maximize consumers' chances of benefiting from them. Unfortunately, when a new transaction type or business model appears, such as BNPL, EWA, income share agreements, or the use of tips to pay for financial transactions, existing consumer protection laws often fit poorly.[14] The results can sometimes be catastrophic, as we learned from the Great Recession.[15] Even when new products do not lead to such catastrophes, better tailored consumer protection laws could still protect consumers from unnecessary risks. But Congress seldom turns its attention to the problem of how best to regulate new consumer financial products. Consequently, regulators are left to catch up by adapting old rules and adopting new ones, using statutory authorities designed to address other products.[16] Too often, regulators never catch up.

Lawmakers often respond to new business models by employing consumer protection methods already in wide use for other kinds of transactions. In other words, the solutions to consumer protection problems generated by new lending methods often already exist and merely need legal authorization—frequently a new statute—to be applied to the new product. But until Congress enacts that statute, the principal federal consumer financial protection agency, the Consumer Financial Protection Bureau (CFPB), is unable to regulate appropriately, or perhaps at all.

Though the CFPB already has some powers it can use with new products,[17] a recent Supreme Court decision, *Loper Bright Enterprises v. Raimondo*,[18] limits administrative agency discretion in ways that are not

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12. *See* FIN. CRISIS INQUIRY COMM'N, FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 6, 23 (2011), https://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf. *See generally* Jeff Sovern, *Preventing Future Economic Crises Through Consumer Protection Law or How the Truth in Lending Act Failed the Subprime Borrowers*, 71 OHIO ST. L.J. 761 (2010); Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359 (2010).

13. *See* Nowacki, *supra* note 1.

14. For an example of this, see *infra* Part IV.

15. *See* sources cited *supra* note 12.

16. *See* Henson v. Santander Consumer USA Inc., 582 U.S. 79, 90 (2017) ("[I]t's hardly unknown for new business models to emerge in response to regulation, and for regulation in turn to address new business models. Constant competition between constable and quarry, regulator and regulated, can come as no surprise in our changing world.").

17. For example, Congress gave the Bureau the power to issue regulations proscribing unfair, deceptive, or abusive acts or practices. *See* 12 U.S.C. § 5531(b); *see also infra* notes 48–54 and accompanying text.

18. 603 U.S. 369 (2024).

yet completely clear.[19] Consequently, the Bureau's existing authority may be narrower than had previously been thought—and even if the Bureau's authority remains broad enough to cover a particular new product, litigation to establish that authority may take years. All this suggests that Congress should pass a new statute clearly granting the CFPB the power to issue consumer protection regulations that draw on the existing consumer financial protection playbook. That way, when consumer financial services companies develop new products or business models, consumers would still be protected while Congress attends to other matters. This Article is the first to propose such an approach to consumer financial regulation and calls the proposed statute the Consumer Universal Financial Protection Act (CUFPA).

This Article explores what the CUFPA should look like. It uses many existing consumer protection methods to identify which powers the statute should grant the Bureau. It then tests CUFPA by examining whether it would better enable appropriate regulation than existing law does for BNPL transactions. BNPL financing has existed since the mid-2010s but is imperfectly regulated.[20] Consumers purchase a product and typically agree to pay for it in no more than four equal installments, the first at the time of purchase and the remaining three usually at two-week intervals. The seller or lender typically does not charge interest. Sometimes BNPL transactions provide for additional charges for late payments, though not always.

Many of the concerns BNPL raises have also arisen with other kinds of consumer loans. But BNPL transactions have one unusual feature: the choice of four installments and no interest (called a finance charge by the Truth in Lending Act (TILA)) are not accidental. Structuring the transaction that way enables lenders to avoid TILA's protections for installment

19. *See* Cary Coglianese & Daniel E. Walters, *The Great Unsettling: Administrative Governance After* Loper Bright, 77 ADMIN. L. REV. 1, 1–2 (2025) (describing *Loper Bright* as "a Rorschach test inside a crystal ball . . . predictions about the decision's impacts cannot be made with anything approaching precision or certitude").

20. In 2024, the CFPB issued an interpretive rule applying to BNPL transactions. *See* Truth in Lending (Regulation Z); Use of Digital User Accounts to Access Buy Now, Pay Later Loans, 89 Fed. Reg. 47068–69 (May 31, 2024) [hereinafter BNPL Interpretive Rule]. The Financial Technology Association, a trade group, quickly sued the CFPB to challenge the BNPL Interpretive Rule. *See FTA Statement on BNPL Interpretive Rule Lawsuit*, FIN. TECH. ASS'N (Oct. 18, 2024), https://www.ftassociation.org/fta-statement-on-bnpl-interpretive-rule-lawsuit/. The Trump administration withdrew the BNPL Interpretive Rule in 2025. *See* Interpretive Rules, Policy Statements, and Advisory Opinions; Withdrawal, 90 Fed. Reg. 20084 (proposed May 12, 2025). In a status report filed in the FTA case, the Bureau stated that it "has determined that it does not intend to reissue the BNPL Interpretive Rule because it was procedurally defective and the interpretation included therein applied ill-fitting open-end credit regulations to BNPL products, which are generally structured as closed-end loans." *See* Status Report at 1–2, Fin. Tech. Ass'n v. CFPB, No. 1:24-cv-2966-ACR (D.D.C. June 2, 2025). While some states regulate BNPL transactions, *see* N.Y. BANKING L. art. 14-B (LexisNexis 2025), others do not. In any event, this Article focuses on federal law.

loans (called closed-end credit by TILA).[21] In other words, as at least one industry lawyer has acknowledged, BNPL takes the form it does to avoid regulation.[22] And perhaps in part for that reason, its use has exploded.[23]

A product that is designed to avoid consumer protection regulation might be profitable for the industry, but it frustrates Congress's consumer protection goals. In 2024, the CFPB published an interpretive rule concluding that some BNPL transactions are credit cards under federal law, even though BNPL transactions seldom involve plastic cards, or any other kind of card for that matter.[24] Consequently, the CFPB concluded that some BNPL consumers are entitled to some protections afforded to credit cardholders.[25] Whether the Bureau's 2024 BNPL interpretation would survive judicial scrutiny remains unclear, especially as an earlier CFPB blog post had observed that "BNPL companies don't offer the same dispute protections as credit cards if the item you purchase is faulty or a scam."[26] In any event, the Trump Administration has already withdrawn the BNPL interpretive rule.[27] But even if courts were to embrace the Bureau's now-rescinded 2024 interpretation, that interpretation is far from a satisfactory solution to the problem of BNPL regulation for the simple reason that credit card laws were not designed for BNPL transactions.[28]

In short, under the approaches of both the Trump and Biden Administrations, federal BNPL consumer protections are inadequate and likely to remain so unless Congress addresses them. Until that happens, BNPL consumers face unnecessary risks. And because lenders may profit when consumers receive less protection, that may be the point.

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21. That is because TILA defines a creditor in part and in most cases as a "person who . . . regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required . . ." *See* 15 U.S.C. § 1602(g). A common example of an installment loan is a car loan in which the borrower promises to repay the loan by making equal monthly payments over a period of, say, five years.

22. *See The CFPB's Use of Interpretive Rules to Expand Regulatory Requirements for Buy-Now, Pay Later and Earned Wage Access Products*, BALLARD SPAHR (Aug. 13, 2024, at 1:00 MDT), https://www.ballardspahr.com/Insights/Events/2024/08/The-CFPBs-Use-of-Interpretive-Rules-to-Expand-Regulatory-Requirements (remarks of Joseph J. Schuster); *see also* James C. Akin, Senior Regul. Affs. Couns., Comment Letter on Proposed Rule regarding Truth in Lending (Regulation Z); Use of Digital User Accounts To Access Buy Now, Pay Later Loans (Aug. 1, 2024), https://www.regulations.gov/comment/CFPB-2024-0017-0031 (stating BNPL "providers often design their products to sidestep regulation and adequate consumer protections").

23. According to one report, American BNPL usage increased from 49.2 million customers in 2021, to 86.5 million in 2024. *See Buy Now Pay Later Statistics*, CAPITALONE SHOPPING RSCH. (June 23, 2025), https://capitaloneshopping.com/research/buy-now-pay-later-statistics/.

24. *See* Truth in Lending (Regulation Z); Use of Digital User Accounts to Access Buy Now, Pay Later Loans, 89 Fed. Reg. 47068–69 (May 31, 2024).

25. *Id.*

26. *See* Nelson Akeredolu, Andrew Braden, Joshua Friedman, & Laura Udis, *Should You Buy Now and Pay Later?*, CFPB (July 6, 2021), https://www.consumerfinance.gov/about-us/blog/should-you-buy-now-and-pay-later/.

27. *See* Interpretive Rules, Policy Statements, and Advisory Opinions; Withdrawal, 90 Fed. Reg. 20084 (proposed May 12, 2025).

28. *See infra* Part IV.

Accordingly, consumer financial protection law faces two problems: a long-term problem of how to deal with the inevitable new unregulated products and the short-term problem of how best to regulate BNPL and other consumer financial products that Congress has not given the CFPB sufficient authority to address. This Article explores both problems and uses one to study the other.

Part I of the Article explains more fully why legislation is needed. Part II discusses five items in the consumer protection toolbox: disclosures, verification of consumers' ability to repay, dispute resolution and enforcement mechanisms, fee regulation, and bars on discrimination. Part III then applies that toolbox to BNPL transactions as a test of how well a statute authorizing CFPB rulemaking for new consumer financial products would work. Part IV measures the CFPB's BNPL interpretive rule against the needed protections as part of assessing whether existing protections are sufficient. Part V discusses the arguments against CUFPA.

I. WHY LEGISLATION IS NEEDED

It has become a truism that Congress has difficulty passing legislation. Because of the country's deep ideological and partisan divisions, only rarely does one party capture enough support in Washington to enact its agenda. To accomplish that goal, a party must win the presidency, both houses of Congress, and for some matters, enough like-minded senators—currently sixty—to defeat a filibuster.[29] While that happens from time to time, it is infrequent. It is no coincidence that Congress has not enacted a major consumer protection law since 2010.[30]

Even when one party achieves that milestone, passing consumer protection laws is still not a certainty. A two-year congressional session is unlikely to be long enough to enable a party to pass the party's full backlog of legislation, and consumer protection may not be its top priority. Consequently, many major consumer protections have not been significantly updated for decades and so fail to address many current issues.[31] In Jonathan S. Gould and Rory Van Loo's words, "financial regulatory legislation is difficult to enact."[32]

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29. Alternatively, the party that controls the Senate could eliminate the filibuster, as has happened for confirmation of nominations, and for certain budgetary legislation, called reconciliation, but not for most legislation.

30. *See* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

31. For an example, see *infra* notes 39–43 and accompanying text.

32. Jonathan S. Gould & Rory Van Loo, *Legislating for the Future*, 92 U. CHI. L. REV. 375, 377 (2025). They explain why:

> Members of Congress focus on their immediate reelection prospects, while regulating to prevent future harms usually means imposing costs in the present. The private sector interests that bear those costs will often mobilize against reform. The uncertainties that

It was not always thus. When businesses began providing car leases, Congress enacted the Consumer Leasing Act of 1976 (CLA) to protect consumers.[33] Increases in the market for home equity loans inspired 1988's Home Equity Loan Protection Act.[34] Congress responded to high-cost mortgage loans with the Home Ownership and Equity Protection Act of 1994.[35] And as more and more consumers use credit cards, Congress has repeatedly amended TILA to provide consumers with greater protections, including in 1974's Fair Credit Billing Act,[36] 1988's Fair Credit and Charge Card Disclosure Act,[37] and 2009's Credit CARD Act.[38]

Congress's treatment of the Fair Debt Collection Practices Act (FDCPA) displays the neglect of many consumer protection laws.[39] Though first enacted in 1977,[40] the FDCPA has barely been amended since.[41] Consequently, the FDCPA's communications provisions mention telegrams[42] but not email, cell phones, or texts. Fax technology has come and largely gone without ever being reflected in the FDCPA's text. The result has been that debt collectors, consumers, and courts have long been forced to wrestle with an archaic text that may not adequately reflect current policy preferences and certainly doesn't reflect today's communications methods.[43]

Congress's solution to the FDCPA problem was not to update the statute itself but to give the CFPB the power to issue regulations interpreting the FDCPA so that the Bureau could update the statute to some extent.[44] In response, the CFPB issued Regulation F in 2020, which regu-

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necessarily surround future harms also make it easier to argue against proposed legislation.

See also Shmuel I. Becher, *Unintended Consequences and the Design of Consumer Protection Legislation*, 93 TUL. L. REV. 105, 108–09 (2018) ("Legislatures will often be too slow-moving and too rigid in their procedures to cope efficiently and successfully with the rapid changes of modern consumer markets.").

33. *See* Consumer Leasing Act of 1976, Pub. L. No. 94-240, 90 Stat. 257.

34. *See* Home Equity Loan Consumer Protection Act of 1988, Pub. L. No. 100-709, 102 Stat. 4725.

35. *See* Home Ownership and Equity Protection Act, Pub. L. No. 103-325, 108 Stat. 2160 (1994).

36. *See* Fair Credit Billing Act, Pub. L. No. 93-495, 88 Stat. 1511 (1974).

37. *See* Fair Credit and Charge Card Disclosure Act of 1988, Pub. L. No. 100-583, 102 Stat. 2960.

38. *See* Credit CARD Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734.

39. *See* 15 U.S.C. § 1692(a)–(b).

40. *See* Fair Debt Collection Practices Act, Pub. L. 95-109, 91 Stat. 874 (1977).

41. It was amended in three minor respects in 2006. *See* Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351, § 802, 120 Stat 1966, 2006.

42. *See* 15 U.S.C. § 1692b(5).

43. Congress's failure to enact new statutes despite developments requiring such legislation is not confined to consumers. *See* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 8–11 (2014) (energy and environmental legislation).

44. *See* 15 U.S.C. § 1692l(d).

lates the use of texts, voicemails, and emails in debt collection efforts subject to the FDCPA.[45]

Unfortunately, Regulation F is not a complete solution to the problems created by Congress's failure to update the FDCPA. While Regulation F addresses some problems, others cannot be resolved without amending the statute. For example, collection business models have shifted since Congress adopted the FDCPA so that many debts are no longer collected by external debt collectors who are retained by the original lender—which is largely what the FDCPA covers—but by debt buyers who have purchased debts for which they seek payment.[46] The Congress that enacted the FDCPA failed to anticipate this business model shift and so did not include some debt buyers within the FDCPA, even though the policy arguments motivating the statute apply with equal force to debt buyers.[47] In a perfect world, Congress would amend the FDCPA to extend it to debt buyers. But Congress has not done so, leaving consumers and the industry with only Regulation F's partial update. Still, even a partial update is better than no update. And increasingly, the alternative to a partial update is not a full update but no update.

The practice of delegating significant power to administrative agencies to protect consumers so that Congress could avoid passing even more statutes has an ancient pedigree. When Congress created the Federal Trade Commission (FTC) in 1918, it gave the Commission the power to block "unfair methods of competition."[48] Congress deliberately chose the vague term—unfair—explaining in a conference committee report that "[i]t is impossible to frame definitions which embrace all unfair practices . . . . If Congress were to adopt the method of definition, it would undertake an endless task."[49]

The courts appear untroubled by the ambiguity inherent in the word unfair,[50] with Judge Learned Hand remarking that the Commission's "duty in part at any rate, is to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop."[51] In 1938, Congress gave the FTC addition-

45. *See* 12 C.F.R. pt. 1006 (2020).

46. The FDCPA regulates debt collector conduct. "Debt collector" is defined in 15 U.S.C. § 1692a(6) in a way that limits the entities subject to the FDCPA almost entirely to external debt collectors.

47. *See* Henson v. Santander Consumer USA Inc., 582 U.S. 79, 88 (2017).

48. Pub. L. No. 63-203, 38 Stat. 717 (1914) (codified at 15 U.S.C. § 45(n)).

49. Hon. Robert E. Freer, Chairman, Fed. Trade Comm'n, Address Before the Int'l and Compar. L. Sec. of the ABA: Some Concepts of Unfair Competition at Home and Abroad (July 11, 1939), https://www.ftc.gov/system/files/documents/public_statements/676501/19390711_freer_iddress_._international_comparative_law_section_of_aba.pdf.

50. *See* FTC v. Bunte Bros., 312 U.S. 349, 353 (1941) ("'[U]nfair competition' was designed by Congress as a flexible concept with evolving content.").

51. FTC v. Standard Educ. Soc'y, 86 F.2d 692, 696 (2d Cir. 1936), *modified by* 302 U.S. 112, 116 (1937).

al unfairness powers on the same theory, in the Wheeler–Lea Amendments. Those amendments gave the FTC powers to bar "unfair or deceptive acts or practices [UDAP powers]."[52] And then again, in 2010's Dodd–Frank Act, Congress bestowed the same powers upon the CFPB.[53] In these latter two enactments, it seems clear that Congress intended that the FTC and CFPB exercise their powers to prohibit unfair acts with the same flexibility as the FTC's unfair methods of competition power.[54]

It remains to be seen, however, how courts will reconcile Congress's desire to give the administrative agencies broad discretion with the Supreme Court's eagerness to limit the power of administrative agencies.[55] In *Loper Bright*,[56] the Supreme Court overturned *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[57] which had provided that in certain circumstances, courts would defer to administrative interpretations of statutes.[58] Under *Loper Bright*, courts usually are to give statutes their best reading, even if an administrative agency interprets the statute differently. But if we are to take *Loper Bright* at its word, the CFPB still has considerable discretion to use its unfairness power to regulate new consumer financial products. That is because *Loper Bright* also provided that when Congress conferred upon the agencies "flexibility," administrative agencies have latitude to interpret statutes[59]—exactly what Congress intended for the unfairness doctrine.

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52. Ch. 49, 52 Stat. 111 (1938) (codified at 15 U.S.C. § 45(n)).

53. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. § 5531).

54. *See* Atl. Refin. Co. v. FTC, 381 U.S. 357, 367 (1965) ("Section 5 of the Federal Trade Commission Act declares '[u]nfair methods of competition in commerce, and unfair . . . acts or practices in commerce . . . unlawful.' In a broad delegation of power it empowers the Commission, in the first instance, to determine whether a method of competition or the act or practice complained of is unfair. The Congress intentionally left development of the term 'unfair' to the Commission rather than attempting to define 'the many and variable unfair practices which prevail in commerce . . . .'") (alterations in original) (quoting S. REP. NO. 63-597, at 13 (1914)); *see also* Neil Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225, 235 (1981) (including among the lessons of the FTC Act's legislative history that "the substantive scope of [the section containing the FTC's unfair or deceptive acts power] should be determined primarily by reference to the original 1914 legislation rather than to the Wheeler-Lea Amendment [and] the original legislation gave the Commission considerable discretion in identifying unfair consumer practices"); F.T.C. v. Wyndham Worldwide Corp., 799 F.3d 236, 243 (3d Cir. 2015). Courts have long used the prior interpretation canon, which provides that when Congress copies words from one statute into another, it is presumed to intend the words to be construed as they were in the original statute. *See* Morissette v. United States, 342 U.S. 246, 263 (1952); Sekhar v. United States, 570 U.S. 729, 733 (2013); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

55. *Compare* Biden v. Nebraska, 600 U.S. 477, 502–03 (2023) (striking down government student loan forgiveness programs for violating the Major Question Doctrine), *with* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 427 (2024) (eliminating *Chevron* deference to administrative determinations).

56. 603 U.S. 369 (2024).

57. 467 U.S. 837 (1984).

58. *Id.* at 842–43; *Loper Bright*, 603 U.S. at 376.

59. *See Loper Bright*, 603 U.S. at 394–95; *see also* Adrian Vermeule, *Chevron By Any Other Name*, NEW DIGEST (June 28, 2024), https://thenewdigest.substack.com/p/chevron-by-any-other-name.

Unfortunately, Congress did not state explicitly in the statutory text that it wanted the CFPB and FTC to have discretion in deciding what was unfair, except to the extent that the word "unfair" is itself inherently ambiguous and so implies that the agencies have considerable flexibility. And conservative judges, who eschew use of the legislative history, may be reluctant to allow the Bureau the discretion the legislative history demonstrates Congress intended it to have.

Other evidence also suggests that Congress intended to provide the CFPB discretion. The Dodd–Frank Act authorizes the CFPB to issue regulations "as may be *necessary or appropriate* to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof,"[60] and *Loper Bright* gave as an example of statutes that provide for flexibility those that use words such as "appropriate."[61] Indeed, the statute at issue in one of the cases *Loper Bright* cited for that proposition, *Michigan v. E.P.A.*,[62] used the phrase "appropriate and necessary."[63]

Even if the Bureau cannot regulate new products using its unfairness or abusiveness powers, it may be able to shoehorn new products into existing laws, as it tried to do with the BNPL interpretive rule.[64] In short, even without a new statutory authorization, the Bureau has some ability to protect consumers against the risks new products generate.

Nevertheless, Congress would do better to recognize, first, that it is unlikely to return to consumer protection issues frequently enough to regulate new consumer financial products on a timely basis,[65] and second, that courts that are eager to limit agency power may conclude existing statutes do not provide the CFPB sufficient authority to regulate new products appropriately.[66] Accordingly, Congress should adopt a general consumer protection statute authorizing the CFPB to promulgate regulations governing such products—within boundaries. Specifically, Congress should enact a statute—CUFPA—that makes clear the Bureau has discretion to mandate certain protections for new consumer financial products.[67]

60. 12 U.S.C. § 5512(b)(1) (emphasis added).

61. *See Loper Bright*, 603 U.S. at 395 (citing Michigan v. EPA, 576 U.S. 743, 752 (2015)).

62. 576 U.S. 743 (2015).

63. *See* 42 U.S.C. § 7412(n)(1)(A).

64. *See infra* notes 259–96 and accompanying text.

65. *See* Gould & Van Loo, *supra* note 32, at 396 ("Congress should act with self-awareness of the high likelihood of its own future inaction."). On the subject of congressional inaction, see generally Shany Winder, *Extraordinary Policymaking Powers of the Executive Branch: A New Approach*, 37 VA. ENV'T L.J. 207, 222–26 (2019).

66. For an example of a court limiting agency power, see *Loper Bright*, 603 U.S. at 376.

67. *See* Gould & Van Loo, *supra* note 32, at 378 (suggesting that Congress should "extend expansive authority to agencies with explicit discretion for the agency to address threats that may have been unforeseen at the time of the legislation's enactment").

Such a statute would reduce challenges to Bureau action for construing statutes improperly under *Loper Bright*. Bureau actions could still be challenged on other grounds, such as for violating the arbitrary and capricious standard,[68] but at least the CFPB would have the flexibility to respond to new problems, even as Congress devotes attention to other problems that it may perceive as more urgent. Given the industry's eagerness to challenge Bureau actions in the courts, the more Congress can make clear that the Bureau has the needed authority, the less the industry can attack, and the more likely consumers are to receive needed protections. Of course, Congress would retain the power both to block any of the Bureau's regulations and to enact different consumer protections.

While CUFPA would be a consumer protection statute, it might actually benefit the industry in a variety of ways. Because CUFPA provides consumers with protections, it might give some consumers the confidence they need to try new products. CUFPA enables businesses to predict how new products might be regulated so that the businesses can plan accordingly. CUFPA also reduces the likelihood of a crisis involving a particular product, to which Congress might respond with overregulation. In short, the industry might be better off if Congress enacts CUFPA than under the current regime in which Congress only sporadically turns its attention to consumer protection, and then only after some crisis has occurred.

CUFPA raises two key questions. One is how to define a new product or business model and the other is what consumer protections CUFPA should include. As to the first question, CUFPA should apply to products or business models that are materially different in some way from existing products and not adequately regulated by existing law. More concretely, it could include products that fit within any of the following categories: they are deliberately structured to avoid existing regulation or operate in a legal gray area where existing federal and state laws (other than general statutes with broad applicability, such as laws barring unfair, deceptive, or abusive practices) do not clearly apply to the transaction; they have novel characteristics, terms, or features or use technological advances in materially new ways; or they materially change the risks, benefits, or costs for consumers compared to existing products. This Article's principal example, BNPL, arguably is described by all of those.

"New" should not necessarily be defined in terms of how recent the product is. Thus, some have compared BNPL to layaway plans, which have existed for nearly a century.[69] Like BNPL transactions, layaway

68. *See* 5 U.S.C. § 706(2)(A).

69. *See, e.g.*, Ashley Hudson & Shawn Paustian, *Insights Into Buy Now, Pay Later: Growth & Trends 2025*, NUMERATOR (Feb. 14, 2025), https://www.numerator.com/resources/blog/buy-now-

plans oblige consumers to pay for items over time.[70] But layaway differs from BNPL in that with BNPL, the *consumer* receives the purchased item at the outset of the transaction while with layaway, the *seller* retains the item until the consumer has paid in full.[71] That benefit is evidently significant to consumers because far more use BNPL than use layaway.[72] Layaway plans and BNPL may also have different fee structures; for example, layaway sellers may also charge the consumer for storage, an issue that does not arise with BNPL because the consumer possesses the item.[73] Thus, BNPL is sufficiently different from layaway plans to warrant treating it as a new product under the above definition.

Similarly, consumer financial companies may use new technology to reinvent or revise products that have long been with us; such products should also be considered new within the meaning of CUFPA in some circumstances. CUFPA should delegate to the CFPB considerable flexibility, under *Loper Bright*, to determine which products fit within its scope to ensure that consumers are adequately protected. The CFPB should exercise that flexibility through its rulemaking power.

The Article now turns to the second question raised by CUFPA, which is what standard consumer protection methods should be included in such a generic statute.

II. THE CONSUMER PROTECTION TOOLBOX

Though the precise forms of consumer protections often differ, they tend to share common traits, including mandatory disclosure, ability-to-repay requirements, dispute resolution regulation, protections against terms that consumers might not pay attention to—such as penalty fees—or cannot understand—such as arbitration clauses—and antidiscrimination protections. Often, a market failure is involved. This Part identifies some such tools and advocates for giving the CFPB the power to adopt them for new consumer financial products. An Appendix at the end of the Article provides a tabular summary of the toolbox.

Each of the consumer protection tools described in this Part has a long history. The oldest has been used for a century while the youngest

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pay-later-market-insights/ ("Although BNPL has gained traction in the modern fintech landscape, the underlying concept has a history in traditional layaway programs.").

70. *See Buy Now, Pay Later, Rent-to-Own, Lease-to-Own, and Layaway*, FED. TRADE COMM'N, https://consumer.ftc.gov/articles/buy-now-pay-later-rent-own-lease-own-and-layaway-0 (last visited Apr. 8, 2026).

71. *See id.*

72. *Compare* George Anderson, *Layaway is the Only Way for Some*, RETAILWIRE (Nov. 13, 2006), https://retailwire.com/discussion/layaway-is-the-only-way-for-some/ (reporting estimate that 5–7% of shoppers currently use layaway), *with* Amy X. Wang, *They Got to Live a Life of Luxury. Then Came the Fine Print.*, N.Y. TIMES (Oct. 7, 2025), https://www.nytimes.com/2025/10/07/magazine/buy-now-pay-later-klarna-affirm-shopping.html (reporting estimates that half of Americans have used BNPL).

73. *See Buy Now, Pay Later, Rent-to-Own, Lease-to-Own, and Layaway*, *supra* note 70.

has been in place for sixteen years.[74] That experience matters because it suggests that the industry and consumers need not be concerned about unanticipated consequences of such laws: we have enough knowledge of how they work to enable us to identify the potential consequences of extending such laws to new transactions. It also suggests that if a particular tool created significant problems, Congress would long since have intervened to address those problems.[75] In other words, Congress's failure to eliminate a tool implies that it has been a net positive, despite opponents' predictions of troubling consequences at the time some were initially proposed.[76]

This Part now explores individual items in the consumer protection toolbox.

A. Disclosure

Though federal disclosure statutes date at least to the 1930s,[77] disclosure became a commonly used consumer protection in the 1960s. Perhaps the leading consumer disclosure statute is TILA.[78] TILA mandates disclosures for, to take only a few transactions, mortgages,[79] reverse mortgages,[80] credit cards,[81] and private student loans.[82] But it is far from the only source of required consumer disclosures: other federal laws mandate disclosures to consumers concerning privacy,[83] debt collection,[84] nutrition facts,[85] and warranties.[86] And so on. This is the golden age of consumer disclosures.[87]

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74. *See, e.g.*, Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. § 301 *et seq.*); 15 U.S.C. § 1665e (consideration of ability to repay); 15 U.S.C. § 1666 (correcting of billing errors).

75. The use of Congress's failure to repeal consumer protection statutes as a sign of congressional approval of such statutes might seem inconsistent with the argument that Congress should enact CUFPA to address congressional gridlock, except that Congress's decision not to repeal existing legislation has occurred over many years—indeed, over many decades, in some cases—while CUFPA is designed to address shorter term congressional inaction.

76. *See, e.g.*, *The Credit Cardholders' Bill of Rights: Providing New Protections for Consumers: Hearing Before the Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs.*, 110th Cong. 14 (2008) (statement of Rep. Jeb Hensarling, Member, H. Comm. on Fin. Servs.) ("I fear again that if we adopt the provisions of this, too many Americans will either be denied credit or see their credit card costs skyrocket, and no longer be able to pay for the bills they need in their everyday lives.").

77. *See* Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. § 301 *et seq.*).

78. *See* Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. § 1601 *et seq.*).

79. *See* 15 U.S.C. § 1638(f).

80. *See id.* § 1648.

81. *See* 12 C.F.R. § 1026.6(b) (2026).

82. *See* 15 U.S.C. § 1638(e).

83. *See* 12 C.F.R. § 1016.4(a) (2026).

84. *See* 15 U.S.C. § 1692g(a).

85. *See* 21 C.F.R. § 101.9 (2026).

86. *See* 15 U.S.C. § 2301.

87. Jeff Sovern & Nahal Heydari, *Not-So-Smartphone Disclosures,* 76 ARK. L. REV. 437, 444 (2024).

A principal justification for mandated disclosures is the belief that, in Dee Pridgen's words, "informed consumers . . . choose wisely in the marketplace."[88] Disclosure was expected to remedy the information asymmetries between merchants and consumers. Disclosure was also thought to facilitate comparison shopping by enabling consumers to put disclosure forms side by side to help them decide which offer was the best.[89] And disclosure is among the least expensive of consumer protections. Computers have made generation of disclosures even cheaper, and for consumers who receive disclosures electronically, companies can avoid the expense of paper. Lenders can even avoid incurring the cost of creating a form if the CFPB provides model forms, as it often does.[90] Some, albeit disputed, evidence suggests that disclosures can even improve merchants' behavior: after Los Angeles required restaurants to post their health department grades (e.g., A, B, C) at their entrances, the area experienced a drop in hospitalizations for food-borne illnesses, presumably because restaurateurs who didn't want to post a bad grade maintained more sanitary conditions.[91]

The Bureau may already have the power to mandate disclosures even for new consumer financial offerings, wholly apart from its unfairness powers.[92] That is because while Congress has enacted many disclosure regimes for specific types of transactions, it has also given the CFPB broad power to mandate disclosures for consumer financial products in both the Consumer Financial Protection Act (CFPA)[93] and TILA.[94]

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88. *See* Dee Pridgen, *Sea Changes in Consumer Financial Protection: Stronger Agency and Stronger Laws*, 13 WYO. L. REV. 405, 416 (2013).

89. *See* 15 U.S.C. § 1601(a) ("It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit . . . .").

90. *See, e.g.*, the model forms collected in 12 C.F.R. § 1026 app. G (2026).

91. *See* Ginger Zhe Jin & Phillip Leslie, *The Effect of Information on Product Quality: Evidence from Restaurant Hygiene Grade Cards*, 118 Q.J. ECON. 409, 410–11 (2003). *But see* Daniel E. Ho, *Fudging the Nudge: Information Disclosure and Restaurant Grading*, 122 YALE L.J. 574, 586–88 (2012) (reporting that New York did not see similar results when it mandated restaurant health grade posting).

92. *See supra* notes 60–63 and accompanying text.

93. *See* 12 U.S.C. § 5532(a), (c):

> (a) . . . The Bureau may prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances . . . .
>
> (c) . . . In prescribing rules under this section, the Bureau shall consider available evidence about consumer awareness, understanding of, and responses to disclosures or communications about the risks, costs, and benefits of consumer financial products or services.

94. *See* 15 U.S.C. § 1604(a):

> The Bureau shall prescribe regulations to carry out the purposes of this subchapter. Except with respect to the provisions of section 1639 of this title that apply to a mortgage referred to in section 1602(aa) of this title, such regulations may contain such additional requirements, classifications, differentiations, or other provisions, and may provide for

The statutory text authorizing the Bureau to issue disclosure regulations, though written before *Loper Bright*, seemingly satisfies *Loper Bright*'s requirements for delegating discretion to an administrative agency.[95] TILA authorizes the Bureau to promulgate "regulations [that] may contain such additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this subchapter," which closely resembles the text that *Loper Bright* said conferred discretion upon agencies: "appropriate and necessary" and the phrase, "in the judgment of the" agency.[96]

But conservative courts may not see it that way. Moreover, CFPB critics may argue that these statutes permit the Bureau to issue regulations governing consumer financial products specifically referred to in TILA but not new products. That claim, however, is inconsistent with the text of both statutes. Specifically, CFPA's § 5532(a) permits the Bureau to "prescribe rules to ensure that the features of *any* consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers."[97] The word "any" would normally extend to new financial products.[98]

Similarly, TILA's § 1604 speaks of "*additional* requirements, classifications, differentiations, or *other* provisions, and may provide for such adjustments and exceptions for all *or any class of transactions*, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this subchapter."[99] The reference to "additional requirements" seemingly means additional to the requirements established by TILA itself.

Relatedly, the words in § 1604, "necessary or proper to effectuate the purposes of this subchapter," also seem to satisfy the requirements for *Loper Bright* delegation.[100] Though the CFPA's § 5532(a) lacks similar necessary or proper language and so departs from *Loper Bright*'s example of delegating language, those two sections, both dealing with the CFPB's disclosure power, should be read together to convey that the Bureau has discretion to issue disclosure regulations governing any con-

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such adjustments and exceptions for all or any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

95. *See supra* notes 60–63 and accompanying text.

96. 15 U.S.C. § 1604(a); Loper Bright Enters. v. Raimondo, 603 U.S. 369, 395 n.6 (2024).

97. *See* 12 U.S.C. § 5532(a) (emphasis added).

98. The Bureau in fact rested its payday lending disclosure rules in part on this section. *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54472 (Nov. 17, 2017).

99. 15 U.S.C. § 1604 (emphasis added).

100. *Id.*; *see supra* note 63 and accompanying text.

sumer financial product or service, including new consumer financial products.

A general statute clearly authorizing the Bureau to create disclosure requirements for new products would eliminate any conceivable doubt and should not be troublesome for Congress to write. Congressional disclosure requirements have already become much more general.[101] For example, consider a typical auto loan as compared with car leases. The two are often seen as alternatives; that is to say, someone who wishes to obtain a car but who cannot pay the full purchase price at the transaction's outset may choose between financing the purchase with a car loan or leasing the car. In either case, the consumer makes monthly payments and obtains the use of the car. Whichever transaction the consumer chooses, TILA mandates certain disclosures.[102] The TILA section providing the disclosure rules for the car loan, § 1638, first enacted in 1968,[103] runs over 5,000 words.[104] The corresponding set of requirements for auto leases, enacted as part of the CLA in 1976,[105] § 1667a, is not even 600 words long.[106] The CLA delegates more of the details to the administrative agencies tasked with developing lease forms.[107] If Congress were to write a generic consumer protection statute, it would merely continue that trend.

But in the words of ChiChi Wu, an attorney at the National Consumer Law Center, disclosure is a necessary but not sufficient consumer protection.[108] Disclosures help some consumers and so have value, but for many consumers, disclosures fail to provide meaningful protection. Among the reasons are that consumers often simply ignore disclosures[109]

101. *Compare* 15 U.S.C. § 1638 (outlining disclosure requirements), *with* 15 U.S.C. § 1667a (consumer lease disclosures).

102. *See* 15 U.S.C. § 1638; 15 U.S.C. § 1667a.

103. *See* Pub. L. No. 90-321, 82 Stat. 155 (1968).

104. *See* 15 U.S.C. § 1638.

105. *See* Pub. L. No. 94–240, 90 Stat. 257 (1976).

106. *See* 15 U.S.C. § 1667a.

107. Today, the CFPB issues the CLA regulations but in 1976, the CFPB had not yet been created and so the Federal Reserve Board was responsible for the regulations.

108. *See* Jeff Sovern, *Who Teaches Consumer Law?*, J. CONSUMER & COM. L., 2025, at 4.

109. Clickstream data has helped researchers ascertain how much time consumers actually spend reading online contracts. Unfortunately, the results are not encouraging. Thus, one study found that "only one or two out of every thousand retail software shoppers chooses to access the license agreement, and those that do spend too little time, on average, to have read more than a small portion of the license text." *See* Yannis Bakos, Florencia Marotta-Wurgler, & David R. Trossen, *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts* 2 (NET Inst., Working Paper No. 09-04, 2014). Similarly, in an experiment, of the 543 subjects who had an opportunity to read a social network's terms of service, only 37—or 7%—objected to the terms even though they obliged the subjects to surrender their first-born child, while the median time the students spent reading the social network's terms of service and privacy policy was about fourteen seconds each. *See* Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services*, 23 INFO., COMMC'N & SOC'Y 128, 137–38 (2018). Indeed, even many consumer law professors say they rarely read disclosures. *See* Jeff Sovern, *Another Survey of Consumer Law Professors Fails to Find Any Who Always Reads Consumer Contracts Before Signing Them*, CONSUMER L. & POL'Y BLOG (June 17, 2019), https://perma.cc/98C3-SGPC (surveying consumer law profes-

or do not understand them.[110] In short, studies confirm the insight of former Federal Reserve Chair Ben S. Bernanke, whose agency was responsible for implementing and enforcing TILA's mandated disclosure rules before creation of the CFPB: "[N]ot even the best disclosures are always adequate."[111]

Moreover, it is likely that the consumers most in need of protection from predatory loans are those for whom disclosures are least useful. Consequently, any list of protections for consumers should include disclosures but not stop there, and so the Article now turns to other consumer protection tools.

B. Ability to Repay and Overextension

Lawmakers have also protected consumers by imposing ability-to-repay requirements.[112] It may seem counterintuitive that such measures are necessary. After all, lenders have a natural incentive to verify that their borrower can repay the loan. Lenders usually lose money on loans if they are not repaid. But occasionally, the borrower's failure to repay does not prevent lenders from making money on the transaction. For example, lenders might originate mortgages that they then sell to others at a profit, leaving these later purchasers to take the loss when the borrower defaults.[113] This type of lending contributed to the Great Recession through mortgage securitization, which separated the role of the loan originator from the role of the entity to which the mortgage was to be repaid.[114] One way to limit the negative externalities associated with this practice is to require that the originator verify before the loan is extended that the consumer will be able to repay the loan.

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sors and finding not one responding professor always reads required disclosures and 45% rarely read them). *See generally* OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014).

110. For example, consumers who were shown TILA-mandated credit card disclosures and then asked questions about them were able to answer only 58% of the questions correctly—less than the 65% score required for passing on many exams. *See* Jeff Sovern & Nahal Heydari, *Not-So-Smartphone Disclosures*, 76 ARK. L. REV. 437, 504 (2024). Consumers did only slightly better on mortgage disclosures, *see* KLEIMANN COMMC'N GRP., KNOW BEFORE YOU OWE: QUANTITATIVE STUDY OF THE CURRENT AND INTEGRATED TILA-RESPA DISCLOSURES C-6, C-11, H-2 tbl.8, H-3 tbl.8 (2013) (when shown mortgage disclosures, less than 65% could identify the first monthly payment correctly, and just over 65% correctly reported that the loan amount would not increase after closing), and also struggled with debt collection disclosures. *See generally* Jeff Sovern & Kate E. Walton, *Are Validation Notices Valid? An Empirical Evaluation of Consumer Understanding of Debt Collection Validation Notices*, 70 SMU L. REV. 63 (2017).

111. *See* Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Rsrv. Sys., Speech at the Federal Reserve System's Sixth Biennial Community Affairs Research Conference: Financial Innovation and Consumer Protection 10 (Apr. 17, 2009), https://fraser.stlouisfed.org/files/docs/historical/bernanke/bernanke_20090417.pdf?utm_source=direct_download [https://perma.cc/CR2A-8VYM] ("[S]ome aspects of increasingly complex products simply cannot be adequately understood or evaluated by most consumers, no matter how clear the disclosure.").

112. *See* 15 U.S.C. § 1665e; 15 U.S.C. § 1639c(a)(1).

113. FED. DEPOSIT INS. CORP., CRISIS AND RESPONSE: AN FDIC HISTORY, 2008–2013, at 4 (2017).

114. *Id.* at 10.

Still another circumstance in which lenders might profit by making loans to those who cannot repay them is if the borrower gets caught in a debt trap, able to pay the interest but not able to repay the principal and so doomed to renew the loan and pay interest indefinitely. For many consumers, payday loans are just such a snare. Payday loans are for short periods—until payday—often at a high interest rate.[115] A CFPB study determined that many payday lender business models depended on borrowers who could not repay the loan's principal when it was due and so ended up perpetually renewing the loan.[116]

Congress enacted an ability-to-repay requirement for credit cards in the 2009 Credit CARD Act.[117] That statute forbids credit card issuers from opening credit card accounts or increasing credit limits "unless the card issuer considers the ability of the consumer to make the required payments."[118] This requirement does not seem to have overly restricted access to credit; indeed, except during the pandemic, the number of annual credit card originations has consistently exceeded 3.5 million, even ranging up to more than 7 million.[119] Congress mandated a similar ability-to-repay requirement for mortgages after the Great Recession.[120]

In sum, lenders behaving appropriately should always confirm the borrower's ability to repay the loan out of self-interest. When a lender fails to do so, it's a red flag that the lender's goal may be something other than obtaining repayment under the loan terms, and that therefore, lawmakers should intervene. In other words, when the lender believes that it might be better off if the borrower is unable to repay the loan under its original terms—as in the debt trap example—or is indifferent to whether the borrower can repay the loan—as with the subprime lending that led to the Great Recession—lawmakers should consider imposing a verification requirement upon the lender. Though this tool is needed only when the originator would not undertake such an examination out of self-interest, there is little downside to imposing a requirement on lenders that they verify that the consumer repay the loan. If the lenders would have verified that the borrower can repay the loan out of self-interest, the requirement would not increase the lender's burden or costs. And if the

115. *See What Is a Payday Loan?*, CONSUMER FIN. PROT. BUREAU (May 28, 2024), https://www.consumerfinance.gov/ask-cfpb/what-is-a-payday-loan-en-1567/ [https://perma.cc/45HX-4S6R].

116. *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54472, 54484 (Nov. 17, 2017).

117. *See* 15 U.S.C. § 1665e.

118. *See* Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, § 109, 123 Stat. 1734, 1743 (codified at 15 U.S.C. § 1665e).

119. *See Origination Activity*, CONSUMER FIN. PROT. BUREAU (Jan. 13, 2026), https://www.consumerfinance.gov/data-research/consumer-credit-trends/credit-cards/origination-activity/ [https://perma.cc/J2TD-JGNX].

120. *See* 15 U.S.C. § 1639c(a)(1). The CFPB ultimately created an alternative to satisfying that requirement. Specifically, the Bureau provided that lenders who provided mortgages that met certain conditions—called qualified mortgages—were presumed to have satisfied the ability-to-pay requirement. *See* 12 C.F.R. § 1026.43(e) (2026).

lender is not verifying that the consumer can repay the loan, something could be amiss.

The Bureau has claimed the right to impose ability-to-repay requirements without an explicit authorization of that power. In 2017, the CFPB issued a rule which would have required payday lenders to verify that borrowers could repay loans according to their original terms.[121] The CFPB based the rule not on a specific statute mandating such a test but upon its determination that the failure to conduct such a verification would constitute an unfair and abusive practice.[122] Though the rule was later challenged in court, courts did not evaluate the Bureau's authority to institute the ability-to-repay requirement because a change in administrations led the Bureau's leadership to delete the ability-to-repay requirement from the rule.[123] Consequently, while we know that some Bureau leaders believed it had the power to mandate such a requirement, that belief remains untested in the courts.[124] Especially after *Loper Bright*, it is even more desirable that Congress explicitly provide such authority to the CFPB to prevent the problems described in the preceding paragraphs from occurring in new products.

C. Dispute Resolution/Enforcement of Consumer Claims

Several tools in the consumer protection toolbox involve dispute resolution and enforcement of consumer claims. While consumers technically can sue under various statutes when things go wrong, litigation costs often exceed the amount at issue, and so filing a lawsuit makes little economic sense.[125] Fortunately, lawmakers have provided other mechanisms for resolving some consumer disputes.

1. Billing Errors, Claims and Defenses, and Unauthorized Use

Often, the particular dispute resolution method depends on how the consumer paid for the item. When consumers pay for goods with cash, there are no built-in dispute resolution mechanisms; unless the seller has provided a contractual right, consumer recourse for problems lies in the courts or arbitration. But when third parties, such as credit card issuers or auto lenders, are involved, Congress and the FTC have provided consumers varying rights against the third party depending on the circum-

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121. *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54472, 54472 (Nov. 17, 2017).

122. *Id.*

123. Payday, Vehicle Title, and Certain High-Cost Installment Loans, 85 Fed. Reg. 44382, 44382 (July 22, 2020) (revoking of mandatory underwriting provisions).

124. At least one state court has upheld an ability to pay requirement under a state UDAP statute. *See* Commonwealth v. Fremont Inv. & Loan, 897 N.E.2d 548, 556–61 (Mass. 2008).

125. *See* David M. Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer, & Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 112 (1983) (explaining that 22% of plaintiffs in the study who had hourly fee lawyers paid their lawyers more than the plaintiffs recovered); Emery G. Lee III, *Law Without Lawyers: Access to Civil Justice and the Cost of Legal Services*, 69 U. MIAMI L. REV. 499, 502 (2015).

stances.[126] The rules for credit cards differ from those for debit cards and both differ from those for installment loans.[127] The type of issue also matters. For example, rules governing unauthorized use diverge from those for items that never arrive.[128] In any event, dispute resolution issues are well within the lawmakers' toolkit. With any new product then, the issue is which, if any, of these approaches is most appropriate.

Consumers who use credit cards to purchase items receive the greatest protections. Thus, TILA allows consumers to have billing errors investigated,[129] protects consumers against unauthorized use of their credit cards,[130] and allows consumers to assert claims and defenses against credit card issuers in some circumstances when products are defective.[131] The last of these protections, found in § 1666i, enables consumers who used a credit card to purchase a defective product costing more than $50 to refuse to pay the credit card issuer for the item after making a good-faith attempt to resolve the dispute with the seller,[132] but only to the extent that the consumer has not yet paid the debt;[133] in other words, the consumer cannot use that provision to recover amounts the consumer has already paid. Even then, consumers can use their § 1666i rights only if they bought the item in the same state as the consumer's billing address or within 100 miles of that address, subject to some exceptions.[134]

As a practical matter, credit card issuers sometimes dispense with the geographical limit, unless substantial sums are involved.[135] Some evidence suggests the geographical limit was originally adopted because Congress believed merchants would be unwilling to accept credit cards from out-of-state banks for fear that they would end up in a dispute with a distant consumer.[136] Whatever merit this view had when Congress adopted it, it no longer describes the marketplace. Many consumers have credit cards issued by banks that operate nationally—often issued from

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126. *See, e.g.*, 15 U.S.C. § 1666i (credit cards); 16 C.F.R. § 433.2 (2026) (installment loans).

127. *Compare* 15 U.S.C. § 1666i (credit cards), *with* 15 U.S.C. § 1693f (debit cards), *with* 16 C.F.R. § 433.2 (2026) (installment loans).

128. *Compare* 15 U.S.C. § 1643 (unauthorized use), *with* 15 U.S.C. § 1666(b)(3) (goods that never arrive).

129. *See* 15 U.S.C. § 1666.

130. *See id.* § 1643.

131. *See id.* § 1666i.

132. *See id.* § 1666i(a).

133. *See id.* § 1666i(b).

134. *See id.* § 1666i(a).

135. *See* RONALD MANN, PAYMENT SYSTEMS AND OTHER FINANCIAL TRANSACTIONS 21 (8th ed. 2023) ("a variety of considerations can lead issuing banks to forego a strict reliance on their rights under the 100-mile limitation."). For an example of a card issuer refusing to waive the limit, see Singer v. Chase Manhattan Bank, 890 P.2d 1305, 1306 (Nev. 1995).

136. *See* S. REP. NO. 93-278, at 10–11 (1973); *Inaccurate and Unfair Billing Practices: Hearing on S. 1630 and S. 914 Before the Senate Subcomm. on Consumer Credit, Comm. on Banking, Hous. & Urb. Affs.*, 93d Cong. 450 (1973) (testimony of John Weistart and Roland E. Brandel); Roland E. Brandel & Carl A. Leonard, *Bank Charge Cards: New Cash or New Credit*, 69 MICH. L. REV. 1033, 1064–68 (1971).

South Dakota, Delaware, or Utah[137]—and buy items from both local retailers and sellers that likewise operate nationally. Consequently, the geographical limit no longer serves a purpose, if it ever did.

Federal regulators have provided more limited dispute resolution processes for closed-end lending. Thus, in 1975, the FTC adopted its so-called "Holder Rule," obliging lenders in some circumstances to include in consumer loan agreements a notice that makes the lender subject to consumer claims and defenses arising from the underlying purchase transaction up to the amount that the consumer had paid.[138] Depending on the relationship between the lender and seller, lenders must include the term in the lending contract even if the seller did not lend the money directly to the consumer.[139] The FTC based its Holder Rule on its UDAP powers.[140]

Congress presumptively bestowed upon the CFPB the power to require consumer lenders in at least some circumstances to include contract terms giving consumers the right to assert claims and defenses against lenders. That is because when Congress created the CFPB, it gave the Bureau the same UDAP powers the FTC enjoys.[141] Under the prior construction canon of statutory interpretation, when Congress enacts a statute which includes language copied from another statute, Congress is presumed to have adopted interpretations of that statute as well, unless it specifies otherwise.[142] In Justice Frankfurter's colorful language, "Words of art bring their art with them . . . . [I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it."[143] The prior construction canon extends to adoption of administrative interpretations.[144] Congress enacted the CFPA in 2010,[145] well after 1975, when the FTC promulgated the Holder Rule,[146] and nothing suggests Congress rejected the FTC's Holder Rule interpretation when it passed the CFPA. Accordingly, the CFPB should be able to extend the FTC's Holder Rule to other forms of lending.

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137. *See* Alex Cramer, *Delaware, South Dakota and Utah: Home Is Where the Card Is?*, FINAL (Apr. 18, 2017), https://www.getfinal.com/company-news/2017/04/18/issuing-states/ [https://perma.cc/M952-K5MP].

138. *See* Preservation of Consumers' Claims and Defenses, Unfair or Deceptive Acts or Practices, 40 Fed. Reg. 53506 (proposed Nov. 18, 1975) (codified at 16 C.F.R. § 433.2 (2026)).

139. *See* 16 C.F.R. §§ 433.1, 433.2 (2026).

140. *See* 16 C.F.R. § 433.2 (2026).

141. *See* 12 U.S.C. § 5531.

142. *See* Morissette v. United States, 342 U.S. 246, 263 (1952).

143. Frankfurter, *supra* note 54, at 537; *see also* Sekhar v. United States, 570 U.S. 729, 733 (2013).

144. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 322, 324 (2012) (explaining that the canon applies to "well-established agency interpretations"). A fifty-year old interpretation that has affected the text of numerous contracts surely qualifies as well-established.

145. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. § 5531(c)).

146. *See* Preservation of Consumers' Claims and Defenses, Unfair or Deceptive Acts or Practices, 40 Fed. Reg. 53506 (Nov. 18, 1975) (codified at 16 C.F.R. § 433.2 (2026)).

Nevertheless, it is desirable for Congress to enact a statute making crystal clear that the Bureau has the power to mandate dispute resolution mechanisms for new consumer financial products, especially in the *Loper Bright* era. As to some products, it is useful for consumers to have access to dispute resolution mechanisms that go beyond the FTC Holder Rule, as Congress recognized when it enacted the various protections for credit card holders. Accordingly, Congress should allow the CFPB to mandate credit card-like protections for new products when appropriate, with one caveat: for the reasons discussed above, the CFPB should be able to dispense with the § 1666i(a)(3) geographical limit on consumers who assert claims and defenses against creditors that they have against the merchant who sold them the item underlying the charge.[147]

2. Private Claims

Congress often supplements public enforcement of consumer protection laws by authorizing injured consumers to bring private claims.[148] Doing so enables enforcement of consumer law while reducing the resource needs of government agencies. But consumer law litigation often faces a fundamental problem: Because the amounts at stake in the typical consumer case are so small, they are not enough to cover the cost of litigation.[149] Congress has often responded by authorizing courts to order defendants to pay prevailing plaintiffs' attorney's fees and statutory damages.[150] CUFPA should authorize a private right of action to enforce regulations the CFPB adopts under CUFPA's authority, together with provisions for attorney's fees and statutory damages when appropriate, unless the CFPB concludes that a private action is inappropriate as to the particular protections. Without such provisions, CUFPA may not adequately deter consumer financial company misconduct or sufficiently compensate injured consumers, especially in times of public-agency enforcement cutbacks, such as during the second Trump Administration.[151]

A possible alternative would be to authorize the CFPB to determine that violation of a CUFPA regulation is an unfair and deceptive act or

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147. *See supra* notes 135–37 and accompanying text.

148. *See, e.g.*, 15 U.S.C. § 1640 (authorizing consumers to sue under TILA); 15 U.S.C. § 1692k (authorizing consumers to sue under FDCPA).

149. *See, e.g.*, John L. Hill, *Introduction*, 8 ST. MARY'S L.J. 609, 609 (1977) ("I was frequently asked . . . to help [clients] in what would now be called a 'consumer case.' . . . . [E]ach had a common characteristic—the amount in controversy was generally very small, normally not more than two hundred dollars. These losses were simply too small to justify the costs of litigation.").

150. *See, e.g.*, 15 U.S.C. § 1640(a)(2)(A), (3) (statutory damages and attorney's fees under TILA); 15 U.S.C. § 1692k(a)(2)(A), (3) (statutory damages and attorney's fees under FDCPA).

151. *See, e.g.*, Interpretive Rules, Policy Statements, and Advisory Opinions; Withdrawal, 90 Fed. Reg. 20084, 20085 (proposed May 12, 2025) ("[T]he Bureau is reducing its own enforcement to only those areas statutorily required."); Maxine Joselow, Hannah Natanson, & Ian Duncan, *Trump Orders the Government to Stop Enforcing Rules He Doesn't Like*, WASH. POST (May 18, 2025), https://www.washingtonpost.com/nation/2025/05/18/trump-enforcement-halt-regulations-laws/ ("'CFPB enforcement work is dormant completely,' said Stephen Springer, a managing partner in the D.C. office of the legal recruiting firm Major, Lindsey & Africa.").

practice. Because every state has enacted a UDAP statute providing for private claims for deceptive conduct—and often for unfair behavior as well—doing so would increase the likelihood that consumers could bring claims under state law.[152] States often follow federal agencies—in particular, the FTC—in deciding what constitutes unfair or deceptive behavior.[153] Consequently, a determination that conduct is unfair and deceptive might well constitute persuasive authority for claims brought under state UDAP statutes.

3. Arbitration Clauses

Another device that enables consumers to bring consumer claims despite the cost of litigation is the class action.[154] Class actions make that possible by spreading the cost of litigation over many plaintiffs.[155] But consumer financial companies frequently foreclose class actions in consumer litigation by including in their consumer contracts arbitration clauses barring consumers from bringing or participating in class actions.[156] The effect is not only to bar the use of class actions but to bar the assertion of claims at all because consumers seldom file arbitration unless a substantial amount of money is at issue.[157] The result is that consumers frequently have no effective redress when companies violate consumer protection laws.[158]

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152. *See* CAROLYN CARTER, JONATHAN SHELDON, JOHN W. VAN ALST, & JEREMIAH BATTLE, JR., UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 12.2.1 (11th ed. 2025) ("There is a private UDAP damages remedy in every state.").

153. For a description of the precedential value of federal agency interpretations for every state UDAP statute, see *id.* at app. A.

154. *See* FED. R. CIV. P. 23.

155. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) ("Class actions . . . permit the plaintiffs to pool claims which would be uneconomical to litigate individually.").

156. *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), at 9, 44 (2015) [hereinafter CFPB, ARBITRATION STUDY], http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-tocongress-2015.pdf ("Tens of millions of consumers use consumer financial products or services that are subject to pre-dispute arbitration clauses." "Almost all of the arbitration clauses studied contained terms limiting the availability of class proceedings in arbitration.").

157. *See id.* at 21, 23–24 (noting that of 1,185 disputes in which parties sought monetary relief, only seventy-four involved claims of $1000 or less); David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 117 (2015) ("In the entire four-and-a-half years covered by our study, only 184 of all 4,839 consumers in our sample demanded under $1,000."); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html ("[B]y assembling records from arbitration firms across the country, The Times found that between 2010 and 2014, only 505 consumers went to arbitration over a dispute of $2,500 or less.").

158. *See* Heidi Shierholz, *Correcting the Record: Consumers Fare Better Under Class Actions than Arbitration*, ECON. POL'Y INST. (Aug. 1, 2017), https://www.epi.org/publication/correcting-the-record-consumers-fare-better-under-class-actions-than-arbitration/ (emphasis in original) (explaining that in a typical year, "[*a*]*t least* 6,800,000 consumers get cash relief in class actions—compared with just 16 consumers who receive cash relief in arbitration . . . . Consumers recover *at least*

Arbitration clauses are also troublesome because consumers often agree to them without understanding what rights they are sacrificing.[159] It is difficult to square the Supreme Court's view that arbitration is a matter of consent[160] with the fact that consumers agree to arbitration without meaningfully understanding it.[161]

While the default federal arbitration law, the Federal Arbitration Act,[162] requires courts to enforce arbitration clauses in most instances,[163] Congress has carved out some exceptions to this default rule in consumer disputes. Thus, arbitration clauses in mortgages[164] or loans to those serving in the military[165] are not enforceable. Congress should likewise add to CUFPA a provision authorizing the CFPB to make arbitration clauses ineffective as to new products or business models.[166]

4. State Enforcement

Congress often provides that state attorneys general can enforce federal consumer laws.[167] The lending that led to the Great Recession illustrates the importance of state consumer protection efforts. As the Senate Banking Committee noted in 2010, "Where federal regulators refused to act, the states stepped into the breach."[168] Unfortunately, federal agencies preempted those efforts.[169] In any event, state enforcement of CUFPA regulations is just as appropriate as state enforcement of any other federal consumer protection law, and so CUFPA should likewise authorize state attorneys general to bring cases under CUFPA.[170]

$440,000,000 in class actions, *after* deducting all attorneys' fees and court costs—compared with a *total* of $86,216 in arbitration.").

159. *See* Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis, & Yuxiang Liu, *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1, 4 (2015) [hereinafter Sovern et al., *Whimsy Little Contracts*]; Roseanna Sommers, *What Do Consumers Understand About Predispute Arbitration Agreements? An Empirical Investigation*, PLOS ONE (2024), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10889883/; CFPB, ARBITRATION STUDY, *supra* note 156, at 3–4.

160. *See* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stan. Junior Univ., 489 U.S. 468, 479 (1989) ("Arbitration under the [Federal Arbitration] Act is a matter of consent . . . .").

161. *See* Sovern et al., *Whimsy Little Contracts*, *supra* note 159, at 69.

162. *See* 9 U.S.C. § 1 *et seq*.

163. *See, e.g.*, CompuCredit Corp. v. Greenwood, 565 U.S. 95, 97, 104 (2012) (explaining that under the FAA, arbitration clauses compel arbitration of consumer claims based on the Credit Repair Organizations Act); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011) (explaining that class action waivers in arbitration clauses are enforceable notwithstanding contrary state law).

164. *See* 15 U.S.C. § 1639c(e)(1).

165. *See* 10 U.S.C. § 987(f)(4).

166. *See generally* Jeff Sovern, *The FAA Should Not Cover Consumer Claims*, *in* THE FEDERAL ARBITRATION ACT: SUCCESSES, FAILURES, AND A ROADMAP FOR REFORM 197, 197 (Richard A. Bales & Jill I. Gross eds., 2024).

167. *See, e.g.*, 15 U.S.C. § 1640(e) (TILA); 12 U.S.C. § 5552 (CFPA).

168. *See* S. REP. NO. 111-176, at 16 (2010), https://www.congress.gov/congressional-report/111thcongress/senate-report/176/1.

169. *Id.*

170. Another common form of dispute resolution gives consumers a right to rescind transactions, often for three days. But despite their ubiquity, no study has ever found that significant num-

D. Fee Regulation

In our economic system, we normally rely on markets to set prices. But in 2009, Congress amended TILA in the CARD Act to limit credit card penalty fees, such as late fees, to reasonable and proportional amounts.[171] Among the justifications for doing so is that the market may not function in setting late fees for multiple reasons. One reason is that some consumers do not understand existing late fee disclosures.[172] Another is that consumers simply don't read disclosures.[173] And a third is that some consumers may optimistically assume that they will not make late payments and so can disregard late fee charges in making borrowing decisions[174]—though some consumers do indeed end up paying late fees.[175]

It is impossible to know whether any of those reasons for assuming the market will not efficiently allocate penalty fees will hold for new credit products without conducting empirical research to test consumer understanding and awareness of late fee disclosures. But it is certainly plausible that the same behaviors consumers exhibit as to other credit products will carry over to new credit products. Accordingly, Congress should also permit the CFPB to limit penalty fees for new credit products

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bers of consumers take advantage of cooling off periods while multiple studies have found that consumers rarely invoke them. *See* Jeff Sovern, *Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures*, 75 U. PITT. L. REV. 333, 334–35 (2014); PUB. SECTOR RSCH. GRP., FINAL REPORT OF AN IMPACT EVALUATION OF THE COOLING-OFF PERIOD FOR DOOR-TO-DOOR SALES TRADE RULE, at I-4–I-5 (1981) (an FTC-commissioned study found that not one of the 1,494 consumers who answered a survey had used the FTC Cooling Off Period Rule to rescind a purchase); WALKER RESEARCH, INC., THREE-DAY COOLING-OFF PERIOD TRADE RULE EVALUATION STUDY 16 (1981) (an FTC-commissioned study found only 2% of businesses queried believed that the number of cancellations their company experienced had increased because of the FTC Cooling Off Period Rule); Note, *A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period*, 78 YALE L.J. 618, 628 (1969) (concluding that a Connecticut one-day cooling-off period "benefits consumers very little"). Accordingly, the Article does not propose to include in CUFPA an option for the CFPB to mandate additional cooling off periods.

171. *See* 15 U.S.C. § 1665d(a).

172. *See* Sovern & Heydari, *supra* note 87, at 499.

173. *See supra* note 109 and accompanying text.

174. *See, e.g.*, *Examining the Billing, Marketing, and Disclosure Practices of the Credit Card Industry, and Their Impact on Consumers: Hearing Before the S. Comm. on Banking, Hous., & Urban Affs.*, 110th Cong. 42 (2007) (statement of Travis B. Plunkett, Legislative Dir., Consumer Fed'n of Am.) ("[C]onsumers do not shop, they do not shop around, based on an assumption that they are going to pay a—make a payment a day late. They are overly optimistic, and research from behavioral economists has shown this, about their ability to meet their financial obligations . . . . They look at annual fees. And it is true that many cards now do not include an annual fee. They do not look at the back end fees."); *The Credit Cardholders' Bill of Rights: Providing New Protections for Consumers: Hearing Before the Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs.*, 110th Cong. 145 (2008) (statement of Katherine Porter, Professor of Law, Univ. of Iowa Coll. of Law) ("Serious cognitive barriers hinder consumers from making effective use of disclosures, including a tendency to underestimate the likelihood that they will encounter a penalty under the contract.").

175. *See* David Sykes, Klarna, Inc., Comment on Interpretive Rule on Buy Now, Pay Later (BNPL) Regulations (July 30, 2024), https://www.regulations.gov/comment/CFPB-2024-0017-0020 (reporting that 4.31% of BNPL provider Klarna's customers incurred late fees in 2023).

to those that are reasonable and proportional, just as Congress did with credit cards. And just as Congress did with the CARD Act, Congress should permit, though not require, the Bureau to establish safe harbor amounts for penalty fees[176] so that lenders can comply with the reasonable and proportional limit without incurring the cost of demonstrating that their fees meet the requirements. Of course, as with the CARD Act, if a particular lender *can* demonstrate that its penalty fee amounts are reasonable and proportional, even though they exceed the safe harbor amount, the lender should be able to charge the higher amount.

E. Discrimination in Consumer Transactions

Several federal laws bar odious discrimination in certain consumer transactions. For example, the Equal Credit Opportunity Act (ECOA) prohibits discrimination in lending on various bases, including race, gender, religion, and national origin.[177] Some civil rights laws also apply to some consumer transactions. Thus, the 1866 Civil Rights laws mandate that all consumers shall have the same rights to buy and lease property and enter into contracts as White consumers.[178] Other laws forbidding certain types of discrimination in some consumer transactions include the Civil Rights Act of 1964,[179] the Americans with Disabilities Act,[180] and the Fair Housing Act of 1968.[181] But these laws, even collectively, do not proscribe all objectionable discrimination in consumer transactions. Thus, no federal law prevents banks from discriminating on the basis of gender or religion when consumers seek to open checking accounts.[182]

Obviously, our country has established a strong norm against objectionable discrimination in consumer transactions. CUFPA should allow the CFPB to extend that norm to new products and business models. In 2022, the CFPB attempted to use its power to proscribe unfair acts within the meaning of the CFPA to extend this norm to consumer financial transactions not already covered by explicit antidiscrimination laws. Specifically, the CFPB revised its supervision manual to instruct examiners to determine whether consumer financial institutions were taking

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176. *See* 15 U.S.C. § 1665d(e).

177. *See* 15 U.S.C. § 1691(a).

178. 42 U.S.C. § 1982 ("All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."); 42 U.S.C. § 1981 ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ."); *see also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968) (emphasis in original) ("§ 1982 bars *all* racial discrimination, private as well as public, in the sale or rental of property . . . .").

179. *See* 42 U.S.C. § 2000a(a).

180. *See id.* § 12181(7).

181. *See id.* § 3604.

182. *See* Jeff Sovern, *Is Discrimination Unfair?*, 41 GA. ST. U. L. REV. 631, 634, 649–51 (2025).

appropriate steps to prevent discrimination against consumers.[183] The Chamber of Commerce and banking trade groups challenged the change in the manual by suing in a federal court in which both federal judges had been nominated by then-former President Trump.[184] The federal district court, not surprisingly, ruled that the amendment to the manual was invalid.[185] The CFPB appealed, but after President Trump returned to the White House, the CFPB entered into a stipulation with the trade associations to dismiss the appeal, making the district court decision the last word on whether discrimination is unfair within the meaning of the CFPB's organic statute, for now.[186] In contrast, the FTC has brought several cases charging that discrimination is unfair within the meaning of the Federal Trade Commission Act, without encountering such pushback.[187] In any event, CUFPA should make clear, at least as to new products and business models, that the CFPB can outlaw odious discrimination.

III. BNPL UNDER CUFPA

This Part of the Article explores what BNPL regulation could look like under the proposed CUFPA. The goal is both to illustrate how the CFPB, if equipped through CUFPA with the tools in the consumer protection toolbox discussed in Part II, might function as to a new product and conduct a quasi-thought experiment as to whether CUFPA would provide consumers with useful protections. This Part first describes BNPL more fully.

183. *See CFPB Targets Unfair Discrimination in Consumer Finance*, CONSUMER FIN. PROT. BUREAU (Mar. 16, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-targets-unfair-discrimination-inconsumer-finance [https://perma.cc/6X9F-76DJ]. The CFPB supervises or examines various financial institutions for compliance with federal consumer protection laws. *See* 12 U.S.C. §§ 5514–5516.

184. *See* Sovern, *supra* note 182, at 636.

185. Chamber of Com. of the U.S. v. CFPB, 691 F. Supp. 3d 730, 732 (E.D. Tex. 2023).

186. *See* Joint Stipulation to Dismiss Appeal at 1, Chamber of Com. of the U.S. v. CFPB, No. 23-40650 (Apr. 30, 2025), https://consumerbankers.com/wp-content/uploads/2025/04/Corrected-Joint-Stipulation-to-Dimiss.pdf.

187. *See* Complaint for Permanent Injunction, Monetary Relief, and Other Relief at 2, 19, FTC v. Passport Auto. Grp., Inc., No. 8:22-cv-02670 (D. Md. Oct. 18, 2022); Complaint for Monetary Relief, Permanent Injunction, and Other Relief at 20, FTC v. Rhinelander Auto Ctr., Inc., No. 3:23-cv-00737 (W.D. Wis. Oct. 24, 2023); Complaint for Permanent Injunction, Monetary Judgment, and Other Relief at 26, FTC v. Floatme Corp., No. 5:24-cv-00001 (W.D. Tex. Jan. 2, 2024); *see also* Press Release, FTC, Federal Trade Commission Takes Action Against Passport Automotive Group for Illegally Charging Junk Fees and Discriminating Against Black and Latino Customers (Oct. 18, 2022), https://www.ftc.gov/newsevents/news/press-releases/2022/10/federal-trade-commission-takes-action-against-passportautomotive-group-illegally-charging-junk-fees [https://perma.cc/3NFP-SMKR] (arranging for higher prices for loans to Black and Latino consumers than similarly situated non-Latino White consumers is an unfair practice in violation of FTC Act); Elisa Jillson, *Aiming for Truth, Fairness, and Equity in Your Company's Use of AI*, FTC: BUS. BLOG (Apr. 19, 2021), https://www.ftc.gov/businessguidance/blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai [https://perma.cc/RH46-UR3B] (explaining that FTC's section five authority prohibiting unfair practices would "include the sale or use of—for example—racially biased algorithms").

A. BNPL Transactions

Many Americans have been persuaded to purchase items using BNPL: Half of all Americans are estimated to have used BNPL while BNPL purchases have increased from $2 billion in 2019 to $120 billion in 2023.[188] Numerous BNPL consumers have their first experience with BNPL when they visit a merchant's website, identify a product they wish to purchase, and the website displays the option to pay for the item in four equal instalments by entering into an agreement with a BNPL provider.[189] Typically, that will be a BNPL business with whom the merchant has a relationship, which enables the merchant to display that provider's BNPL option during the checkout process. In other words, often BNPL consumers, rather than shopping for the best BNPL terms available to them, simply patronize the provider selected for them by the merchant whose wares they are considering—though some BNPL users also form relationships directly with BNPL companies.[190] Put another way, it's not a business model that facilitates comparison shopping.

BNPL might at first seem like a poor deal for the BNPL lender precisely because the lender makes an interest-free loan. But, just as with credit cards, BNPL lenders don't pay sellers the full amount of the item the consumer pays; the difference covers the BNPL provider's costs and profit.[191] In fact, sellers often receive less from BNPL providers than they do when accepting payment through credit or debit cards.[192] Sellers nevertheless find BNPL attractive because consumers purchase considerably more when they use BNPL.[193] According to one survey, nearly half

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188. *See* Wang, *supra* note 72.

189. *See* Sahil Soni, *Regulating Buy Now, Pay Later: Consumer Financial Protection in the Era of Fintech*, 123 COLUM. L. REV. 2035, 2042 (2023).

190. *See* JULIAN ALCAZAR & TERRI BRADFORD, FED. RSRV. BANK K.C., THE APPEAL AND PROLIFERATION OF BUY NOW, PAY LATER: CONSUMER AND MERCHANT PERSPECTIVES 1 (2021), https://perma.cc/CU82-CHUA; CONSUMER FIN. PROT. BUREAU, BUY NOW, PAY LATER: MARKET TRENDS AND CONSUMER IMPACTS 12–15 (2022) [hereinafter CFPB, MARKET TRENDS], https://files.consumerfinance.gov/f/documents/cfpb_buy-now-pay-later-market-trends-consumer-impacts_report_2022-09.pdf. Many BNPL providers have phone apps though which customers can access retailers. *See* 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, 286 (2023).

191. BNPL payment models vary; for example, the BNPL provider may charge the merchant a flat fee, or a percentage of the amount of the purchase price, or both. *See* Sanjay Kidecha, *Buy Now Pay Later (BNPL) Model Explained: How It Works and Makes Money*, KODY TECHNOLAB (Jul. 21, 2025), https://kodytechnolab.com/blog/buy-now-pay-later-business-model.

192. *See* ALCAZAR & BRADFORD, *supra* note 190, at 4.

193. *See* Fin. Health Network, Comment Letter on the Interpretive Rule on the Use of Digital User Accounts to Access Buy Now, Pay Later Loans, CFPB-2024-0017 (Aug. 1, 2024) [hereinafter Financial Health Comment], https://www.regulations.gov/comment/CFPB-2024-0017-0033 ("[W]e found that one-third of BNPL users report that they spent more than they would have, or made a purchase they would not have made, if BNPL had not been available; this varies considerably by financial health tier, with fully 49% of the Financially Vulnerable BNPL users but just 13% of the Financially Healthy users so reporting."); *see* Akin, *supra* note 22, at 1; Courtney Reagan, *Retailers Bid Farewell to Layaway, as Shoppers Embrace Buy Now, Pay Later Options*, CNBC (Sept. 25 2021), https://www.cnbc.com/2021/09/25/why-retailers-are-embracing-buy-now-pay-later-financing-services.html; Stijn Maesen & Dionysius Ang, *Buy Now, Pay Later: Impact of Installment*

of American BNPL users say they make more impulse purchases and spend more than they otherwise would because of BNPL.[194] Many BNPL consumers report feeling as if they were getting "free stuff" and "hid[ing] large purchases."[195] One commentator has described BNPL as "a marketing tool that merchants use to drive sales."[196]

But what is good for sellers can be bad for buyers. Some consumers overuse BNPL and become overloaded with debt.[197] For example, a consumer with annual household income of $150,000 who had maxed out her credit cards at $88,000 of debt was still able to take on another $30,000 of BNPL debt.[198]

Not only is there evidence that a disturbing number of BNPL borrowers cannot afford the items they buy through BNPL,[199] multiple studies also raise questions about the ability of BNPL buyers to repay loans generally. A Federal Reserve study found that BNPL users "tend to be more financially vulnerable relative to BNPL nonusers."[200] Similarly, the CFPB found that BNPL users' average credit card utilization rate—a measure of how much of consumers' credit card credit limit they are using—is over 60%, nearly twice that of non-BNPL users.[201] The significance of this is illustrated by the fact that utilization rates of more than 30% may reduce credit scores.[202] Researchers report that BNPL borrowers are more likely to be subprime borrowers than consumers of traditional banking products.[203] BNPL borrowers are also more likely to have at least one serious negative event on their credit history and more likely

Payments on Customer Purchases, 89 J. MKTG. 13, at 14 (2025) (demonstrating BNPL increases purchase incidence by 9% and purchase amounts by 10%).

194. *See BNPL on the Rise: 65% of Gen Zers Using BNPL More in 2025*, PARTNERCENTRIC (Apr. 30, 2025), https://partnercentric.com/blog/bnpl-industry-consumer-trends/.

195. *Id.*

196. *See* Sahil Soni, *Regulating Buy Now, Pay Later: Consumer Financial Protection in the Era of Fintech*, 123 COLUM. L. REV. 2035, 2038 (2023).

197. *See* Nowacki, *supra* note 1 (24% of BNPL users reported overspending).

198. *See* Lauren Aratani, *'How Did I Get Approved for $30,000?': Is Buy Now, Pay Later Headed for a Fall?*, THE GUARDIAN (June 12, 2025), https://www.theguardian.com/us-news/2025/jun/12/buy-now-pay-later-fall.

199. *See, e.g.*, Financial Health Comment, *supra* note 193, at 2 ("[C]onsumers who use BNPL are disproportionately struggling financially.").

200. *See* Fumiko Hayashi & Aditi Routh, *Financial Constraints Among Buy Now, Pay Later Users.*, ECON. REV., May 29, 2025, at 1–2, https://www.kansascityfed.org/documents/10891/EconomicReviewV110N4HayashiRouth.pdf.

201. *See* CONSUMER FIN. PROT. BUREAU, CONSUMER USE OF BUY NOW, PAY LATER AND OTHER UNSECURED DEBT 27 (Jan. 2025) [hereinafter CFPB, CONSUMER USE OF BNPL], https://files.consumerfinance.gov/f/documents/cfpb_BNPL_Report_2025_01.pdf.

202. *Id.*

203. *See id.* at 6 ("Consumers with subprime or deep subprime scores were responsible for nearly two-thirds of BNPL originations."); *Briefing 1: Gaining Clarity on the BNPL User Base*, LEXISNEXIS RISK SOLUTIONS 3 (2023), https://risk.lexisnexis.com/insights-resources/article/buy-now-pay-later-credit-risk (demonstrating that 51% of BNPL applicants are subprime borrowers, compared to 33% of traditional banking product applicants; the corresponding numbers for near-prime borrowers were 33% and 11%).

to have filed for bankruptcy.[204] Indeed, one trade association charged that BNPL providers "target[] . . . low-income or paycheck-to-paycheck consumers."[205]

BNPL lenders must engage in some form of underwriting because some BNPL applicants are rejected.[206] Still, a credit union trade association has complained that "retailers and BNPL providers appear largely indifferent to whether consumers can afford the payments."[207] Reports indicate that BNPL providers do not currently verify that applicants can afford their loans or do so only cursorily, making merely a soft pull of credit reports.[208] According to the National Consumer Law Center and Consumer Reports, "BNPL lenders do not ask the consumer information about their income, assets, or other debts."[209]

BNPL providers can afford to discount default risks because BNPL default rates are low compared to other consumer loans. Indeed, BNPL users are five times as likely to default on their credit cards as on BNPL transactions.[210] The CFPB suggests the low default rate is because most BNPL providers require borrowers to set up automatic repayment of BNPL loans from bank accounts or credit cards.[211] But repaying the BNPL loan may empty out the consumer's account, causing defaults in other transactions.[212] As the CFPB explained: The "BNPL business model may encourage overextension, and . . . may affect consumers' ability

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204. *See Briefing 2: A Fuller Picture of the BNPL User Base*, LEXISNEXIS RISK SOLUTIONS 1 (2023), https://risk.lexisnexis.com/insights-resources/article/buy-now-pay-later-credit-risk. Heavier users of BNPL are more likely to have had more negative credit events, *see id.* at 4, more likely to be heavily leveraged, *see Briefing 3: Defining the Divide*, LEXISNEXIS RISK SOLUTIONS 2 (2023), https://risk.lexisnexis.com/insights-resources/article/buy-now-pay-later-credit-risk, and more likely to have missed payments on existing tradelines, *see id.* at 3.

205. *See* Akin, *supra* note 22, at 2.

206. *See* CFPB, MARKET TRENDS, *supra* note 190, at 4, 16 ("73 percent of applicants were approved for credit in 2021, up from 69 percent in 2020.").

207. *See* Akin, *supra* note 22, at 2.

208. *See* Nat'l Consumer L. Ctr. & Consumer Reps., Comments on: Truth in Lending (Regulation Z): Use of Digital User Accounts to Access Buy Now, Pay Later Loans CFPB-2024-0017, 89 Fed. Reg. 47068, at 18 (May 31, 2024) [hereinafter NCLC/CR Comment], https://www.regulations.gov/comment/CFPB-2024-0017-0028.

209. *Id.*

210. *See* CFPB, CONSUMER USE OF BNPL, *supra* note 201, at 3 ("On average, between 2019-2022, BNPL borrowers defaulted on 2 percent of their BNPL loans. In comparison, BNPL borrowers defaulted on 10 percent of the credit cards they held during the same time period."). *See generally* CFPB, MARKET TRENDS, *supra* note 190, at 4 ("3.8 percent of borrowers had a loan that was charged off in 2021, up from 2.9 percent in 2020."); Sykes, *supra* note 175, at 3 (BNPL company Klarna claims a global default rate of less than one percent).

211. *See* CFPB, CONSUMER USE OF BNPL, *supra* note 201, at 3; *see also* Financial Health Comment, *supra* note 193, at 3 ("Almost 90% of BNPL users authorize repayment via their debit card."); NCLC/CR Comment, *supra* note 208, at 18 (at least one BNPL company secures payments through payroll deductions).

212. *See* DAVID KRAUSE, BUY NOW, PAY LATER: AN ANALYSIS OF CONSUMER FINANCIAL PROTECTION BUREAU RESEARCH AND REGULATORY ACTIONS 9 (May 5, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5237925 (suggesting that automating BNPL payments by linking them to other accounts "mask[s] underlying financial distress by triggering overdraft fees or interfering with borrowers' ability to prioritize other obligations").

to meet non-BNPL obligations."[213] One study found that "[o]n average, BNPL users have 4.0% more overdraft charges, 1.1% higher credit card interest, and 2.3% more credit card late fee charges."[214] Put still another way, BNPL lenders can afford to make riskier loans than other lenders because they are less likely to suffer the consequences of that riskier lending; it is other lenders and the borrowers who suffer the consequences.[215]

BNPL customers who take out new BNPL loans before paying off their other BNPL loans—called stacking—are even more likely to miss payments,[216] and for better or worse, many BNPL borrowers do indeed stack transactions.[217] That stacking may trigger unanticipated late fees—and the amounts of those fees are neither regulated nor subject to federal disclosure requirements.[218] Half of BNPL consumers who report missing a payment said that they had expected to be able to make the payment but fell short.[219] That raises questions about whether better underwriting

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213. *See* CFPB, MARKET TRENDS, *supra* note 190, at 5.

214. *See* Ed deHaan, Jungbae Kim, Ben Lourie, & Chenqi Zhu, *Buy Now Pay (Pain?) Later*, 70 MGMT. SCI. 5586, 5588 (2024); *see also* RACHEL GITTLEMAN, LUCIA MATTOX, & PETER SMITH, CONSUMER FED. OF AM. & CTR. FOR RESPONSIBLE LENDING, ISSUE BRIEF: CONSUMER UNDERSTANDING OF BUY NOW, PAY LATER IN CALIFORNIA 6 (2023), https://consumerfed.org/wp-content/uploads/2023/10/CFA-CRL-BNPL-Issue-Brief-1025-final.pdf (survey found that "37% [of BNPL users had] incurred an overdraft fee in the last 6 months"). According to the Financial Health Network, because so many BNPL consumers set up payments through their debit cards, they "may be subject to up to three overdraft fees over a period of 45 days . . . ." Financial Health Comment, *supra* note 193, at 3.

215. At least one study undermines this view. Cortnie Shupe and Giordano Palloni's study of BNPL borrowers found that "access to BNPL credit [does not] lead[] to negative impacts on any measures of financial distress related to non-BNPL borrowing, such as past-due non-BNPL debt, credit card utilization, the share of credit cards revolving debt, or finance charges paid on credit cards." Cortnie Shupe & Giordano E Palloni, *The Effect of BNPL on Consumer Debt and the Ability to Repay Non-BNPL Debt Obligations* 24–25 (CFPB Office of Rsch., Working Paper No. 2025-11, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5284530. But they also observed that the consumers they studied had typically assumed only small amounts of BNPL debt, and that about a quarter of the consumers they studied "had no non-BNPL debt in the year just prior to their application." *Id.* at 25. Their study followed BNPL borrowers for eighteen months during 2019-2022. *Id.* at 3, 7. BNPL use has increased significantly since 2022 and so the study may no longer report current conditions. *See* CONSUMER FIN. PROT. BUREAU, The BUY NOW, PAY LATER MARKET 5 (2025), https://files.consumerfinance.gov/f/documents/cfpb_bnpl-market-report_2025-12.pdf.

216. *See* CONSUMER REPS. SURV. GRP., BUY NOW PAY LATER SERVICES 1 (2022) [hereinafter CR, BNPL SERVICES], https://advocacy.consumerreports.org/wp-content/uploads/2022/11/2022-Consumer-Reports-Buy-Now-Pay-Later-Survey-Report.pdf ("People with four or more concurrent purchases are twice as likely to have missed a payment than people with fewer concurrent purchases (18% of those with four or more concurrent purchases missed a payment, compared with 9% of those with fewer concurrent purchases)."); Nowacki, *supra* note 1 (16% of BNPL users report missing payments).

217. *See* Schulz, *supra* note 7 (reporting 23% of BNPL users have had three or more BNPL loans simultaneously); Financial Health Comment, *supra* note 193, at 3 ("[I]n our most recent (not-yet published) survey we found that 31% of BNPL users reported making more than one BNPL purchase in the prior month and that 62% of those said they used multiple providers, suggesting that they may hold multiple concurrent BNPL loans.").

218. *See infra* Part IV.

219. *See* CR, BNPL SERVICES, *supra* note 216, at 2; *see also* Nowacki, *supra* note 1 (16% of BNPL borrowers report having missed a payment). It may be that some who claimed that they missed payments for other reasons (e.g., "I thought I had set up automatic payments, but the payment was not made automatically") may in fact have been claiming a pretext to save embarrassment,

would have resulted in those consumers not being able to avail themselves of BNPL and so avoiding default. And as might be expected of new consumer financial products, errors occur, but dispute-resolution procedures for BNPL are unclear.

Credit reporting can also be an issue. BNPL lenders do not usually report payments to credit bureaus,[220] so BNPL borrowers' credit reports may not accurately indicate when they make payments timely. But BNPL consumers who miss payments may nevertheless find their defaults affect their credit scores because BNPL providers may sell unpaid BNPL debts to debt buyers or retain debt collectors who do report to credit bureaus.[221] That can cause credit scores to decline, which in turn leads to higher borrowing costs. Even prime borrowers who regularly use BNPL typically experience a decline in their credit scores.[222]

But while BNPL poses risks for some consumers, many consumers find BNPL helpful and wish to continue using it.[223] They may benefit from BNPL's convenience and being able to spread payments out without paying interest.[224] Some BNPL customers may not be able to obtain credit in other ways.[225] David Krause has suggested that BNPL "function[s] as a shadow credit mechanism for financially constrained households, many of whom may be excluded from mainstream lending."[226] One study found that subprime BNPL borrowers' credit scores tend on average to increase more over time than applicants for bank credit cards

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meaning that the actual number of those who took on an obligation they couldn't meet is even higher.

220. *See* Financial Health Comment, *supra* note 193, at 3 ("BNPL loans generally are not reported to the national consumer reporting agencies . . . .").

221. *See* Press Release, FICO, *FICO Unveils Groundbreaking Credit Scores That Incorporate Buy Now, Pay Later Data* (June 23, 2025), https://investors.fico.com/news-releases/news-release-details/fico-unveils-groundbreaking-credit-scores-incorporate-buy-now (stating the leading credit scoring service, FICO, takes account of BNPL transactions in some of its credit scoring models, but it can do so only if the BNPL information appears in a credit report).

222. *See Briefing 4: Exploring Divergent Credit Paths for Frequent Buy Now, Pay Later Users*, LEXISNEXIS RISK SOLUTIONS 7 (2023), https://risk.lexisnexis.com/insights-resources/article/buy-now-pay-later-credit-risk.

223. *See* CR, BNPL SERVICES, *supra* note 216, at 4, 5 ("88% of BNPL users said that they will probably or definitely use it again" while "86% of BNPL users said they were very satisfied or somewhat satisfied with BNPL").

224. *See* Hayashi & Routh, *supra* note 200, at 5.

225. *Id.* at 7; Jeff Larrimore, Alicia Lloro, Zofsha Merchant, & Anna Tranfaglia, *"The Only Way I Could Afford It": Who Uses BNPL and Why*, FEDS NOTES (Dec. 20, 2024), https://www.federalreserve.gov/econres/notes/feds-notes/the-only-way-i-could-afford-it-who-uses-bnpl-and-why-20241220.html ("[A]dults who report lower overall financial well-being and those who appear liquidity or credit constrained were not only among the most likely to use BNPL, but most of these consumers also indicated that they used BNPL because it was the only way they could afford to make the purchase . . . . Individuals who reported 'just getting by' or 'finding it difficult to get by' were nearly twice as likely to have used BNPL in the prior year as those 'doing okay' or 'living comfortably[.]'").

226. *See* KRAUSE, *supra* note 212, at 6.

and that those who use BNPL most heavily tended to experience the greatest credit score improvements.[227]

The goal of BNPL regulation, then, should be to protect consumers for whom BNPL would cause problems while enabling those for whom BNPL is a positive to continue using it, perhaps in a safer way. This Part now turns to what that regulation might look like under CUFPA. Then it compares that ideal regulation with actual federal BNPL regulation.

B. BNPL Disclosures

Because BNPL typically contemplates only four payments and no interest,[228] the transactions might seem fairly straightforward, and disclosures might seem unnecessary. But the CFPB has observed that BNPL often lacks "clear disclosures of loan terms."[229] Some BNPL borrowers are confused about how BNPL transactions work.[230]

For example, according to one survey, 30% of first-time BNPL users said they were not aware of possible late fees or other penalties for missing payments.[231] Six percent said they were charged unexpected fees or interest, suggesting a disclosure failure.[232] Some BNPL borrowers complained about a lack of transparency and lamented that the lender is trying to "take advantage of someone not knowing exactly what they were getting into . . . ."[233] Thus, one borrower told Consumer Reports that she did not realize that she would be charged interest on her BNPL transaction until after the purchase had been completed.[234] Another BNPL borrower complained that she never knew what was going on.[235]

What would an ideal BNPL disclosure regime look like? Ideally, BNPL disclosures would serve two principal purposes: First, they would provide the information consumers need to decide if they want to engage in the BNPL transaction at all. For example, consumers who can't afford the full payment at the time of purchase but who might be able to pay

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227. *See Briefing 3: Defining the Divide*, LEXISNEXIS RISK SOLUTIONS 5 (2023), https://risk.lexisnexis.com/insights-resources/article/buy-now-pay-later-credit-risk.

228. *See* Soni, *supra* note 189, at 2042.

229. *See* CFPB, MARKET TRENDS, *supra* note 190, at 4.

230. *See* Penelope Wang, *The Hidden Risks of Buy-Now, Pay-Later Plans*, CONSUMER REPS. (Feb. 14, 2021), https://www.consumerreports.org/money/shopping-retail/hidden-risks-of-buy-now-pay-later-plans-a7495893275/ ("'Consumers don't always understand how these loan programs work, or what help they can expect if something goes wrong,' says Chuck Bell, a program director with the advocacy division of Consumer Reports.").

231. *See* CR, BNPL SERVICES, *supra* note 216, at 19; *see also Buy Now Pay Later Online Discussion Panel*, CONSUMER REPS. SURV. RSCH. DEP'T 15 (May 25, 2023), https://advocacy.consumerreports.org/wp-content/uploads/2023/05/BNPL-Discussion-Board-Jan2023-Report.pdf (identifying instances in which some borrowers don't realize that they may be charged fees).

232. *See* CR, BNPL SERVICES, *supra* note 216, at 20.

233. *See Buy Now Pay Later Online Discussion Panel*, *supra* note 231, at 11.

234. *Id.*

235. *See* Wang, *supra* note 72.

over time should be able to use the disclosures to determine if they will be able to make the scheduled payments.

Second, the disclosures should facilitate comparison shopping by mandating standard disclosures, as TILA requires for mortgages, car loans, credit cards, and many other consumer loans.[236] While BNPL transactions are largely standardized at the moment, with a quarter of the purchase price due every second week, that seems to be changing. Some BNPL providers have begun insisting on a larger first payment.[237] Alternatively, at some point, some BNPL providers may compete for consumers by using payment plans that some consumers might prefer, such as lower payments at the outset and larger payments at the end, or longer payment periods. Even now, BNPL plans offer different late fees, with some not charging late fees at all.[238] Others charge larger late fees, with some even charging additional late fees if the consumer does not make the payment within a specified time after missing it.[239] Consumers who know they are at risk of making payments late might find it in their interest to choose providers who charge lower late fees. Consequently, ideal BNPL disclosures would enable consumers to compare terms and determine which provider offers the best deal. Comparison shopping might undermine the arrangements under which a retailer agrees with a single BNPL provider to serve the retailer's customers, but it would facilitate consumer efforts to obtain better loan terms.

In short, if the CFPB were to design BNPL disclosures from scratch, it might want to mandate, at a minimum, pre-transaction disclosures that inform consumers in a readily understandable way the amount of each payment, when it is due, and the consequences of failing to make timely payments, such as a late fee. Because consumers may have made multiple BNPL purchases,[240] the disclosures should also tell consumers when their other BNPL payments are due, at least for the same provider, and the amounts of those payments so that consumers can take their other commitments into account when deciding whether to assume a new BNPL obligation. The Bureau might also call for a periodic statement, perhaps supplied every two weeks as BNPL payments are usually made on such a schedule,[241] which would include similar information, report

236. *See, e.g.*, 15 U.S.C. §§ 1632, 1637, 1638.

237. *See* CFPB, CONSUMER USE OF BNPL, *supra* note 201, at 2.

238. *Compare* Katherine Adkins, Chief Legal Off./Chief Compliance Off., Affirm, Inc., Comment Letter on Interpretive Rule under
the Truth in Lending Act and Regulation Z regarding Use of Digital User Accounts To Access Buy Now, Pay Later Loans (July 25, 2024), https://www.regulations.gov/comment/CFPB-2024-0017-0015 (Affirm does not charge late fees), *with* Sykes, *supra* note 175, at 4 (Klarna charges late fees).

239. *See User Agreement*, FOUR, https://www.paywithfour.com/legal/user-agreement (last visited Apr. 15, 2026) (charging $7 late fee the day after the payment is missed and an additional $8 one week later if payment has not been made).

240. *See* CFPB, CONSUMER USE OF BNPL, *supra* note 201, at 17 (reporting that nearly two-thirds of BNPL borrowers have multiple BNPL loans at a time).

241. NCLC/CR Comment, *supra* note 208, at 8.

payments that have already been made, and disclose whether any late fees are being charged. Doing so might help borrowers make timely payments and avoid late fees.[242]

A table seems like the best choice to convey all that information, similar to the Schumer Box required of credit card solicitations.[243] But the Bureau should conduct consumer testing, as it has for some other disclosures, to determine if that supposition is correct, and adopt the disclosure that consumers can most easily understand.

C. Ability to Repay BNPL Loans

The ability-to-repay and the possibility of overextension are particular problems for BNPL customers, as discussed above.[244] Just as with mortgages and credit cards,[245] a strong case can be made for imposing ability-to-repay requirements on BNPL providers. The use by BNPL providers of automatic withdrawals from consumer accounts, thus ensuring that other lenders, rather than the BNPL providers themselves, bear losses caused by consumer overborrowing, creates a moral hazard problem that reduces the incentive for BNPL providers to ensure that their customers are not taking on more obligations than they can meet. An ability-to-repay requirement would solve that problem.

One approach to reduce the cost of such requirements would be to use a safe harbor. For example, the CFPB could except customers whose BNPL purchases over a specified period are for less than a certain amount from an ability-to-repay requirement. That would be consistent with a study finding that when consumers use BNPL for only small amounts, they are not more likely to default on other loans.[246] Or perhaps the CFPB could specify that consumers whose credit reports meet certain criteria fall into the safe harbor. After all, BNPL providers already obtain some credit report information about their customers from the soft pulls.

D. Dispute Resolution in BNPL Transactions

BNPL shoppers report a variety of problems that could generate dispute resolution issues. In one survey, 32% of users reported having issues when using BNPL, with 18% wanting to return an item and saying

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242. *Id.*

243. *See* 15 U.S.C. § 1637(c); 12 C.F.R. § 1026.60 (2026); BNPL Interpretive Rule, *supra* note 20, at 47071 n.28 (stating that 12 C.F.R. 1026.60, which provides for the Schumer Box disclosures, "may also apply" to BNPL providers); *see also* Ctr. for Responsible Lending, Comment on Truth in Lending (Regulation Z); Use of Digital User Accounts to Access Buy Now, Pay Later Loans, Docket No. CFPB–2024–0017 (Aug. 1, 2024), https://www.regulations.gov/comment/CFPB-2024-0017-0040 ("[S]hort form disclosures modeled after the prepaid rule could certainly benefit consumers when they begin using a BNPL digital credit card account.").

244. *See supra* notes 197–205 and accompanying text.

245. *See supra* notes 117–120 and accompanying text.

246. *See supra* note 215 and accompanying text.

they had problems obtaining a refund.[247] The CFPB reported that nearly 14% of 2021 BNPL transactions involved a return.[248] Some consumers "described difficult return processes that took a long time or where they were required to continue making payments until the return was resolved."[249] It thus appears that consumers have enough problems involving BNPL purchases that some type of dispute resolution method outside of going to court would be helpful.

Ideally, BNPL consumers would have a protection akin to that of credit card borrowers: protection against unauthorized transactions, billing error disputes, and the ability to assert claims and defenses to payment against BNPL lenders in some circumstances. The Article discusses below the Biden Administration's attempts to provide those protections. In addition, under CUFPA, the CFPB should take advantage of the ability to permit the use of private claims to enforce violations of the law in BNPL lending, to block the use of arbitration clauses to prevent injured consumers from participating in class actions to effectively enforce their rights, and to authorize state agency enforcement.

E. BNPL Fee Regulation

According to one commentator, "Late payment fees and penalties are one of the main revenue sources for BNPL providers."[250] The CFPB has reported that late fees and other fees generate increasing shares of BNPL revenues.[251] And overdue BNPL payments are on the rise; 41% of BNPL borrowers have made a payment late, according to a 2025 survey.[252] In another survey, more than half of BNPL borrowers who missed a payment reported being charged a fee while more than a quarter said

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247. *See* Jack Caporal, *2025 Buy Now, Pay Later Trends Study*, MOTLEY FOOL MONEY (Nov. 14, 2025), https://www.fool.com/the-ascent/research/buy-now-pay-later-statistics/.

248. *See* CFPB, MARKET TRENDS, *supra* note 190, at 4 ("13.7 percent of individual loans in 2021 had at least some portion of the order that was returned, up from 12.2 percent in 2020.").

249. *See Buy Now Pay Later Online Discussion Panel*, *supra* note 231, at 11; *see also* Supervisory Highlights, 90 Fed. Reg. 607, 611 (Jan. 6, 2025) (stating BNPL "Lenders engaged in unfair acts or practices by failing to timely resolve consumer disputes in which consumers alleged they were owed refunds for various reasons, such as where the delay was contrary to the dispute policy on its website regarding dispute resolution timelines. These delays were long, with hundreds of consumers deprived of funds for months at a time.").

250. *See* Kidecha, *supra* note 191.

251. *See* CFPB, MARKET TRENDS, *supra* note 190, at 9 ("Lenders' share of revenues from consumer fees (late fees and other fees) was 13.4 percent in 2021, up from 11.7 percent in 2020. Late fees specifically accounted for 6.9 percent of revenues in 2021 (up from 4.8 percent in 2020)."); *see also id.* at 10 (reductions in BNPL lenders' margins have driven the lenders to increase reliance on fees, including late fees).

252. *See* Schulz, *supra* note 7; CFPB, MARKET TRENDS, *supra* note 190, at 4 ("10.5 percent of borrowers were charged at least one late fee in 2021, up from 7.8 percent in 2020."). Eleven percent of BNPL borrowers noted that they had missed one or more payments, *see* CR, BNPL SERVICES, *supra* note 216, at 20, while another source reported that 18% of American BNPL users had made a late payment. *See* FED. RSRV., ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2023, at 42 (2024), https://www.federalreserve.gov/publications/files/2023-report-economic-well-being-us-households-202405.pdf.

they were charged interest.[253] BNPL customers who make late payments are more likely to be financially constrained than other BNPL borrowers, who themselves are more likely to have financial issues than non-BNPL users.[254]

In a BNPL market with perfect competition, few consumers would pay late fees, all other things being equal. That is because consumers who are given a choice between a provider who does not charge late fees and one who does would choose the provider that does not assess late charges. Because most other aspects of BNPL transactions are standardized—four equal biweekly payments and no finance charge—BNPL providers cannot compete for customers on much other than the late fee, unless they depart from the standard BNPL model. But reports that many BNPL borrowers pay late fees raise questions about whether late fees in BNPL transactions are a sign of a market failure, which could be explained in part by the fact that many BNPL consumers use the BNPL provider selected by the retailer rather than shopping for the best terms.[255]

As discussed above, other reasons also exist to suggest that late fees generally are not set by a functioning market.[256] If the evidence bears that out, the CFPB would be wise to use its CUFPA power to limit BNPL late fees to amounts that are reasonable and proportional, and to establish a late fee safe harbor, as it has done with credit card late fees.

F. BNPL and Discrimination

Because BNPL transactions are subject to the ECOA, which bars objectionable discrimination in lending, it should not be necessary for a BNPL regulation adopted under CUFPA to address discrimination. ECOA outlaws odious discrimination in "any aspect of a credit transaction"[257] and defines "credit" as "the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor."[258] That should include BNPL transactions. Consequently, discrimination is already forbidden in BNPL transactions.

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253. *See* CR, BNPL SERVICES, *supra* note 216, at 22. At least one BNPL provider charges a $41 late fee. *See* Tajammul Pangarkar, *Buy Now Pay Later Statistics 2025 by Payment Method*, MARKET.US SCOOP (Dec.1, 2025), https://scoop.market.us/buy-now-pay-later-statistics/.

254. *See* Hayashi & Routh, *supra* note 200, at 12–13.

255. *See supra* notes 189–90 and accompanying text.

256. *See supra* notes 138–40 and accompanying text.

257. 15 U.S.C. § 1691(a).

258. *Id.* § 1691a(d); *see also* 12 C.F.R. § 1002.2(l) (2026) ("Creditor means a person who, in the ordinary course of business, regularly participates in a credit decision, including setting the terms of the credit. The term creditor includes a creditor's assignee, transferee, or subrogee who so participates.").

In sum, if Congress were to enact CUFPA, the CFPB should mandate appropriate disclosures for BNPL, impose an ability to repay requirement, require suitable dispute resolution mechanisms, and regulate late fees. The Article now examines whether existing federal approaches to BNPL regulation achieve these goals.

IV. EXISTING BNPL REGULATION

The CFPB has chosen different paths for BNPL regulation at different times. The Trump Administration prefers not to regulate BNPL transactions while the Biden CFPB issued an interpretive rule in 2024 concluding that BNPL (the "BNPL Interpretive Rule") is subject to certain statutory provisions that normally apply to credit cards.[259] The Trump CFPB later withdrew the BNPL Interpretive Rule.[260] Neither approach seems well-suited to BNPL regulation, in that they will not accomplish the goals identified in the preceding Part, though the Biden approach comes closer. Because it seems obvious that the Trump CFPB's laissez-faire approach rejects the positions urged in the preceding Part, this Part explores the Biden CFPB view more thoroughly.

The precise effect of the BNPL Interpretive Rule remains ambiguous, and not just because it is not currently in effect. Interpretive rules are not binding.[261] The Bureau's rescission of the BNPL Interpretive Rule does not necessarily mean that courts will reject the Interpretive Rule's conclusions, any more than the original issuance of the BNPL Interpretive Rule meant that courts would follow it. After *Loper Bright*, courts are most likely to follow whichever approach they conclude is best reasoned.[262] The BNPL Interpretive Rule engaged in a complex analysis of TILA and Regulation Z, TILA's implementing regulation. Though the Bureau did not provide an explanation that applied specifically to the BNPL Interpretive Rule when it rescinded the rule, it later explained the withdrawal in a status report in a case challenging the BNPL Interpretive Rule.[263]

The BNPL Interpretive Rule reached a conclusion that is confusingly counterintuitive: For some purposes—specifically, some disclosures and dispute resolution rights—digital user accounts involving BNPL

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259. BNPL Interpretive Rule, *supra* note 20, at 47069.

260. *See* Interpretive Rules, Policy Statements, and Advisory Opinions; Withdrawal, 90 Fed. Reg. 20084, 20085 (May 12, 2025).

261. *See* Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995) ("Interpretive rules . . . do not have the force and effect of law . . . .").

262. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944):

> [T]he rulings, interpretations and opinions of the [agency] under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

263. *See* Status Report, Fin. Tech. Ass'n v. CFPB, No. 1:24-cv-2966 (D.D.C. June 2, 2025).

transactions are credit cards even though they do not typically involve the use of plastic cards.[264] For other purposes, however, BNPL transactions are not credit cards. And presumably BNPL transactions that do not proceed through digital user accounts are not credit cards and so are not covered by the rule, even though the policy justifications for treating BNPL accounts still apply to such transactions.[265]

Neither TILA nor Regulation Z defines the phrase “digital user accounts.” Indeed, most of the relevant rules in TILA and Regulation Z were drafted before people could even maintain digital accounts.[266] Nor is the BNPL Interpretive Rule a model of clarity about what a digital user account is.[267] As the use of the word “digital” implies, a digital user account must be online. The BNPL Interpretive Rule describes digital user accounts as “secure, personal profiles that the BNPL provider activates for a consumer, enabling the consumer to access and utilize BNPL credit.”[268]

Under TILA, most consumer loans are either open-end or closed-end. As the name suggests, open-end loans, such as credit cards, contemplate repeated transactions—they are open-ended.[269] In contrast, a closed-end loan, such as a car loan, is for a specified amount and period, and the transaction ends when the consumer has made all the (usually monthly) payments.[270]

BNPL appears to be a closed-end loan because the loans are for a specified amount and are to be repaid in four payments of specified

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264. *But see* Kari Mitchum, Vice President, Payments Policy, Indep. Cmty. Bankers of Am., Comment Letter on Truth in Lending (Regulation Z); Use of Digital User Accounts To Access Buy Now, Pay Later Loans (July 31, 2024), https://www.regulations.gov/comment/CFPB-2024-0017-0023 (“BNPL digital user accounts are similar to credit cards in their transaction model, access devices, credit line and expected repeated purchases. The differences between a digital user account and a credit card account are minimal. The main distinctions are that a digital user account lacks a physical card and has a much shorter repayment period.”).

265. *See* Eve DelSoldo, Senior Vice President & Gen. Couns., Qurate Retail Grp., Comment on Comment on Docket No. CFPB-2024-0017: Truth in Lending (Regulation Z); Use of Digital User Accounts To Access Buy Now, Pay Later Loans (July 31, 2024), https://www.regulations.gov/comment/CFPB-2024-0017-0024 (arguing that Qurate’s installment payment options are not digital user accounts because customers can make purchases over the phone in addition to online).

266. *See* Sykes, *supra* note 175, at 1 (“[T]he CFPB is attempting to apply to the BNPL industry rules created for the credit card industry over 50 years ago, before the advent of cell phones, personal computers, and digital BNPL accounts.”).

267. For example, one commenter asked whether a digital user account is “1) one single BNPL transaction, 2) an account that includes all BNPL transactions with a specific provider, 3) an account that encompasses all BNPL transactions and additional loan products with a specific provider, or 4) something else entirely?” *See id.* at 5.

268. BNPL Interpretive Rule, *supra* note 20, at 47070. The Rule observes that the “BNPL business model is designed around the repeat use of a digital user account to make real-time purchases on credit.” *Id.* at 47072.

269. *See* 15 U.S.C. § 1602(j).

270. *Compare* 12 C.F.R. § 1026.2(a)(10) (2026) (closed-end), *with* 12 C.F.R. 1026.2(a)(20) (2026) (open-end).

amounts.[271] But TILA does not treat BNPL loans as closed-end loans because most of TILA's provisions apply to "creditors," and the statute's definition of creditor excludes loans which are to be repaid in four or fewer installments and in which the lender does not charge a finance charge.[272] That is not, however, the end of the story. TILA also provides that for purposes of certain provisions, the word "creditor" includes "card issuers whether or not the amount due is payable by agreement in more than four installments or the payment of a finance charge is or may be required."[273] Thus, as long as BNPL providers are card issuers within TILA's meaning, BNPL providers are creditors and so subject to some TILA provisions.

That brings us to the question of whether a BNPL lender is indeed a card issuer within TILA's statutory definition. TILA provides that "card issuer" means "any person who issues a credit card."[274] And "credit card" is defined as including "any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit."[275] In other words, a "credit device existing for the purpose of obtaining money, property, labor, or services on credit" is a credit card even if it does not entail use of a card.[276] The BNPL Interpretive Rule explains:

> The definition of 'credit card' in TILA and Regulation Z is not limited to a plastic or metal embossed physical card. While the term certainly includes those, it also includes archaic forms of credit devices like plates and coupon books, and non-physical credit devices like account numbers, including virtual credit cards where the account number itself is the 'credit card.' In creating these definitions, Congress understood the need for flexibility to cover evolving types of credit devices, reflecting the rapid advancement of credit mechanisms at the time of enactment.[277]

The BNPL Interpretive Rule then relied on dictionary definitions, prior interpretations, and other interpretive tools to conclude that a BNPL loan

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271. *See* Mitchum, *supra* note 264, at 2.

272. *See* 15 U.S.C. § 1602(g).

273. *See id.* This assumes that the BNPL transaction does not charge a finance charge. Because the seller does not receive the full amount of the purchase price from the BNPL company, it could be argued that the transaction contains a "hidden finance charge." In effect, the argument is, that consumers actually do pay a finance charge in BNPL transactions: the difference between what they pay and what the merchant receives is a cost of credit—that is, the right to defer payment. *See id.* § 1605(a) ("[T]he amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit."). *See generally* Yazzie v. Reynolds, 623 F.2d 638, 642–43 (10th Cir. 1980). But the same is true of credit cards and credit card transactions are not treated as involving hidden finance charges.

274. *See* 15 U.S.C. § 1602(o).

275. *See id.* § 1602(l).

276. *Id.*

277. *See* BNPL Interpretive Rule, *supra* note 20, at 47071.

is such a device.[278] In contrast, the Trump CFPB relied on an Official Interpretation of Regulation Z, which says that the term "credit card" does not include an "account number that accesses a credit account, unless the account number can access an open-end line of credit to purchase goods or services," to conclude that BNPL transactions are *not* credit cards.[279] It remains to be seen which approach, if either, courts agree with. The Trump CFPB also took the position that the Bureau could not have concluded that BNPL transactions are credit cards within the meaning of TILA without going through the notice and comment process and that the BNPL Interpretive Rule provided "little benefit to consumers and substantial burden to regulated entities."[280]

Assuming that the CFPB's BNPL Interpretive Rule is correct that BNPL lenders are credit card issuers and hence creditors within TILA's meaning, that still leaves open the question of which TILA provisions apply to BNPL transactions. Some TILA provisions apply only to open-end transactions,[281] some only to closed-end transactions,[282] and some apply only to still other kinds of transactions.[283] The TILA definition of creditor, on which the BNPL Interpretive Rule relied, lists statutory provisions that apply when that definition applies. These statutory provisions fall into two categories: One category consists of specific disclosures;[284] the other is TILA's Part D, which pertains to billing.[285]

The Bureau also published a compliance aid answering frequently asked questions that identified the applicable Regulation Z provisions (BNPL FAQs).[286] The BNPL FAQs take the position that BNPL provid-

278. *See id.* at 47071–72.

279. *See* Status Report at 2, Fin. Tech. Ass'n v. CFPB, Case No. 1:24-cv-02966 (D.D.C. June 2, 2025) (quoting 12 C.F.R. § 1026.2(a)(15)-2.ii.C (2026)). Because Official Interpretations are adopted through the notice and comment process, the amount of deference they are due is presumably governed by *Loper Bright*.

280. *See id.* at 2–3; *see also* Scott Pearson & Bryan Schneider, *Chevron's End Puts Target on CFPB's Aggressive BNPL Rule*, LAW360 (July 23, 2024), https://www.law360.com/articles/1857316/chevron-s-end-puts-target-on-cfpb-s-aggressive-bnpl-rule ("[T]he rule is vulnerable to attack as having failed to comply with the requirements of the Administrative Procedure Act."); David Pommerehn SVP & Gen. Couns., Consumer Bankers Ass'n, & Paige Pidano Paridon SVP & Senior Assoc. Gen. Couns., Bank Pol'y Inst., Comment Letter on Buy Now Pay Later Interpretive Rule - Docket No. CFPB-2024-0017 (Aug. 1, 2024), https://www.regulations.gov/comment/CFPB-2024-0017-0030; Jeffrey Levine, Senior Vice President, Legal, PayPal, Inc., Comment on Interpretive Rule Entitled Truth in Lending (Regulation Z); Use of Digital User Accounts to Access Buy Now, Pay Later Loans, Docket No. CFPB-2024-0017, at 4–7, 12–14 (July 31, 2024), https://www.regulations.gov/comment/CFPB-2024-0017-0025 (arguing that BNPL transactions are not card issuers and that the Interpretive Rule is arbitrary and capricious).

281. *See, e.g.*, 15 U.S.C. § 1637.

282. *See, e.g.*, *id.* § 1638.

283. *See, e.g.*, *id.* § 1667a (consumer leases).

284. The sections are 15 U.S.C. §§ 1637(a)(5)–(7) to -(b)(1)–(3), (8), (10); *see id.* § 1602(g).

285. *See* 15 U.S.C. §§ 1666–1666j.

286. *See Buy Now, Pay Later Product FAQs*, CFPB (Dec. 13, 2024) [hereinafter CFPB, BNPL FAQs], https://www.consumerfinance.gov/compliance/compliance-resources/consumer-cards-resources/buy-now-pay-later-bnpl-products/buy-now-pay-later-product-faqs/, archived at https://web.archive.org/web/YYYYMMDDHHMMSS/originalURL. The amount of deference courts

ers "must comply with Regulation Z provisions that apply to card issuers" and with provisions that apply to creditors, other than provisions that exclude closed-end loans.[287] These go beyond the disclosures identified by TILA's definition of creditor. For example, the BNPL FAQs oblige BNPL providers to disclose the method by which balances will be computed.[288] But the TILA provision governing disclosure of the balance computation method[289] is not included in the list of TILA subsections applicable to card issuers in the definition of creditor, even though other subsections in the same section are; the fact that some subsections are included and others are not implies that the omitted subsections do not apply to such card issuers.

Among the Regulation Z provisions that the BNPL FAQs state apply to BNPL transactions are those requiring account-opening disclosures and the periodic statement.[290] But that seemingly requires BNPL providers to make disclosures that are ill-suited to BNPL transactions. For example, the mandated account-opening disclosures include fees for cash advances,[291] exceeding the credit limit,[292] and balance transfers,[293] none of which pertain to BNPL transactions.[294] Unfortunately, including irrelevant disclosures increases the chances of information overload and reduces the chances that consumers pay attention to the disclosures that actually matter to them, thus sapping the effectiveness of the disclosures.

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should provide to the BNPL FAQs is unclear. Cases decided before the Supreme Court's *Loper Bright* decision took a different approach from *Loper Bright*. Thus, in *Kisor v. Wilkie*, 588 U.S. 558, 576 (2019), the Court concluded that agency interpretations of the agency's own regulations should be given controlling weight if certain considerations were satisfied. In contrast, *Loper Bright* held that the job of a court interpreting a statute in most cases is to give the statute its best reading even if an administrative agency interprets the statute differently. *See supra* notes 58–59 and accompanying text. The Court has not addressed *Kisor*'s status in the post-*Loper Bright* era. On the one hand, courts might continue to say that agency interpretations of their own regulations are due more deference than agency interpretations of statutes—which Congress, rather than administrative agencies, writes. On the other hand, because agency interpretations of regulations are, at the end of the day, also interpretations of the underlying statute, courts may conclude that such interpretations should not be treated more respectfully than regulations.

287. *See* CFPB, BNPL FAQs, *supra* note 286.

288. Regulation Z requires this in 12 C.F.R. § 1026.6(b)(2)(vi) (2026) and the BNPL FAQ lists § 1026.6(b) as one of the sections applicable to BNPL providers in response to question 4. CFPB, BNPL FAQs, *supra* note 286.

289. *See* 15 U.S.C. § 1637(a)(2).

290. *See* CFPB, BNPL FAQs, *supra* note 286 (referring to 12 C.F.R. §§ 1026.6(b), 1026.7(b) (2026)).

291. *See* 12 C.F.R. § 1026.6(b)(2)(vii) (2026).

292. *See id.* § 1026.6(b)(2)(ix).

293. *See id.* § 1026.6(b)(2)(x).

294. *See* Status Report at 3, Fin. Tech. Ass'n v. CFPB, No. 1:24-cv-02966 (D.D.C. June 2, 2025) ("BNPL consumers would gain limited value from the mandated disclosures."). The Status Report also stated: "In addition, the timing requirements for periodic statements, in particular—also designed for revolving credit—are mismatched to the repayment schedule of the traditional BNPL loan model, imposing significant operational burdens on BNPL providers who would have had to comply with the now-withdrawn Interpretive Rule." *Id.* But those timing rules appear for the most part in Regulation Z's § 1026.5(b)(2)(ii)(A), which, according to the BNPL FAQs, does not apply to BNPL transactions. *See* CFPB, BNPL FAQs, *supra* note 286.

Meanwhile, the required disclosures do not include disclosures that would probably be of greater value to BNPL borrowers. For example, BNPL borrowers might benefit from a table identifying precisely when each payment is due and how much it will be, but the relevant sections do not require such a disclosure. In contrast, the required disclosures for *closed-end credit*—such as a car loan—do oblige lenders to set out the payment schedule,[295] but those rules do not apply to BNPL transactions. Relatedly, the rules governing timing of credit card disclosures[296]—designed for a payment device when payments are due on a monthly schedule—do not fit with a payment device in which payments are due on a two-week schedule. The problem is not necessarily that the Bureau has missed the mark but that it is operating within a statutory and regulatory scheme not designed for BNPL transactions and so its choices are either to shoehorn a consumer financial product into a set of rules designed for another product, forego regulation altogether, or invoke its general disclosure or UDAAP powers—which would surely draw a vigorous court challenge.

As for dispute resolution mechanisms, as discussed above in Section II.C.1, when it comes to credit cards, TILA addresses unauthorized use and billing errors and gives cardholders the ability to assert claims and defenses against card issuers. TILA's definition of creditor subjects card issuers to the provisions governing billing errors and assertion of claims and defenses but does not explicitly refer to unauthorized use.[297] However, the BNPL FAQs specifically identify Regulation Z's provision on unauthorized use as one of the sections applicable to BNPL transactions.[298] In other words, the BNPL Interpretive Rule extends the credit card dispute resolution mechanisms to BNPL transactions, just as this Article proposes. But whether courts will agree with that interpretation remains to be seen.

Regulations adopted under CUFPA could go further than the BNPL Interpretive Rule. The BNPL Interpretive Rule is constrained by TILA's existing text, which limits the consumer's right to withhold payment to transactions in the consumer's home state or within 100 miles of the consumer's address.[299] Some BNPL providers are based overseas and so such a limit could enable them to avoid being subject to consumer claims and defenses.[300] Preserving the limit might also incentivize domestic

295. *See* 12 C.F.R. § 1026.18(g) (2026).

296. *See id.* § 1026.7(b)(11).

297. *See* 15 U.S.C. § 1602(g), which provides that TILA's Part D applies to such card issuers. Part D includes the sections on billing errors, § 1666, and assertion of claims and defenses, § 1666i(a), but the unauthorized use section, § 1643(a)(1), appears in Part B.

298. *See* CFPB, BNPL FAQs, *supra* note 286 (referring to 12 C.F.R. § 1026.12 (2026)).

299. *See* 15 U.S.C. § 1666i(a).

300. Few reported cases address the question of whether a consumer purchasing a product online *within* the geographical limits, such as in their home, from a seller *outside* the geographical limits can take advantage of the right to withhold payment. The CFPB's Official Commentary to

BNPL providers to move overseas. Given the dramatic increase in interstate consumer transactions in the decades since Congress originally wrote § 1666i, the geographic limits serve little purpose. Indeed, as discussed above, the geographic limits are rooted in assumptions about markets that are no longer true, if they ever were.[301] Accordingly, if Congress were to adopt CUFPA, it would be wise to eliminate those exceptions.

In sum, the Bureau's attempt to shoehorn BNPL transactions into TILA is far from an ideal solution for BNPL loans. It does not oblige BNPL providers to verify their customers' ability to repay their debts, nor does it prevent excessive late fees. The disclosures are insufficient and arguably ineffective, as are the dispute resolution and enforcement mechanisms. While they may be better than nothing, Congress should make clear that the Bureau has the authority needed to adequately protect BNPL consumers.

V. OBJECTIONS TO CUFPA

This Part explores arguments against CUFPA, including its cost to industry, its effect on innovation, agency inaction, CUFPA's adequacy in regulating BNPL transactions, and the potential for a legal challenge.

A. Cost

To the extent that the CFPB uses CUFPA to provide consumer protections, it may increase industry costs. But the CFPB would have discretion to mandate CUFPA's protections for particular products and in making a judgment about which protections are needed for which products, would take cost into account. If that cost becomes too great, the Bureau could forego application of particular CUFPA protections to specific products. Indeed, the Dodd–Frank Act requires the CFPB to consider costs when issuing regulations.[302] The industry and conservative legislators often oppose regulation on the theory that regulation increases the

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Regulation Z states "The question of where a transaction occurs (as in the case of mail, Internet, or telephone orders, for example) is to be determined under state or other applicable law." 12 C.F.R. pt. 1026, Supp. I, ¶ 12(c)(3)(i)(B) (2026). Some cases have focused on where the contract was accepted, presumably the last act in forming the contract. In *Catanach v. Citi Cards/Bank*, No. Civ. 06-1115 LH/RHS, 2008 WL 11451608, at *12 (D.N.M. Mar. 18, 2008), the court, relying on the Commentary, held that the place of acceptance in the transaction at issue was the seller's place of business, which was neither within 100 miles from the seller's home nor in the same state, and thus § 1666i did not apply. On the other hand, in *In re Standard Fin. Mgmt. Corp*., 94 B.R. 231, 239 (Bankr. D. Mass. 1988), involving a telephone sale rather than an internet transaction, the court held that the buyer had accepted the contract at the buyer's home, stating that "the customer who is solicited at home has a reasonable expectation that future contacts can likewise be adjusted at or near his home."

301. *See supra* notes 135–37 and accompanying text.

302. *See* 12 U.S.C. § 5512(b)(2)(A)(i). Consumer advocates have questioned the value of cost-benefit analysis in formulating consumer protection rules. *See generally* Jeff Sovern, *Can Cost-Benefit Analysis Help Consumer Protection Laws? Or at Least Benefit Analysis?*, 4 UC IRVINE L. REV. 1241, 1261 (2014).

cost of credit and reduces its availability.[303] But that need not be the case. For example, even though consumers receive greater protections when paying for items with credit cards than debit cards, retailers often do not charge higher prices for payments by credit card than by debit card.[304] Indeed, because many credit cards provide rewards to consumers,[305] consumers may effectively pay less for credit card purchases than when paying with debit cards. It might well be the same for BNPL purchases. That is to say, sellers might not raise prices to customers paying via a BNPL provider, just as sellers mostly have not for credit card purchasers.

To the extent that sellers do increase prices to offset increased expenses caused by regulation, consumers might still be better off with the regulation. For example, consumers who purchase defective products would surely rather have the right to avoid payment altogether, as credit card-like protections would provide them, than to have to pay for a defective product, even if the charge is slightly less than it otherwise would be.

B. Would CUFPA Discourage Innovation?

The consumer financial industry sometime decries regulation on the theory that it discourages innovation.[306] Perhaps proposals like CUFPA will elicit similar complaints. Daniel Solove calls such claims a myth and argues that regulation can foster innovation.[307] In any event, CUFPA should not hamper innovation. Because CUFPA would draw on existing

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303. *See, e.g.*, *The Credit Cardholders' Bill of Rights: Providing New Protections for Consumers: Hearing Before the H. Subcomm. on Fin. Insts. & Consumer Credit of the Comm. on Fin. Servs.*, 110th Cong. 14 (2008) (statement of Rep. Jeb Hensarling), https://www.govinfo.gov/content/pkg/CHRG110hhrg41731/pdf/CHRG-110hhrg41731.pdf [https://perma.cc/V7C2-36EQ] ("I fear again that if we adopt the provisions of this, too many Americans will either be denied credit or see their credit card costs skyrocket, and no longer be able to pay for the bills they need in their everyday lives.").

304. *See* Scott Horsley, *Why Many Business Owners Would Love It If You Stopped Using Your Credit Card*, NPR (Sept. 26, 2023, at 5:00 AM ET), https://www.npr.org/2023/09/26/1201257895/credit-card-fees-visa-mastercard-retailers.

305. *See* CONSUMER FIN. PROT. BUREAU, CREDIT CARD REWARDS 2 (2024), https://files.consumerfinance.gov/f/documents/cfpb_credit-card-rewards_issue-spotlight_2024-05.pdf ("Rewards programs that promise consumers financial incentives for spending are a central feature of most consumer credit cards.").

306. *See, e.g.*, *Modernizing Consumer Protection in the Financial Regulatory System: Strengthening Credit Card Protections: Hearing Before the Sen. Comm. on Banking, Hous., and Urb. Affs.*, 111th Cong. 94 (2009) (testimony of Kenneth J. Clayton, Senior Vice President & Gen. Couns., Am. Bankers Assoc.) (opposing bill because it will "stifle innovation"); Penny Lee, President & CEO, Fin. Tech. Assoc., Comment Letter on Earned Wage Access Proposed Interpretive Rule (Docket No. CFPB-2024-0032-0043), at 6 (Aug. 30, 2024), https://www.regulations.gov/comment/CFPB-2024-0032-0043 (opposing proposal because it will undermine product innovation); Kyle Bligen, Dir. of Fin. Pol'y, Chamber of Progress, Comment Letter in Opposition to CFPB's Proposed Interpretive Rule on Truth in Lending (Regulation Z); Consumer Credit Offered to Borrowers in Advance of Expected Receipt of Compensation for Work [Docket No. CFPB2024-0032] (Aug. 30, 2024), Regulations.gov (opposing rule because it will stifle innovation).

307. *See* DANIEL J. SOLOVE, ON PRIVACY AND TECHNOLOGY 21–22 (Oxford Univ. Press 2025).

consumer protections on existing products—tools well-established in the consumer protection toolbox—industry innovators should be able to predict the effect of any regulation they are subject to. They should also be able to turn to a well-established playbook for how to comply with that regulation, which would also help reduce compliance costs. In fact, by making clear what the potential rules of the road could be for innovations, CUFPA might in fact *encourage* innovation by enabling innovators to plan for potential regulation, as opposed to their trying to anticipate unique rules for each product.

Moreover, innovation is not an unalloyed positive. As the country learned from the Great Recession, to which new business models contributed,[308] unbridled innovation can sometimes have catastrophic results. Regulation can prevent such catastrophes. By giving the CFPB the power to impose regulation more dynamically, Congress can make it possible for government to impose guardrails more quickly when the financial industry creates risky new products—which may actually help spur innovation because consumers will know when they use new consumer financial products that the government is protecting them against excessive risk.

C. The CFPB Might Not Use Its Authority

Agencies do not always use their authority to protect consumers.[309] Indeed, the Federal Reserve's failure to use its power contributed to the creation of the CFPB. In 1994, Congress gave the Fed the power to prevent precisely the lending that led to the Great Recession.[310] The Fed disdained the use of that power until 2008, far too late to prevent the Great Recession.[311] Congress responded by transferring that power to the CFPB.[312]

Nor is the CFPB immune from the failure to use its powers. For example, the second Trump Administration initially sought to shutter the Bureau, and then in response to litigation that forced it to allow the CFPB to continue operating, reduced the Bureau's staff by more than 80% and abandoned virtually all of the CFPB's discretionary functions.[313]

But if the Bureau fails to regulate, consumers are no worse off under CUFPA than they would be in its absence. And when an administra-

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308. *See* FIN. CRISIS INQUIRY COMM'N, *supra* note 12, at xv–xvii, 41.

309. *See* Gould & Van Loo, *supra* note 32, at 403 ("[T]here is no guarantee that agencies will in fact use the power that they hold.").

310. *See* Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 129(l)(2), 108 Stat. 2160, 2194.

311. *See* Truth in Lending, 73 Fed. Reg. 44522, 44522 (July 30, 2008).

312. *See* 15 U.S.C. § 1639(p)(2).

313. *See* James Baratta & Maureen Tkacik, *Hardly Workin'*, AM. PROSPECT (July 11, 2025), https://prospect.org/economy/2025-07-11-hardly-workin-cfpb-doge-trump/.

tion more protective of consumers is in office, consumers will be better off.

D. What if CUFPA Isn't Enough?

To the extent that the traditional regulatory mechanisms included in CUFPA adequately protect consumers, CUFPA should succeed. But what if a new product or business model requires additional protection? For example, if Congress were to write a law specifically regulating BNPL, it would probably consider requiring BNPL providers to report BNPL transactions to credit bureaus (called credit reporting agencies in the Fair Credit Reporting Act).[314] But because credit reporting obligations are not a standard tool in the consumer protection toolbox,[315] CUFPA would not give the CFPB the power to order such reporting.

It is one thing to extend the consumer protection toolbox to new transactions on the theory that experience has taught us the likely consequences of doing so. It is another to create new requirements which may produce unanticipated consequences. To be sure, newness is not necessarily a reason to oppose a particular proposal, but it at least introduces a measure of uncertainty. It also increases the strength of arguments that Congress is the appropriate policymaker in such cases, though that argument should not itself be enough to prevent the CFPB from adopting such a requirement using other powers. Drafters of a statute focused on BNPL should certainly consider imposing such a requirement, but for better or worse, it does not belong in a statute drawing upon the existing consumer protection toolkit.

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314. Mandating credit reporting for BNPL transactions serves multiple purposes. First, doing so could prevent excessive BNPL stacking. *See* Akin, *supra* note 22, at 3. At present, BNPL lenders cannot be confident that they know all of a particular borrower's BNPL transactions and so they cannot be certain that the borrower will be able to repay a new loan. KRAUSE, *supra* note 212, at 11 (stating BNPL functions "as a decentralized credit system operating parallel to regulated finance, complicating both risk evaluation and consumer financial planning."); CR, BNPL SERVICES, *supra* note 216, at 23. The uncertainty increases the risk of consumer loans generally, because other lenders too cannot know if a consumer has taken on BNPL loans that will be paid automatically from the consumer's bank account, causing consumers to default on their other loans. *See* Zhu Wang, *Buy Now, Pay Later: Market Impact and Policy Considerations*, FED. RSRV. BANK OF RICHMOND (Jan. 2025), https://www.richmondfed.org/publications/research/economic_brief/2025/eb_25-03 (noting BNPL "can become so-called 'phantom debt' that introduces systemic risk"). And that risk in turn is likely to be priced into consumer loans, increasing their price. But if BNPL loans must be reported to a central repository, such as a credit bureau, BNPL providers will be better able to assess whether a consumer can be expected to repay an additional loan. This obligation would thus make possible ability to repay requirements, or at least make them more accurate. While some reports indicate that progress is being made in increasing reporting of repayment of BNPL loans, *see* CR, BNPL SERVICES, *supra* note 216, at 23, no federal law currently obliges BNPL lenders to report such transactions. Another reason BNPL providers should report transactions to credit bureaus is that it would enable borrowers who make timely payments to improve their credit records. *See* Financial Health Comment, *supra* note 193, at 4. At present, nearly two-thirds of BNPL users believe making timely payments increases their credit score, despite the fact that few BNPL providers report their transactions to credit bureaus. *See* Schulz, *supra* note 7.

315. For example, the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, does not mandate credit reporting but only regulates it.

Just as a generic statute is an imperfect solution to the problem of how to regulate BNPL, it is unlikely to be a perfect solution to the problem of how to regulate other consumer financial products. And that raises a question: Are we better off with a generic statute like the CUFPA, or would we be better off waiting for Congress to enact a statute tailored specifically to each new consumer financial product? One answer is that while CUFPA's existence would not prevent Congress from passing new statutes that fit each new product better, the existence of a CUFPA would probably reduce Congress's interest in adopting such statutes. Recent history suggests, however, that waiting for Congress to act is likely to be no more effective than waiting for Godot,[316] and therefore, nothing is lost by enacting a CUFPA. Or to put it another way, CUFPA might indeed reduce the likelihood that Congress enacts a new statute every time the industry invents a new product as to which regulation is needed, but it probably reduces the likelihood by only a trivial amount. That reduction is surely a cost worth incurring for a statute that goes a long way towards enabling needed regulation, even if it does not go as far as would be desirable in particular instances.

E. Major Questions Doctrine

Opponents of consumer protection regulation often use the Major Questions Doctrine to attack consumer protection regulation.[317] The Supreme Court has explained that doctrine as follows:

> When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' [the Supreme Court] typically greet[s] its announcement with a measure of skepticism. [The Court] expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'[318]

If, as seems plausible, the Major Questions Doctrine is a canon of statutory construction rather than a constitutional requirement,[319] Congress has the power to declare in a statute that the doctrine should not be applied to regulations adopted under the statute. Accordingly, CUFPA should explicitly provide that the Major Questions Doctrine is inapplicable to regulations adopted pursuant to CUFPA.

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316. *See* SAMUEL BECKETT, WAITING FOR GODOT (1953)(spoiler alert: the title character never appears in the play).

317. *See, e.g.*, Chamber of Com. of the U.S. v. CFPB, 691 F. Supp. 3d 730, 740 (E.D. Tex. 2023).

318. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).

319. *See* Biden v. Nebraska, 600 U.S. 477, 508 (2023) (Barrett, J., concurring) ("[T]he major questions doctrine is a tool for discerning . . . the text's most natural interpretation."); Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. 465, 510 (2024) ("[T]he major questions doctrine is now clearly a substantive canon of statutory construction.").

Even if the Major Questions Doctrine is rooted in the Constitution, however, it should be irrelevant to CUFPA regulations for two reasons. First, it applies to "agency decisions of vast 'economic and political significance.'"[320] Regulations imposing disclosure requirements and other traditional tools of consumer protection regulation scarcely meet that requirement, especially when the products are likely to be limited to niche markets, like EWA.[321] Second, the Major Questions Doctrine requires only a clear statement,[322] and CUFPA should include a clear statement that Congress authorizes the CFPB to impose the identified requirements on new consumer financial products.

F. Will There Be Excessive Litigation Over Whether a Product or Business Model Is New?

Because CUFPA is limited to new products and business plans, the industry may challenge regulations under CUFPA on the ground that the particular product is not in fact new. There are two solutions to this problem.

One is to limit the scope of judicial review by providing, for example, that products or business models the CFPB designates as new, as defined in Part I, are presumed to be new within CUFPA's meaning, and such judgments can be overturned only by clear and convincing evidence that no aspect of the product or business plan is new. That heavy burden, combined with the constraints of Federal Rule of Civil Procedure 11,[323] seems likely to deter inappropriate challenges to CUFPA regulations.

Another option is simply to dispense with the requirement that the product be new and allow the Bureau to issue regulations applying the consumer protection tools discussed above in Part II to both new and old products and business plans. That would be consistent with Congress allowing the CFPB to issue regulations to update the Fair Debt Collection Practices Act, as discussed above.[324] But that undermines the argument that the Bureau needs CUFPA to respond to new developments rather than existing products as to which Congress has already enacted

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320. *See Util. Air Regul. Grp.*, 573 U.S. at 324 (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160).

321. *See Data Spotlight: Developments in the Paycheck Advance Market*, CFPB (July 18, 2024), https://www.consumerfinance.gov/data-research/research-reports/data-spotlight-developments-in-the-paycheck-advance-market/ (estimating that seven million workers accessed approximately $22 billion through earned wage access in 2022).

322. *See* West Virginia v. EPA, 597 U.S. 697, 742 (2022) (Gorsuch, J., concurring) ("The Court has applied the major questions doctrine for the same reason it has applied other similar clear-statement rules . . . ."); *see also* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1035 (2023) ("[T]he core features of the new major questions doctrine resemble a clear statement rule rather than a method of resolving statutory ambiguity in the traditional sense.").

323. *See* FED. R. CIV. P. 11(b)(2) (stating claims asserted in court filings must be warranted by existing law or nonfrivolous arguments for changing existing law).

324. *See supra* notes 44–45 and accompanying text.

protections. The solution may be for Congress to grant to the CFPB, in CUFPA or a separate statute, authority to provide additional protections for existing products and business models for which Congress wants updated protections.

G. CUFPA Requires Congress to Solve the Problem of the Inability to Enact Statutes . . . by Enacting a Statute

It is true that this Article calls for Congress to cure its inability to enact statutes by enacting a statute, but from time to time, Congress does have the wherewithal to enact consumer protection statutes.[325] CUFPA would enable the CFPB to protect consumers from new problems even during the periods when Congress was not inclined to attend to consumer protection issues. Or perhaps more accurately, Congress could make its failure to pass consumer protection statutes less of a problem for consumers by passing a single law that authorizes the Bureau to issue regulations. CUFPA offers Congress a "set it and forget it" solution to the problem of new consumer financial products and business models.

CONCLUSION

Congress has enacted an elaborate set of consumer financial protections, with gaps filled in by the CFPB, to enable consumers to engage in consumer transactions without suffering untoward consequences. But the creativity of the consumer financial industry, together with the forces of creative destruction, often produces new products that existing laws do not adequately regulate. Years may elapse between the proliferation of such products and Congress enacting new statutes regulating them, years in which consumers may suffer problems that could have been prevented simply by applying to these new products tools in the existing consumer protection toolbox, tools like mandated disclosures, ability-to-repay requirements, dispute resolution rules, enforcement mechanisms, bars on discrimination, and fee regulation.

Congress should solve this problem of inadequate regulation by authorizing the CFPB to promulgate regulations that draw on the consumer protection toolkit as appropriate. The Article proposes a statute to accomplish that goal. While CFPB regulations may be less helpful to consumers than a statute tailored to particular financial products, they should fill the gap until Congress can enact a statute specifically covering the product. And because the CFPB regulation would employ regulatory methods that are already in place for other products, the likelihood of unintended consequences is low.

The Article also examines how BNPL transactions would be regulated under such a statute. BNPL lending is a relatively new business

325. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

model for consumer credit products. The current regulatory landscape for such products is sparse. A generic statute like CUFPA would empower the CFPB to apply standard consumer credit regulations to this novel, under-regulated product to protect consumers until Congress can amass the political will to enact tailored consumer protections.

APPENDIX

CONSUMER PROTECTION TOOLBOX SUMMARY

Tool	**Purpose**	**Example Statute**	**CUFPA Application to BNPL**
Disclosure	Ensure consumers are informed about terms and risks	Truth in Lending Act (TILA), 15 U.S.C. § 1601 *et seq.*	Require clear disclosure of BNPL terms and fees
Ability to Repay	Prevent consumers from taking on unaffordable debt	Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. 111-24, § 109, 123 Stat. 1734, 1743 (codified at 15 U.S.C. § 1665e) .	Require BNPL providers to assess consumers' ability to repay
Dispute Resolution/Enforcement	Provide mechanisms for resolving consumer disputes, asserting consumer claims, and addressing arbitration clauses	TILA, 15 U.S.C. §§ 1643, 1666, 1666i, 1640; 15 U.S.C. § 1692k; 10 U.S.C. § 987(f)(4).	Establish BNPL dispute resolution processes based on protections for credit cards, permitting private enforcement, and making pre-dispute arbitration clauses unenforceable
Fee Regulation	Limit excessive	Credit Card	Cap BNPL late

	fees	Accountability Responsibility and Disclosure Act of 2009, Pub. L. 111-24, § 102, 123 Stat. 1734, 1740 (codified at 15 U.S.C. § 1665d).	fees to reasonable amounts
Discrimination	Bar discrimination in consumer transactions	Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*	Unnecessary as to BNPL because ECOA already applies