

Note

Avoiding the Anchor: An Analysis of the Minimum-Payment and 36-Month Disclosures Mandated by the CARD Act and How to Improve Cardholder Repayment Patterns*

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I. Introduction

The Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) sought to ameliorate many of the debilitating problems associated with credit card use. Before the passage of the CARD Act, credit card issuers took advantage of behavioral biases and lack of consumer understanding to engage in practices that exacerbated consumer credit card debt, contributing to a national consumer debt crisis. Scholars have described credit cards as a dangerous product in need of more regulation.¹ The CARD Act addressed the problem by prohibiting some “abusive” issuer practices and requiring more transparency in credit card agreements and monthly bills.

One of the more noticeable changes to credit card bills involved the minimum payment. The CARD Act amended the Truth in Lending Act of 1968 (TILA) to provide for enhanced disclosures in addition to displaying the minimum payment for any given month.² Along with the minimum payment, monthly credit card statements must now alert customers to the downsides of paying only the minimum payment each month.³ Specifically, issuers must compare the total cost of paying off a bill by only paying the minimum monthly payment with the total cost of paying a higher amount which, if paid monthly, would pay the balance in 36 months.⁴ In addition, the issuer must provide a toll-free number the consumer may call to receive debt-counseling services.⁵

Pulling from the behavioral economic and empirical literature, this Note addresses the merits and shortcomings of the minimum-payment disclosure

1. See generally Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008) (arguing that credit cards are similar to dangerous physical products and should be regulated for safety in the same way those products are).

2. Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, § 201(a), 123 Stat. 1734, 1743–44 (codified as amended at 15 U.S.C. § 1637(b)(11) (2012)).

3. 15 U.S.C. § 1637(b)(11) (2012).

4. *Id.*

5. *Id.*

and the 36-month disclosure, arguing that the provisions could be improved to better help consumers climb out of debt or help consumers avoid debt in the first place. Quite simply, the two disclosures do not do enough to help credit card users escape from crippling debt. One study found that by “reframing” the consumer on the 36-month target rather than the minimum payment, the disclosures led to higher monthly payments.⁶ Unfortunately that 36-month payment serves as an “anchor”; many consumers chose to pay the amount that pays off the debt faster, but actually paid less than a matched cohort—meaning they might have otherwise paid more each month.⁷ In other words, the nudge to pay a higher or “better” amount than the minimum payment works, but the target amount paid is not optimal. Other studies find the 36-month disclosure does little to mitigate the anchor effect of disclosing a minimum payment.⁸

This Note suggests that studies be done to find a more optimal target. The 36-month target that Congress proposed and enacted helps some consumers pay more than the minimum monthly payment but not enough to avoid accumulating, in some cases, overwhelming amounts of debt. Additionally, the disclosure should be reformulated to be less confusing to consumers. I also suggest the possibility of raising the minimum payment. Finally, in order to better effectuate Congress’s purpose, I suggest that policy makers should require issuers to implement commitment devices that would assist consumers in paying down their debt in a more efficient manner. Studies show consumers like commitment devices and are likely to use them if offered.⁹ It follows that consumers would be likely to opt into a payment-plan system that would allow consumers to control the way they pay off their debt along with the debt itself.

Part II of this Note addresses the major problems that exist with credit cards and the behavioral biases that allow consumers to acquire massive amounts of credit card debt despite their best intentions. Part II also describes the CARD Act’s response to these problems, including the requirement of the minimum-payment disclosure and the 36-month disclosure. Part III discusses the results of empirical analysis of how the CARD Act impacts consumers’ repayment behavior and what those results mean with regard to the success or failure of the 36-month and minimum-payment disclosures. Part IV proposes several alternatives to the disclosures as required by the CARD Act, which would better effectuate Congress’s purpose in impacting the way consumers repay their credit cards. Part V concludes.

6. *See infra* section III(B)(1).

7. *See infra* Part III.

8. *See infra* sections III(B)(2)–(3).

9. *See infra* section II(C)(2).

II. Behavioral Biases Exacerbate Credit Card Debt and Affect Payment Choices

Generally, certain inefficiencies or costs justify regulation in a given market. Economic inefficiencies in the market can warrant regulation to correct those inefficiencies, while welfare costs on the general public in a particular market may also support regulation to correct for those costs.¹⁰ In the case of credit cards, the staggering levels of consumer debt exacerbated by credit card use have imposed welfare costs on the nation at large. Specifically, multiple empirical studies have demonstrated that the increased level of credit card debt in the United States has increased consumer bankruptcy filings.¹¹

Credit cards have contributed so significantly to the consumer debt problem in the United States in part because of a combination of behavioral biases that cardholders experience and the business model issuers use to exploit those biases. Empirical research suggests that cardholders behave irrationally when making borrowing decisions, and the ease of credit card use only worsens the problems that result when cardholders cannot anticipate how their future selves will make decisions.¹² In particular, cardholders tend to fall victim to underestimation biases as well as a phenomenon called “hyperbolic discounting.”¹³ In concert, these behavioral biases contribute to cardholders taking on more debt than they predicted when opening the credit card and making lower payments than they originally anticipated being able to make.¹⁴ Further worsening the problem is the ability for cardholders to take on minor amounts of debt at a time.¹⁵

A. Overview of Behavioral Biases

Cardholders overestimate their self-control. Many cardholders apply for credit cards with one of two intentions: to never borrow on the card and pay it off each month or to borrow only a certain amount.¹⁶ On top of those

10. See STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 4–8 (7th ed. 2011) (discussing accepted justifications for administrative regulation to protect against market failures).

11. See OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS 63 & n.22 (2012) (listing the various statistical studies “suggest[ing] a causal relationship between credit card debt and consumer bankruptcy filings”); RONALD J. MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS 66 (2006) (indicating that “an increase in credit card debt . . . is associated with an increase in bankruptcy filings”).

12. See, e.g., Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1395–1401 (2004) (describing the behaviors that cause consumers to underestimate future borrowing); Cass R. Sunstein, *Boundedly Rational Borrowing*, 73 U. CHI. L. REV. 249, 251–54 (2006) (examining the mechanisms that contribute to excessive borrowing).

13. Bar-Gill, *supra* note 12, at 1396.

14. *Id.* at 1396–97, 1408.

15. *Id.* at 1399.

16. *Id.* at 1395.

original intentions, if they do take on debt, cardholders tend to anticipate paying down the debt responsibly and quickly.¹⁷ Imperfect self-control leaves open the possibility that neither happens.¹⁸ Credit cards are open-ended loans that have no commitment mechanism to ensure that a cardholder will act the way she originally intended to act.¹⁹ Potentially inevitable lack of self-control might put the cardholder in a position where she will either take on more debt than she can handle or be unable, or unwilling, to pay off the debt as quickly as originally planned.

Empirical research in part attributes the high level of credit card debt caused by underestimation of future borrowing to a phenomenon called hyperbolic discounting.²⁰ In essence, cardholders tend to inaccurately predict their preferences at some point in the future.²¹ Hyperbolic discounters make more patient and rational decisions when making decisions for their future selves than they are when making shorter term decisions.²² When making a choice that affects her future self, a hyperbolic discounter would wait a little longer for a better benefit.²³ For instance, given the option of getting \$100 a year from now or \$150 thirteen months from now, a hyperbolic discounter would typically choose to receive the \$150 in thirteen months. But in the short term preferences change, and hyperbolic discounters would rather take the less preferable benefit sooner rather than waiting for the better benefit.²⁴ Using the same example, given the choice of receiving \$100 today or \$150 a month from now, a hyperbolic discounter may choose to receive the more immediate benefit of \$100 today.

Hyperbolic discounters discount costs as well as benefits.²⁵ So, when making the decision to get a credit card, a consumer may decide that the future costs of borrowing outweigh any future benefit of borrowing.²⁶ When time comes to make the decision whether to borrow, however, the consumer may change her mind and perceive the current benefits of borrowing as outweighing the future costs in that moment.²⁷ Scholars call the inability to predict that change in preference hyperbolic discounting,²⁸ and economists

17. See *id.* at 1408 (describing the hyperbolic discounter's tendency to anticipate quick repayments).

18. *Id.* at 1395.

19. *Id.* at 1395–96.

20. See, e.g., George-Marios Angeletos et al., *The Hyperbolic Consumption Model: Calibration, Simulation, and Empirical Evaluation*, J. ECON. PERSP., Summer 2001, at 47, 49 (predicting that hyperbolic discounting households “are likely to have high levels of [credit card] debt”).

21. Bar-Gill, *supra* note 12, at 1396.

22. Angeletos et al., *supra* note 20, at 48.

23. *Id.*

24. *Id.*

25. Bar-Gill, *supra* note 12, at 1397.

26. *Id.*

27. *Id.*

28. *Id.*

have shown that hyperbolic discounters are more likely to carry more credit card debt.²⁹

Other forms of “bounded rationality” may contribute to the consumer’s excessive borrowing in spite of the best intentions to borrow responsibly, including savoring the luxury of the life borrowing affords now at its expense later³⁰ and underestimation of the probability of future adverse events, like a car accident or sudden illness.³¹ The combination of these behavioral biases contributes to a general pattern of cardholders taking on more credit card debt in the short term than is consistent with their own long-term preferences and paying that debt back slowly through low minimum payments.³² The situations cardholders find themselves in—despite their best intentions—lead to consumer bankruptcy and financial distress.³³

B. Issuer Capitalization of Behavioral Biases in Credit Card Pricing

Credit card issuers capitalize on cardholders’ behavioral biases, profiting off of cardholders’ inability to accurately predict their future behavior. Cardholders are most profitable to issuers when they are paying high interest on large balances, occasionally triggering additional fees.³⁴ However, cardholders generally choose among credit cards not by comparing the potential cost to borrow but by weighing promotional rates, low or nonexistent annual fees, and rewards programs.³⁵ Future cardholders focus on these features of credit cards because of their inability to accurately assess their future borrowing behavior.³⁶ As a result, issuers tend to compete on front-end, immediately salient costs and charge higher interest rates than might otherwise be justified.³⁷

Combining the behavioral biases cardholders experience with credit card issuers’ design of products that take advantage of those biases results in a market sector designed to encourage consumers to take on debt they cannot handle. Ronald Mann has dubbed this phenomenon the “sweat box” of credit

29. Angeletos et al., *supra* note 20, at 49; David Laibson et al., *A Debt Puzzle*, in KNOWLEDGE, INFORMATION, AND EXPECTATIONS IN MODERN MACROECONOMICS: IN HONOR OF EDMUND S. PHELPS 228, 229–30 (Philippe Aghion et al. eds., 2003).

30. Sunstein, *supra* note 12, at 252.

31. Bar-Gill, *supra* note 12, at 1400.

32. *Id.* at 1396–97, 1408.

33. See Bar-Gill & Warren, *supra* note 1, at 3, 33–37 (describing the various behavioral mistakes cardholders make that may “lead to financial distress, bankruptcy, and foreclosure”).

34. See Oren Bar-Gill & Ryan Bubb, *Credit Card Pricing: The CARD Act and Beyond*, 97 CORNELL L. REV. 967, 977 (2012) (explaining that issuers price credit cards so that long-term prices, like interest rates, are emphasized in order to better profit off of consumer behavior).

35. See Bar-Gill, *supra* note 12, at 1401 (suggesting that consumers tend to underestimate the cost of borrowing, focusing more on “short-term, non-contingent price elements”).

36. See *supra* subpart II(A).

37. Bar-Gill, *supra* note 12, at 1401.

card debt.³⁸ Issuers profit from distressed cardholders who have large balances and are on the verge of default.³⁹ Obviously, large-scale consumer default on loans would be bad for the issuer. But cardholders with large, unmanageable balances who are unable to pay those balances off remotely quickly generate a significant amount of profit for the issuer.⁴⁰ Issuers are therefore incentivized to push cardholders to such a point of financial distress.

Another pricing feature that issuers embrace is a low minimum monthly payment.⁴¹ Cardholders who decide to only pay the minimum monthly payment set by the issuers accumulate a balance and do not pay enough of that balance to get out of debt for the foreseeable future. Since issuers profit from maintaining outstanding balances, they would prefer that cardholders pay as little as possible, “as long as cardholders do not default,” in order to maximize revenues.⁴² Issuers used to set minimum monthly payments so low that they would negatively amortize the balance, which means that the payment would not even cover the interest on the principal so the balance would actually grow each month in spite of the cardholder not making any additional purchases.⁴³ Due to regulatory intervention, minimum payments may no longer be set so low as to negatively amortize the balance,⁴⁴ but issuers still cling to low minimum monthly payments to keep cardholders in the sweat box.⁴⁵

C. *Consumer Attitudes Towards Credit Cards*

1. Cardholders Appreciate Flexibility, but Flexibility Encourages Behavioral Biases.—The major advantage of credit cards to consumers is their unparalleled convenience. Rather than drive to the bank and take out a

38. See generally Ronald J. Mann, *Bankruptcy Reform and the “Sweat Box” of Credit Card Debt*, 2007 U. ILL. L. REV. 375.

39. *Id.* at 386.

40. *Id.*

41. Bar-Gill, *supra* note 12, at 1408.

42. BAR-GILL, *supra* note 11, at 72.

43. DIV. OF SUPERVISION & CONSUMER PROT., FED. DEPOSIT INS. CORP., RISK MANAGEMENT EXAMINATION MANUAL FOR CREDIT CARD ACTIVITIES 69 (2007), available at https://www.fdic.gov/regulations/examinations/credit_card/pdf_version/ch9.pdf, archived at <https://perma.cc/X3AQ-XJKU>.

44. See OFFICE OF THE COMPTROLLER OF THE CURRENCY ET AL., ACCOUNT MANAGEMENT AND LOSS ALLOWANCE GUIDANCE FOR CREDIT CARD LENDING 3 (2003) (“Prolonged negative amortization . . . raise[s] safety and soundness concerns and [is] subject to examiner criticism.”), available at <http://www.occ.gov/news-issuances/bulletins/2003/bulletin-2003-1a.pdf>, archived at <http://perma.cc/N635-89KJ>; Mann, *supra* note 38, at 387 (reporting that an interagency regulatory entity “issued a ‘guidance’ suggesting that lenders should not permit negative amortization and should require payment in a ‘reasonable’ time”).

45. See Mann, *supra* note 38, at 391 (explaining the issuer’s benefit from encouraging customers to carry balances, make minimum payments, or even miss payments—the sweat box zone).

loan for a fixed amount, consumers can apply for credit cards without leaving their homes.⁴⁶ Approval for a credit card is often instantaneous,⁴⁷ and customers often receive cards with substantial credit limits that often do not reflect a cardholder's true ability to pay.⁴⁸ Cardholders can borrow in large amounts up to, and sometimes beyond, their credit limits, but many cardholders gradually accumulate debt with small purchases.⁴⁹ This practice is problematic but also convenient; cardholders can make purchases for their family by borrowing money without first having to go to the bank to be approved for a loan. Low minimum monthly payments also allow cardholders to experience the luxury of borrowed wealth now, at the expense of a long payoff period later.⁵⁰ The combination of these factors makes credit cards an incomparably easy way to borrow and spend money.⁵¹

2. *Consumers Desire Commitment Devices.*—However, the incredible ease with which consumers can borrow on credit cards encourages the very behaviors that result in consumers acquiring unmanageable credit card debt. One problem presented by the flexibility and ease of use of credit cards is the purposeful elimination of any precommitment element that might be found in other lending devices.⁵² As a result, cardholders go back on promises they made to themselves to pay down balances responsibly, with no assistance from the issuer to meet their goals. In at least one study, cardholders expressed a desire for precommitment devices that would allow them to counteract the poor decisions their future selves make.⁵³ In fact, 52% of the

46. MANN, *supra* note 11, at 40.

47. A quick Google search of "credit card approval" demonstrates this point: the first result promises "instant" approval in as little as 60 seconds. *Instant Approval Credit Cards*, CREDITCARDS.COM, <http://www.creditcards.com/instant-approval.php>, archived at <http://perma.cc/MHT7-SEZ5>.

48. See, e.g., Angela Littwin, *Testing the Substitution Hypothesis: Would Credit Card Regulations Force Low-Income Borrowers into Less Desirable Lending Alternatives?*, 2009 U. ILL. L. REV. 403, 426 (indicating that the mean and median balances on study participants' credit cards were significantly larger than the participants' mean and median monthly income levels, respectively). Congress tried to address the lack of correlation between credit availability and cardholders' ability to pay in the CARD Act, but the Act only requires that issuers consider whether a prospective cardholder can make the *minimum* payments. Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, § 109(a), 123 Stat. 1734, 1743 (codified at 15 U.S.C. § 1665e (2012)).

49. Bar-Gill, *supra* note 12, at 1399.

50. See Sunstein, *supra* note 12, at 252 (stating that "myopic borrowing" is characterized by "a taste for current well-being over future well-being").

51. MANN, *supra* note 11, at 45; see also Angela Littwin, *Beyond Usury: A Study of Credit-Card Use and Preference Among Low-Income Consumers*, 86 TEXAS L. REV. 451, 457–58 (2008) (explaining that low-income borrowers valued credit cards for their ease of use in emergencies).

52. Littwin, *supra* note 51, at 472.

53. *Id.* at 472–73.

study participants attempted to create commitment devices of their own to prevent excess borrowing on their credit cards.⁵⁴

The desire for a commitment device to counteract negative behaviors in the credit card context is relatively unsurprising given the wide-ranging preference of people to precommit to certain behaviors. Ulysses provides a classic example from literature: knowing his ship was about to sail past the sirens, he instructed the members of his crew to fill their ears with wax and tie him to the mast of his ship so he was physically prevented from succumbing to the temptation he knew was coming.⁵⁵

The desire to precommit has also been tested and confirmed empirically. One study examined student choice when students were presented with flexibility for turning in three assignments.⁵⁶ Students could choose to make all three papers due on the same due date at the end of the semester or choose their own deadlines for each individual paper (with the final available due date being the one those choosing the first option would have at the end of the semester), which became binding upon turning in a schedule.⁵⁷ The students who created their own deadlines subjected themselves to a grade penalty for potential procrastination without an added benefit.⁵⁸ Seventy-three percent of the participants in the study chose the option to set deadlines before the last day of the semester.⁵⁹

Another experiment studied whether the availability of a smaller portion size encouraged diners to commit themselves to smaller meals. Diners at a Chinese fast food restaurant were asked whether they would prefer to downsize a starchy side option.⁶⁰ Up to 33% of diners chose to downsize their meals, and the result was unaffected by whether the cashier offered a nominal \$0.25 discount in connection with the downsizing.⁶¹ Participants almost never requested to downsize spontaneously, meaning the availability of the option needed to be made known to the diners in order for them to take advantage.⁶² But the diners who took advantage of the downsize offer tended not to add more calories to their plates to compensate for downsizing their side dishes, thereby succeeding in precommitting to eating less unhealthy food by having less of it available at the dinner table.⁶³

54. *Id.* at 473.

55. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 41–42 (2008).

56. Dan Ariely & Klaus Wertenbroch, *Procrastination, Deadlines, and Performance: Self-Control by Precommitment*, 13 *PSYCHOL. SCI.* 219, 220–22 (2002).

57. *Id.* at 220.

58. *Id.*

59. *Id.* at 220–21.

60. Janet Schwartz et al., *Inviting Consumers to Downsize Fast-Food Portions Significantly Reduces Calorie Consumption*, 31 *HEALTH AFF.* 399, 401 (2012).

61. *Id.* at 404.

62. *Id.*

63. *Id.*

These scenarios reinforce the potential popularity of commitment devices as a debiasing mechanism. However, there are great benefits to the flexibility of credit cards, especially in times of emergency.⁶⁴ A successful policy proscription to the problems created by overborrowing and underpaying should address the problems caused by ease of borrowing, while being careful not to make borrowing too difficult.

D. Theories Dominating the Proposed Regulatory Response to the Problems with Credit Cards

Three schools dominate the debate over the proper function of regulation.⁶⁵ The neoclassical school argues that almost all regulation, save disclosure, should be avoided because a competitive market creates better products and services.⁶⁶ The school assumes either that consumers make rational choices⁶⁷ or, at the very least, that consumers learn from their irrational mistakes.⁶⁸ From the neoclassical perspective, most government regulation serves to disadvantage consumers by impeding consumer liberty due to the restriction or limitation of choice.⁶⁹

The more liberal school believes that paternalism need not be considered a negative term and that regulation—even regulation that restricts citizen choice—can effectively solve societal problems.⁷⁰ Proponents of this view believe that choice-preserving regulatory mechanisms do not go far enough to achieve the social goals they are meant to achieve.⁷¹ These proponents would abandon softer regulatory techniques, such as default rules and increased disclosure, in favor of more paternalistic techniques, such as direct mandates.⁷² These theorists view weak paternalistic techniques as ineffective in achieving their goals; often, the consumer behaves as expected or desired, but the result is not socially optimal.⁷³

64. Littwin, *supra* note 51, at 457–58.

65. See generally THALER & SUNSTEIN, *supra* note 55, at 4–6 (discussing the libertarian paternalism ideal that defines the behavioral law and economics approach to regulation and how that approach incorporates “nudges”); Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1597–98 (2014) (describing issues with the behavioral law and economics approach to regulation and outlining how traditional restrictive regulation would be more effective); Richard A. Epstein, *The Neoclassical Economics of Consumer Contracts*, 92 MINN. L. REV. 803, 804–05 (2008) (outlining the neoclassical school of thought on the proper function of regulation).

66. Epstein, *supra* note 65, at 804.

67. Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. U. L. REV. 1033, 1050 (2012).

68. Epstein, *supra* note 65, at 811.

69. Wright & Ginsburg, *supra* note 67, at 1067.

70. Bubb & Pildes, *supra* note 65, at 1600.

71. *Id.* at 1597–99.

72. *Id.* at 1597–98.

73. *Id.*

The school of behavioral law and economics, which advocates for a “weak” or “libertarian” paternalistic approach to regulation, aims to represent a middle ground.⁷⁴ A behavioral economics approach to regulation introduces “nudges” that influence consumer behavior but preserve consumer choice, such as use disclosures or commitment devices.⁷⁵ These regulatory “nudges” theoretically “alter people’s behavior in a predictable way without forbidding any options”⁷⁶

E. The CARD Act Response

Congress responded to the consumer debt crisis by passing the CARD Act of 2009.⁷⁷ The CARD Act sought to ameliorate the financial distress brought about by irresponsible credit card use and issuer pricing policies.⁷⁸ The CARD Act limited or banned some issuer practices deemed abusive, such as over-limit fees⁷⁹ and a practice called double-cycle billing.⁸⁰ The CARD Act’s other focus was mandating a number of behaviorally informed disclosures that issuers would be required to include in their credit card agreements and monthly statements, justified for consumer-protection reasons.⁸¹

In an effort to assist cardholders in understanding the ramifications of paying only the intentionally low minimum monthly payment that issuers set, Congress mandated a collection of disclosures that together, it hoped, would give consumers pause before they chose to submit the minimum payment.⁸² The minimum-payment disclosure, located on the monthly statement, informs the cardholder of the total cost of paying off her balance by only paying the minimum monthly payment and of the total amount of time it would take her to pay off the balance in full.⁸³ For comparison, issuers must also indicate the total cost of paying an amount that, if paid from that month forward and without adding to the balance, would pay off the balance in 36

74. THALER & SUNSTEIN, *supra* note 55, at 4–6.

75. *See id.* at 145–46 (suggesting that credit card users should be provided an annual statement listing all the fees incurred within the past year and credit card companies should allow customers to opt in to automatic payment of the full bill).

76. *Id.* at 6.

77. Credit Card Accountability Responsibility and Disclosure Act, Pub. L. No. 111-24, 123 Stat. 1734 (codified as amended in scattered sections of 15 U.S.C.).

78. CONSUMER FIN. PROT. BUREAU, CARD ACT REPORT 10 (2013) [hereinafter CARD ACT REPORT].

79. § 102(a), 123 Stat. at 1738–39 (codified at 15 U.S.C. § 1637(k) (2012)).

80. *Id.* at 1739–40 (codified at 15 U.S.C. 1637(j) (2012)).

81. *See* CARD ACT REPORT, *supra* note 78, at 10–13 (providing an overview of the CARD Act’s purpose and major provisions).

82. *See, e.g.*, § 201(a), 123 Stat. at 1743–45 (codified as amended at 15 U.S.C. § 1637(b)(11) (2012)) (mandating a number of creditor disclosures for the customer’s benefit); CARD ACT REPORT, *supra* note 78, at 12 (summarizing various disclosure provisions that must be included in monthly statements).

83. 15 U.S.C. § 1637(b)(11) (2012).

months.⁸⁴ Issuers must also disclose a toll-free phone number a cardholder could call to receive debt-counseling services.⁸⁵ An example of these minimum-payment and 36-month disclosures follows⁸⁶:

Minimum Payment Warning: Making only the minimum payment will increase the amount of interest you pay and the time it takes to repay your balance.

If you make no additional charges and each month you pay . . .	You will pay off the balance on this statement in . . .	And you will ultimately pay an estimated total of . . .
The minimum payment	X months	\$XXXX
\$X	36 months	\$XXXX (Savings: \$XXXX)

For information about credit counseling services, call 1-800-XXX-XXXX.

The CARD Act took into account the various behavioral biases that impact consumer credit card use. Some of the law involves more paternalistic regulation of credit cards that bans certain abusive practices by credit card issuers.⁸⁷ However, a number of the changes involve requiring disclosures to consumers. This approach is a classic application of the behavioral economics theory, which advocates for regulatory action that preserves consumer choice.⁸⁸ In the case of the disclosures mandated by the CARD Act, consumer autonomy is preserved because consumers are not being forced to make any changes to their behavior but rather are being nudged in a particular direction to make a particular choice.

In requiring the minimum-payment disclosure, the 36-month disclosure, and the inclusion of the toll-free number for debt-counseling services, Congress embraced a hybrid that included various weak paternalistic ideas; in other words, the legislation served to help consumers make better decisions without mandating any particular action. The mandatory disclosures seek to both inform consumers of their minimum payments and warn cardholders of the dangers that accompany paying only a small proportion of the total balance. The warning serves a weak debiasing purpose, since the disclosure

84. *Id.* § 1637(b)(11)(B)(iii).

85. *Id.* § 1637(b)(11)(B)(iv).

86. See Connie Prater & Tyler Metzger, *How to Read, Understand Your Credit Card Statement*, CREDITCARDS.COM (May 29, 2013) <http://www.creditcards.com/credit-card-news/new-look-credit-card-statement-1273.php>, archived at <http://perma.cc/3Z33-XWH6> (providing examples of statements from various issuers, all of which include variations on this disclosure).

87. See *supra* notes 79–80 and accompanying text.

88. Jonathan Slowik, Comment, *Credit CARD Act II: Expanding Credit Card Reform by Targeting Behavioral Biases*, 59 UCLA L. REV. 1292, 1316 (2012).

alerts consumers that paying the minimum each month will keep them in debt for a long time, counteracting the behavioral bias that makes consumers overoptimistic that they can pay off their bills on time.⁸⁹ The minimum-payment disclosure is concededly less illustrative than Cass Sunstein's suggestion of using "vivid narratives of possible harm" to debias consumers,⁹⁰ but since the disclosures are "use disclosures" that provide information about the cardholder's own use of her credit card, they work towards the same debiasing purpose. Additionally, the 36-month disclosure in conjunction with the minimum-payment disclosure serves as a nudge to reframe the consumer away from the minimum payment anchor to a different, higher, "better" payment. The whole disclosure preserves consumer choice, with the caveat that a cardholder must pay at least the minimum payment. The disclosure constitutes a compromise between heavy paternalism and hands-off disclosure, since it debiases by attempting to show each consumer how her own decisions will affect her future finances.

III. Empirical Studies of the Minimum-Payment and 36-Month Disclosures Demonstrate that Framing Probably Works but the 36-Month Target Is Wrong

An empirical analysis of the CARD Act's mandate of the minimum-payment and 36-month disclosures reveals that the policy proscription positively affects behavior, yet exhibits some shortcomings. A collection of studies, construed together, essentially reveals that the disclosure of any minimum payment anchors cardholders to that amount, lowering repayment levels.⁹¹ One study found that the 36-month disclosure successfully improves cardholder repayment patterns.⁹² In spite of that improvement, the target of the 36-month disclosure not only moves but is also suboptimal.⁹³ Some cardholders made better payment decisions, but others made worse decisions than they had made before the introduction of the 36-month disclosure.⁹⁴ Other studies have indicated that disclosures such as the minimum-payment and 36-month disclosures do little to change cardholder repayment patterns.⁹⁵

89. See *supra* note 17 and accompanying text.

90. Sunstein, *supra* note 12, at 258.

91. See Neil Stewart, *The Cost of Anchoring on Credit-Card Minimum Repayments*, 20 PSYCHOL. SCI. 39, 39 (2009) (reporting and summarizing the findings of a credit card repayment survey that "showed a strong correlation between minimum repayment size and actual repayment size").

92. See Dennis Campbell et al., *Reframing Behavior: The Impact of the CARD Act on Cardholder Repayment Plans*, CONSUMER FIN. PROTECTION BUREAU 8 & fig. (2001), <http://files.consumerfinance.gov/f/2011/03/Gartenberg-Presentation-Revised-Final.pdf>, archived at <http://perma.cc/JS36-JV7B> (documenting an increase "in the fraction of cardholders paying at the 36 month level").

93. *Id.* at 19.

94. *Id.* at 20.

95. See Daniel Navarro-Martinez et al., *Minimum Required Payment and Supplemental Information Disclosure Effects on Consumer Debt Repayment Decisions*, 48 J. MARKETING RES.

Overall, the takeaway from these various empirical analyses of the CARD Act disclosures and their predecessors is that the CARD Act's solutions do not adequately address the minimum-payment problem Congress was attempting to solve.

A. *Disclosing a Minimum Payment Anchors Payments to That Level*

Before the CARD Act mandated the minimum-payment and 36-month disclosures, scholar Neil Stewart studied the effects of disclosing minimum payments on cardholder repayment patterns.⁹⁶ This study revealed that disclosing a minimum payment served as an “anchor.”⁹⁷ A number that anchors biases decision making in a way that is arbitrary.⁹⁸ In the context of credit card minimum payments, the disclosure of a minimum monthly payment makes the suggestion that the number given is the proper or suggested amount to pay.⁹⁹ The study compared repayment patterns of participants who received bills that disclosed a minimum payment with those of participants who received bills that did not.¹⁰⁰ Stewart discovered that while removing the disclosure of a minimum payment did not substantially affect those paying the bill in full, it did affect those making partial repayments.¹⁰¹ In particular, mean repayments rose 70% when the minimum-payment disclosure was removed.¹⁰² These findings suggest that cardholders who pay in full will not be significantly affected by a minimum-payment disclosure, but those who make partial payments will essentially interpret a minimum-payment disclosure as a suggested amount to pay, thereby reducing monthly payments.

A follow-up study revealed that raising minimum payments led to cardholders paying larger proportionate amounts of their bills each month.¹⁰³ Higher minimum payments were correlated with a larger percentage of the cardholders paying in full, higher partial repayments by those not paying in full, and fewer cardholders paying only the minimum payment.¹⁰⁴ This finding seems to suggest that the higher the anchor, the lower the anchor's

(SPECIAL ISSUE) S60, S61 (2011) (concluding that neither minimum-payment disclosure nor additional disclosures, such as loan-cost information or length of time required to pay off the loan, had a substantive impact on payment patterns); Linda Salisbury, *Minimum Payment Warnings and Information Disclosure Effects on Consumer Debt Repayment Decisions*, 33 J. PUB. POL'Y & MARKETING 49, 56 (2014) (concluding that statements disclosing negative effects of minimum payments have little effect on consumer repayment choices but that inclusion of a three-year repayment amount does have an influence on behavior).

96. Stewart, *supra* note 91, at 39–40.

97. *Id.* at 39.

98. *Id.*

99. *Id.*

100. *Id.* at 40.

101. *Id.*

102. *Id.*

103. Navarro-Martinez et al., *supra* note 95, at S74.

104. *Id.*

effect has in the context of minimum payments. Together, the results of these studies may indicate that allowing issuers to keep minimum payments as low as they currently do works against Congress's goal of improving repayment patterns among cardholders.

B. Adding Supplemental Disclosure Possibly Improves Repayment Patterns, but Results Are Mixed

1. The 36-Month Disclosure Has Been Shown to Improve Repayment Patterns, but Frames to the Wrong Target.—The results from at least one study indicate that the CARD Act's disclosures altered repayment patterns. In a study of a small credit union's cardholder repayment activity, researchers found that fewer cardholders paid the minimum-payment amount after the CARD Act's disclosure mandates went into effect, instead paying an amount higher than the minimum.¹⁰⁵ The researchers expected the 36-month disclosure to counter the anchoring effect of revealing a minimum-payment amount on the bill, and they found that a number of cardholders did reframe to the 36-month disclosure amount.¹⁰⁶ In fact, the most credit constrained of the cardholder base began paying the 36-month amount in much higher numbers after the CARD Act's implementation.¹⁰⁷

While many of the most credit-constrained cardholders paid more than the minimum after reframing to the 36-month amount, those that paid the 36-month amount paid much less than a matched cohort.¹⁰⁸ Those who paid the 36-month amount also maintained higher credit balances than the matched cohort.¹⁰⁹ The sharp increase in people paying the 36-month amount may also be an indication that some cardholders who previously paid their balances off faster are now anchored by the 36-month disclosure.

In addition to these indicia of the target of a three-year payoff being suboptimal, the target moves. The disclosure makes it reasonably clear that in order to pay off the balance in either the 36-month time frame or the minimum-payment time frame (i.e., the amount of time the bill says it will take to pay off the balance by only paying the minimum payment), cardholders must not make any additional purchases on the card.¹¹⁰ However, unwary consumers may not realize that in order to pay off the debt

105. Campbell et al., *supra* note 92, at 2.

106. *Id.* at 8 & fig.

107. *See id.* at 10–14 (indicating that customers who, prior to the CARD Act's enactment, had slower payoff rates—those with lower credit scores, high balance-per-limit ratios, and higher balances—adopted the 36-month amount more readily than other cardholder segments).

108. *Id.* at 17 & fig.

109. *Id.* at 18 & fig.

110. *See* 15 U.S.C. § 1637(b)(11)(B)(i), (iii) (2012) (stating that the disclosure must list the number of months, if paying the minimum monthly payment, or the monthly payment amount, if following the 36-month plan, required to pay off the entire remaining balance “if no further advances are made” (emphasis added)).

in three years, the consumer needs to pick a month to begin a 36-month payoff, pay the disclosed payment amount, and must stick to that amount for all three years.¹¹¹ In a quick glance, the cardholder might assume that if she pays the amount in the 36-month time-frame box, she is not only paying a higher and therefore “better” amount than the minimum payment but is also going to pay off the bill in 36 months. While the first assumption is certainly true, the second assumption—that paying the amount in the box next to the 36-month payoff timeline will pay off the debt in 36 months—is false. The 36-month disclosure is therefore a moving target because each successive month a cardholder pays the 36-month amount disclosed on her statement, she is 36 months away from paying off her balance.¹¹² Indeed, evidence shows that consumers either do not take the time to understand what the 36-month disclosure is telling them or simply do not understand the disclosure at all.¹¹³ While customers who focus on this “better” number are paying more than the minimum, the disclosure might cause some—those who simply glance at the two options and pay the higher number—to miss the point: that to pay the balance off in three years, the consumer must affirmatively pick a time to start a three-year payment plan and stick to that payment each month.

Another major problem the study found with the 36-month disclosure is it anchored certain cardholders who otherwise would have made better repayment decisions to the 36-month payoff amount.¹¹⁴ That amount is only better for those who were paying the minimum payment before the implementation of the disclosure. The study found that some cardholders began paying the 36-month payoff amount even though that amount was not in fact better than their previous repayment patterns.¹¹⁵ In other words, while the 36-month payoff amount counteracted the anchoring effect of the minimum payment, it served as a new anchor for certain cardholders.

The thrust of these findings is that the CARD Act’s minimum-payment and 36-month disclosures successfully reframe a cardholder away from the minimum-payment amount to a higher, “better” payment amount and tends

111. See Karen Haywood Queen & Marissa Fajt, *Survey: Minimum Card Payments Rising*, CREDITCARDS.COM (June 26, 2014), <http://www.creditcards.com/credit-card-news/minimum-credit-card-payments-survey-1276.php>, archived at <http://perma.cc/2PJJ-ZQRW> (“[T]hose looking to that 36-month number . . . should realize that the minimum payment changes every month . . . Consumers who want to pay the card off in the 36-month time frame should maintain the same payment and make no additional charges.”).

112. Campbell et al., *supra* note 92, at 19.

113. See Ann Carrns, *Disclosures Are Found to Change Financial Behavior*, BUCKS, N.Y. TIMES (Feb. 22, 2012, 12:05 AM), http://bucks.blogs.nytimes.com/2012/02/22/disclosures-are-found-to-change-financial-behavior/?_php=true&_type=blogs&_r=0, archived at <http://perma.cc/9NWR-5KVW> (explaining that customers who adopt the 36-month payment may carry higher credit balances because the 36-month payment plan is a moving target).

114. See Campbell et al., *supra* note 92, at 17 & fig. (finding that customers using the 36-month payment amount “made smaller payments than a matched cohort”).

115. See *id.* at 10 & fig. (showing that some cardholders who paid off their bills in under 36 months reframed to the 36-month payment amount upon being exposed to the 36-month disclosure).

to change some cardholders' payment strategy to pay the higher amount. However, that "better" payment amount is not an optimal target.

2. *Supplemental Information Disclosure May Have an Insignificant Effect on Repayment Patterns.*—When paired with a minimum payment, one study found that "supplemental information" disclosures did little to ameliorate partial-repayment strategies. This study examined the propensity for subjects to pay the minimum when additional information was disclosed along with the minimum payment as compared to subjects who only received a bill listing the minimum payment.¹¹⁶ The types of additional information included the future interest cost of paying only the minimum; the time to pay off the amount if the subject paid only the minimum; a combination of those two information disclosures; and a combination of the time-to-pay-off disclosure with three-year payoff information, indicating an amount the subject could pay in order to pay the balance off in three years.¹¹⁷ The CARD Act's mandatory disclosures inspired these variable choices.¹¹⁸

The subjects who received bills disclosing the minimum payment along with the future interest cost were more likely to pay just the minimum payment than they would have been had they received a bill only indicating a minimum-payment amount.¹¹⁹ This effect was negated by adding the time-to-pay-off information, but including both categories of information did very little to affect the propensity to pay the minimum as compared to those who received a bill only listing the minimum-payment amount.¹²⁰ The variable that most resembled the CARD Act's requirements—the one including the three-year payoff amount and the time to pay off the balance paying only the minimum payment—was most successful in lowering the number of subjects choosing to only pay the minimum.¹²¹ However, the change was not statistically significant.¹²²

3. *The Disclosures May Have Been Ineffective in Ameliorating the Behavior of the Intended Targets.*—Yet another study examined results from a research center's Consumer Finance Monthly survey, in which a representative sample answers financial questions having to do with credit card use in the past month.¹²³ The study found that repayment behavior

116. Navarro-Martinez et al., *supra* note 95, at S64.

117. *Id.*

118. *See id.* at S62, S75 (noting the similarities between the CARD Act disclosures and the potential supplemental information studied).

119. *Id.* at S67–S68.

120. *Id.* at S68.

121. *Id.* at S67.

122. *Id.*

123. Lauren Jones et al., *The Effects of CARD Act Disclosures on Consumers' Use of Credit Cards* 12–13 (June 15, 2012) (unpublished manuscript), available at <http://ssrn.com/abstract=2034419>, archived at <http://perma.cc/M758-TCJ4>.

improved, but primarily among users who were very close to becoming transactors before the passage of the CARD Act.¹²⁴ Transactors are cardholders who use credit cards' purchasing function but not their borrowing function.¹²⁵ In other words, they pay their balances off in full each month. The study found that after the implementation of the CARD Act disclosures, users who had been paying most, but not all, of their bills each month became transactors.¹²⁶ In fact, the researchers found that the payment-to-debt ratio among revolvers actually decreased, although not statistically significantly.¹²⁷ Essentially, those who felt the benefits of the CARD Act were those who did not need the help in the first place.¹²⁸

C. *While the Disclosures Might Change Some Behavior, They Do Not Reach All Cardholders*

Another problem with the CARD Act's solution to the minimum-payment problem is that many card users may never see the 36-month disclosure or the minimum-payment disclosure. Issuers invariably offer an online payment screen as an alternative to mailing in a check after receiving a paper bill or paying over the phone.¹²⁹ This screen does not post the disclosure since issuers are only required to provide the disclosure on the monthly bill itself, and issuers do not require credit card users to view their bills before making a payment.¹³⁰ As a result, a potentially large number of credit card users may never see the disclosures and therefore will not change their behavior accordingly.¹³¹

IV. *The Minimum-Payment and 36-Month Disclosures May Be Improved by Incorporating Behavioral Economic Principles More Effectively*

Given the shortcomings of the CARD Act's minimum-payment and 36-month disclosures in practice, I propose some alternative options that would better address the problem and improve consumer behavior. Each alternative seeks to increase monthly cardholder payments. Congress could seek to fix the existing disclosures by clarifying them, by fixing the moving target problem, and perhaps by optimizing the target as well. Going a step further,

124. *Id.* at 35.

125. BAR-GILL, *supra* note 11, at 57 & n.5.

126. *See* Jones et al., *supra* note 123, at 12–13 (finding an increased likelihood of “fully paying off credit card debt each month”).

127. *Id.* Revolvers are those “who carry credit card debt for more than one month.” *Id.* at 24.

128. The study notes that this result could possibly be explained by the disclosures' lack of effectiveness but might also be explained by the lasting effects of the financial crisis that began in 2008. *Id.* at 35. More specifically, revolvers might have maintained low repayment patterns because they simply could not afford to pay more in light of their personal financial situations brought about by the recession occurring during the study period. *Id.*

129. CARD ACT REPORT, *supra* note 78, at 68.

130. *Id.*

131. *Id.*

Congress could raise minimum-payment levels to a more optimal target. Congress could also require issuers to offer commitment devices to help consumers stick to a payment plan. These commitment devices would either subscribe cardholders to a payment plan or offer enrollment in a payment plan. Either option would require a default set to an optimal target payment rate.

As a preliminary matter, I propose changing the 36-month disclosure to make the frame more effective. As was shown in Part III, the 36-month target is suboptimal; thus the target should be set higher. While an empirical study of the “correct” target is beyond the scope of this Note, for the sake of argument I will hereinafter assume that a 12-month target strikes the proper balance between a manageable payoff goal and a responsibly high monthly payment level. Accordingly, all recommendations will assume the 12-month target to be optimal and therefore stand up to hypothetical critique for potentially being suboptimal. Additionally, any reference to the current 36-month disclosure will now be referred to as the “comparison disclosure,” and the new recommendations will assume that the comparison disclosure should reflect a 12-month, rather than a 36-month, payoff rate.

A. Proposal 1: Restructure and Rephrase the Comparison Disclosure for Clarity.—As it stands, the payment amount in the comparison disclosure changes each month since the time-to-payoff starting point restarts each month. Part III explained the specific moving target problem that cardholders experienced when making a payment decision using these boxes.¹³² A minimally burdensome solution to this problem would be to add a new box indicating how long it would take to pay off the balance should the cardholder pay the amount that she paid in the previous month. If in the previous month the cardholder picked the higher, now 12-month disclosure payment amount in order to pay off the balance in 12 months, she would be able to see exactly how many more months it would take to pay off the loan (which would be 11 months the following month). As a result, she would more easily understand that, in order to continue to pay off the balance in the new one-year time frame, she must pay the same amount as she did last month and not the amount that was recalculated for the existing comparison disclosure. To make it clear to cardholders that the 12-month amount is merely a suggested amount, it would be labeled as such under this policy suggestion. This solution would make the comparison and minimum-payment disclosure more salient to the cardholder. This disclosure would be printed alongside the comparison disclosure and the minimum-payment disclosure. The suggestion would place little burden on issuers, who would simply have to re-report a number elsewhere on the bill along with a simple calculation

132. See *supra* section III(B)(1).

indicating the length of time it would take to pay off the balance if she continued to make that payment.

The added disclosure further counteracts the anchoring problem of disclosing a minimum payment by providing an additional higher option. The proposed additional disclosure would fall in line with weak paternalistic principles, since consumer choice is preserved while encouraging welfare-increasing options.¹³³ This new target would likely produce higher monthly payments if chosen than would the moving target of the comparison disclosure. The comparison disclosure remains—along with its moving target—in order to provide a higher suggested amount (as compared to the minimum payment) in order to nudge the cardholder away from that anchor. Providing information about the cardholder's own use of the card might help to counteract biases. Ideally, the cardholder would choose to pay the 12-month amount, note the better progress she made the next month, and continue to pay that amount. Regardless of what path the cardholder chooses, the new box would alert her to the consequences of her choices.

Such a disclosure might be criticized as an overdisclosure, overwhelming consumers with too much information.¹³⁴ Undeniably, many of the disclosures on credit card statements are already too complex for consumers to adequately understand.¹³⁵ Adding yet another box might further discourage a consumer from even attempting to understand her credit card statement. However, the new disclosure is a use disclosure, or one that gives information to the consumer about her own use of the product. Oren Bar-Gill has promoted use disclosures as effective in preventing or correcting consumer mistakes.¹³⁶ In fact, he also suggested a disclosure that would alert a cardholder to the rate at which she would personally take to pay off her bill given her current repayment rates.¹³⁷ Use disclosures therefore do a better job than product-feature disclosures in alerting consumers to their own behaviors so that they may correct them.

An additional problem with the minimum-payment and 36-month disclosures as currently used is that they are only required to be placed on the physical or electronic credit card bill and not on the online payment screen, thus possibly hiding the disclosure from many users who either pay straight from the online payment screen without checking the bill or those who set up an automatic monthly payment.¹³⁸ A simple solution to this secondary

133. See THALER & SUNSTEIN, *supra* note 55, at 5 (defining the libertarian paternalism approach as giving people the freedom to choose, while influencing them to choose the option that is better for them).

134. See Slowik, *supra* note 88, at 1306 (noting that consumer decision making only improves when consumers have the opportunity to read and understand the provided disclosures).

135. *Id.*

136. Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749, 800 (2008).

137. *Id.* at 800–01.

138. CARD ACT REPORT, *supra* note 78, at 68.

problem would be to require issuers to post the disclosure on the bill as well as on any online payment screen, automatic payment set-up screen, or other alternative methods of paying that don't involve looking at the monthly statement. This more widespread disclosure would serve to ensure that most, if not all, cardholders would see the disclosure before making a payment decision.

B. Proposal 2: Raise the Minimum Payment to Match a 12-Month Payment Schedule.—An alternative change to the CARD Act's approach to the minimum payment and the surrounding disclosures is to raise the minimum payment. I suggest either setting the minimum payment to an intermediate level—to be determined empirically, but at a level higher than the 36-month repayment level—or to the 12-month repayment level. If the payment were raised to an intermediate level, the comparison disclosure would remain, as would the suggested third box disclosing the last month's payment level and the time to pay off. If the payment were raised to the 12-month repayment level, the comparison disclosure would be eliminated, as it would be duplicative.

There is plenty of empirical support for raising the minimum payment from the low levels issuers currently set. Stewart's study indicated that the disclosure of any minimum payment anchors payments to that level, in spite of what a cardholder might have otherwise paid.¹³⁹ Moreover, further empirical findings indicate that raising the minimum payment leads to better repayment practices.¹⁴⁰ As the follow-up study examining whether higher minimum payments affected repayment behavior indicated, even though disclosing minimum payments anchored payments generally, raising minimum payments tended to improve repayment behavior, increasing the proportion of credit card balances cardholders paid each month.¹⁴¹

Importantly, raising the minimum payment would counteract many of the behavioral biases previously discussed that allow consumers to take on too much debt and pay it off too slowly. First, raising the minimum to a mandatory level would take away issuers' discretion in setting minimum payments, thereby mandating a more optimal payoff level. Under such a calculation of minimum payments, cardholders could better "assess the affordability of their debts."¹⁴² Additionally, cardholders would pay less total interest than if they paid a lower minimum payment.¹⁴³ Credit card loans

139. See *supra* subpart III(A).

140. Navarro-Martinez et al., *supra* note 95, at S74.

141. *Id.* at S74–S75. This change would need to be implemented gradually, or only on future balances, to prevent harming consumers who cannot pay more than the minimum on preexisting balances. See Littwin, *supra* note 51, at 491 (indicating that low-income women who recommended an increase in the minimum payment made clear that it would be harmful to apply a higher minimum payment to existing balances).

142. Slowik, *supra* note 88, at 1333–34.

143. *Id.* at 1334.

would also bear a more direct relationship “to the useful life of their purchases.”¹⁴⁴ Restructuring monthly minimum payments in this way might also make the costs of borrowing on credit cards “more salient to the cardholder.”¹⁴⁵ A disclosure of a high minimum payment has a greater likelihood of changing behavior because the immediate impact of the higher minimum payment will force the consumer to “take notice.”¹⁴⁶ Indeed, others have suggested that better associating the pain of credit card use (i.e., the excessive spending leading to debt) with the actual use of credit cards will help break the cycle of overspending.¹⁴⁷

A higher minimum payment, tied to the 36-month disclosure or not, is subject to criticism for infringing on consumer choice.¹⁴⁸ Specifically, any higher minimum payment will force the cardholder to pay a certain minimum amount, but there is a large range above the current minimum-payment levels from which to choose a monthly payment. The larger the range, the more flexibility a cardholder retains in choosing a monthly payment. Even the most responsible cardholders value flexibility to pay less than they usually do in a particularly expensive month; indeed, a cardholder might pick a particular card because of its low minimum monthly payment.¹⁴⁹ Mandating a high minimum monthly payment might help relatively irresponsible cardholders pay back their debts in a more sensible time frame, but the regulation might hurt consumers who otherwise appreciate and only occasionally take advantage of the flexibility that a low minimum affords them. It may also push some highly distressed customers into default.

Jonathan Slowik has also suggested that Congress mandate a higher minimum payment,¹⁵⁰ but his suggestion is flawed. Slowik suggests a 36-month target, reasoning that Congress chose the 36-month time period for the 36-month disclosure because Congress wanted cardholders to pay down their debts in that amount of time.¹⁵¹ Alternatively, he suggests a 5-year target.¹⁵² One clear drawback of Slowik’s policy proposal is that while Congress might have thought 36 months was a good amount of time to pay off debt, the study examining the effects of the CARD Act on the credit union indicated that the 36-month target is not an optimal time frame.¹⁵³ While true that, under that time frame, cardholders would pay more than their existing minimum payments, the empirical evidence highlights the possibility of a better

144. *Id.*

145. *Id.*

146. *Id.* at 1334–35.

147. *See* MANN, *supra* note 11, at 194 (highlighting that an increased minimum payment may address the problem of the “lack of pain tied” to credit card spending decisions).

148. Slowik, *supra* note 88, at 1335.

149. *Id.*

150. *Id.* at 1334–35.

151. *Id.* at 1333.

152. *Id.* at 1333 n.314.

153. *See supra* section (III)(B)(1).

solution. My proposal avoids this suboptimal repayment and instead suggests either a higher intermediate number or the 12-month repayment amount.

Many consumers use credit cards because of their incredible convenience, and requiring a recalculation of the minimum payment could affect that convenience in multiple ways. Some consumers already struggling with debt might no longer be able to afford their credit card, having relied on the lower minimum payment for budgeting purposes.¹⁵⁴ Other consumers might be taking advantage of a teaser rate or other promotional rate and be forced to pay more than was previously required.¹⁵⁵ Raising the minimum payment would help many consumers pay down their debt faster, but it would do so while decreasing others' flexibility. Such a regulation aims to help those most in need at the expense of others who use credit cards responsibly and probably also hurts those who are already drowning in debt. Raising the monthly minimum payment to such a high level might therefore be overly paternalistic. As a strong paternalistic policy, raising the minimum payment might therefore hurt those who borrow rationally in order to help those who do not.¹⁵⁶

Raising minimums would threaten issuers' pricing model; therefore, they would be expected to fight such a regulatory change. Even if Congress could manage to pass a law requiring higher minimum payments in the face of likely lobbying on behalf of issuers, issuers would change their pricing in order to compensate for lower profits due to fewer people with large balances accumulating large amounts of interest. At the prospect of losing back-end costs, issuers would likely raise front-end costs, such as annual fees, to compensate for the loss in profits.¹⁵⁷ Therefore, even if raising the minimum payment initially helps cardholders, issuers would likely shift their increased cost to cardholders.

Even though raising the minimum payment seems compelling, such a paternalistic approach may raise too many problems.

C. Proposal 3: Mandate the Availability and Advertisement of an Opt-In Payment Plan with a Default Monthly Payment.—Another potential solution is to mandate that issuers make available a payment plan that incorporates a default monthly payment higher than the minimum payment. Congress could mandate that issuers offer cardholders a payment plan that

154. See Allie Johnson, *4 Ways to Fight Minimum Payment Increases*, CREDITCARDS.COM (July 31, 2009), <http://www.creditcards.com/credit-card-news/four-ways-fight-minimum-payment-increases-1267.php>, archived at <http://perma.cc/S46M-B8FH> (detailing how some consumers use the lower rate offered for a balance transfer to reduce their monthly minimum payment).

155. A teaser rate is a low- or no-interest rate that a consumer enjoys for a set period of time upon signing up for a credit card before the card's standard interest rates kick in. BAR-GILL, *supra* note 11, at 69.

156. Sunstein, *supra* note 12, at 254.

157. Bar-Gill & Bubb, *supra* note 34, at 978.

would pay off their debt in a certain amount of time, setting the default to the assumed-optimal 12-month target monthly payment. Such an opt-in plan would serve as a commitment device that consumers could use to sign themselves up for more responsible borrowing.

The proposed opt-in system would set the default amount at the 12-month repayment level. This default amount would set an encouraged payoff level for those interested in paying credit card debt down faster than at the minimum-payment level. Cardholders would then have the choice of signing up for alternative payment plans, paying more or less each month than the 12-month amount, but keeping the cardholder on track to pay off the debt in a certain amount of time. An opt-in system would preserve choice and would simply serve to give cardholders an alternative means of paying their bills. Additionally, an opt-in system would not threaten to drag transactors down to a lower minimum payment. In fact, it may provide an easier means to opt in to a payment plan that pays the bill off each month.

Evidence shows that people want to find ways to be more responsible and counteract their behavioral biases with commitment devices, particularly in the context of credit card debt.¹⁵⁸ Requiring issuers to offer payment plans would minimally invade on consumer autonomy, while providing a mechanism that would encourage cardholders to borrow more responsibly. Of course, to have an effect on many consumers' behavior, the availability of these plans would have to be advertised or made clear to cardholders. To accomplish such required notice to cardholders, Congress could mandate that issuers conspicuously disclose the availability of the payment plan on the credit card statement and on any online payment screens.

Those in favor of stronger paternalistic policies would argue that an opt-in payment system would not go far enough in getting more consumers to pay off their credit card debt, leaving too much room for behavioral biases to prevent consumers from making the more optimal choice.¹⁵⁹ For instance, cardholders could choose to opt in to a payment plan but choose a payoff timeline below the optimal level. Additionally, the default could be set at a suboptimal level and may be too "sticky," meaning that employees tend not to deviate from the savings rate they are automatically enrolled in, bringing partial balance payments down from where they might otherwise be.¹⁶⁰ However, the 12-month level has been assumed optimal for purposes of this Note, and the real level would be derived from empirical study.

In spite of these shortcomings, an opt-in payment plan has many benefits. The opt-in system would essentially serve as a commitment device that issuers would be required to offer. Evidence across disciplines shows that cardholders, especially those who have learned from their former bad

158. *See supra* section II(C)(2).

159. *See supra* notes 70–73 and accompanying text.

160. *See* Bubb & Pildes, *supra* note 65, at 1618 (describing how a low default retirement contribution rate may reduce the savings rate of many employees).

practices, want to be more responsible in paying off their credit card debt.¹⁶¹ Issuers would likely be more amenable to a solution that does not change their minimum-payment practices, either absolutely, by raising the minimum monthly payment by statute, or functionally, by mandating an opt-out payment plan. Importantly, especially in terms of a product that is used primarily for its flexibility and convenience, an opt-in system would preserve consumer choice while both making available and encouraging a means by which cardholders can more responsibly manage their debt.

D. Proposal 4: Mandate an Automatic-Enrollment Payment Plan with a Default Monthly Payment.—An alternative to an opt-in system might be an opt-out system that would require issuers to enroll all cardholders into a payment plan with a default set to the 12-month target monthly payment amount. Logistically, an issuer would require cardholders to repay the 12-month target monthly payment each month. That amount would be the only allowed amount due each month, no matter the payment method, absent an affirmative opting out by the cardholder to pay any amount from the issuer-set minimum to the balance in full. Additionally, instead of fully opting out, the cardholder could remain in a payment plan but choose to pay a different level than the target amount. Thus, a cardholder could continue to take advantage of the commitment device offered while paying an amount she deems more appropriate.

Such a plan could be modeled loosely after successful retirement savings plans.¹⁶² Multiple studies have confirmed that automatic-enrollment retirement savings plans raised savings rates significantly, as compared to an opt-in approach.¹⁶³ The criticisms of these plans involve the default set for the automatic enrollment—the default is too “sticky.”¹⁶⁴ As a result, employees collectively save less than they would in an alternative opt-in plan.¹⁶⁵ However, with the right default, an automatic enrollment in a payment plan could be an effective means of getting cardholders to pay down their debt more responsibly.

Opt-out plans tend to be significantly more effective than opt-in plans at getting targeted users to do whatever the regulator wants those users to do.¹⁶⁶ The automatic-enrollment retirement plans constitute one example;

161. See *supra* section II(C)(2).

162. See Sunstein, *supra* note 12, at 256–57 (explaining the advantages of private default rules).

163. See Bubb & Pildes, *supra* note 65, at 1616–17 (discussing study results indicating that automatic enrollment as the default leads to higher participation rates).

164. *Id.* at 1618.

165. See *id.* (emphasizing that automatic enrollment plans reduce the savings rate of some employees).

166. See Bubb & Pildes, *supra* note 65, at 1618–19 (explaining how, in the area of retirement saving, “the default rules function much like mandates for many individuals”); Sunstein, *supra* note 12, at 264–65 (noting that imposing an additional-action requirement to change a default rule favors the default rule).

another is the organ donor rate when the default rule is a presumption of consent to donate coupled with an affirmative opt-out system.¹⁶⁷ The success demonstrated in those cases is reasonably likely to be replicated in the suggested-payment-plan context.

Obviously, the proposed system has its drawbacks in the context of the findings regarding automatic-enrollment plans for retirement savings. Presumably, the plan would not affect transactors or those who pay their bill in full each month.¹⁶⁸ It seems likely that cardholders intending to pay off their balance each month would actively opt out of the payment plan or set up their plan to pay in full each month; deciding to be a transactor is a choice that seems to survive regulations seeking to affect revolvers' behavior, and that presumption is unlikely to fail in this case.¹⁶⁹ Nevertheless, revolvers that would otherwise pay a higher amount than the default might anchor to the target level out of convenience. However, even though a default might be sticky, effectively "mandating" a certain amount, we can be sure that those who remain in the payment plan are paying more than the minimum payment; for those that would otherwise only pay the minimum, that is a positive result.

Issuer pushback limits the feasibility of a mandatory opt-out payment plan. As with the minimum-payment disclosure, any policy that would require issuers to raise minimum payment levels would hurt issuer profitability, as cardholders would be less likely to enter the sweat box.¹⁷⁰ And, if enacted, issuers would have to find a different source of profits to make up for the loss, likely increasing front-end costs for cardholders.¹⁷¹ Issuers may also push back by sabotaging the effectiveness of the default through endless marketing.¹⁷²

Despite potential criticism, an opt-out payment plan may be most effective at keeping cardholders from paying off their balances slowly and inefficiently.

V. Conclusion

Thanks to their incredible ease of use, credit cards often trap consumers in unwieldy debt that becomes impossible to pay off. The CARD Act sought

167. See Sunstein, *supra* note 12, at 264–65 (discussing that countries that assume consent to donate organs and require an affirmative declaration disallowing harvesting at death have an incredibly high organ donation rate).

168. See *supra* note 125 and accompanying text.

169. See, e.g., Navarro-Martinez et al., *supra* note 95, at S67 (finding that changing minimum payment amounts insignificantly alters the behavior of those with a propensity to pay only the minimum).

170. See *supra* note 38–40 and accompanying text.

171. Bar-Gill & Bubb, *supra* note 34, at 978.

172. See Bubb & Pildes, *supra* note 65, at 1655 (discussing that when the Federal Reserve required banks to implement a default system opting account holders out of automatic overdraft protection, banks fought back by subjecting its customers to an onslaught of marketing encouraging them to re-enroll and opt into automatic overdraft protection).

to ameliorate this problem by alerting cardholders to the dangers of paying only the minimum payment, a practice that results in cardholders taking on unmanageable debt. However, the disclosures mandated by the CARD Act fall short; they probably improve repayment patterns, but the results are either insignificant or reveal a suboptimal payoff target. Improving the disclosures to provide more information about the cardholder's own use patterns, requiring issuers to raise the minimum payment, or mandating the subscription to or availability of a payment plan commitment device would better ameliorate cardholders' repayment patterns.

—*Angela K. Daniel*