NOTE

The Case for UDAAP-Based Credit Card Lending Regulations: Providing Greater Financial Security for America and American Consumers

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ABSTRACT

In the lead up to the financial crisis of 2007–2009, federal banking regulators failed to keep large national banks in safe and sound condition while allowing them to engage in lending practices that exploited vulnerable consumers. Measures have been passed in recent years to reign in the most egregious consumer abuses of financial institutions. Nevertheless, "hidden" credit card fees and service charges remains an area of banking practice that has the real potential to seriously harm consumers and weaken our national economy. Measures such as the 2009 CARD Act do not go far enough in protecting American consumers from unfair, deceptive, and abusive credit card lending practices. This Note reviews how, prior to the financial crisis, federal preemption, coupled with a lax and fragmented federal regulatory system, shielded national banks from state-law-based enforcement actions that might have otherwise curbed abusive and unsound credit-extending practices. The Note suggests a way in which various provisions of the Dodd-Frank Act can work together to provide a stronger, more comprehensive regulatory regime covering credit card fees and service charges. The proposed scheme is designed so that state governments—which are best positioned to act as consumer financial protection advocates—can effectively spearhead the effort to combat consumer credit card abuse and is intended to reach unfair, deceptive, and abusive credit card practices that have until now mostly escaped the gamut of federal banking regulation.

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Introduction

Banks play a special role in our economy by providing an efficient payments system and by operating as financial intermediaries, thereby spurring new economic development.[1] Effective banking regulation is critical because of the important part that banks play in the overall economic system, and because banks themselves are naturally unstable institutions based on their susceptibility to panics and "runs."[2] Current regulation, however, has largely failed to prevent national banks from engaging in credit lending practices that are highly damaging to individual consumers and that ultimately weaken the U.S. economy.[3] Federal regulators have endorsed preemption to the

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1 Shelagh Heffernan, Modern Banking 9 (2005).

2 *See* Richard Sylla, *The US Banking System: Origin, Development, and Regulation*, The Gilder Lehrman Inst. of Am. History, http://www.gilderlehrman.org/history-by-era/economics/essays/us-banking-system-origin-development-and-regulation (last visited May 30, 2016).

3 *See* Karen K. Harris, *The State of Preemption and the Dodd-Frank Act*, The Shriver Brief (July 13, 2011), http://www.theshriverbrief.org/2011/07/articles/financial-protection/the-state-of-preemption-and-the-doddfrank-act/.

extent that it enables banks to take advantage of consumers in states where state usury or consumer protection laws would otherwise protect them.[4] In the lead-up to the 2007–2009 financial crisis ("Crisis"), federal preemption shielded some of the most unscrupulous lending practices of national banks from state law enforcement.[5]

The cost to consumers of an open-ended line of credit has been effectively deregulated nationwide due to section 85 of the Banking Code[6] and federal preemption, and credit card fees and service charges pose some of the best-documented risks to unwary financial consumers.[7] Like other questionable lending practices that led to the financial crisis, the imposition of unexpected fees results in consumers finding themselves in far greater debt than they originally anticipated.[8] The financial distress brought on by the lending practices of these banks and the resulting unmanageable debt can have devastating personal consequences for consumers and their families. In one recent highly publicized case, a Maryland man, Christopher Wood, shot his wife and three young children before turning the gun on himself.[9] In the six different suicide notes Mr. Wood left behind, he described the depression and anxiety he felt in dealing with over $460,000 in debt.[10] Investigators later reported that about half that amount was from credit card debt.[11]

While murder-suicide is certainly not the inevitable result for all American families who suffer from unmanageable debt, the social costs associated with credit card debt are well documented.[12] The

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4 *See id.*

5 *See, e.g.*, Watters v. Wachovia Bank, N.A., 550 U.S. 1, 11 (2007) (holding NBA preempted state enforcement of licensing, reporting, and visiting requirements against Wachovia Bank's real estate lending business).

6 12 U.S.C. § 38 (2012).

7 *See, e.g.*, *5 Common Hidden Credit Card Charges*, FoxBusiness.com (Aug. 7, 2013), http://www.foxbusiness.com/personal-finance/2013/08/07/5-common-hidden-credit-card-charges/; Shelby Bremer, *Are You at Risk of Hidden Credit Card Charges?*, ABC News (July 27, 2013), http://abcnews.go.com/Business/hidden-credit-card-charges-risk/story?id=19775719; Jeanine Skowronski, *11 Hidden Card Fees You've Never Heard of*, BankRate.com, http://www.bankrate.com/finance/credit-cards/hidden-credit-card-fees-youve-never-heard-of-1.aspx (last visited May 30, 2016).

8 155 Cong. Rec. 11,106–118 (2009).

9 Matt Zapotosky, *In Notes Left in Family's Killings, Md. Man Details Debts, Depression*, Wash. Post (Apr. 22, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/04/21/AR2009042102484.html.

10 *Id.*

11 *Id.*

12 *See, e.g.*, Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. Pa. L. Rev. 1, 5 (2008).

larger economic implications of having broad swaths of American consumers encumbered by such debt are also potentially troubling. Some scholars recognize a direct correlation between credit card deregulation and the skyrocketing rate of personal bankruptcy filings in recent decades.[13] Furthermore, rendering consumers economically impotent due to crippling credit card debt arguably has a negative overall effect on the economy.[14] Misunderstood credit card terms and products undoubtedly play a significant role in saddling consumers with debt amounts that they never expected and, unfortunately, may never be able to fully repay.[15]

Because the majority of fees and service charges that plague consumers have generally been defended as part of the "interest rate" national banks are federally authorized to exact from their customers, consumers and state-based consumer advocates have historically been unable to challenge them as violations of state usury laws.[16] This result both hurts consumers and prevents state regulatory bodies from overseeing national bank lending practices that could potentially be unsafe for the economic system. In the wake of the Crisis, however, Congress identified federal regulatory preemption—coupled with exceedingly lax and fragmented regulation by the federal banking agencies—and abusive consumer lending practices as driving forces behind the "credit boom" and subsequent bust that ultimately crippled the world economic system.[17] As a result, in July of 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"),[18] implementing various measures with the clear intent of both limiting the degree of federal preemption afforded to national banks and of providing stronger protection for financial consumers against lender abuse.[19]

While Congress has acted to place limits on certain types of damaging credit card fees,[20] the latest reforms still fall short in creating a

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13 *See, e.g.*, Lawrence M. Ausubel, *Credit Card Defaults, Credit Card Profits, and Bankruptcy*, 71 AM. BANKR. L.J. 249, 260–64 (1997).

14 *See* David K. Stein, *Wrong Problem, Wrong Solution: How Congress Failed the American Consumer*, 23 EMORY BANKR. DEV. J. 619, 620 (2007).

15 *See* 155 CONG. REC. 11,106 (2009) (statement of Rep. Maloney).

16 Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 10–11 (2003).

17 *See generally* S. REP. NO. 111-176, at 227–30 (2010) (discussing the causes of the most recent financial crisis).

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

19 *See id.*

20 *See, e.g.*, Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734.

regulatory regime that can protect consumers from the most pervasive types of credit card abuse. The current system's lack of comprehensive protection, coupled with the consistent failure of federal banking regulators to rein in the opportunistic and abusive lending practices of national banks, suggests a new strategy is needed to protect consumers from exploitative credit card practices. This Note argues that states and their attorneys general represent the strongest possible frontline defense against consumer abuse and that they should therefore be empowered to act in that capacity with respect to credit card lending. As explained below, the Dodd-Frank Act provides all the tools necessary to overcome federal preemption and to reestablish states as the primary financial consumer advocates.

Part I.A of this Note reviews the history of how credit card fees and service charges came to be federally protected and how the federal banking agencies have repeatedly sided with banks at the expense of consumers in this regard. Part I.B describes, in concrete terms, the explosion of consumer credit card debt that has occurred in the past three decades as a result of the near complete deregulation of card interest rates and add-on fees and charges and will briefly address some of the potentially damaging effects that such debt may have on the economy at large. Part II examines congressional intent behind the Dodd-Frank Act and precise statutory mechanisms introduced by the Act that can be used to combat the problems explained in Part I. Part III explains how the aforementioned provisions of the Dodd-Frank Act can be employed to create a more robust and effective regulatory regime where states can serve as the primary watchdogs over consumer credit card abuse. Part IV discusses the various benefits that this system would yield to credit card consumers and the economy, at least as compared to the existing regulatory regime, and also addresses potential counterarguments that might be raised against the suggested approach.

I. Preemption and the Credit Boom

A. *The Dual System and Federal Preemption*

Before the Civil War, state-chartered institutions dominated banking in the United States, and their management therefore had been primarily a matter of state regulation.[21] Ultimately, however, the lack of a uniform national currency became a major issue when

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21 Jerry W. Markham, *Banking Regulation: Its History and Future*, 4 N.C. Banking Inst. 221, 224–27 (2000).

the government found itself hard-pressed to fund the Union war effort.[22] As a response to this problem, the federal government began printing and issuing huge numbers of its own bills, colloquially known as "greenbacks," and mandated that the bills had to be accepted as payment in lieu of "harder" currency.[23] In 1863, the National Bank Act ("1863 Act"),[24] originally known as the National Currency Act, was passed into law by a narrow margin with the immediate goal of eliminating state bank notes and replacing them with a uniform currency that could be exchanged nationwide.[25]

In order to affect this goal, the 1863 Act authorized the creation of "national" banks that would be permitted (indeed obligated) to issue national bank notes in amounts as regulated by the Office of the Comptroller of the Currency ("OCC").[26] When the National Bank Act of 1864 ("NBA") superseded the 1863 Act,[27] it created a formal federal chartering system and split bank-chartering power between the federal government and the states, which was previously the sole province of states and their legislatures.[28] Thus a "dual system" of regulation was born.[29]

After the NBA was passed, it quickly became clear that federal preemption gave national banks special privileges to engage in activities that would otherwise be forbidden under state law. Perhaps the earliest example of how the NBA confers special status on national banks is *Tiffany v. National Bank of Missouri*.[30] The Supreme Court in *Tiffany* approved of a national bank's preemptive right to charge interest at rates higher than those allowed to similarly situated state-

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22 Edward Flaherty, *A Brief History of Central Banking in the United States*, AM. HIST. FROM REVOLUTION TO RECONSTRUCTION AND BEYOND, http://www.let.rug.nl/usa/essays/general/a-brief-history-of-central-banking/national-banking-acts-of-1863-and-1864.php (last visited May 30, 2016).

23 *Id.*; Markham, *supra* note 21, at 228.

24 National Currency Act, ch. 58, 12 Stat. 665 (1863) (repealed 1864).

25 *See* Note, *The Policies Behind Lending Limits: An Argument for a Uniform Country Exposure Ceiling*, 99 HARV. L. REV. 430, 430 (1985); Markham, *supra* note 21, at 228; Flaherty, *supra* note 22; *see also* Jonathan L. Levin, *In Search of the National Bank Act*, 97 BANKING L.J. 741, 742–43 (1980); John Wilson Million, *The Debate on the National Bank Act of 1863*, 2 J. POL. ECON. 251, 275 (1894).

26 Markham, *supra* note 21, at 228.

27 12 U.S.C. § 38 (2012).

28 *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, ADMINISTRATOR OF NATIONAL BANKS, NATIONAL BANKS AND THE DUAL BANKING SYSTEM 5, 7–8 (2003), http://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/national-banks-and-the-dual-banking-system.pdf.

29 *Id.* at 8.

30 *See* Tiffany v. Nat'l Bank of Mo., 85 U.S. (18 Wall.) 409, 413 (1873).

chartered banks.[31] Since *Tiffany*, preemption from state laws for national banks has been justified on a few straightforward grounds. Generally, these arguments point to those *special* functions that the national banking system serves in relation to the overall wellbeing of our national economy and the fact that banks are far more susceptible to panics and "runs" than other businesses.[32] Accordingly, proponents of federal preemption assert that nationwide regulatory uniformity is essential because the system's member institutions must be protected from "unduly burdensome and duplicative state regulation."[33]

The NBA sets specific rules for interest rates that national banks may charge on loans and other extensions of credit in section 85 of the Banking Code, and it gives all member banks three options when it comes to setting their interest rates.[34] A national bank may charge: (1) the highest interest rate allowable to *any institution* under the laws of the State where the bank is "located"; (2) one percent above the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located; or (3) seven percent if no interest rate is fixed by state law.[35] The first of these options represents the foundation for the "most favored lender doctrine" for national banks.[36] This means that a national bank may adopt the highest interest rate that can legally be charged by any entity within the state, regardless of whether the state's regulations specifically set lower limits for their own state-chartered banking institutions.[37]

Allegations against national banks for charging excessive interest are thus governed exclusively by federal statute, and any state cause of action based on such allegations is completely preempted.[38] It is important to note that states are still able to enforce their usury laws

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31 *See id.* at 409–10. Although Missouri state banks were limited under state law to charging a maximum of eight percent interest on loans, the Court found that the NBA permitted nationally-chartered banks operating within the State to charge a rate of up to ten percent. *See id.* at 410.

32 *See, e.g.*, First Nat'l Bank of San Jose v. California, 262 U.S. 366, 369 (1923); Davis v. Elmira Sav. Bank, 161 U.S. 275, 283 (1896); Gerald P. Dwyer, Jr. & R. Alton Gilbert, *Bank Runs and Private Remedies*, 71 FED. RES. BANK OF ST. LOUIS REV. 43, 45–47 (1989), https://research.stlouisfed.org/publications/review/89/05/Remedies_May_Jun1989.pdf.

33 Watters v. Wachovia Bank, N.A., 550 U.S. 1, 11 (2007).

34 12 U.S.C. § 85 (2012).

35 *Id.* § 85.

36 Harris, *supra* note 3.

37 *See* 12 C.F.R. § 7.4001(b) (2010).

38 *See* 12 C.F.R. § 7.4008(d)(10) (2014).

against national banks, albeit indirectly, because the federal law limits a bank to charging the maximum allowable rate under the laws of the state where it is "located."[39] However, even this roundabout manner of enforcing state usury laws has been abnegated by the judge-made doctrine of "exportation."[40]

The landmark case *Marquette National Bank of Minneapolis v. First of Omaha Service Corporation*,[41] arose when First National Bank of Omaha ("Omaha"), a federally chartered bank with headquarters in Nebraska, began soliciting customers for its recently formed credit card program across state lines in Minnesota.[42] Omaha charged its new Minnesota customers a rate of up to eighteen percent interest on their credit cards, and although this represented the maximum rate allowable within the State of Nebraska, it was well in excess of the twelve percent limit set by Minnesota's state usury law.[43] Marquette National (confusingly, a state-chartered institution) argued that because Omaha provided its credit card services to customers in Minnesota, the national bank was effectively "located" there for purposes of section 85 and should be subject to the state's usury limits when conducting business with Minnesota residents.[44] The Supreme Court rejected this argument, finding that the word "located" in section 85 referred to only the state named in the bank's organizational charter.[45] The Court openly admitted that a ruling in Omaha's favor would "significantly impair the ability of States to enact effective usury laws" and that "[t]his impairment may in fact be accentuated by the ease with which interstate credit is available by mail through the use of modern credit cards."[46] Nevertheless, the Court dismissed this "impairment" as having "always been implicit in the structure of the National Bank Act" and labeled it merely as "an issue of legislative policy."[47]

The pronouncement of the exportation doctrine in *Marquette* prompted a veritable "race to the bottom" among those states who

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39 *See* 12 U.S.C. § 85 (2012); 12 C.F.R. § 7.40001(b).

40 *See generally* Elizabeth R. Schiltz, *The Amazing, Elastic, Ever-Expanding Exportation Doctrine and Its Effect on Predatory Lending Regulation*, 88 MINN. L. REV. 518, 546, 617–19 (2004) (detailing the origination and effects of the exportation doctrine).

41 Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299 (1978).

42 *Id.* at 301–04.

43 *Id.*

44 *Id.* at 309–10.

45 *Id.* at 310.

46 *Id.* at 318–19.

47 *Id.*

hoped to draw in large national banks looking for an ideal place to incorporate special new "credit card bank" subsidiaries.[48] For instance, early in 1980, South Dakota completely repealed all caps on interest rates and promptly welcomed a then-struggling Citibank into the state.[49] Delaware followed suit less than a year later.[50] By setting up their credit card issuing institutions within these no usury limit states, national banks could now "export" any rate of interest they pleased to customers in any state—subject only to the pressures of competition with other national banks—even in states where such rates would otherwise be illegal.[51] Regulators in these other states were rendered powerless to stop the banks from charging their citizens these limitless rates.[52]

Over the years, the definition of what constitutes "interest" for the purposes of section 85 has gradually expanded. *Smiley v. Citibank (South Dakota)*,[53] in particular, marked a turning point, after which the vast majority of fixed fees, penalties, and service charges assessed by banks against credit card customers would be treated as "interest" for section 85 purposes.[54] At issue in the case were certain "unconscionable" late fees that Citibank imposed on its out-of-state credit card customers.[55] These fees were legal under the laws of South Dakota, where the bank was located, but they violated the laws of the plaintiff's home state of California.[56] Whether the petitioner's state-law-based challenge would be preempted depended on whether late fees could be regarded as part of the "interest" that section 85 authorizes national banks to charge on extensions of credit.[57]

Writing for the majority, Justice Scalia sought the precise meaning of the term "interest," noting that, "[i]t is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administer-

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48 *See* Nat'l Consumer Law Ctr., *Comment Letter Regarding Petition for Rulemaking to Preempt Certain State Laws*, FED. DEPOSIT INS. CORP. (May 16, 2005), https://www.fdic.gov/news/conferences/agency/public_renuart_test.html.

49 Robin Stein, *The Ascendancy of the Credit Card Industry*, FRONTLINE (Nov. 23, 2004), http://www.pbs.org/wgbh/pages/frontline/shows/credit/more/rise.html.

50 *Id.*

51 *See id.*

52 Today it is generally accepted that "there is, in short, no such thing as a state-law claim of usury against a national bank." Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 11 (2003).

53 Smiley v. Citibank (S.D.), N.A., 517 U.S. 735 (1996).

54 *See id.* at 744–47.

55 *Id.* at 738.

56 *Id.*

57 *Id.* at 737.

ing."[58] Interestingly, the Comptroller of the Currency had issued regulation 61 Fed. Reg. 4869[59] while the *Smiley* litigation was actually ongoing.[60] The regulation stated in part:

> The term "interest" as used in 12 U.S.C. [§] 85 includes any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, the following fees connected with credit extension or availability: numerical periodic rates, late fees, not sufficient funds (NSF) fees, overlimit fees, annual fees, cash advance fees, and membership fees. It does not ordinarily include appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports.[61]

There the petitioner argued that the Comptroller's regulation provided "no rational basis for distinguishing the various charges [it] has denominated interest . . . from those charges it has denominated 'non-interest.'"[62] Although the Court conceded that, "in the broadest sense *all* payments connected in any way with the loan . . . can be regarded as 'compensating [the] creditor for [the] extension of credit,'" it nevertheless disagreed with the petitioner's argument.[63] Neither did the fact that the OCC had changed its position on the issue over time[64] convince the Court that the Comptroller's determination was not worthy of deferential treatment.[65] Ultimately, in finding that "the Comptroller's interpretation of § 85 is not an unreasonable one," the Court approved the OCC's definition of "in-

58 *Id.* at 739.

59 12 C.F.R. § 7.4001(a) (1997).

60 *Smiley* 517 U.S. at 739–40. The Court dismissed this anomaly by asserting that "[the fact] [t]hat it was litigation which disclosed the need for the regulation is irrelevant." *Id.* at 741.

61 12 C.F.R. § 7.4001(a).

62 *Smiley*, 517 U.S. at 741.

63 *Id.* at 741–42 (emphasis in original).

64 *See id.* at 742–43. As proof that the OCC reversed itself on the issue, the petitioner pointed to a June 1964 letter from the Comptroller to the President's Committee on Consumer Interests, stating that "charges for late payments, credit life insurance, recording fees, documentary stamp are illustrations of charges which are made by some banks which would not properly be characterized as interest," and a 1988 opinion letter from the Deputy Chief Counsel of the OCC that said "it is my position that [under section 85] the laws of the states where the banks are located . . . determine whether or not the banks can impose the foregoing fees and charges [including late fees] on Iowa residents." *Id.* at 743.

65 *See id.* at 742–43.

terest" and found Citibank's late fees to be a legal and federally preempted exercise of the power granted to national banks under section 85.[66]

Since *Smiley*, there have been a plethora of cases finding various credit card fees, penalties, and service charges to be within the definition of "interest" and thus duly preempted from state-law regulation under section 85.[67] The assumption has been that the only way consumers can challenge these "interest-related" charges is by claiming they violate section 85 rules for allowable interest rates, a claim on which the consumer would almost inevitably fail given that most national banks' credit card subsidiaries operate in states completely devoid of usury limits.[68] Even assuming that the plaintiff could somehow demonstrate that a section 85 violation occurred, her remedy would be limited solely to the mandate of section 86, which allows a plaintiff to recover in the case of a "knowing" violation of section 85 only "twice the amount of the interest thus paid."[69]

B. *The "Golden Age" of Credit Cards*

The near complete deregulation of interest rates brought on by the *Marquette Bank* decision ushered in an age of plenty for national banks and their credit card issuing businesses,[70] particularly starting in

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66 *Id.* at 739–40, 745, 747. This regulatory definition of interest remains unchanged today.

67 *See* Schiltz, *supra* note 40, at 562–63.

68 *See* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 18–19 (2003); Schiltz, *supra* note 40, at 597–98.

69 *See* 12 U.S.C. § 86 (2012).

70 Today, the largest, most well-known national banks manage their operations under the umbrella of a bank holding company ("BHC"), defined broadly as "any company which has control over any bank." *See* 12 U.S.C. § 1841(a)(1)–(2) (2012); *see generally* Saule T. Omarova & Margaret E. Tahyar, *That Which We Call a Bank: Revisiting the History of Bank Holding Company Regulation in the United States*, 31 REV. BANKING & FIN. L. 113 (2012) (outlining the prevalence and typical structure of the modern bank holding company). As a parent corporation, a BHC may own numerous subsidiaries, which engage in various kinds of financial transactions. *See* Omarova & Tahyar, *supra*, at 118–20. Typical subsidiaries of a BHC include commercial banks (those depository institutions which we typically think of as "banks"), investment banks, and also credit card banks, which are specialized, monoline institutions established primarily to issue and service credit card accounts. *See id.* at 169–72; BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO THE CONGRESS ON THE PROFITABILITY OF CREDIT CARD OPERATIONS OF DEPOSITORY INSTITUTIONS 1 (2014), http://www.federalreserve.gov/publications/other-reports/files/ccprofit2014.pdf; Nicola Cetorelli, *How Have Bank Holding Companies Evolved?*, WORLD ECON. F. (Oct. 15, 2015), https://www.weforum.org/agenda/2015/10/how-have-bank-holding-companies-evolved. Although this Note sometimes speaks specially about credit card banks (referred to variously as "card providers," "card issuers," and "credit card companies") it may be helpful to remember that credit card issuance and servicing represents only one line of business engaged in by large national banks. *See id.* Omarova & Tahyar, *supra,* at 138–78.

the years following 1982.[71] Credit card banks, which had operated previously at a net loss, transformed into national banks' most profitable business ventures.[72] In 2013, the average rate of return on assets for all commercial banks was 1.52%, while credit card banks posted an average return on assets of 5.20%.[73] These numbers are not particularly unique, and in the years since 2001, the credit card businesses of large banks have typically been about three times more profitable than their commercial banking operations.[74]

As the profitability of credit cards exploded in the years following 1982, national banks had obvious incentives to expand their customer base. Aggressive promotional activities, such as direct mailing consumers with preapproved cards and offering customers introductory "teaser" interest rates, became exceedingly popular throughout the 1990s.[75] Often, these promotions were aimed at so-called "marginal borrowers," i.e., consumers that previously would have been unable to obtain easy credit due to their personal circumstances.[76] Although these types of borrowers obviously represented a greater risk of default to the issuers, risk-based pricing (which implements features like minimum monthly payments, adjustable retroactive interest rates, and hefty late payment and over-limit fees) allowed banks to reap extraordinary long-term profits from the majority of these customers.[77] After all, as multiple commentators have pointed out, "the overwhelming majority of card issuers' profits are generated from consumers who pay late, exceed their credit limit, pay interest, carry higher balances, and consistently make the minimum monthly payment, and not from convenience users whom the credit card industry commonly

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71 *See* Dan Bryan, *Give Me Liberty or Give Me Debt—A History of Credit Cards*, AM. HIST. USA (Apr. 30, 2012), http://www.americanhistoryusa.com/give-me-liberty-or-give-me-debt-a-history-of-credit-cards/. In the early 1980s, rampant inflation meant the credit card companies could charge interest rates of up to twenty percent without seeming unreasonable. *See id.* Interestingly, when the recession ended in 1982 and inflation rates receded, card companies found that customers were mostly willing to continue paying the high rates. *See id.*

72 *See* Ausubel, *supra* note 13, at 259–60.

73 BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO THE CONGRESS ON THE PROFITABILITY OF CREDIT CARD OPERATIONS OF DEPOSITORY INSTITUTIONS 3–4 (2014), http://www.federalreserve.gov/publications/other-reports/files/ccprofit2014.pdf.

74 *See id.*; *see also* Ausubel, *supra* note 13, at 259–60.

75 *See* Ausubel, *supra* note 13, at 262, 266; Stein, *supra* note 14, at 627–28.

76 *See* Adam Goldstein, *Why "It Pays" to "Leave Home Without It": Examining the Legal Culpability of Credit Card Issuers Under Tort Principles of Products Liability*, 2006 U. ILL. L. REV. 827, 839; Stein, *supra* note 14, at 627–30.

77 *See* Ausubel, *supra* note 13, at 264; Goldstein, *supra* note 76, at 831 (citing ROBERT D. MANNING, CREDIT CARD NATION 5, 120–21 (2000)); Stein, *supra* note 14, at 627–30.

refers to as 'deadbeats.'"[78] Clearly the profits culled from these marginal customers over time much more than offset any losses from their occasional default.[79]

In 1980, the total combined amount of outstanding revolving consumer credit (which for the most part means credit card debt) in the United States was about $58 billion.[80] By the end of 2008, that number peaked at over $1 trillion.[81] The Federal Reserve released figures estimating the total to be $936 billion at the close of 2015.[82] It is worth mentioning that this net decrease is perhaps best explained by higher consumer default rates coupled with banks' increased willingness to write-off seriously delinquent debts in those years since the Crisis, as opposed to any greater tendency for Americans to actually pay off their credit cards.[83] Whatever the case, statistics show that in 2015 the average American household was encumbered with roughly $5800 worth of credit card debt. Personal bankruptcy filings in the United States increased by over 350% in the years between 1980 and 2005.[84]

Commentators have explained the boom in consumer credit as the product of a variety of influences. Interestingly, studies indicate that it is rarely personal or family emergencies that lead consumers to become heavily indebted.[85] Indeed a significant portion of credit card debt in this country is attributable to "subsistence users," which are individuals who use open-ended lines of credit, with the accompanying high rate of interest, simply to meet their day-to-day expenses.[86]

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78 Goldstein, *supra* note 76, at 831 (citing ROBERT D. MANNING, CREDIT CARD NATION 5, 120–21 (2000)); *see also* Ausubel, *supra* note 13, at 264.

79 *See* Goldstein, *supra* note 76, at 840 (citing TERESA A. SULLIVAN ET AL., THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 246–47 (2000)); Stein, *supra* note 14, at 627–30.

80 BD. OF GOVERNORS OF THE FED. RESERVE SYS., CONSUMER CREDIT REPORT G.19, STATISTICAL RELEASES AND HISTORICAL DATA, http://www.federalreserve.gov/releases/g19/HIST/cc_hist_mt_levels.html.

81 *Id.*

82 *Id.*

83 *See* Erin El Issa, *2015 American Household Credit Card Study*, NERDWALLET.COM, http://www.nerdwallet.com/blog/credit-card-data/average-credit-card-debt-household/ [https://perma.cc/EUS5-ZQ8C] (last visited May 30, 2016).

84 Thomas A. Garrett, *The Rise in Personal Bankruptcies: The Eighth Federal Reserve District and Beyond*, 89 FED. RES. BANK OF ST. LOUIS REV. 15, 15 (2007), http://research.stlouisfed.org/publications/review/07/01/Garrett.pdf.

85 *See* Stein, *supra* note 14, at 622 (citing Ed Flynn & Gordon Bermant, *Bankruptcy by the Numbers, Charging Their Way into Bankruptcy*, AM. BANKR. INST. J., Oct. 2000, at 22).

86 Andrea Freeman, *Payback: A Structural Analysis of the Credit Card Problem*, 55 ARIZ. L. REV. 151, 156, 160–62 (2013). Freeman highlights the importance of subsistence users, who generally carry a high balance and make only minimum payments on their cards, to the credit card industry by reporting that "issuers earn roughly 80% of their profits from interest rates and penalty fees." *Id.* at 161.

In explaining why Americans voluntarily incur so much credit card debt in the first instance, scholars have cited a psychological tendency for being overly optimistic with respect to personal finances as well as increased societal pressures to live above one's means.[87] Further, all of this is driven, at least in part, by a revolution in consumer advertising.[88] Some believe that credit card spending has become an uncontrollable compulsion for many individuals in this country and have even likened such spending to an addiction, like smoking tobacco or crack cocaine.[89]

C. *Attempts at Credit Card Reform and Their Shortcomings*

Americans' observed behavior with respect to credit card products has led some scholars to reject the applicability of neoclassical economic theory in the consumer-lending context.[90] Put simply, the neoclassical view operates on the assumption that all consumers are perfectly rational utility-maximizers.[91] This model therefore asserts that in a world of perfect information where all terms of a credit agreement have been disclosed, the consumer will only make credit decisions that promote his or her best interests.[92] In this view, market distortions, such as dangerously overblown levels of consumer debt, arise primarily in connection with problems of imperfect information, i.e., fraud or insufficient disclosure.[93] The bulk of financial consumer protection law up to this point has operated primarily on assumptions

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87 *See id.* at 160 ("The present-day leisure class transmits its taste and values to "the 99%" primarily through fictional families, and studies reveal that most people report dissatisfaction with their class status, regardless of what it is."); *see also* Stein, *supra* note 14, at 625–32.

88 Freeman, *supra* note 86, at 160.

89 *See* Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 520 (2005) (quoting *Bankruptcy Reform Act of 1999—Part I: Hearing on H.R. 833 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 106th Cong. 7–8 (1999) (statement of Rep. Jackson Lee)); Ellen Gans, *Compulsive Shopping and Credit Card Addiction*, THE SIMPLE DOLLAR (Aug. 24, 2015), http://www.thesimpledollar.com/treating-credit-card-addiction/.

90 *See, e.g.*, Patrick M. Corrigan, Note, *"Abusive" Acts and Practices: Dodd-Frank's Behaviorally Informed Authority over Consumer Credit Markets and Its Application to Teaser Rates*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 125, 145 (2015); Jonathan Slowik, Comment, *Credit CARD Act II: Expanding Credit Card Reform by Targeting Behavioral Biases*, 59 UCLA L. Rev. 1292, 1304–07 (2012).

91 Corrigan, *supra* note 90, at 140.

92 *Id.*

93 *See* Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. U. L. REV. 1033, 1036–37 (2012); Corrigan, *supra* note 90, at 128.

made by the neoclassical model, insomuch as it focuses almost exclusively on policing fraud and facilitating the disclosure of credit terms.[94]

In contrast, the more modern behavioral model of economics concerns itself with ways in which real people differ from the neoclassical ideal of *Homo economicus*.[95] This school of thought recognizes that human beings inevitably suffer from the limits of bounded rationality, bounded willpower, and bounded self-interest.[96] In short, proponents of the behavioral model argue that the typical consumer suffers from certain "biases" such that, even in a credit environment of perfect disclosure, it is unrealistic to assume that all consumers will only make decisions that maximize their financial wellbeing.[97] Consumer behavioral biases manifest themselves in numerous ways, e.g., in misunderstanding complex contract terms,[98] overvaluing immediate benefits and costs and undervaluing future benefits and costs,[99] overoptimistic expectations about one's earning capacity or the likelihood of occurrence of an adverse event,[100] or an over-dependence on the judgment or goodwill of lenders.[101]

One recent industry reform in particular, the Credit Card Accountability Responsibility and Disclosure Act of 2009 ("CARD Act"),[102] has inspired substantial debate about how the problem of overwhelming credit card debt ought to be approached from a regulatory standpoint. Primarily, the CARD Act amends the Truth in Lending Act ("TILA")[103] to require stricter disclosures on credit agreements and monthly billing statements.[104] Although the CARD Act also imposes some substantive limitations on some types of penalties and marketing techniques,[105] it would be fair to view the CARD Act as a continuation of financial regulation's neoclassical focus on enhancing disclosure, i.e., making sure consumers have all the facts necessary to make the right choice. Although the CARD Act has

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94 Corrigan, *supra* note 90, at 128.

95 Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476 (1998).

96 *Id.* at 1476–79.

97 *Id.*

98 *See* Corrigan, *supra* note 90, at 148–49.

99 *See* Slowik, *supra* note 90, at 1311–12.

100 *See id.* at 1313–14.

101 *See* Corrigan, *supra* note 90, at 141–42.

102 CARD Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734.

103 Consumer Credit Protection Act of 1968, Pub. L. No. 90-321, tit. I, 82 Stat. 146 (1968) (codified at 15 U.S.C. §§ 1601–1665).

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

105 *See id.* §§ 102, 302.

drawn back on the amount of money that national banks earn from certain types of back-end fees and penalties,[106] current data indicates that neither the profitability of credit card servicing nor the overall cost of credit to consumers has significantly declined.[107] This strongly suggests that national banks have found other products and service charges to replace those that were banned by the CARD Act.[108] The Consumer Financial Protection Bureau ("CFPB") assessed the impact of the CARD Act at its first anniversary in July 2011 in rather neutral terms, stating only that, "[t]he total amount consumers are paying for their credit cards is no higher, on average, than it was one, two, or three years ago, but the pricing is clearer and more up-front."[109]

Naturally, therefore, many argue that the CARD Act does not go far enough in combating lending practices that lead many American consumers, particularly the most vulnerable groups, to incur unmanageable amounts of credit card debt. The "overall effect [of the CARD Act]," one scholar summarizes, "was to make a gesture towards consumer protection without reducing, and perhaps increasing, consumer debt."[110] One broad criticism asserts that the CARD Act, by operating on the neoclassical understanding of consumers as perfectly rational, fails to address problems associated with consumer behavioral biases, which card issuers may continue to routinely exploit even despite the nominally enhanced disclosures required of them.[111] Enhanced disclosure requirements, it is argued, are of limited or no value in some of the most potentially damaging lending situations, such as, where the borrower misunderstands (fails to grasp the import of) complex or non-salient terms,[112] where the borrower lacks meaningful choice over the terms of his or her credit,[113] or when the borrower is forced to rely on information conveyed to him or her by the

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106 *See* CONSUMER FIN. PROT. BUREAU, CARD ACT REPORT 20 (2013), http://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf.

107 *See id.* at 31–35.

108 *See id.* at 36–37. The CFPB has expressed particular concern over the now-increased popularity of add-on products, deferred interest products, and "fee harvester" cards, all of which remain largely unregulated by the CARD Act. *Id.* at 7.

109 CONSUMER FIN. PROT. BUREAU, BUILDING THE CFPB: A PROGRESS REPORT 12 (2011), http://files.consumerfinance.gov/f/2011/07/Report_BuildingTheCfpb1.pdf.

110 Freeman, *supra* note 86, at 172.

111 *See* Corrigan, *supra* note 90, at 135. ("While TILA addresses problems of imperfect information, it does not require the regulator to inquire into whether or not the consumer *understands* the information in the disclosure. TILA addresses problems of imperfect information but not problems of misunderstanding.") (footnote omitted); *see also* Slowik, *supra* note 90, at 1304–07.

112 *See* Corrigan, *supra* note 90, at 135; Slowik, *supra* note 90, at 1310–11.

113 *See* Freeman, *supra* note 86, at 156–58.

card issuer.[114] Circumstances such as these, which may be especially prevalent among subprime or marginal consumers, leave open the potential for abuse even after all the technical requirements of TILA and the CARD Act have been met.[115]

Given that the industry operates in a landscape without any concrete restrictions on usury, it seems likely that credit card banks will always find regulatory loopholes that allow them to reap extraordinary returns in the form of one fee or another. Although ultimately it would be impracticable, and arguably undesirable, to wipe out all credit card lending techniques that play to inherent consumer biases, the extraordinary level of consumer debt—especially that attributable to low-income families—and the overall cost of credit in this country make clear that additional regulatory action is needed to draw back on the most pervasive and exploitative credit card practices affecting American consumers. A strictly disclosure-based regime, such as that imposed by TILA and the CARD Act, has shown itself to be inadequate in this respect.[116] Ultimately what is needed to combat these problems is a more flexible, adaptable, and universally-applicable approach to regulatory enforcement.

II. The Dodd-Frank Wall Street Reform and Consumer Protection Act

After the Crisis, much of the discussion in Congress focused on understanding what factors had generated that perfect storm, which led to "the most calamitous worldwide recession since the Great Depression."[117] Much of the scholarly analysis pointed to the perverse incentives created by securitization and the near complete absence of regulatory oversight by federal banking agencies, which had also actively sought to bar state regulators from prosecuting banks for unsound and abusive practices.[118] In formulating the Dodd-Frank Act, the legislative history reveals that Congress intended to implement

114 *See* Corrigan, *supra* note 90, at 135; Slowik, *supra* note 90, at 1306.

115 *See* Slowik, *supra* note 90, at 1306 ("Nothing compels consumers to read, understand and respond to disclosures. There is no elixir to cure consumer illiteracy, 'innumeracy,' or just plain disinterest. [Disclosure] cannot force economic rationality into a consumer's consciousness." (quoting Ralph J. Rohner, *Whither Truth in Lending?*, 50 Consumer Fin. L.Q. 114, 114 (1996))).

116 *See supra* Section I.C.

117 *Creating a Consumer Financial Protection Agency: A Cornerstone of America's New Economic Foundation: Hearing Before S. Comm. on Banking, Hous., & Urban Affairs*, 111th Cong. 82 (2009) (statement of Travis B. Plunkett, Legislative Director, Consumer Federation of America).

118 *See, e.g.*, S. Rep. No. 111-176, at 9–23 (2010).

both a stricter regime of regulation with respect to unfair and deceptive lending practices and to draw back on the broad federal preemption that undoubtedly played a role in letting such practices flourish.

A. *The CFPB and Its UDAAP Authority*

Congress evinced a clear intent in the formulation of the Dodd-Frank Act to impose stricter regulation and more comprehensive oversight on national banks with respect to the types of unfair, deceptive, and abusive lending practices that fueled the "credit boom" of the early 2000s and ultimately set the stage for the Crisis.[119]

Perhaps the biggest step that Congress took to increase consumer financial protection was the Dodd-Frank Act's creation of a new, independent federal agency, the CFPB.[120] The CFPB effectively assumes the authority to enforce federal consumer protection laws against the largest banks and other systemically important nonbank financial institutions.[121] The CFPB's power in this respect had previously been divided among the various federal banking agencies (including the OCC, the Federal Reserve, the Federal Deposit Insurance Corporation, and even the Federal Trade Commission).[122] By consolidating consumer protection enforcement authorities into the body of one agency, Congress hoped to put an end to "the fragmented U.S. regulatory structure [that] contributed to failures by the existing regulators to adequately protect consumers and ensure financial stability."[123] Congress noted that historically,

> This fragmentation led to regulatory arbitrage between federal regulators and the states, while the lack of any effective supervision on nondepositories led to a "race to the bottom" in which the institutions with the least effective consumer regulation and enforcement attracted more business, putting pressure on regulated institutions to lower standards to compete effectively, "and on their regulators to let them."[124]

This passage makes evident that one of the Dodd-Frank Act's primary missions is to put *all banks* (whether they are nationally-

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119 *See id.*

120 *See* Dodd-Frank Act, Pub. L. No. 111-203 § 1011, 124 Stat. 1376, 1964 (2010) (codified at 12 U.S.C. § 5491 (2012)).

121 *See* 12 U.S.C. § 5511(a)–(b).

122 S. Rep. No. 111-176, at 10, 16, 19, 24.

123 *Id.* at 10 (quoting testimony of Gene Dodaro, Acting Comptroller General of the United States).

124 *Id.* (quoting statement of Hon. Michael S. Barr, Assistant Secretary for Financial Institutions).

chartered or otherwise) on a "basic, minimum federal level playing field" when it comes to marketing and selling consumer financial products to American families.[125]

The Dodd-Frank Act assigns to the CFPB the power to enforce a new, enhanced version of the federal statute prohibiting businesses from engaging in unfair or deceptive acts or practices (formerly, "UDAP") in their transactions with consumers.[126] Originally, the job of enforcing this federal law against all U.S. businesses fell solely within the purview of the Federal Trade Commission ("FTC"), whose chartering Act prohibits unfair or deceptive acts or practices in or affecting commerce.[127] The Dodd-Frank Act section 1031[128] additionally prohibits banks from engaging in "abusive" acts or practices (hence the current acronym, "UDAAP").[129]

The FTC has interpreted the terms "unfair" and "deceptive" extensively over time, and the Dodd-Frank Act defines "unfair" in essentially the same language used by the FTC.[130] However, the Act left "deceptive" conspicuously undefined, and some other aspects of section 1031, particularly when viewed in light of the legislative history that preceded them, reveal a congressional intent not to restrict the scope of those terms to their prior FTC interpretations.[131] In particular, commentators point to Congress's refusal to adopt any direct reference to FTC guidance in the final version of the Act as evidence that the CFPB may now have a "freer hand to define its ability to reach unfair and deceptive practices under Dodd-Frank."[132] Never-

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125 *Id.* at 11.

126 *See* 12 U.S.C. § 5531(a).

127 *See* Federal Trade Commission (FTC) Act of 1914, Pub. L. No. 63-203, § 5 (codified at 15 U.S.C. § 45 (2012)).

128 12 U.S.C. § 5531.

129 *Id.* § 5531(a).

130 *See generally* FED. DEPOSIT INS. CORP., FDIC COMPLIANCE EXAMINATION MANUAL, SECTION VII: ABUSIVE PRACTICES (2015) (summarizing FTC guidance on section 5 of the FTC Act). The FTC has stated that an act is "deceptive" if (1) it is likely to mislead the consumer, (2) the consumer's interpretation is reasonable under the circumstances, and (3) the misleading act is material. An "unfair" act or practice (1) causes or is likely to cause substantial injury to consumers, where (2) the injury is not reasonably avoidable, and (3) the injury is not outweighed by countervailing benefits to consumers or to competition. *Id.* at VII–1.3, VII–1.7.

131 See Dodd-Frank Act, Pub. L. No. 111-203 § 1011, 124 Stat. 1376, 2005–06 (2010) (codified at 12 U.S.C. § 5531 (2012)).

132 Carey Alexander, Note, *Abusive: Dodd-Frank Section 1031 and the Continuing Struggle to Protect Consumers*, 85 ST. JOHN'S L. REV. 1105, 1119 (2011). Alexander also argues that the inclusion of a provision expressly calling for consideration of established public policy in determining whether an act or practice is "unfair" suggests that Congress wanted to de-emphasize the strict "countervailing benefits to consumers" balancing test that previously played a major role in the FTC's application of that term. *See id.* at 1111, 1118, 1130.

theless, thus far the CFPB has been content to employ the unfairness and deception prongs of its UDAAP authority in a way that largely mirrors prior FTC doctrine.[133]

Insertion of the new term "abusive" represents an expansion of the CFPB's authority beyond that exercised by the FTC to combat business practices that harm financial consumers.[134] Undoubtedly, Congress intended the provision to prohibit practices not encompassed by the more delineated parameters of unfair and deceptive;[135] in practice, the term has yet to be expounded upon in any meaningful way (to date, only three CFPB enforcement actions have been premised in whole or in part on the bank's use of abusive tactics).[136] Some argue persuasively that the term significantly augments the old disclosure-based regulatory regime.[137] Specifically, it is thought that the abusive prong of UDAAP can be used to address lending techniques that, while in technical compliance with disclosure-based regulations such as those promulgated under TILA, nevertheless prey on consumers' behavioral biases and rational shortcomings.[138] In this regard, at least one observer laments the CFPB's failure up to this point to delineate "abusiveness" on its own terms, noting that recent enforcement actions use the label "abusive" primarily in connection with acts or practices also identified as unfair or deceptive.[139]

B. A Desire to Hedge Federal Preemption

After the failure of federal regulators to reprimand national banks for engaging in abusive and ultimately unsound lending practices during the lead-up to the Crisis, Congress perceived the need to give more power to the states to enforce consumer financial protec-

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133 *See, e.g.*, CONSUMER FIN. PROT. BUREAU, CFPB SUPERVISION AND EXAMINATION MANUAL VERSION 2, 1–10 (2012) [hereinafter CFPB MANUAL].

134 *Compare* 12 U.S.C. § 5531(a) (adding the term "abusive"), *with* 15 U.S.C. § 45 (2012) ("abusive" not mentioned).

135 *See* Corrigan, *supra* note 90, at 133.

136 *See id.* at 151 ("To date, the CFPB has yet to demonstrate a coherent and consistent understanding of its own abuse authority.").

137 *See, e.g.*, Alexander, *supra* note 132, at 1122, 1127–44; Corrigan, *supra* note 90, at 140.

138 *See* Alexander, *supra* note 132, at 1125 ("Of especial relevance to the CFPB was the Fed's suggestion that better disclosure by itself could not stop abusive practices."); *see also* Corrigan, *supra* note 90, at 146, 155.

139 *See* Corrigan, *supra* note 90, at 151.

tion laws.[140] Title X of the Dodd-Frank Act demonstrates congressional intent in this respect.[141]

The Dodd-Frank Act adds section 25b to the Banking Code, which sets rules for determining when a state consumer financial protection law is preempted by federal law.[142] The standard for preemption is now specifically defined, with the law stating that a state consumer financial protection law is preempted *only if* (1) the law would have a discriminatory effect upon national banks, (2) the law prevents or significantly interferes with the exercise by the national bank of its powers, or (3) the law is preempted by any other provision of federal law.[143] Additionally, section 25b mandates that OCC rulings regarding preemption are no longer to be given the typical administrative deference outlined by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[144] (i.e., evaluated merely for "reasonableness").[145] Rather, the agency's interpretation is to be evaluated in a manner approximating the approach taken in *Skidmore v. Swift & Co.*[146] by assessing "the validity of such determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision."[147] As a base-level requirement, the OCC must now present "substantial evidence" to support the propriety of its decision,[148] and furthermore, it must conduct a review through notice and public comment of each preemption determination at least once every five years and submit said reports to Congress.[149]

Section 1042 of the Dodd-Frank Act,[150] entitled "Preservation of Enforcement Powers of States," provides generally that,

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140 *See* Arthur E. Wilmarth, Jr., *The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. Corp. L. 893, 896, 948 (2011).

141 *See id.* at 948.

142 12 U.S.C. § 25b(b) (2012).

143 *Id.* Although the OCC has subsequently tried to contend that its prior preemption regulations were all in accordance with these guidelines, commentators generally agree that this provision signals Congress's intent to more strictly define the limits of federal preemption over state consumer financial protection laws. *See, e.g.*, Wilmarth, *supra* note 140, at 936.

144 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 840 (1984).

145 12 U.S.C. § 25b(b)(5)(A).

146 Skidmore v. Swift & Co., 323 U.S. 134 (1944).

147 12 U.S.C. § 25b(b)(5)(A); *see also Skidmore*, 323 U.S. at 140.

148 12 U.S.C. § 25b(c).

149 *Id.* § 25b(d).

150 12 U.S.C. § 5552 (2012).

> the attorney general (or the equivalent thereof) of any State may bring a civil action in the name of such State in any district court of the United States in that State or in State court that is located in that State and that has jurisdiction over the defendant, to enforce provisions of this title . . . .[151]

Although this initial language looks promising for pro-state, anti-preemption advocates, the immediately succeeding clause of section 1042 puts a significant restriction on this general enforcement power. Section 1042(a)(2)(A) states that state attorneys general may not bring civil actions against federally-chartered national banks to enforce provisions of the Act.[152] These two subsections taken together essentially state that attorneys general can enforce Dodd-Frank's consumer protection laws, but only against their own state-chartered institutions. This, of course, limits the effectiveness of section 1042 as a weapon against unfair, deceptive, or abusive credit card practices, as the vast majority of credit cards used in this country are issued by companies belonging to a small group of nationally-chartered institutions.[153]

However, section 1042(a)(2)(B) provides that state attorneys general do have the power to enforce against national banks *specific rules and regulations* promulgated by the CFPB.[154] This provision effectively allows the CFPB to turn states into primary enforcers of powers granted to it under the Act, including the CFPB's new UDAAP authority.[155] Thus far the CFPB has refrained from producing any specific regulations with respect to UDAAP provisions, opting instead for a scatter-shot "we know it when we see it" approach.[156] Although state attorneys general have been empowered by section 1042(a)(2)(B) to the extent that they are now able to enforce regula-

151 *Id.* § 5552(a)(1).

152 *Id.* § 5552(a)(2)(A).

153 *See* Freeman, *supra* note 86, at 163 ("Five credit card issuers (Chase, Bank of America, Citi, American Express, and Capital One) dominate the issuer industry, and the top nine issuers hold approximately 90% of the existing credit card balances.") (footnote omitted).

154 12 U.S.C. § 5552(a)(2)(B).

155 *See generally* Lauren Saunders, *The Role of the States Under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*, NAT'L CONSUMER LAW CTR. (2010), https://www.nclc.org/images/pdf/legislation/dodd-frank-role-of-the-states.pdf (giving an overview of the states' new ability under Dodd-Frank to enforce certain aspects of federal law, including rules of the CFPB).

156 *See generally* Donald C. Lampe et al., *The CFPB & UDAAP: A "Know It When You See It" Standard?*, MORRISON & FOERSTER 1 (June 2014), http://documents.jdsupra.com/8178fd57-3952-4f69-9abe-7c262d7e0503.pdf (noting patterns from CFPB enforcement actions and statements to help regulated entities predict how the agency will exercise its UDAAP authority).

tions promulgated under TILA (most recently those prompted by passage of the CARD Act of 2009) against national banks, as discussed above, there is strong evidence that the disclosure-centric regimen those regulations promote will never be totally successful at eliminating the most pervasive and damaging credit card lending practices in which the largest card issuers engage.[157] This Note argues that the CFPB should take a more aggressive approach in regulating the cost of credit to consumers by promulgating regulations under its UDAAP authority. These regulations can be designed and sufficiently delineated so as to curb national banks' most unjust techniques. Generating regulations of this type and then allowing states to enforce them independently would have numerous beneficial effects for financial consumers and the economy.

III. A Framework for CFPB Rulemaking Targeting Hidden Credit Card Fees

This Note does not provide any specific language for the regulations it suggests. Rather, it lays out a set of guiding principles for tailoring UDAAP-based regulations that will eliminate the most unjust credit card practices currently harming consumers by leading them to incur more debt than they can manage. In that pursuit, the Note proceeds through each of the three elements of the Dodd-Frank Act's UDAAP prohibition and discusses how, in light of previous case law, agency guidance, and congressional mandates, regulations based on these terms should be formulated so as to maximize benefits for consumers and the economy and minimize any potential costs.

A. Deception

So far, the majority of CFPB enforcement actions against credit card companies have been based on the deceptive prong of UDAAP.[158] The Dodd-Frank Act itself does not provide a definition for deceptive, as it does with unfair and abusive, but, until now, the CFPB has interpreted and enforced the provision in a manner consistent with its original FTC meaning.[159] Deceptive in this context means

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157 *See supra* Section I.C.

158 *See, e.g.*, Am. Express Centurion Bank, CFPB No. 2013-CFPB-0011, at 1, 7 (Dec. 24, 2013) (consent order); Capital One Bank (U.S.A.), CFPB No. 2012-CFPB-0001, at 8 (July 18, 2012) (consent order and stipulation); Discover Bank, CFPB No. 2012-CFPB-0005, at 1–23 (Sept. 24, 2012) (joint consent order).

159 Consumer Fin. Prot. Bureau, Bulletin No. 2013-07, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts 3 n.16 (2013).

an act or practice that is likely to mislead the consumer, when the consumer's interpretation is reasonable under the circumstances, and the misleading act is "material."[160] Under the FTC standard, deception typically requires some affirmative misstatement or misrepresentation or concealment of material terms.[161] This Note argues that regulations promulgated under UDAAP should go further than simply prohibiting blatant misrepresentations or concealments by credit card issuers, and should work to proscribe practices that mislead consumers by exploiting their (often predictable) lack of understanding or lack of bargaining position. Regulations targeting these sorts of practices, which may be subtle and hard to quantify, would effectively advance the Dodd-Frank Act's consumer protection goals by providing enforcers with a flexible tool for dealing with material deception in the ever-evolving landscape of credit card products and marketing.

To a large extent then, whether a particular bank practice can be labeled as deceptive depends on the specific factual circumstances of the transaction. For example, whether an act is "likely to mislead" the consumer and whether that consumer's interpretation was "reasonable under the circumstances" are questions that require an evaluation of all the surrounding facts.[162] Previous CFPB guidance and various CFPB enforcement actions highlight factual elements that make it more or less likely for an act or practice to be deceptive under the circumstances.

The CFPB has repeatedly expressed concern with credit cards and card services sold to consumers in connection with "special" promotions.[163] A typical scenario is when a card is marketed to consumers as charging no interest on purchases made during a stated promotional period.[164] What is not always made clear to consumers accepting an offer of this sort is that the interest-free treatment can only be maintained subject to certain conditions.[165] For example, a

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160 CFPB Manual, *supra* note 133, at 5.

161 *See* Corrigan, *supra* note 90, at 137.

162 CFPB Manual, *supra* note 133, at 5.

163 *See, e.g.*, GE Capital Retail Bank, CFPB No. 2013-CFPB-0009, at 6 (Dec. 10, 2013) (consent order); Consumer Fin. Prot. Bureau, Bulletin No. 2014-02, Marketing of Credit Card Promotional APR Offers 1–4 (2014).

164 *See, e.g.*, GE Capital Retail Bank, CFPB No. 2013-CFPB-0009, at 6; Consumer Fin. Prot. Bureau, Bulletin No. 2014-02, Marketing of Credit Card Promotional APR Offers 1 (2014).

165 *See generally* Consumer Fin. Prot. Bureau, Bulletin No. 2014-02, Marketing of Credit Card Promotional APR Offers 1 (2014) (CFPB informing credit card issuers of risk of engaging in deceptive acts and practices in connection with "solicitations that offer a promotional annual percentage rate (APR) on a particular transaction over a defined period of time").

cardholder may be allowed to accrue a balance for new purchases without incurring interest during the promotional period, but only so long as she continues to pay off her complete card balance by the monthly billing cycle due date.[166] If she fails to fully pay for her new purchases by the billing cycle due date, her interest-free "grace period" lapses and interest charges will apply to any remaining unpaid balance, as well to any future purchases, until the full card balance is paid.[167]

Similarly, cards may be advertised as charging no interest during a promotional period, when, in fact, interest on any purchase made during the period is only *deferred*.[168] If the cardholder fails to pay his full balance by the end of the promotional period, he automatically becomes liable for all *past interest*, calculated from the date of purchase.[169]

The CFPB evidently views promotional offers like those described above as being particularly susceptible to deception when they are marketed to target groups of consumers. For instance, in a recent CFPB enforcement action, deferred interest cards were promoted inside doctors' and dentists' offices to individuals waiting for healthcare and were marketed specifically as a way to pay for their health services.[170] In this same vein, the CFPB has expressed particular concern about card services targeted at subprime borrowers.[171] Subprime borrowers are often marketed contingency-based, add-on products due to their poor credit histories. Although these products might initially seem invaluable to vulnerable borrowers, banks in their marketing efforts can over-inflate the true value of such products to consumers,[172] while downplaying the cost as being well worth the potential benefits.[173] Students,[174] the elderly,[175] and non-English speakers[176] re-

166 *See id.*

167 *See id.*

168 *See id. See also* GE Capital Retail Bank, CFPB No. 2013-CFPB-0009 (Dec. 10, 2013).

169 *See* Consumer Fin. Prot. Bureau, *Ask CFPB, Credit Cards*, http://www.consumerfinance.gov/askcfpb/40/i-bought-something-using-my-store-credit-card-and-was-told-that-interest-would-be-deferred-and-that-i-would-not-have-to-pay-any-interest-for-12-months-how-does-that-work.html [https://perma.cc/E45F-ZBJT] (last visited June 5, 2016).

170 GE Capital Retail Bank, CFPB No. 2013-CFPB-0009, at 4.

171 *See* Cont'l Fin. Co., LLC, CFPB No. 2015-CFPB-0003, at 3–20 (Feb. 4, 2015) (consent order).

172 For example, by overestimating the chances that the product will activate and become useful, or by overstating the benefits that will actually accrue to the cardholder when the product is activated.

173 *See, e.g.*, Bank of America, N.A., CFPB No. 2014-CFPB-004, at 6–9 (Apr. 9, 2014) (consent order); Am. Express Centurion Bank, CFPB No. 2013-CFPB-0011, at 7–9 (Dec. 24, 2013) (consent order).

present other unique classes of individuals whom the CFPB views as being particularly at risk of deception when it comes to promotional offers and unnecessary and valueless add-on products. These classes often include individuals who, because of their personal circumstances, may be less likely to understand or to inquire about the full array of contract terms and may also feel that they have little or no chance of obtaining a better deal elsewhere.[177]

As a general matter, "special deal" promotional offerings represent a pitfall for consumers in that they necessarily highlight positive aspects of the product or service, making it less likely that consumers will inquire about corresponding negative aspects that may come with it.[178] Card products and marketing campaigns targeted at certain classes of consumers increase the risk of high credit costs because the borrowers involved are more prone to misunderstanding or miscalculating the cost or value of certain terms and may feel constrained in their choice of lender.[179] In these contexts then, danger for financial consumers arises from the misleading *presentment* of material terms, as opposed to any identifiable failure to disclose.[180]

Regulations promulgated under the anti-deception mandate should contain rules prohibiting the less-than-clear-and-full explanation of *all* terms relating to a promotional rate or product and should outline enhanced safeguards on the marketing of credit products to certain target audiences. In either of these cases, explanations of material terms (and their consequences) should be given verbally using nontechnical, easy-to-understand language. In the case of promotional products specifically, this explanation must highlight how and

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174 *See* Consumer Fin. Prot. Bureau, Annual Report to Congress on College Credit Card Agreements 1, 4–5 (2014), http://files.consumerfinance.gov/f/201412_cfpb_college-card-agreement-report-2014.pdf.

175 *See* Bd. of Governors of the Fed. Reserve Sys. et al., Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults 1, 2–3 (2013), http://files.consumerfinance.gov/f/201309_cfpb_elder-abuse-guidance.pdf.

176 *See* Keith R. Fisher, *CFPB Joins Forces with FDIC on Spanish-Language Tool to Prevent Senior Financial Abuse*, CFPB Monitor (Oct. 31, 2014), http://www.cfpbmonitor.com/2014/10/31/cfpb-joins-forces-with-fdic-on-spanish-language-tool-to-prevent-senior-financial-abuse/.

177 *See* Bd. of Governors of the Fed. Reserve Sys. et al., Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults 1, 2 (2013), http://files.consumerfinance.gov/f/201309_cfpb_elder-abuse-guidance.pdf.

178 *See* Freeman, *supra* note 86, at 167 n.103 (citation omitted) (Freeman refers to this practice as "shrouding" and describes it as "the process by which merchants identify a myopic class of customers and exploit their lack of rationality by systematically backloading the less attractive terms into a less prominent time and place in the relationship." (citation omitted)).

179 *See id.* at 167–68.

180 *See id.*

when the rate or product is activated and deactivated (i.e., specific identification of all "triggering events") and any differences in cost that will accrue to the customer in the event that the promotional rate or product comes to an end or is deactivated. The failure to present negative (or potentially negative) features of a card in the same light and detail as the positive promotional features should be regarded as deceptive.

Classes of "vulnerable borrowers" need to be delineated,[181] and in the event that a borrower fits into one of these classifications, certain highly prescient terms bearing on the overall cost of credit associated with the marketed product must be emphasized in a verbal communication. At a minimum, this would include a run-down of all triggering events that can cause the customer to incur additional fees or interest charges above the stated monthly APR, including an up-front explanation of interest and account fees that accrue in the case that the individual can only make minimum allowable monthly payments.[182] With respect to add-on products and services, card issuers should be charged with giving a realistic assessment of the service being provided *and* its potential value (or lack thereof) to the specific consumer.

From the viewpoint of congressional intent, regulations like those described above would serve the substantive goals of the Dodd-Frank Act's UDAAP prohibition. These types of subtle marketing practices may not be accompanied by any affirmative act of deception on the part of the credit card issuer, but they exploit known consumer biases in ways that make it difficult for consumers to grasp the true costs of owning and using a credit card.[183] In this sense they are likely—indeed, they are designed—to mislead. FTC guidance states that any misleading act must be "material" in order to be deemed deceptive,[184] and the CFPB has stated that material information is information that "is likely to affect a consumer's choice of, or conduct regarding, the product or service."[185] The factual situations that these proposed rules

181 Importantly, these classes should be both *situational* (e.g., cards marketed as a method for paying medical services to consumers in a doctor's office) and *categorical* (e.g., borrowers who meet the definition of subprime).

182 Since the CARD Act, TILA mandates that the cost of repaying with only minimum monthly payments be included on consumers' monthly statements, *see* CARD Act of 2009, Pub. L. No. 111-24, § 201, 123 Stat. 1734, 1743–45, but, in the case of vulnerable consumers, this Note assumes that a *pre-enrollment* explanation of the effects of minimum monthly payments would be a more effective way to prevent them from incurring unmanageable amounts of debt.

183 *See supra* Section I.C.

184 CFPB MANUAL, *supra* note 133, at 5.

185 *Id.* at 6.

seek to regulate more aggressively are the type most likely to affect consumer choice. In the case of a promotional rate or product, the consumer is under the impression that he or she is being offered some kind of "special deal" "for a limited time only."[186] Obviously, these are powerful factors likely to influence the average consumer in deciding whether to act, and a failure to effectively convey the possibility of negative externalities ought to be regarded as materially misleading.

The choice-impacting element is even more prominent in the case of products geared towards specific classes of individuals. As mentioned above, these are often individuals who are financially unsophisticated or who believe they cannot find a better credit option elsewhere.[187] These facts, in conjunction with the understanding that such persons may be disproportionately at risk of default, mean that a more complete understanding of all potential costs associated with a product would be materially beneficial. Interestingly, with respect to whether a consumer's understanding of a financial product is "reasonable under the circumstances" (as traditional FTC guidance on deception requires), the CFPB has taken the position that a consumer's specific characteristics should be considered.[188] One could argue that heightened standards guarding against forms of latent deception aimed at certain groups are therefore not only appropriate, but mandated, by the CFPB's own interpretations.

B. Unfairness

"Unfair" represents perhaps the most broadly applicable UDAAP term, and thus may prove to be the most difficult to sufficiently delineate for regulatory enforcement purposes. The Dodd-Frank Act defines an unfair act or practice as one that causes or is likely to cause substantial injury to consumers where the injury is not reasonably avoidable and the injury is not outweighed by countervailing benefits to consumers or to competition.[189] Once again, although this formulation largely mirrors FTC guidance, legislative history suggests that Congress believed unfairness under section 1031 of the Dodd-Frank Act should not be restricted solely to those practices previously contemplated by the FTC.[190]

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186 *See supra* notes 163–169 and accompanying text.

187 *See supra* notes 174–176 and accompanying text.

188 *See* CFPB MANUAL, *supra* note 133, at 6.

189 12 U.S.C. § 5531(c) (2012).

190 *See* Alexander, *supra* note 132, at 1117–20.

For the purposes of discussing unfairness, it is important to bear in mind that some credit card costs must be regarded as fairly compensating the lender for its extension of credit to the consumer. This Note concedes that there is such a thing as a "fair interest rate"; otherwise the practice of lending money would not exist in the first place. In separating the "fair" from the "unfair," it is instructive to begin with the federal law definition of which fees and charges properly qualify as "interest." This Note posits that fairness in the credit card services context can be broken down in terms of procedure and substance.

1. *Procedural Unfairness*

According to the federal regulations, "[t]he term 'interest' as used in 12 U.S.C. [§]85 includes any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended."[191] From a basic, procedural standpoint, the major question with respect to fairness is whether, as a factual matter, the creditor is being "compensated" by a customer's fee. The word "compensation" denotes the existence of some *quid pro quo* between buyer and seller.[192] If the customer pays a fee for a product or service that the bank ultimately fails to provide, no compensation has occurred, and it would be unreasonable and unfair to label such a charge "interest."

In a recent consent order entered into with Chase Bank, the CFPB found that Chase had unfairly charged its credit card customers monthly fees for its "3-Bureau Credit Monitoring" service.[193] The CFPB held that in many instances Chase Bank assessed the full monthly fee to customers enrolled in the service, despite the fact that due to federally-mandated authorization requirements, "the Bank and its Vendors were unable to provide part or all of the credit monitoring services."[194] Because the CFPB found that this practice "resulted in substantial injury to more than 2.1 million consumers in the amount of at least $270 million in fees and over-limit charges, as well as more than $39 million in associated interest fees," Chase Bank was ordered

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191 12 C.F.R. § 7.4001 (2015).

192 *See Compensation*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/compensation (last visited June 5, 2016).

193 JPMorgan Chase Bank, N.A., CFPB No. 2013-CFPB-0007, at 4, 8–9 (Sept. 19, 2013) (consent order).

194 *Id.* at 4–5.

to refund customers those amounts, plus pay $20 million in civil money penalties.[195]

A straightforward, per se rule proscribing the charging of customers for services that they do not actually receive, in part or in full, would undoubtedly serve the substantive goals of the Dodd-Frank Act's UDAAP prohibition. The practice can easily be said to cause substantial harm,[196] and in the case of something like credit fraud monitoring, where the service presumably being rendered is not immediately observable, the average consumer cannot reasonably avoid the injury.[197] In the Chase Bank consent order, the CFPB essentially paid lip service to the third qualifying element of unfairness, stating simply that "[t]his injury . . . is not outweighed by any countervailing benefit to the consumers or to competition."[198] Despite the lack of evaluation,[199] this conclusion seems undeniable given that there can be no benefit to consumers where they receive nothing in return for their payment, and commercial competition is not served by such a practice.[200]

2. *Substantive Unfairness*

A much more interesting and difficult question arises when a credit card service is being or has been definitively provided, but the corresponding fee is arguably exorbitant. Take for instance the typical example of an over-limit fee.[201] For customers enrolled in over-limit programs, the bank will accommodate the customers in their breach of the contract agreements by allowing them to make purchases that ex-

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195 *Id.* at 5, 19.

196 *See* CONSUMER FIN. PROT. BUREAU, BULLETIN NO. 2013-07, PROHIBITION OF UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES IN THE COLLECTION OF CONSUMER DEBTS 2 (2013) (defining "substantial injury" as "monetary harm, such as fees or costs paid by consumers because of the unfair act or practice").

197 *See id.* (stating that an injury is not reasonably avoidable "when an act or practice interferes with or hinders a consumer's ability to make informed decisions or take action to avoid that injury").

198 *See* JPMorgan Chase Bank, N.A., CFPB No. 2013-CFPB-0007, at 5.

199 *See id.* This lack of evaluation may be a positive sign for advocates of a more expansive CFPB approach to unfairness. It suggests the CFPB does not intend to engage in a very searching review of possible "countervailing benefit[s] to consumers or to competition" in the financial services context. *See id.* This would be a break from the FTC approach, which generally gives substantive weight to any such "countervailing benefits." *See* Corrigan, *supra* note 90, at 135–36.

200 Indeed, commercial competition may be harmed by it, i.e., this may qualify as "unfair competition."

201 *See generally Ask CFPB*, CONSUMER FIN. PROTECTION BUREAU, http://www.consumerfinance.gov/askcfpb/search/?selected_facets=tag_exact%3Aoverlimit+fee [https://perma.cc/N9ES-CD7D] (last visited June 5, 2016) (providing overview of over-limit services).

ceed their credit limit.[202] In this sense, the bank is undoubtedly providing a service in connection with the extension of credit, and they deserve to be compensated. The difficult task comes in determining when the amount of compensation exacted for a service can be labeled substantively "unfair." The determination becomes even more complicated in the case of contingency-based services, such as payment protection plans, which demand monthly service charges, but only provide benefits at the occurrence of some specified event.[203]

Admittedly, this is a task more appropriately left to Congress than to a court. Indeed, in 2009, Congress passed the CARD Act, which puts quantitative limits on certain types of "penalty fees," namely, late payment and over-limit charges.[204] As discussed above, evidence collected by the CFPB indicates that the CARD Act has been highly successful at reducing the percentage of debt incurred by consumers as a result of late and over-limit fees.[205] Ultimately however, the overall cost of credit to consumers has declined by only two percent in the last six years,[206] indicating that passage of the CARD Act has simply led banks to implement new products and services (or to reprice old ones) in order to make up for lost penalty fees.[207] Importantly, the CFPB's research finds that the prices of other, non-penalty fees and interest-related charges have substantially increased in the years since the passage of the CARD Act.[208] Setting a standard for judging their substantive fairness may be more important now than ever.

Although the CARD Act's mandate that penalty fees be "reasonable and proportional to the omission or violation to which the fee or charge relates"[209] technically only applies to late payment and over-limit fees, the rules promulgated by the Federal Reserve Board ("FRB" or "Board") in connection with this limited provision re-

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202 *See id.*

203 *See Debt Cancellation Contracts and Debt Suspension Agreements*, DEBT CANCELLATION COAL. 2–3, https://www.aba.com/ABIA/Documents/36a3b8296aef4474b90d3e3f9a8896feGAODebtCancellationCoalitionFinal2810conformed.pdf (last visited June 5, 2016).

204 CARD Act of 2009, Pub. L. No. 111-24, § 149(a), 123 Stat. 1734, 1740.

205 *See* CONSUMER FIN. PROT. BUREAU, CARD ACT REPORT 20–21 (2013), http://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf.

206 *Id.* at 33.

207 *See id.* at 37. Some new areas of concern for the CFPB include deferred interest products, add-on products or services, and the continued existence of certain "fee-harvester" credit cards not specifically outlawed by the CARD Act. *See id.* at 76–78.

208 *Id.* at 26–27 (reporting that "[o]n a per-active account basis, other fees *rose* from $1.35 per-active account per quarter in 2008 to $1.75 per-active account per quarter in 2012.").

209 CARD Act of 2009, Pub. L. No. 111-24, § 149, 123 Stat. 1734, 1740.

present an ideal starting point for the CFPB in defining the substantive fairness of *any* fee intended to "compensate" the lender for a service connected to the extension of credit. Under the CARD Act, the Board is asked to consider the reasonableness and proportionality of penalty fees in light of "(1) the cost incurred by the creditor from such omission or violation; (2) the deterrence of such omission or violation by the cardholder; [and] (3) the conduct of the cardholder . . . ."[210] The second factor, "deterrence," has little application outside the penalty fee context, and, at any rate, the FRB essentially dismissed it as a guiding principle in its final rulemaking.[211] Requirements (1) and (3), on the other hand, highlight factual elements that ought to be considered when evaluating the substantive fairness of any fee or charge.

Regulations of the sort suggested by this Note should focus on the cost incurred by the creditor as a basis for delineating substantive fairness. "Fairness" in this respect requires a "generally consistent relationship"[212] (i.e., proportionality) between the benefits provided by the credit service and the cost incurred by the consumer. The harder, more technical question comes in determining what truly represents proportional cost, which in turn gives rise to potentially substantial enforceability problems. Ultimately, this Note cannot provide a precise "proportionality formula" for judging subjective fairness, but, at a minimum, rulemakers must take into consideration the average cost incurred by the bank in providing a given service and the corresponding market value of the benefits received from such service by the average consumer. Perhaps a good initial benchmark for such a discussion would be the CARD Act's current restriction on the amount of over-limit fees that banks can assess their customers.[213] In any case, this consideration, in conjunction with considerations of consumer behavior (discussed below), provides a fair base for those who undertake to create such a formula.

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210 *Id.* § 149 (stating that the FRB may also consider any "other factors as the Board may deem necessary or appropriate.").

211 Truth in Lending, 75 Fed. Reg. 37,526, 37,533 (June 29, 2010) (to be codified at 12 C.F.R. pt. 226).

212 *Id.* at 37,532–34.

213 The FRB's final rule limits banks to charging their customers a fee equal to the dollar amount that the purchase exceeded their limit, with a maximum fee amount of thirty-five dollars. *Id.* at 37,534. This indicates that Congress might regard a two-to-one cost-to-service ratio as fairly "proportional" in the credit card servicing context, though there is no guarantee they would find this ratio acceptable in the case of all card fees and service charges.

From an economic perspective, much of the fairness in credit card pricing depends on drawing conclusions from the past and likely future conduct of the cardholder. Allowing open-ended credit lenders to price their services based on factual circumstances such as the consumer's credit history or the consumer's line of business is both economically desirable and beneficial to consumers. Creditors simply would not extend credit to some classes of individuals if they were unable to hedge their risks by restricting and pricing credit terms in a certain way, and allowing them to do so opens up credit possibilities to individuals who might otherwise be unable to obtain it.[214] Furthermore, terms based on these types of factual circumstances ultimately take into consideration a borrower's ability to repay, and thus serve to protect both the lender and the consumer. In this sense, it would not be substantively unfair for pricing of credit services to be based on beliefs about how much a certain consumer will benefit from that service (or to put it another way, how much provision of the service is likely to cost the creditor).

Determining the objective reasonableness of such beliefs would be the trickier task. Regulations should list specific criteria such as age, employment, and credit history that may be used as fair bases for pricing services and products—as long as those prices bear a proportionality to the credit risks involved and are applied uniformly to all consumers in like circumstances. At this point, however, we return to overarching concerns of substantive proportionality, inasmuch as it would be unfair for credit card companies to give undue weight to (and therefore charge an unreasonable premium because of) any single aspect of the consumer's conduct. UDAAP regulations could guide the weighting of pricing factors to some extent by drawing the line between factors that can be reasonably foreseen or controlled by the consumer and those that cannot. Default regulations should label the pricing of interest-related charges based on factors beyond the consumer's foreseeability or control as unfair, to the extent that such factors form the *primary* basis for such pricing. Individual consumers and card providers should be left alone to contract on terms to the contrary (e.g., explicitly variable rate credit cards), but at a base level, pricing the cost of credit on factors not foreseeable to—or under the influence of—the borrower leads to an injury that is "not reasonably avoidable."[215]

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214 *See* Consumer Fin. Prot. Bureau, CARD Act Report 48–49 (2013), http://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf.

215 *See supra* notes 196–197 and accompanying text.

Ultimately, finding substantive fairness in the credit card service fee context requires both an objective analysis of present circumstances (what services are being provided now, i.e., an evaluation of proportionality) and a predictive analysis of future circumstances (what services will likely be provided later on, i.e., an evaluation of the borrower's conduct). Regulations could delineate a safe harbor for credit card banks by prescribing something akin to an actuarial table. To meet the safe harbor, a bank would be required to use the table in conjunction with quantifiable criteria about the borrower to calculate the probability of any triggering event that might result in cost to the bank.[216] Then, using information about the consumer's sought-after terms of credit, such as the desired spending limit and applicable interest rate, one could determine the maximum possible cost incurred by the bank in the case of such an event. Once these two factors have been multiplied together, the result is a reasonable cost of prevention, and any charge passed on to the consumer should be fairly proportional to that cost.[217]

Although banks have their own internal methods for pricing risk premiums,[218] a regulatory safe harbor would be highly beneficial for consumers. Desires to save on the cost of compliance would likely drive banks towards uniform adherence with the safe harbor,[219] and so the effect of having such an explicitly-stated formula would be to give consumers a totally transparent view of what factors drive up their overall cost of owning a credit card. In turn, consumers would be in a better position to bargain for terms of credit and could tailor them, along with their own personal spending habits, so that their credit needs are met with the lowest possible risk of incurring unmanageable debt.

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216 Triggering events in the life of the cardholder that might result in a write-off to the bank generally include contingencies which would impact the cardholder's own ability to repay. Such an event might involve death or serious illness, loss of employment, or identity theft. This Note allows that the relative risk of such events may fairly be passed on to the cardholder in the form of interest rates and service fees, but only so long as that risk (and proportionate pricing of interest and fees) is evaluated based on factors known to or reasonably foreseeable by the individual seeking credit.

217 Once again, this Note mostly defers to the judgment of others in setting a specific number value as to what is legally "proportional."

218 Matthew D. Diette, *How Do Lenders Set Interest Rates on Loans?*, FED. RESERVE BANK OF MINNEAPOLIS (Nov. 1, 2000), https://www.minneapolisfed.org/publications/community-dividend/how-do-lenders-set-interest-rates-on-loans.

219 *See* Peter P. Swire, *Safe Harbors and a Proposal to Improve the Community Reinvestment Act*, 79 VA. L. REV. 349, 350 (1993) (arguing generally that safe harbors work to reduce the cost of compliance for regulated entities).

C. Abusiveness

The prohibition against abusive acts or practices is still a relatively new and untested statutory mechanism as compared to the other aspects of the Dodd-Frank Act's UDAAP law.[220] However, recent CFPB guidance and enforcement action indicate that abuse may be used to proscribe a wide array of credit card practices that harm consumers, and some view this provision as an especially powerful new tool in combating those harmful practices which may be non-obvious or hard to quantify.[221] The Dodd-Frank Act defines "abusive" as an act or practice that:

> (1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) takes unreasonable advantage of— (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.[222]

To date, the CFPB has only brought three enforcement actions alleging abusive practices.[223] However, the facts of at least one of these cases highlight what some main concerns ought to be in evaluating potentially abusive credit card practices and provide substantial guidance for crafting effective regulations prohibiting the same.

American Debt Settlement Solutions, Inc. ("ADSS") was a Florida-based corporation that sold debt-relief products to consumers, promising in exchange for a fee to "renegotiate, settle, reduce, or otherwise alter the terms of at least one debt between consumers and one or more unsecured creditors or debt collectors."[224] Consumers applying to enroll in ADSS's debt-relief program were required to complete detailed worksheets describing their monthly income,

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220 *See* Corrigan, *supra* note 90, at 127.

221 *See* Alexander, *supra* note 132, at 1120–44; *id.* at 145–59.

222 12 U.S.C. § 5531(d) (2012).

223 *See* Complaint, Consumer Fin. Prot. Bureau v. CashCall, Inc., No. CV 13-13167-GAO, 2015 WL 5610813 (D. Mass. Sept. 23, 2015); Complaint, Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc., No. 1:14-CV-00292-SEB, 2015 WL 1013508 (S.D. Ind. Mar. 6, 2015); Complaint, Consumer Fin. Prot. Bureau v. Am. Debt Settlement Sols., Inc., No. 9:13-cv-80548-DMM (S.D. Fla. May 30, 2013).

224 Complaint at 4, *Am. Debt Settlement Sols., Inc.*, No. 9:13-cv-80548-DMM.

expenditures, and debts.[225] Consumers enrolling in the program paid a substantial upfront "enrollment" fee—typically fifteen percent of the amount of the consumers' enrolled debts—as well as monthly "service" fees for as long as they were enrolled in the program.[226] Despite taking these substantial upfront and monthly fees from consumers, the CFPB's complaint against ADSS states that the company "has failed to renegotiate, settle, reduce, or otherwise alter the terms of a single debt for approximately 89 percent of the consumers who enrolled in its debt-relief programs."[227] The complaint further alleges that "[s]ince its inception, ADSS *has known* that it was nearly impossible for ADSS to renegotiate . . . the terms of debts under $700. Nonetheless, it has been ADSS's practice to enroll consumers in its program with debts under $700 without disclosing this limitation."[228] Furthermore, ADSS collected fees by enrolling consumers in its program even when *it knew* that a consumer's income would be inadequate to complete the debt-relief programs in which he or she enrolled.[229]

This complaint and the facts surrounding it identify two key factors that can help delineate the concept of abuse within regulations. The first focuses on a *disparity in knowledge* between the service provider and the consumer, and introduces at least a semi-"scienter" requirement to the statutory interpretative mix. The language from the complaint indicates that abuse occurs whenever the provider takes money in exchange for a service that it knows, or even ought to reasonably believe, will not benefit the consumer in any way.[230] Further examples of an abusive practice might involve allowing a subprime borrower to enter into a credit card agreement that offers a limited-time promotional interest rate, with the knowledge (or reasonable belief) that the borrower likely will not be able to support their debt once the full interest rate kicks in.[231] Another example would be enrolling a consumer in a payment protection plan with the knowledge that that particular consumer is unlikely to qualify for the plan's protection in any case.[232] As a statutory matter, one can conclude that the CFPB views such acts or practices as taking unreasonable advantage

225 *Id.*

226 *Id.* at 4–5.

227 *Id.* at 7.

228 *Id.* at 7 (emphasis added).

229 *Id.* at 4–7.

230 *See id.* at 14–15.

231 *See supra* notes 224–230.

232 *Id.*

of a consumer's "lack of understanding . . . of the material risks, costs, or conditions of the product or service."[233] Note, importantly, that the CFPB does not indicate that a desire to "rip off" the consumer is necessary for abuse in this context; it requires merely the provider's understanding (or even merely *constructive understanding*) that the consumer is not likely to benefit from the transaction.[234]

The second factor highlighted by this case is the increased potential for abuse in situations where there is a clear *disparity in bargaining position*. Statements made by the CFPB in connection with this case suggest that abuse may be more easily found in transactions where a consumer's circumstances make them particularly vulnerable to financial harm. According to the CFPB's director Rich Cordray, ADSS has been "preying on financially vulnerable consumers," and in his opinion, "[c]onsumers struggling to pay off a debt are among the most at risk and deserve better."[235] Statutorily, one can say that transactions involving these kinds of vulnerable individuals effectively set the scene for a service provider to take unreasonable advantage of "the inability of the consumer to protect [his or her] interests."[236] Although there is admittedly no precise guidance on the issue, CFPB guidance in other contexts makes it reasonable to assume that the CFPB would view other classes of individuals, such as students,[237] the elderly,[238] non-English speakers,[239] and subprime borrowers,[240] as vulnerable and less able to "protect [their] interests" when entering into a credit agreement.[241]

Regulations promulgated under the abusive prong of the Dodd-Frank Act's section 1031 UDAAP provision should be designed to limit the financial harms that arise out of situations where there is

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233 12 U.S.C. § 5531(d) (2012).

234 *See id.*

235 Press Release, Consumer Fin. Prot. Bureau, *CFPB Takes Action to Stop Florida Company from Engaging in Illegal Debt-Relief Practices* (May 30, 2013), http://www.consumerfinance.gov/newsroom/cfpb-takes-action-to-stop-florida-company-from-engaging-in-illegal-debt-relief-practices/.

236 12 U.S.C. § 5531(d).

237 *See* CONSUMER FIN. PROT. BUREAU, ANNUAL REPORT TO CONGRESS ON COLLEGE CREDIT CARD AGREEMENTS 1, 4–5 (2014), http://files.consumerfinance.gov/f/201412_cfpb_college-card-agreement-report-2014.pdf.

238 *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS. ET AL., INTERAGENCY GUIDANCE ON PRIVACY LAWS AND REPORTING FINANCIAL ABUSE OF OLDER ADULTS 1, 2–3 (Sept. 24, 2013), http://files.consumerfinance.gov/f/201309_cfpb_elder-abuse-guidance.pdf.

239 *See* Fisher, *supra* note 176.

240 *See* Cont'l Fin. Co., LLC, CFPB No. 2015-CFPB-0003, at 1–8 (Feb. 4, 2015) (consent order).

241 12 U.S.C. § 5531(d).

likely to be a disparity in knowledge or a disparity in bargaining position. In that pursuit, this Note acknowledges the possibility of an overlap between regulations based on deception and unfairness and those based on abuse.[242] For instance, a marketing technique that emphasizes positive card features at the expense of not adequately explaining negative ones may fit both within an expanded definition of deception and abuse insomuch as the card issuer acts with knowledge of the consumers' lack of understanding.[243] Similarly, a credit card company's[244] high pricing of fees or service charges might be unfair if it bears no proportional relationship to the benefits being provided or if its pricing is based on unfairly weighted credit risk factors.[245] Further, the credit card company's high fees and service charges might also be abusive if they routinely cause harm to consumers that results in an identifiably weak bargaining position.[246] Nevertheless, regulations outlining abusive conduct should serve an important backstop role in catching certain lending techniques, which may otherwise conform with disclosure requirements or substantive term limitations but which ultimately push unnecessary and harmful costs onto consumers by targeting their predictable behavioral biases and rational shortcomings.[247]

Aside from suggesting that abuse be defined in terms of disparity in knowledge or bargaining power, this Note intentionally refrains from laying out guidelines for limiting specific types of abusive conduct. Direct financial harm to consumers as a result of either one or both of those two conditions may take a variety of forms. In light of this Note's view that the abusive prong should act as a catch-all for damaging credit card practices that do not necessarily fit into other UDAAP categories, it would be inappropriate to try to delineate the concept of abuse any more narrowly. Doing so would jeopardize the provision's effectiveness and flexibility in confronting lending techniques or credit products that exploit consumer weaknesses in ways that are subtle or hard to quantify and that may not yet have been contemplated.

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242 *See id.* § 5531(c)–(d).

243 *See id.* § 5531(d); *supra* notes 178–180 and accompanying text.

244 *See supra* note 70 and accompanying text.

245 *See supra* notes 209–219 and accompanying text.

246 *See supra* notes 229–239 and accompanying text.

247 *See* Lampe, *supra* note 156, at 1 (emphasizing that an act or practice can be unfair, deceptive or abusive "even if the regulated entity complies with all applicable legal and regulatory requirements.").

IV. Benefits and Potential Costs

A. *Benefits of This Approach*

The most beneficial aspect of this proposed solution is that it defeats the federal preemption barriers associated with credit card fees and service charges, and in this way re-empowers states as primary regulators in this particular field of consumer protection. Even given the various pro-state provisions present in the Dodd-Frank Act, it would still be difficult to effectively challenge such fees under state law.[248] As an initial matter, there would still be "complete preemption" to overcome with respect to section 85 of the Banking Code's definition of "interest."[249] Indeed, section 25b includes a special provision for "interest rate" preemption in section 25b(f), which states in relevant part: "No provision of [this title] shall be construed as altering or otherwise affecting the authority conferred by section 85 of this title for the charging of interest by a national bank . . . ."[250] And even if state attorneys general could use their in-state UDAP laws to get past complete preemption, they would still have to overcome the "prevents or significantly interferes" standard mandated by section 25b(b)(1)(B).[251] However, if the CFPB were to issue formal regulations of the kind this Note suggests, they would be regarded as *federal* law.[252] In bringing enforcement actions under CFPB regulations, the state attorneys general would be basing their claims upon a violation of federal law, and could therefore avoid altogether any preliminary arguments relating to federal preemption.

Enabling state attorneys general to enforce regulations of the sort proposed by this Note would be a massive "force multiplier" with respect to credit card fee regulation. As of fourth quarter 2014, the top ten issuers, all national banks, accounted for nearly ninety percent of all credit cards in circulation in the United States.[253] Thus, at present,

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248 *See supra* Section II.B.

249 Arguably this could be done using state UDAP laws, but this is a tricky proposition. *See, e.g.*, Hood ex rel. Mississippi v. JP Morgan Chase & Co., 737 F.3d 78, 89–92 (2013).

250 12 U.S.C. § 25b(f) (2012).

251 *See id.* In this respect, it seems hard to argue that the Dodd-Frank Act's plain language really made it easier for states to avoid federal preemption at all, as this subsection of section 25b represents the basic conflict preemption standard, which was, at least arguably, the standard all along. *See* Barnett Bank of Marion Cty. v. Nelson, 517 U.S. 25, 33–34 (1996).

252 *See* Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979) (holding that if "properly promulgated, substantive agency regulations have the 'force and effect of law.'").

253 Tamara E. Holmes, *Credit Card Market Share Statistics*, CreditCards.com, http://www.creditcards.com/credit-card-news/credit-card-market-share-statistics-1264.php [https://perma.cc/7QUY-4P3C] (last updated Apr. 8, 2016).

state-based consumer protection advocates are closed out from assisting in the monitoring and prosecution of the vast majority of credit card abuse that goes on in this country. Dumping the UDAAP enforcement burden with respect to these huge banking institutions, and their credit card issuing subsidiaries, at the feet of just one agency is not sensible or efficient, and likely contributes to the scattershot enforcement approach of which some industry insiders have complained.[254]

Furthermore, by providing clear-cut guidance in the form of regulations, the CFPB could promote the goal of nationwide uniformity with respect to regulating banks' potentially unfair, deceptive, or abusive credit card practices. All states and their attorneys general would be operating off the same set of federal rules, so enforcement of UDAAP provisions in this context would be consistent from state to state.[255] Regulatory arbitrage, identified as a main concern by Congress while drafting the Dodd-Frank Act, would be unavailable for banks hoping to find states that allow certain types of fees and service charges because the *federal* regulations would be available to the attorney general in *any* state.[256] There could be no more "race to the bottom,"[257] at least not in the case of allowing certain classes of fees, penalties, and services charges.

Ultimately the states and their attorneys general, as opposed to the federal banking agencies, stand as the best monitors of consumer abuse. First, state attorneys general are necessarily closer to their constituents, so in a very real, physical sense they are going to be more in touch with the average in-state consumer suffering from unfair and abusive credit card practices.[258] Also, state attorneys general have no direct obligations to the national banks as financial institutions.[259] As Congress noted, the federal agencies had previously been tasked with overseeing the banks' safety and soundness, while also (as a secondary concern) reviewing their practices for instances of consumer abuse—two functions that do not always necessarily coincide.[260] Add into all

254 *See* Lampe, *supra* note 156.

255 *See* Mark Totten, *Credit Reform and the States: The Vital Role of Attorneys General After Dodd-Frank*, 99 IOWA L. REV. 115, 155–56 (2013).

256 *See supra* note 124 and accompanying text.

257 *See supra* Section I.A.

258 *See* Totten, *supra* note 255, at 161.

259 *Id.* at 123–24.

260 *See* S. REP. NO. 111-176, at 10 (2010). Indeed, one can imagine that sometimes what is most beneficial for the bank from a safety and soundness perspective may result in harm to consumers.

this the very real possibility of "industry capture" on the part of the federal agencies,[261] and one can see how states will almost always have the greatest incentive to monitor and prosecute national banks in connection with unfair, deceptive, or abusive credit card fees and service charges.

These regulations represent a necessary addition to the current regulatory system if a meaningful reduction in the level of open-ended consumer debt is to be attained. As explained, the disclosure-focused approach that has previously characterized this area of regulation has had only limited success (at only limited times) in accomplishing that goal.[262] UDAAP-based regulations will supplement the old disclosure-based system in a way that more realistically interprets and responds to the needs of modern financial consumers. It very well may be that some consumers will accept credit terms they cannot support no matter how thoroughly and openly you explain the dangers to them. And yet, limiting the degree and circumstances in which card issuers may exploit latent consumer biases will undoubtedly allow some to make smarter choices and to choose a path which does not ultimately lead them to incur an unmanageable amount of debt. Substantive guidelines for the fair, proportionate pricing of credit card services will likewise enable consumers to more clearly understand which factors most significantly impact their cost of credit and hopefully allow them to more easily avoid unnecessary costs. Short of complete reinstatement of federal usury laws, the measures proposed by this Note represent the best approach currently available to regulating the total cost of using an open-ended line of credit. Nonetheless, critics may assert that this Note's proposed solution is flawed in some respects. Those counterarguments are explored in the next Section.

B. Addressing Potential Counterarguments to This Approach

Providing regulations that target only the most harmful fees and service charges will undoubtedly be a complicated undertaking. Using UDAAP-based regulations to separate the most egregious fees from those that are reasonable requires a delicate balancing of interests.

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261 Some critics argue that the federal banking agencies (and the OCC in particular) have become "captured" by the industry. Often these individuals point to the fact that these agencies are funded by yearly assessments paid to them by the banks under their regulatory jurisdiction. *See, e.g.*, Lawrence G. Baxter, *Capture Nuances in Financial Regulation*, 47 WAKE FOREST L. REV. 537, 541 (2012).

262 *See supra* Section I.C.

On the one hand, an under-protective regime would do little to curb the problems of consumer abuse and ever-increasing levels of consumer debt; on the other, imposing overly-restrictive regulations risks chilling the credit market.[263] If banks do not believe they can make a reasonable return on consumer loans, they will stop taking such risks and consumers will find it increasingly difficult to obtain credit.[264] This result hurts consumers and the broader economy. This is a well-recognized economic dilemma[265] and "drawing the line" will be difficult, but it is important that well-crafted regulations result in net benefits to consumers *and* the economy that outweigh the corresponding costs in this respect.

With respect to the types of disclosure techniques for which this Note advocates, banks might argue that requiring a more extensive explanation of negative cost aspects in promotions or products and services aimed at particular consumer groups will unnecessarily discourage some consumers from taking out lines of credit that they otherwise would have been able to afford. In this way, "over-disclosure" may stifle otherwise beneficial economic activity. Yet, a body of evidence suggests that more extensive disclosure and a better understanding of banking risks increase economic stability and decrease the possibility of financial crises.[266] Ultimately, empowering consumers to make better-informed decisions about whether to purchase (and how to best use) credit products and services should have a net-positive economic benefit.[267] In any case, as a practical matter, it seems unlikely that banks will stop offering credit products to vulnerable groups simply because banks are required to undertake a more thorough explication of the terms.[268]

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263 *See* Yutao Li et al., *Regulation of Fair Disclosure and Credit Market* 8–9 (Mar. 2012), https://www.stern.nyu.edu/sites/default/files/assets/documents/con_040109.pdf.

264 *See id.* at 4, 8.

265 *See, e.g.*, Amy McIntire, *Dodd-Frank's Risk Retention Requirement: The Incentive Problem*, 33 BANKING & FIN. SERVS. POL'Y REP. 5 (2014). Debating the merits of these research findings is beyond the scope of this Note.

266 *See generally* Solomon Tadesse, *The Economic Value of Regulated Disclosure: Evidence from the Banking Sector* (William Davidson Inst. at the Univ. of Mich., Working Paper No. 875, 2006), http://deepblue.lib.umich.edu/bitstream/handle/2027.42/57255/wp875%20.pdf?sequence=1&isAllowed=Y.

267 *See* Li, *supra* note 263, at 3.

268 Previous experience with TILA and the CARD Act supports this belief. *See* Corrigan, *supra* note 90, at 145–59; *see also* Alexander, *supra* note 132, at 1125 ("Of especial relevance to the CFPB was the Fed's suggestion that better disclosure by itself could not stop abusive practices.").

Further complicating this rulemaking task is that "unfair," "abusive," and "deceptive" are inherently vague terms, as are the words used by the statute to define them.[269] To ensure that the benefits of the regulations proposed by this Note outweigh the costs, the regulations must specifically delineate these terms to some extent. In this respect, there would be costs associated with making the regulations too specific and also with making them too broad.[270] Although defining the terms with great specificity would make them more predictable and easier to enforce, it would also make it easier for banks to navigate requirements and find loopholes in the regulations.[271] One of the most appealing aspects of the UDAAP provisions is that they are broad and flexible enough to respond to unfair or abusive practices that may not have been foreseen by legislators and therefore may not be specifically proscribed by statute.[272] However, leaving the UDAAP terms insufficiently delineated risks creating a regulatory regime that is too unpredictable and possibly duplicative, and, in that way, could cause more harm to the financial economy than it prevents.[273] These risks are magnified by banking's dual regulatory system[274] and the fact that these regulations would be enforceable by fifty different sovereigns with varying (and sometimes competing) agendas.

The risk of excessive regulation stifling banks' productivity should be regarded as fairly minimal with regard to the regulations suggested above. Considering possible drawbacks in this area, it is important to note that the states and their attorneys general would only be empowered to enforce specific CFPB regulations, not the statute itself.[275] Furthermore, the regulations proposed by this Note would be enforceable only in fact-specific circumstances, significantly restricting the range of prosecutorial discretion available in their enforcement.

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269 *See supra* Part III.

270 *See, e.g.*, James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 CAL. L. REV. 115, 135–36 (2012).

271 *See id.* at 135; *see also supra* notes 106–109 and accompanying text.

272 *See* Jeffrey P. Naimon & Kirk D. Jensen, *The UDAP-ification of Consumer Financial Services Law*, 128 BANKING L.J. 22, 22–23 (2011).

273 *See generally* Rick Seaberg, *Combating Uncertainty in the Face of Economic and Regulatory Ambiguity*, GENPACT (2012), http://www.genpact.com/docs/resource-/combating-uncertainty-in-the-face-of-economic-and-regulatory-ambiguity_final (noting that regulatory uncertainty has become pervasive part of financial services landscape); *see also* Barnett Bank of Marion Cty., N.A. v. Nelson, 517 U.S. 25, 31 (1996) (citing concerns of over-regulation in the banking industry).

274 *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 28.

275 *See supra* notes 151–153 and accompanying text.

In the case of deception, many of the regulations this Note proposes would ultimately take the form of heightened disclosure requirements, which can and should be crafted to be situationally and substantively specific. That is to say, the disclosures would be legally required only in specific marketing *situations* and the exact *substance* of those disclosures could be laid out with relative specificity. Determining whether a deceptive UDAAP violation has occurred under the regulations ought to be a cut-and-dried matter. Additionally, the fact that these regulations would require enhanced disclosure methods in only a handful of transactions limits the breadth of any potentially negative economic effects resulting from uneven enforcement. The inclusion of a semi-scienter requirement (i.e., knowledge or understanding of exploitation) and a scrutiny that mainly focuses on transactions where there is a clear lack of bargaining power on the consumer side will similarly help to limit instances where charges of abuse are truly appropriate.

Regulations attempting to define substantive fairness may ultimately suffer from some issues related to inconsistent enforcement. For example, differences in interpretation may arise with respect to whether a specific pricing factor used by a bank was known to or reasonably foreseeable by the consumer, or whether any particular aspect of the borrower's conduct was given undue weight within the bank's calculation. Similarly, determinations regarding whether the prices charged for certain services are truly "proportional" to the "cost" incurred by the card provider may vary from state to state. These concerns, however, can be mitigated by the adoption of a safe harbor for credit card pricing practices, which would delineate criteria that can be fairly considered by the card provider and would lay out how those criteria are to be weighted in calculating a proportional, fair price for certain services. Because most card issuers would likely feel compelled to comply with the safe harbor as a matter of minimizing regulatory exposure,[276] enforcement actions arising out of the unfairness regulations should be few and far between.

Lastly, some critics might argue that many of the practices targeted by these proposed regulations are already sufficiently addressed by various provisions of the 2009 CARD Act.[277] This argument fails to consider the incremental consumer benefits that would

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276 *See* Swire, *supra* note 219, at 350.

277 *See* CARD Act of 2009, Pub. L. No. 111-24, § 149, 123 Stat. 1734, 1740.

come from regulations specifically promulgated under UDAAP.[278] Regulations of this sort would undoubtedly be capable of covering a much wider array of harmful consumer transactions, including many that would otherwise pass muster under the CARD Act. For example, although the CARD Act requires certain written disclosures in connection with promotional interest rates, banks can provide such disclosures without specifically highlighting adverse (or potentially adverse) terms for the consumer during the marketing process.[279] Thus, marketing techniques that conform to the technical requirements of the CARD Act could still be materially deceptive under the regulations suggested by this Note. This also applies to products targeted at classes of vulnerable consumers, which is a potentially harmful practice that the CARD Act fails to address. The CARD Act also fails in unfair or abusive add-on credit products cases, as it does not specifically prohibit the charging of fees for services that the bank knows or ought to know are of little or no value to the consumer.[280] In these ways, at the very least, UDAAP-based regulations provide a more robust and flexible regulatory arsenal for states looking to combat credit card fees that unjustifiably harm consumers.

Conclusion

Strong federal preemption coupled with an exceedingly lax and fragmented federal regulatory structure created an environment in the early 2000s where abusive credit card fees, penalties, and service charges could flourish without fear of state government intervention.[281] In the absence of any meaningful regulation, unfair, deceptive, and abusive lending practices drove many consumers deeper and deeper into debt,[282] causing not only a great amount of anguish for many individual Americans and their families, but also playing at least some role in building the "house of cards" that ultimately came tumbling down in 2007.[283] Congress spent several years dissecting the causes of the financial crisis,[284] and, in consideration of these causes, ultimately passed the Dodd-Frank Act, which clearly aims to provide

278 *See, e.g.*, Naimon, *supra* note 272, at 23 (discussing the flexibility of UDAP regulations to protect consumers in the context of evolving standards of what constitutes an unfair product).

279 *See supra* notes 104, 157, 178–180 and accompanying text.

280 *See* Consumer Fin. Prot. Bureau, CARD Act Report 76–77 (2013), http://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf.

281 *See supra* Sections I.A, I.B, and I.C.

282 *See supra* Section I.B.

283 *See, e.g.*, S. Rep. No. 111-176, pt. 3 (2010).

284 *See id.*

stricter consumer protection oversight while dialing back on the extent of federal preemption for national banks.[285]

As the body with the best knowledge and incentives, state governments ought to be able to prosecute national banks when they engage in practices that needlessly and oppressively drive up the cost of credit to financial consumers, something that they have previously been unable to do with much success.[286] The Dodd-Frank Act provides a unique set of tools, including those that have been made available to the CFPB, which can be used to enlist the states as major new players in the struggle to make credit card debt more reasonable and manageable for American consumers.[287] If the CFPB issues formal regulations applying its federal UDAAP enforcement authority to national banks' credit card practices, it greatly empowers the states to this end, creating undoubtedly a more robust, uniform, and nonfragmented regulatory scheme for this particular area of financial activity.

285 *See supra* Part II.

286 *See supra* Section I.A.

287 *See supra* Part II.