Waging an Effective War on Consumer Credit: The Case and Framework for Reducing Credit Card Penetration in Favor of Debit Cards

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American consumers are increasingly over-indebted to credit card issuers. The Credit Card Accountability Responsibility and Disclosure Act of 2009 and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 in part aimed to address the age-old issue by protecting consumers from specific, unscrupulous lender practices that plagued the consumer credit card market and by overall enhancing consumer protections. Despite Congress's and the Consumer Financial Protection Bureau's efforts, credit card debt continues to mount, suggesting that the existing regulatory landscape may be insufficient and that the credit card, as a payment product, inherently poses a risk to consumers' financial health. This Note argues that, beyond improving protections against predatory practices by credit card issuers, policymakers should promote the use of debit cards as a safer alternative. This Note suggests that debit cards are the ideal substitute for credit cards and less financially risky for consumers. The Note then proposes a framework for transitioning American consumers from credit to debit, which involves legislative measures that dismantle the credit card rewards regime and give consumers access to less financially risky methods of building credit. Finally, because this Note advocates for a shift to debit, it also calls upon Congress to ensure that debit card users receive equivalent fraud protection to that provided under the Truth in Lending Act for credit card users.

* This Note is published anonymously at the request of the author. The author has accepted post-graduate employment that may, from time to time, involve the representation of entities discussed in this piece. Anonymity was requested to avoid the potential of any appearance of personal or professional conflict. The author would like to thank Professor Angela Littwin for her rigorous comments on drafts of this Note and the editors of the *Texas Law Review* for their suggestions and the countless hours they have spent making Volume 103 possible.

Introduction

American consumers are racking up credit card debt like never before.[1] Despite "rising wages and a low unemployment rate," delinquencies are on

1. *See American Credit Card Debt Hits a New Record—What's Changed Post Pandemic?*, U.S. GOV'T ACCOUNTABILITY OFF. (Oct. 31, 2023), https://www.gao.gov/blog/american-credit-card-debt-hits-new-record-whats-changed-post-pandemic [https://perma.cc/2R9E-JF3H] (describing the "new milestone" of national credit card debt reaching $1 trillion); Dan Avery, *Credit Card Debt in the US Hits $1 Trillion for the First Time*, CNET (Aug. 9, 2023, 1:51 PM), https://www.cnet.com/personal-finance/credit-cards/credit-card-debt-in-the-us-hits-1-trillion-for-the-first-time-ever/ [https://perma.cc/E5CJ-M2V7] (same). Additionally, the share of individuals who own and use credit cards has been on the rise. *See Share of Individuals Who Own a Credit*

the rise[2] and increasing at a rate unrivaled since the 2008 financial crisis.[3] And while lower income households often—and perhaps rationally—assume credit card debt burdens to get by,[4] six-figure earners also find themselves trapped in an expensive cycle of debt.[5] Some data indicates that credit card debt is even worse for high earners,[6] and the *Washington Post* remarked that "[h]ouseholds with high incomes are not just using credit but keeping it around like a pet rock."[7] This trend suggests that many consumers are taking on credit card debt irrationally. Indeed, several scholars theorize that credit cards, as payment products, are designed to increase debt burdens and the risk of financial distress by exploiting consumers' imperfect or bounded rationality.[8]

Card in the United States in 2011, 2014, 2017 and 2021 with a Forecast for 2024, by Age, Gender, and Income Level, STATISTA (Mar. 2024), https://www.statista.com/statistics/1362152/credit-card-ownership-rate-usa/ [https://perma.cc/V6MZ-N6MA] (reporting the increasing percentages of people in the United States who owned and used a credit card in 2014, 2017, and 2021).

2. Scott Horsley, *More Americans Are Falling Behind on Credit Card Bills*, NPR (May 14, 2024, 5:19 PM), https://www.npr.org/2024/05/14/1251295805/credit-cards-debt-inflation#:~:text=Credit%20card%20delinquencies%20have%20returned,on%20for%20months%20to%20come [https://perma.cc/9U4T-Z5ED]; *see also* Fed. Rsrv. Bank of St. Louis, *Delinquency Rate on Credit Card Loans, All Commercial Banks*, FRED, https://fred.stlouisfed.org/series/DRCCLACBS [https://perma.cc/WKL5-VBAW] (showing delinquency rates rising from 2022 to 2024).

3. *Goldman: Credit Card Losses Climbing at Quickest Rate Since 2008*, PYMNTS (Sept. 24, 2023), https://www.pymnts.com/consumer-finance/2023/goldman-credit-card-losses-climb-at-fastest-rate-since-2008/ [https://perma.cc/5R4A-UB8W].

4. *See* Ben Popken, *Lower-Income and Minority Households Assuming Bigger Debt Risks*, NBC NEWS (Feb. 11, 2022, 9:46 PM), https://www.nbcnews.com/business/lower-income-minority-households-assuming-bigger-debt-risks-rcna15898 [https://perma.cc/BRA2-K2MR] (explaining that some credit card users—and, in particular, low-income consumers—take on debt to pay for essential goods).

5. *See* Michelle Singletary, *Credit Card Debt Tops $1 Trillion, Trapping Even Six-Figure Earners*, WASH. POST (Aug. 8, 2023, 6:21 PM), https://www.washingtonpost.com/business/2023/08/08/credit-card-debt-1-trillion-high-earners/ [https://perma.cc/MBZ6-8YLS] (noting that "72 percent of cardholders with credit card debt and annual household incomes of $100,000 or more have been in debt for at least a year").

6. *See* Jessica Dickler, *Credit Card Debt Is Worse for Those with High Income*, CNBC (Jan. 6, 2020, 10:13 AM), https://www.cnbc.com/2019/12/18/credit-card-debt-is-worse-for-those-with-high-income.html [https://perma.cc/8JH8-9FEN] (noting that six-figure earners "are more likely to carry credit card debt than those with fewer assets").

7. Singletary, *supra* note 5.

8. *See, e.g.*, Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1395 (2004) ("The distinct [credit card] pricing scheme . . . can be traced to a behavioral bias on the demand side of the credit card market—to consumers' systematic underestimation of their future borrowing."); 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, 154, 162 (2015) (noting that "the CFPB may be missing opportunities to remove exploitation of consumer misunderstanding from consumer financial marketplaces" and that teaser rates specifically "take[] advantage of a behavioral market failure to exploit known consumer biases to the detriment of consumers"); Ronald Mann, *Mann Offers Solutions to Credit Card Debt*, COLUM. L. SCH., https://www.law.columbia.edu/news/archive/mann-offers-solutions-credit-card-debt [https://perma.cc/472E-SWRM] ("The sweat box model [of credit card lending] emphasizes

Professor Ronald Mann summarized the vicious cycle in which debt-based issuers aim to ensnare their cardholders, a cycle he aptly labeled the "sweat box" of credit card debt:

> [T]he first hint of sustained profitability comes when the cardholder (now borrower) stops regularly paying her balance in full each month. . . . [W]hatever the basis for the decision to carry a balance, this is not an event of concern. Rather, it suggests imminent profit for the issuer because the decision to carry a balance leads immediately to interest charges on the cardholder's account, which accrue at a rate far exceeding the lender's cost of funds. Moreover, once the borrower begins to carry a balance, the likelihood of . . . fees can increase substantially.
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> As the credit card borrower spirals downward . . . with the monthly balances growing to amounts that equal, or even surpass, the borrower's annual income, the issuer begins to earn large monthly profits on the relationship.[9]

In other words, the lenders' business models are squarely predicated on their customers remaining in financial distress for as long as possible before failure occurs.[10]

Ruth Owens was trapped in the sweat box for over six years. In January 1996, Owens owed Discover Bank approximately $1,400.[11] Over the course of the next year, Owens did not make any purchases on her credit card but made payments to Discover.[12] In March 1997, Owens used her credit card

the acquisition of financially naïve cardholders who will borrow without appreciating the risks of semi-permanent indebtedness."); Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 6 (2008) ("[S]ellers of credit products have learned to exploit the lack of information and cognitive limitations of consumers in ways that put consumers' economic security at risk . . . ."); Eliot Schaefer, Comment, *The Credit Card Act of 2009 Was Not Enough: A National Usury Rate Would Provide Consumers with the Protection They Need*, 41 U. BALT. L. REV. 741, 757 (2012) ("The nature of the credit card agreement and the knowledge credit card issuers obtain regarding consumer behavior place issuers in a position where they are able to exploit consumers' irrational tendencies. As highly sophisticated and well-capitalized companies, credit card issuers are in position to exploit consumers' behavioral biases . . . ." (citation omitted)).

9. Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 385–86, 391 (citation omitted). Professor Jay Westbrook initially described "the business model of squeezing a few years of fees out of debtors before financial default" as a "sweatbox." Pamela Foohey, Robert M. Lawless, Katherine Porter & Deborah Thorne, *Life in the Sweatbox*, 94 NOTRE DAME L. REV. 219, 220 n.1 (2018) (quoting John A. E. Pottow, *Private Liability for Reckless Consumer Lending*, 2007 U. ILL. L. REV. 405, 416). Mann has been credited for applying the term to credit card lending. *Id.* (citing Mann, *supra*, at 391).

10. Mann, *supra* note 9, at 391. As Mann notes, this is a stark distinction between the business model of credit card lending and that of commercial lending, for example. *Id.* at 384–85 ("For many other types of lenders . . . the most profitable customers are the ones least likely to default. . . . [T]he [commercial lending] model works best if all borrowers retain robust financial health throughout the term of their obligations.").

11. Discover Bank v. Owens, 822 N.E.2d 869, 871 (Ohio Mun. Ct. 2004).

12. *Id.* at 872.

for the last time by taking a $300 cash advance.[13] By May 1997, Owens's balance grew to $1,962.82 due to the accrual of monthly financing charges.[14] Because these financing charges put her account over its credit limit, Owens began to incur over-limit fees in addition to the financing fees.[15] "Despite never using her credit card again, Owens was charged a monthly over-limit fee" for the next six years.[16] During this six-year period, Owens made numerous payments, ultimately paying Discover a total of $3,492—roughly twice the amount she had borrowed.[17] Despite these payments, in May 2003, Discover filed a collection lawsuit against Owens for a "$5,564.28 balance still owing on the account."[18]

Representing herself, Owens submitted a handwritten answer to Discover Bank's complaint:

> I would like to inform you that I have no money to make payments. I am on Social Security Disability. After paying my monthly utilities, there is no money left except little food money and sometimes it isn't enough. If my situation was different I would pay. I just don't have it. I'm sorry.[19]

The court, exercising its equitable jurisdiction, held for Owens[20] and remarked:

> How does something like this happen? Had Owens simply stopped paying on her account in May 1997, as perhaps some unscrupulous person might have considered, her account would have been closed and charged off at approximately $2,000, an amount that Discover would have sought to collect at the court *seven years ago*. . . . But because Owens was not unscrupulous and evidently did her absolute best despite being on Social Security Disability, she found herself in debt so deeply that she ultimately came to the sad conclusion that it was a debt out from under which she could never climb. . . . Discover kept Owens's account open and active long after it was painfully obvious that she was never going to be able to make payments at the expected level.[21]

In 2009, Congress took notice of America's burgeoning credit card crisis, enacting the Credit Card Accountability Responsibility and Disclosure

13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 872, 874.
18. *Id.* at 871–72.
19. *Id.* at 871.
20. *Id.* at 875.
21. *Id.* at 872–73 (emphasis added).

Act (CARD Act).[22] This consumer-protection legislation amended the Truth in Lending Act (TILA) "to establish fair and transparent practices relating to the extension of credit under an open end consumer credit plan."[23] Further, in 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),[24] founding the Consumer Financial Protection Bureau (CFPB) in part to protect consumers from "unfair, deceptive, or abusive act[s] or practice[s]" by financial firms.[25] Now, over a decade has passed since the CFPB embarked on its campaign to make credit cards safer for consumers, yet consumers are more indebted to credit card issuers than ever before.

This Note argues that, in addition to protecting consumers from the sordid schemes of many credit card issuers, policymakers and legislative reformers must encourage use of debit cards, which are less inherently threatening to consumers' financial health. While preexisting literature has proposed debit cards as the ideal substitute for credit cards,[26] this Note proposes a three-part framework for reducing credit card penetration in favor of debit cards: Policymakers must (i) quash the availability or allure of credit card rewards programs; (ii) provide consumers with access to credit-building opportunities not tied to credit card use and adjust the current credit scoring formula; and (iii) guarantee TILA fraud protections for debit card users.

While Professor Oren Bar-Gill has proposed restricting credit card rewards for the purpose of helping debit cards replace credit cards,[27] this Note emphasizes the specific societal and consumer harms caused by credit card rewards programs and proposes that policymakers leverage this reality to make legislation that restricts credit card rewards programs more politically palatable. This Note also nests this measure within a larger framework to encourage a shift to debit. Additionally, a previous piece urged Congress to extend TILA fraud protections to debit card users because the Electronic Fund Transfer Act (EFTA) exposes those users to expansive liability and "the distinctions between debit and credit cards do not warrant disparate legal

22. Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (codified as amended in scattered sections of 15 U.S.C.).

23. *Id.* at 1734.

24. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12, 15 U.S.C.).

25. 12 U.S.C. §§ 5491(a), 5531(a) (2012).

26. *See, e.g.*, RONALD J. MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS 166 (2006) ("My argument is that we would accomplish a great deal more if we could . . . create incentives under which customers would choose to make their routine daily purchases with debit cards, not credit cards."); Jeffery C. Arnier, Jr., *Encouraging Surcharge: Toward a Market-Driven Solution to Supracompetitive Credit Card Interchange Fees*, 99 TEXAS L. REV. 621, 638 (2021) ("Debit cards bundle cheaper payment processing with the transactional efficiency of credit cards, making them an ideal candidate for substitution from credit cards.").

27. Bar-Gill, *supra* note 8, at 1421.

treatment."[28] This Note argues that such protections will grow even more critical following legislative reform encouraging a shift from credit to debit cards.

Thus, this Note proceeds as follows: Part I contends that the debit card is the ideal and likely substitute for credit cards, and that debit is probably cheaper for revolvers, transactors, and society at large. In doing so, Part I notes that consumers overwhelmingly open and use credit cards for earning rewards and building credit—not to borrow money. Part II argues that a framework for shifting consumers from credit to debit must confront credit card rewards programs and enable consumers to more easily build credit without the use of a credit card. Part II additionally considers that this framework may cause issuing banks to revoke their zero-liability debit cards and thus calls upon Congress to guarantee debit card users the same level of fraud protection that TILA offers credit card users.

I. Regulatory Efforts Should Aim to Reduce Credit Card Penetration in Favor of Debit Cards

While the CARD Act and the CFPB have transformed the landscape of the credit card market in an effort to protect consumers from financial harm and the trickery to which some credit card issuers resort,[29] these efforts have exposed the futility of making credit cards "safer."[30] The CARD Act all but eliminated overlimit fees,[31] effectively capped the late fees that credit card issuers may charge,[32] and banned interest rate increases on existing

28. D. Alex Robertson, Note, *Safe to Swipe?: Why Congress Should Amend the EFTA to Increase Debit Card User Protection*, 93 TEXAS L. REV. 505, 505 (2014).

29. For example, the CARD Act eliminated "double-cycle billing," an insidious practice that some issuers engaged in to force cardholders to pay interest on balances they might have already paid off. 15 U.S.C. § 1637(j)(1); LaToya Irby, *Ways Finance Charges Are Calculated*, THE BALANCE (June 25, 2021), https://www.thebalancemoney.com/ways-finance-charges-are-calculated-960256 [https://perma.cc/3ANQ-TEPJ]. The CARD Act also requires issuers to promptly credit payments to cardholders' accounts once received. 15 U.S.C. § 1666c(a); *see also* 12 C.F.R § 1026.10(a) (2024) (establishing the general rule that a "creditor shall credit a payment to the consumer's account as of the date of receipt"). Finally, the CFPB has taken action against multiple issuers that deceptively marketed worthless add-on products for credit card accounts to consumers. *E.g.*, CONSUMER FIN. PROT. BUREAU, SUPERVISORY HIGHLIGHTS: FALL 2012, at 7–9 (2012), https://files.consumerfinance.gov/f/201210_cfpb_supervisory-highlights-fall-2012.pdf [https://perma.cc/5KZE-L5AL].

30. *See* Bar-Gill & Warren, *supra* note 8, at 6 (arguing that credit cards are not only contracts but products that should be regulated for safety in the same manner that physical products such as toasters and lawnmowers are regulated).

31. CONSUMER FIN. PROT. BUREAU, CARD ACT REPORT 21 (2013) [hereinafter CFPB 2013 CARD ACT REPORT], https://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf [https://perma.cc/ZV5E-DERR] ("It is clear that the CARD Act has effectively eliminated overlimit fees as a source of cost to consumers and revenue to issuers.").

32. *See id.* at 63 ("Consistent with the safe harbor of [Regulation Z, which implements the CARD Act], nearly every agreement studied provided for a penalty fee on late/returned payments

balances[33]—but issuers pivoted to recoup these dents in revenue and then some.[34]

Since the CFPB assumed responsibility for the CARD Act in 2011,[35] annual percentage rates (APRs), total fees assessed to cardholders, and Americans' aggregate outstanding credit card debt have soared.[36] Additionally, despite the CARD Act requiring issuers to deliver account statements at least twenty-one days before a payment due date[37] and mandating that payment due dates be on the same date each month,[38] the incidence of late payments made by cardholders has not appeared to significantly decline.[39] In 2023, the CFPB remarked that APRs "continue to

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of $25 or less for a first violation, and $35 or less for subsequent violations within six billing cycles."); 12 C.F.R. § 226.52(b)(1)(ii) (2011) (setting limits on fees).

33. 15 U.S.C. § 1666i–1(a) ("[N]o creditor may increase any . . . finance charge applicable to any outstanding balance . . . .").

34. *See, e.g.*, *Total Revenue for Credit Card Issuing, All Establishments, Employer Firms*, FED. RSRV. BANK OF ST. LOUIS (Jan. 31, 2024, 10:32 AM), https://fred.stlouisfed.org/series/REVEF52221ALLEST [https://perma.cc/4Y2C-6MXM] (tracking the increase in revenue for the issuance of credit cards from 2009 to 2022); CFPB 2013 CARD ACT REPORT, *supra* note 31, at 24 ("The decline in late and overlimit fees was offset to some extent by an increase in the size and frequency of annual fees.").

35. *CFPB Finds CARD Act Helped Consumers Avoid More than $16 Billion in Gotcha Credit Card Fees*, CONSUMER FIN. PROT. BUREAU (Dec. 3, 2015), https://www.consumerfinance.gov/about-us/newsroom/cfpb-finds-card-act-helped-consumers-avoid-more-than-16-billion-in-gotcha-credit-card-fees/ [https://perma.cc/569G-JTR3].

36. *See* CONSUMER FIN. PROT. BUREAU, THE CONSUMER CREDIT CARD MARKET 33, 53, 63 (2023) [hereinafter CFPB 2023 REPORT], https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2023.pdf [https://perma.cc/5SQS-ZU7N] (reporting increases in credit card debt, APRs, and annual fees from 2015 to 2022); BD. OF GOVERNORS OF THE FED. RSRV. SYS., FEDERAL RESERVE STATISTICAL RELEASE: CONSUMER CREDIT 1 (2024), https://www.federalreserve.gov/releases/g19/20240807/g19.pdf [https://perma.cc/NYT6-WBPD] (reporting that commercial bank interest rates on all credit card plans were six percentage points higher in 2024 than in 2019); RSCH. & STAT. GRP., FED. RSRV. BANK OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT 3, 6 (2024), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2024Q2 [https://perma.cc/F9T7-UYZ7] (illustrating a 59% increase in outstanding credit card balances between Q1 2012 and Q3 2023). It is important to note that most credit cards have variable interest rates; in other words, the interest rates are tied to a nationwide index, such as the prime rate. *See* CFPB 2023 REPORT, *supra*, at 55–56 ("As of 2022, 98 percent of general purpose accounts in the Y-14 were variable rate cards . . . ."). However, the CFPB has also reported that "[i]ssuers' growing margin (APR less the prime rate) represents a significant portion of the increase in the average APR in the Y-14 over the past eight years." *Id.* at 53.

37. 15 U.S.C. § 1666b(a).

38. *Id.* § 1637(o)(1).

39. *See* CONSUMER FIN. PROT. BUREAU, THE CONSUMER CREDIT CARD MARKET 69–70 (2015) [hereinafter CFPB 2015 REPORT], https://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf [https://perma.cc/2VMG-CXX5] (reporting that the quarterly incidence of late fees declined to about 20% after the passage of the CARD Act and "held relatively steady" through the next several years); CFPB 2013 CARD ACT REPORT, *supra* note 31, at 24 (reporting an initial drop of approximately four percentage points in the incidence rate of late fees to 20% in 2010, but then a slight increase to 22% by the end of 2012).

rise far above the cost of offering credit," and that "[c]redit card companies charged borrowers the highest amount of interest and fees *ever measured* by the CFPB's data."[40] The CFPB has been losing a game of regulatory "Whac-a-Mole" for over a decade, and there is a demonstrated need for regulatory efforts that encourage consumers to substitute less risky payment mechanisms for their credit cards.

While debit cards were originally introduced as a substitute for checks,[41] they are also the likely and ideal substitute for credit cards.[42] The debit card, like the credit card, is safer to carry than cash, compact in size, and widely accepted by both online and brick-and-mortar merchants. Both can be added to digital wallets with ease, and most debit cards offer the consumer an experience at the point of sale identical to that associated with credit cards. As discussed, the debit card is also, on the whole, a cheaper payment product for consumers and society at large.

A. The Debit Card Is Currently a Cheaper Payment Product for Both Card Users Specifically and Society at Large

In order to rationally advocate for debit cards as a substitute for credit cards, one must first demonstrate that consumers stand to benefit from a regulatory scheme that reduces credit card penetration and encourages debit card use. Most available data on the various costs associated with debit and credit cards has proven difficult to compare. It is still clear, however, that the individual and societal costs imposed by debit are significantly less than those imposed by credit.

Available data suggests that debit cards are cheaper for payment-card users than credit cards. Notably, a debit card, unlike a credit card, decouples transacting from borrowing, meaning that debit card users do not risk accruing interest on the value of their purchases as credit card users do.[43] This distinction alone makes credit cards more likely than debit cards to cause consumers to overspend and face financial distress.[44] However, debit cards

40. *CFPB Report Finds Credit Card Companies Charged Consumers Record-High $130 Billion in Interest and Fees in 2022*, CONSUMER FIN. PROT. BUREAU (Oct. 25, 2023) (emphasis added), https://www.consumerfinance.gov/about-us/newsroom/cfpb-report-finds-credit-card-companies-charged-consumers-record-high-130-billion-in-interest-and-fees-in-2022/ [https://perma.cc/U7AX-8SPW].

41. MANN, *supra* note 26, at 100.

42. *See supra* note 26 and accompanying text.

43. *Cf.* DANIEL GRODZICKI & SERGEI KULAEV, CONSUMER FIN. PROT. BUREAU, DATA POINT: CREDIT CARD REVOLVERS 13 (2019), https://files.consumerfinance.gov/f/documents/bcfp_data-point_credit-card-revolvers.pdf [https://perma.cc/VMN7-V5AR] ("[M]ore often than not those using their [credit] cards borrow on them, and . . . this revolving state is persistent.").

44. *See* MANN, *supra* note 26, at 66–70 (noting that "it is well recognized in the psychological literature that the credit card is associated with increased spending" and finding that when other forms of borrowing "are held constant, an increase in credit card debt . . . is associated with an

can impose costs on their users, primarily in the form of account maintenance, overdraft, and non-sufficient funds (NSF) fees.[45]

Overdraft and NSF fees incurred by debit cardholders might be compared to the interest and late-payment fees paid by credit card users, while checking maintenance fees can be likened to credit card annual fees (both charge the consumer for access to funds held by the bank). In 2023, it was reported that the average credit card user pays $1,657 *in interest alone* every year.[46] While recent, comparable data on overdraft and NSF costs is limited, the CFPB found in 2014 that, on average, checking account holders incur total fees of $9.87 per month (around $118 annually)[47] and that this figure increases to $349 annually for account holders who opt in to incur penalty fees, such as overdraft or NSF charges.[48] And recently, after the CFPB increased its scrutiny of overdraft and NSF fees, a 2024 CFPB report revealed five straight quarterly declines in overdraft and NSF revenue and found that banks have significantly reduced or eliminated these fees.[49] Thus,

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increase in bankruptcy filings" and "changes in the rate of consumer bankruptcy filings depend primarily on the aggregate level of consumer borrowing *and the consumer's choice to use a credit card to borrow*" (emphasis added)); Natasha Sarin, *Making Consumer Finance Work*, 119 COLUM. L. REV. 1519, 1544 (2019) (remarking that debit is credit's cheaper counterpart); *see also* Claire Greene & Joanna Stavins, *Credit Card Debt Puzzle: Liquid Assets to Pay Bills* 11 (Fed. Rsrv. Bank of Bos., Working Paper No. 22-8, 2022), https://doi.org/10.29412/res.wp.2022.08 [https://perma.cc/478E-BKTS] ("In every year of the [Survey of Consumer Payment Choice], consumers rated credit cards as the costliest way to pay among all payment instruments (credit card, debit card, prepaid card, OBBP, BANP, cash, check, money order).").

45. *Overdraft and Account Fees*, FDIC CONSUMER NEWS (Fed. Deposit Ins. Corp.), Dec. 10, 2021, at 1–2, https://www.fdic.gov/system/files/2024-07/2021-12.pdf [https://perma.cc/D7C2-4YFD].

46. Matt Frankel, *The Average Credit Card User Pays $1,657 in Interest Every Year—Here Are 3 Ways to Avoid It*, THE ASCENT (Oct. 11, 2023), https://www.fool.com/the-ascent/credit-cards/articles/the-average-credit-card-user-pays-1657-in-interest-every-year-here-are-3-ways-to-avoid-it/#:~:text=Americans%20have%20over%20%241%20trillion,%241%2C657%20in%20interest%20every%20year [https://perma.cc/33CN-5YKS].

47. TREVOR BAKKER, NICOLE KELLY, JESSE LEARY & ÈVA NAGYPÀL, CONSUMER FIN. PROT. BUREAU, DATA POINT: CHECKING ACCOUNT OVERDRAFT 9 (2014), https://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf [https://perma.cc/3Y7D-WCW9]. A more current source reports that the average checking-account fee at top American banks is $10.77. Liz Smith, *Checking Account Fees: How Much Are They and How Can You Avoid Them?*, SMARTASSET (Apr. 21, 2024, 5:53 AM), https://smartasset.com/checking-account/cost-of-checking-account-fees-and-how-to-avoid [https://perma.cc/36LG-3DL5]. This figure is necessarily higher than the fee incurred by the average checking-account holder because the vast majority of checking-account holders take advantage of free checking and do not pay maintenance fees. *See* Sarah Foster, *Survey: Nearly Half of Americans Are Sacrificing Recession Preparedness by Paying Checking Fees*, BANKRATE (Jan. 17, 2023), https://www.bankrate.com/banking/checking-fees-survey/#monthly [https://perma.cc/X8ZP-LVV9] (noting that only 27% of checking account holders pay monthly fees).

48. BAKKER ET AL., *supra* note 47, at 9.

49. Offs. of Mkts. & Consumer Populations, *Overdraft/NSF Revenue in 2023 Down More than 50% Versus Pre-Pandemic Levels, Saving Consumers Over $6 Billion Annually*, CONSUMER FIN. PROT. BUREAU (Apr. 24, 2024), https://www.consumerfinance.gov/data-research/research-

there is a strong likelihood that the average annual cost to checking account holders has decreased since 2014.

To be sure, overdrawing a checking account can be exorbitantly expensive. Consumers often overdraw in small amounts and are assessed steep fees in comparison.[50] However, the CFPB has found that over 65% of checking accounts with an active debit cardholder do not overdraft each year.[51]

Because credit card networks charge lower interchange or "swipe" fees for debit card transactions than for credit card transactions, debit cards also impose lower transaction costs on society at large.[52] In most cases, debit card interchange fees may not legally exceed twenty-one cents plus 0.05% of the transaction value.[53] However, credit card interchange fees are unregulated, and the average credit card interchange rate hovers at 2.24% and is tacked onto flat fees of up to twenty-five cents.[54]

Although the Durbin Amendment to the Dodd-Frank Act—which went into effect through regulation in 2011—imposed a cap on debit card interchange fees,[55] debit cards have long been cheaper than credit cards with respect to the interchange fees they impose.[56] This reality—and the fact that

reports/data-spotlight-overdraft-nsf-revenue-in-2023-down-more-than-50-versus-pre-pandemic-levels-saving-consumers-over-6-billion-annually/#:~:text=Following%20five%20straight%20quarterly%20declines,in%20reported%20overdraft%2FNSF%20fees [https://perma.cc/8ZX8-JL8D].

50. *See* BAKKER ET AL., *supra* note 47, at 5 ("Transactions that lead to overdrafts are often quite small. In the case of debit card transactions, the median amount that leads to an overdraft fee is $24 . . . ."); *Overdraft and Account Fees*, *supra* note 45, at 1 ("The cost for overdraft fees varies by bank, but they may cost around $35 per transaction.").

51. DAVID LOW, ÈVA NAGYPÀL, LESLIE PARRISH, AKAKI SKHIRTLADZE & COREY STONE, CONSUMER FIN. PROT. BUREAU, DATA POINT: FREQUENT OVERDRAFTERS 8, 13 (2017), https://files.consumerfinance.gov/f/documents/201708_cfpb_data-point_frequent-overdrafters.pdf [https://perma.cc/2SAQ-TPLM].

52. Specifically, processing rewards credit cards is significantly more expensive than processing debit cards. Natasha Sarin, *What's in Your Wallet (and What Should the Law Do About It?)*, 87 U. CHI. L. REV. 553, 556 (2020) ("To process certain rewards cards, [merchants] pay more than 3 percent of total transaction value in interchange fees. This fee is significantly higher than the cost of processing debit cards . . . ." (citation omitted)).

53. *Regulation II (Debit Card Interchange Fees and Routing)*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Sept. 27, 2023), https://www.federalreserve.gov/paymentsystems/regii-average-interchange-fee.htm [https://perma.cc/CM74-KKTQ].

54. Jack Caporal, *Average Credit Card Processing Fees and Costs in 2024*, THE ASCENT (Aug. 28, 2024), https://www.fool.com/the-ascent/research/average-credit-card-processing-fees-costs-america/ [https://perma.cc/SFF9-MJEL].

55. *See* 15 U.S.C. § 1693o-2(a)(2) (requiring that debit card interchange fees be "reasonable and proportional" to the issuer's cost); 12 C.F.R. § 235.3(b) (2012) (establishing the maximum interchange fee as twenty-one cents plus 5% of the transaction value). The amendment impacted banks with $10 billion or more in assets. *Id.* § 235.5(a).

56. *See* Robin A. Prager, Mark D. Manuszak, Elizabeth K. Kiser & Ron Borzekowski, *Interchange Fees and Payment Card Networks: Economics, Industry Developments, and Policy Issues* 26 (Fed. Rsrv. Bd. Divs. of Rsch. & Stat. & Monetary Affs., Working Paper No. 2009-23,

the issuing bank typically does not face any lending risk when a consumer swipes a debit card—suggests that debit cards, as payment products, are cheaper to transact with than are credit cards.[57]

When consumers choose credit over debit, retailers collectively "make millions of dollars less on sales than they otherwise would have."[58] Additionally, merchants typically do not set differential prices for card users to recoup the costs of interchange fees. Instead, merchants pass these transaction costs on to all consumers by marking up retail prices of goods and services.[59] As a result, consumers who pay with cash or other payment mechanisms with lower transaction costs subsidize consumers who use premium credit cards with higher interchange fees.[60] While shifting to debit would not eliminate this cross-subsidization dilemma created by payment cards, doing so would enable merchants to lower the cost of retail prices and reduce subsidization's overall impact.

B. Credit Card Transactors Also Stand to Benefit from a Shift to Debit

While a reduction in credit penetration in favor of debit will likely enhance cardholder welfare (and social welfare more generally), data suggests that a significant number of consumers seek to obtain credit cards only to transact—or to take advantage of credit card "perks" without paying interest or late fees. And in fact, there are credit cardholders who successfully transact in this manner.[61] Ostensibly, then, these consumers must suffer from

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2009), https://www.federalreserve.gov/pubs/feds/2009/200923/200923pap.pdf [https://perma.cc/7X4Q-T52M] ("Credit card interchange fees have been above signature debit card interchange fees since 2003, and both credit and signature debit interchange fees have consistently exceeded PIN debit interchange fees."); Alan S. Frankel & Allan L. Shampine, *The Economic Effects of Interchange Fees*, 73 ANTITRUST L.J. 627, 636–37 (2006) ("Merchants generally consider credit and charge cards, followed by signature debit cards, to be the most expensive of the commonly accepted payment methods. . . . [These fees are] much higher than interchange fees charged by ATM/debit card networks for online, PIN-verified debit transactions." (citation omitted)); MANN, *supra* note 26, at 29–30 ("[T]he charges to merchants for PIN-based transactions are much lower than the charges for conventional credit card transactions . . . . PIN-less debit transactions cost the merchants . . . considerably less than credit card transactions . . . .").

57. *See* MANN, *supra* note 26, at 123 ("The most reliable data . . . suggest that credit cards often are . . . the most expensive system and that debit cards are almost always less expensive than credit cards . . . ."). PIN-based debit cards, specifically, are also a cheaper payment product due to their low fraud rates. *See id.* at 31 (noting such low fraud rates).

58. *See* Samuel J. Merchant, Comment, *Merchant Restraints: Credit-Card-Transaction Surcharging and Interchange-Fee Regulation in the Wake of Landmark Industry Changes*, 68 OKLA. L. REV. 327, 327 (2016) (discussing how credit card fees cost merchants).

59. Frankel & Shampine, *supra* note 56, at 632–33, 635.

60. *Id.* at 636 n.30.

61. *See* Robert Adams, Vitaly M. Bord & Bradley Katcher, *Credit Card Profitability*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Apr. 20, 2023), https://doi.org/10.17016/2380-7172.3100 [https://perma.cc/XR88-Y2EH] (finding that 21.47% of active accounts with a twelve-month history did not carry a balance at all over a twelve-month period, excluding "instances of revolving due to a forgotten payment").

few if any of the financial harms that stem from credit card use. Thus, the case must be made for encouraging these transactors—both would-be transactors and the transactors analyzed in the literature—to choose debit as well. The data suggests that even would-be and apparent transactors stand to benefit from a regulatory scheme that encourages cardholders at large to choose debit over credit cards.

1. Data Suggests that Many Would-Be Transactors Will Borrow on Their Credit Cards.—Scholars have proposed that consumers regularly misjudge how much they will borrow on their credit cards.[62] Moreover, both academics and empirical data suggests that consumers underestimate the likelihood that they will borrow on their credit cards *at all*.[63]

Indeed, consumers primarily open credit cards for non-borrowing reasons. In 2018, approximately 55% of 2,500 consumers self-reported that they would open a new credit card to earn cash back, travel rewards, or store rewards.[64] Another 42% indicated that they would open a new credit card to

62. *E.g.*, Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1642 (2014); Bar-Gill, *supra* note 8, at 1395.

63. *See* Jennifer Tescher & Corey Stone, *Revolving Debt's Challenge to Financial Health and One Way to Help Consumers Pay It Off*, BROOKINGS INST. (June 7, 2022), https://www.brookings.edu/articles/revolving-debts-challenge-to-financial-health-and-one-way-to-help-consumers-pay-it-off/ [https://perma.cc/RD9P-CE3P] ("Many expect not to borrow on their credit card accounts but end up carrying balances anyway . . . ."); Bar-Gill, *supra* note 8, at 1375 ("Often the consumer will end up borrowing on her credit card, despite her ex ante intentions *not* to borrow."); Lawrence M. Ausubel, *The Failure of Competition in the Credit Card Market*, 81 AM. ECON. REV. 50, 72 (1991) ("[T]he data provide indirect empirical confirmation of the presence of consumers who act as though they do not intend to borrow but who continuously do so.").

64. Kristin McGrath, *U.S. Credit Card and Debt Study 2018*, CREDIT CARDS EXPLAINED (Aug. 15, 2018), https://www.creditcardsexplained.com/articles/credit-card-and-debt-survey [https://perma.cc/GV82-6X9E]; *see also* Press Release, J.D. Power, Credit Card Rewards Battle Continues as Customers Seek Better Programs, J.D. Power Finds (Aug. 16, 2018), https://www.jdpower.com/system/files/legacy/assets/2018135_u.s._credit_card_study_v2.pdf [https://perma.cc/5L22-57SC] (reporting that "47% of credit card customers who switched to a new card . . . did so for a better rewards program"); *The Most Important Factors for Consumers Choosing a Credit Card*, PAYMENTSJ. (Nov. 18, 2021), https://www.paymentsjournal.com/the-most-important-factors-for-consumers-choosing-a-credit-card/ [https://perma.cc/6NTR-97EW] ("50% of credit card users say an attractive points/rewards program is an important consideration when deciding which credit card to apply for."); Andrew Latham, *2024 Consumer Credit Card Industry Study*, SUPERMONEY (Mar. 15, 2024), https://www.supermoney.com/studies/credit-card-industry-report/ [https://perma.cc/C6QA-A66Z] ("Rewards are the most attractive feature for consumers shopping for credit cards.").

improve their credit scores.[65] Notably, few consumers reported that they would open a credit card because they need access to more credit.[66]

Data also suggests that credit cardholders actually use their cards at the point of sale for the same non-borrowing reasons.[67] The results of one 2020 survey revealed that 47% of American adults have used a credit card *solely* to earn rewards points.[68] And another source reported on a survey in which 70% of consumers responded that they use credit cards either to earn rewards (36%) or build credit (34%).[69]

Additionally, planning to borrow is especially irrational on rewards credit cards because rewards cards typically have much higher interest rates than their non-rewards counterparts, and borrowing negates the rewards earned.[70] Borrowing on a credit card is also one of the least efficient and least

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65. McGrath, *supra* note 64; *see also* Nicole Spector, *The Top Reasons People Use Credit Cards May Surprise You*, GOBANKINGRATES (Oct. 19, 2021), https://www.gobankingrates.com/uncategorized/the-top-reasons-people-use-credit-cards-may-surprise-you/?utm_campaign=1146044&utm_source=yahoo.com&utm_content=14&utm_medium=rss [https://perma.cc/WGC8-FP7A] (noting that over 20% of credit card users employ credit cards to "build or repair their credit").

66. *See* McGrath, *supra* note 64 (reporting that only 8% of consumers would open a new credit card because they maxed out one they already have); *see also Survey Findings: How Do Consumers Feel About Credit Cards?*, EXPERIAN [hereinafter *Survey Findings*], https://www.experian.com/blogs/ask-experian/survey-findings-how-do-consumers-feel-about-credit-cards/ [https://perma.cc/472R-PQG3] (reporting that only 9% of survey respondents in the market for a new credit card cited the need for a higher credit limit); Salman Haqqi, *Why Do People Use Credit Cards?*, MONEY (Oct. 13, 2022), https://www.money.co.uk/credit-cards/why-do-people-use-credit-cards [https://perma.cc/6FTZ-5T7Y] (finding that only 11.2% of surveyed consumers use a credit card to "access money [they] do not have upfront"); Spector, *supra* note 65 (reporting that less than 10% of credit card users primarily use their cards to defer payment or finance large purchases).

67. *See* CFPB 2023 REPORT, *supra* note 36, at 98 (noting that rewards drive originations and that "[a]fter a consumer chooses to open a card, rewards continue to play a major role, often determining card choice at point-of-sale"); Spector, *supra* note 65 (reporting that almost 25% of people primarily use credit cards for perks and rewards while over 20% primarily use them "to build or repair their credit, meaning nearly half of [survey] respondents primarily use credit cards not to pay for things, but to achieve another goal"); *see also* Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1346 (2008) ("Rewards cards are driving the increase in credit card usage.").

68. *Chasing Points: How Many of Us Use Credit Cards Just for the Rewards?*, FINDER [hereinafter *Chasing Points*], https://www.finder.com/chasing-points [https://perma.cc/M7GS-DHYC].

69. *Survey Findings*, *supra* note 66.

70. *See* CFPB 2023 REPORT, *supra* note 36, at 68 ("When a consumer revolves a balance on their credit card, interest and fee costs typically exceed the value of any rewards earned."); Louis DeNicola, *Are Credit Card Rewards Worth It?*, EXPERIAN (July 10, 2024), https://www.experian.com/blogs/ask-experian/are-rewards-cards-worth-it/ [https://perma.cc/79SV-F4AY] ("Rewards cards may have a higher APR than non-rewards cards. . . . [C]arrying a balance . . . could accrue interest daily . . . [and] a low-interest credit card could be a better alternative."); Melissa Lambarena, *What Is a Good APR for a Credit Card?*, NERDWALLET (Sept. 16, 2024, 8:31 PM), https://www.nerdwallet.com/article/credit-cards/what-is-a-good-apr-for-a-credit-card#:~:text=Rewards%20credit%20cards%20and%20store,the%20value%20of%20your%20rewards [https://perma.cc/TRN7-94UQ] ("[T]he interest [on rewards credit cards] can

effective ways to build credit. While opening a card and carrying a balance does create a credit history for a consumer who otherwise had none, revolving even a small balance impacts credit scores negatively and costs consumers interest.[71] All this to say: The rational consumer who opens or uses a credit card for reward-earning or credit-building purposes likely plans to do so without going into debt.[72]

Another perhaps more disturbing data point indicates that many credit card users do not initially intend to borrow. The CFPB reports that "many consumers do not know their credit card APR, nor do they shop with it in mind."[73] And a recent survey reveals that 43% of those carrying credit card debt do not know the attached interest rates on those cards.[74] At the same time, consumers are aware of the relationship between interest and their loan balances.[75]

Yet a variety of sources suggest that the majority of credit card users are revolving a balance on their cards at any given time.[76] Additionally, a recent

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more than offset the value of your rewards."); Emily Stewart, *Your Credit Card Rewards Might Not Be Worth It*, VOX (Jan. 17, 2023, 6:00 AM), https://www.vox.com/the-goods/2023/1/17/23550612/credit-card-rewards-fico-score-balance [https://perma.cc/3NWG-BXTP] ("Less financially sophisticated consumers—meaning people with higher unpaid balances or who don't pay off their cards month to month—ultimately end up losing out.").

71. *See* Daniel Grodzicki & Sergei Koulayev, *Sustained Credit Card Borrowing*, 55 J. CONSUMER AFFS. 622, 624 (2021) ("[W]e document a substantial and persistent decline in individuals' credit score during a revolving episode.").

72. The credit card market is plagued with informational asymmetries. Evidence suggests, however, that consumers are well attuned to the credit-scoring formula's major variables. One study reported that when asked "[w]hich of these is typically the biggest factor in determining your credit score?x," about 82% of consumers chose one of the two best answers to the question (the best answers being "[h]ow often you pay your bills on time" and "[h]ow much debt you have compared to your available credit"). Matt Schulz, *Nearly 4 in 10 Americans Say They 'Have No Idea' How Credit Scores Work*, LENDINGTREE (Jan. 2, 2019), https://www.lendingtree.com/credit-cards/study/americans-no-idea-how-credit-scores-work/#biggest-factor [https://perma.cc/LW2M-DMVW]. Consumers also appear to be aware that borrowing defeats the benefit of rewards. *See* Press Release, J.D. Power, Credit Card Issuers Must Confront Consumers' Mounting Debt, J.D. Power Finds (Aug. 17, 2023), https://japan.jdpower.com/en/press-releases/2023_us_credit_card_satisfaction_study [https://perma.cc/2998-ZAUB] (reporting that "[a]s the overall financial health of cardholders deteriorates, customer satisfaction with rewards programs . . . is suffering").

73. CFPB 2023 REPORT, *supra* note 36, at 54.

74. Erica Sandberg, *Survey: More Americans Are Carrying Debt, and Many of Them Don't Know Their APRs*, BANKRATE (Jan. 10, 2023), https://www.bankrate.com/finance/credit-cards/more-americans-carrying-debt-and-many-dont-know-apr/ [https://perma.cc/EER3-YR48].

75. Issuers' use of low-interest "teaser" rates to appeal to consumers indicates that consumers are sensitive to and understand the relationship between interest rates and their credit card balances. *See* Oren Bar-Gill & Ryan Bubb, *Credit Card Pricing: The Card Act and Beyond*, 97 CORNELL L. REV. 967, 1005–10 (2012) (examining issuers' practice of luring consumers with short-term low-interest rates).

76. *See, e.g.*, Press Release, J.D. Power, Show Me the Money! Cashback and Value Credit Cards Grow in Popularity as Financial Health of Cardholders Declines, J.D. Power Finds (Aug. 15, 2024), https://www.jdpower.com/business/press-releases/2024-us-credit-card-satisfaction-study [https://perma.cc/WU8J-UZJU] ("For a second consecutive year, 51% of cardholders are carrying

survey reveals that 81% of credit cardholders have been in credit card debt *at some point* in their lives.[77]

In sum, data suggests that most consumers open and use credit cards for non-borrowing reasons and are instead likely would-be transactors. At the same time, however, the overwhelming majority of credit card users end up borrowing on their cards.[78] Thus, it is likely that many, if not most, would-be transactors end up revolving a balance on their credit cards, become trapped in an expensive cycle of debt,[79] and stand to benefit from a regulatory scheme that reduces credit card penetration and encourages debit card use.

2. Debit Cards Are Also Likely Cheaper for Those That the Literature Deems Transactors.—Perhaps least obvious is the proposal that the credit card accounts that the literature deems successful "transactors" stand to benefit from a shift to debit cards as well.

For credit card users who do not revolve a balance for an extended period, annual fees are the primary cost of using a credit card.[80] Of course, some transactors may open and use zero-annual-fee cards, thus transacting with their credit cards for free. In 2022, however, the Federal Reserve Board found that transactor accounts (active accounts that did not revolve a balance for twelve months) paid almost 30% of all annual fees while comprising only about 20% of all accounts.[81] This data point suggests that most transacting accounts pay annual fees or that transactor accounts typically hold cards that carry relatively high annual fees.

Whether transacting accounts specifically are more likely than credit card users generally to recoup money spent on annual fees by redeeming rewards merits further study and consideration. However, in view of current data indicating that many consumers are not taking advantage of their rewards,[82] it is likely that many transactors incur a positive net cost from their credit cards when they could be transacting with debit for zero direct cost.[83]

revolving debt."); Matt Brannon, *Credit Card Debt: 1 in 4 Americans Fall Deeper Into Debt Each Month (2023 Data)*, CLEVER (Sept. 18, 2023), https://listwithclever.com/research/average-american-credit-card-debt-2023/ [https://perma.cc/T5HW-H4BR] (reporting that "61% of American credit card users are in credit card debt").

77. Dawn Papandrea, *81% of Credit Cardholders Have Been in Debt, but Only 39% Have Taken Advantage of Consolidation*, LENDINGTREE (July 31, 2023), https://www.lendingtree.com/credit-cards/study/debt-payoff-strategies/ [https://perma.cc/HTX3-H2S6].

78. *Id*.

79. *See* GRODZICKI & KULAEV, *supra* note 43, at 13 (noting that, when credit card users revolve a balance, the revolving state is "persistent").

80. CFPB 2023 REPORT, *supra* note 36, at 51. Transactors, by definition, do not pay late fees.

81. Adams et al., *supra* note 61.

82. *See infra* subsection II(A)(2)(b).

83. It is also worth mentioning that, in 2023, the CFPB reported that a small number of "transactors" were in "persistent debt" due to "high annual fees and few purchases." CFPB 2023 REPORT, *supra* note 36, at 71.

Furthermore, "[t]he real cost seeps into [consumers'] spending behavior, subtly nudging [them] to spend more with the promise of earning more, distorting [their] financial priorities."[84] Would-be transactors are presumably more rewards-oriented than other cardholders and thus more likely to be enticed to spend for the sake of earning rewards when they otherwise would not.[85]

More importantly, "transactor" or "transacting" are often over-simplified terms to describe the accounts studied in the literature. Rather than encompassing active credit card accounts that have never revolved a balance (or even those that have transacted for more billing cycles than they have borrowed), these terms are often defined by a certain time period.[86] And in light of data indicating that the vast majority (81%) of credit card users have revolved a balance at some point,[87] it is likely only a matter of time before these accounts revolve a balance if they have not already done so.

II. The Proposed Framework for a Shift from Credit to Debit

The following framework proceeds from the insight that if policies render credit cards less desirable with respect to their most enticing features or make these features available elsewhere, credit card users will gravitate towards debit cards. Debit and credit cards are extensively interchangeable payment products, and other payment mechanisms such as cash, checks, and "buy now, pay later" loans do not rival the debit card's ease of use or ubiquitous acceptance by merchants. Also, as mentioned, consumers primarily open and use credit cards without intending to use their borrowing function.[88] Finally, most U.S. credit cardholders already have a debit card they can reach for instead.[89]

84. Jordi Lippe-McGraw, *Why Reward Credit Cards Might Not Be Rewarding for Everyone*, MOTLEY FOOL MONEY (May 9, 2024), https://www.fool.com/money/credit-cards/articles/why-reward-credit-cards-might-not-be-rewarding-for-everyone/#:~:text=The%20real%20cost%20seeps%20into,of%20those%20setting%20the%20rules%3F [https://perma.cc/H68X-J2E6].

85. *See infra* subsection II(A)(2)(b).

86. *See, e.g.*, Adams et al., *supra* note 61 (defining a "transactor" account as an account that did not revolve a balance for a period of twelve months); CFPB 2015 REPORT, *supra* note 39, at 46 (assuming that an account is transacting if it was "paid in full in the prior two billing cycles").

87. Papandrea, *supra* note 77.

88. *See supra* section I(B)(1).

89. *See* KEVIN FOSTER, CLAIRE GREENE & JOANNA STAVINS, FED. RSRV. BANK OF ATLANTA, THE 2020 SURVEY OF CONSUMER PAYMENT CHOICE: SUMMARY RESULTS 7 (2021), https://www.atlantafed.org/-/media/documents/banking/consumer-payments/survey-of-consumer-payment-choice/2020/2020-survey-of-consumer-payment-choice.pdf [https://perma.cc/Z8HR-U6WC] (finding that 85% of consumers own a debit card and that "79 percent of consumers reported that they had a credit or charge card").

A. *Policymakers Must Quash the Availability or Allure of Credit Card Rewards Programs*

Because credit card rewards programs are the main driver of credit card account originations and use,[90] policymakers must confront the availability or the allure of credit card rewards programs to support a shift from credit to debit card use. Indeed, one study reveals that lower levels of credit card rewards are associated with higher shares of debit card purchases in terms of both value and volume.[91]

Consumers are enchanted by credit card rewards programs, so lawmakers are all but physically restrained from acting to ban these programs outright. They can, however, shape the rewards landscape with legislation that targets interchange fees.

In 2010, the Durbin Amendment to the Dodd-Frank Act instructed the Federal Reserve Board to regulate debit card interchange fees to make them "reasonable and proportional to the cost incurred by the issuer with respect to the transaction."[92] Debit card issuers were forced to reduce interchange fees and because interchange fees often fund rewards,[93] debit card rewards were effectively eliminated.[94] In an effort to put similar pressure on credit card issuers, a bipartisan congressional cohort (which included Senator Durbin) introduced the Credit Card Competition Act (CCCA) in 2023, which would not explicitly cap credit card interchange fees but would instead facilitate competition among issuers in an effort to lower the price of interchange.[95] Personal finance pundits forecast that credit card rewards will become extinct if the CCCA passes.[96]

90. *See supra* section I(B)(1).

91. Carlos Arango, Kim P. Huynh & Leonard Sabetti, *Consumer Payment Choice: Merchant Card Acceptance Versus Pricing Incentives*, 55 J. BANKING & FIN. 130, 133–34 (2015).

92. 15 U.S.C. § 1693o-2(a)(2).

93. John Egan, *What Are Interchange Fees?*, INVESTOPEDIA (Apr. 18, 2024), https://www.investopedia.com/terms/i/interchange-rate.asp [https://perma.cc/8C6N-UVDE].

94. *See* Ryan McCarthy, Recent Development, *The Durbin Amendment: Summary, Impact, and Reform*, 37 REV. BANKING & FIN. L. 68, 79 (2017) (noting that "banks cut debit reward programs" in response to the Durbin Amendment and losses in interchange fees); Norbert Michel, *Durbin Remains Persistent—and Misguided*, FORBES (June 13, 2023, 6:00 AM), https://www.forbes.com/sites/norbertmichel/2023/06/13/durbin-remains-persistent--and-misguided/?sh=342d02c51f5c [https://perma.cc/579Q-FLHY] ("[T]he 2010 Durbin amendment led to the virtual disappearance of debit card rewards programs . . . .").

95. Press Release, Dick Durbin, Sen., Durbin, Marshall, Welch, Vance Introduce Bipartisan Credit Card Competition Act (June 7, 2023), https://www.durbin.senate.gov/newsroom/press-releases/durbin-marshall-welch-vance-introduce-bipartisan-credit-card-competition-act [https://perma.cc/K8Z9-Z6PU]; Credit Card Competition Act of 2023, S. 1838, 118th Cong. (2023).

96. *See, e.g.*, Kenley Young, *Is Congress Going to Kill Credit Card Rewards?*, NERDWALLET (Feb. 23, 2024, 11:26 AM), https://www.nerdwallet.com/article/credit-cards/is-congress-going-to-kill-credit-card-rewards [https://perma.cc/4N2Z-AZ7S] (discussing one pundit's prediction that credit reward programs will "dry up, just as they did with debit cards"); Dawn Nici, *Credit Card Rewards Still Safe as Congress Sets Aside Credit Card Competition Act*, NASDAQ (Aug. 10, 2023,

While this predicted result is desirable, it is likely that these sources underestimate credit card issuers' commitment to offering rewards. Merchant coalitions in favor of the CCCA retort that rewards programs are issuers' most effective marketing tools, and issuers are likely to cut into other sources of revenue to fund them.[97] Issuers may alternatively increase non-penalty fees[98] or APRs (and thus, the overall cost of credit) to recoup the loss in income. Moreover, credit card rewards programs persist in other jurisdictions that have regulated both credit and debit interchange fees. A decade after both debit and credit interchange fees were capped in Australia, for example, the Reserve Bank of Australia noted the "existence of significant credit card rewards programs."[99] Additionally, the European Union adopted a regulation capping both debit and credit card interchange fees in 2015,[100] and while credit card rewards programs in Europe tend to be less generous than those offered to U.S. consumers, large issuers in Europe still offer credit cards with cashback and rewards.[101]

Aiming the Durbin Amendment at the right target is likely a more effective legislative approach. In other words, rather than capping credit card

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9:19 AM), https://www.nasdaq.com/articles/credit-card-rewards-still-safe-as-congress-sets-aside-credit-card-competition-act [https://perma.cc/TPA8-XQZU] (discussing banking groups' predictions that the legislation would reduce funding for credit card rewards); Caroline Tanner & Nick Ewen, *Explaining the Credit Card Competition Act and What It Means for Your Credit Card Rewards*, THE POINTS GUY (Dec. 4, 2023), https://thepointsguy.com/news/credit-card-competition-act/ [https://perma.cc/P5YY-USNC] (predicting that the legislation could lead to companies reducing or discontinuing rewards programs).

97. Press Release, Merchs. Payments Coal., New Study Says 'Swipe' Fee Bill Would Not Lead to Loss of Credit Card Rewards (July 24, 2023), https://merchantspaymentscoalition.com/new-study-says-swipe-fee-bill-would-not-lead-to-loss-of-credit-card-rewards/ [https://perma.cc/R2BD-QRGW]; Meghan Cruz, *4 Things to Know About the Credit Card Competition Act*, NAT'L RETAIL FED'N (Sept. 14, 2023), https://nrf.com/blog/4-things-know-about-credit-card-competition-act [https://perma.cc/93VA-2MZA]; *see also* Fumiko Hayashi, *Do U.S. Consumers Really Benefit from Payment Card Rewards?*, FED. RSRV. BANK KAN. CITY: ECON. REV., First Quarter 2009, at 37, 40 ("Card issuers typically have several potential revenue sources to pay for rewards.").

98. The CARD Act has effectively prevented issuers from raising "penalty" fees, such as late fees, via its "safe harbor" provision. *See* 15 U.S.C. § 1665d(a), (e) (requiring penalty fees to be "reasonable and proportional" and creating governmental authority to prescribe a particular number at which such fees are presumed to be so).

99. RSRV. BANK OF AUSTL., REVIEW OF CARD PAYMENTS REGULATION 14–16 (2016), https://www.rba.gov.au/payments-and-infrastructure/review-of-card-payments-regulation/pdf/review-of-card-payments-regulation-conclusions-paper-2016-05.pdf [https://perma.cc/2KBQ-QLZ3].

100. Council of the European Union Press Release, Capping Fees for Card-Based Payments: Regulation Adopted (Apr. 20, 2015), https://www.consilium.europa.eu/en/press/press-releases/2015/04/20/capping-fees-card-based-payments/ [https://perma.cc/G4YA-8Z9W].

101. *See* JULIAN MORRIS, INT'L CTR. FOR L. & ECON., THE CREDIT CARD COMPETITION ACT'S POTENTIAL EFFECTS ON AIRLINE CO-BRANDED CARDS, AIRLINES, AND CONSUMERS 3, 23–24 (2023), https://laweconcenter.org/resources/the-credit-card-competition-acts-potential-effects-on-airline-co-branded-cards-airlines-and-consumers/ [https://perma.cc/NBC6-LVDY] (discussing how credit card issuers "increase[d] interest rates and late fees so that they [could] continue to offer some level of rewards").

interchange fees *in addition to* debit card interchange fees, legislation should instead regulate *only* credit card interchange fees. And in fact, until extensive lobbying by credit card networks and financial firms shifted the Durbin Amendment's focus to debit, credit card interchange fees were in lawmakers' crosshairs.[102]

Prior to the amendment, debit card rewards were popular with consumers.[103] In response to the adoption of the Durbin Amendment, however, banks jettisoned most debit card rewards programs and began offering more robust rewards with their credit-based products, whose interchange fees were left unregulated.[104] This time around, banks would be incentivized to make the same move in reverse.

While capping credit interchange fees would position debit cards to impose greater social costs than credit cards,[105] the aggregate societal costs imposed by payment-card products would not increase if the cap caused debit card interchange rates to increase a proportional amount. These societal costs would then be accompanied by the benefits to credit cardholders who are no longer incentivized to simmer in the credit card sweat box. Additionally, debit users would be subsidized by consumers paying with cash to a much lesser extent than credit card users are currently subsidized by those paying with debit or cash, as debit cards are more equitably distributed than the highest tier of rewards credit cards.[106]

However, because credit cards are a lucrative source of income for credit card issuers[107] and the borrowing function of a credit card makes up

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102. Vladimir Mukharlyamov & Natasha Sarin, The Impact of the Durbin Amendment on Banks, Merchants, and Consumers 10 (Jan. 31, 2019) (unpublished manuscript) (on file with the University of Pennsylvania Carey Law School: Legal Scholarship Repository); *see also* Credit Card Interchange Fees Act of 2008, H.R. 6248, 110th Cong. § 192 (2008) (proposing to regulate interchange fees for credit and debit cards); Credit Card Fair Fee Act of 2008, H.R. 5546, 110th Cong. (2008) (proposing to "amend the antitrust laws to ensure competitive market-based rates").

103. Blake Ellis, *Wells Fargo, Chase, SunTrust Cancel Debit Rewards Program*, CNN MONEY (Mar. 28, 2011, 10:08 AM), https://money.cnn.com/2011/03/25/pf/debit_rewards/index.htm [https://perma.cc/GY6D-C68G] ("Debit rewards are so popular with customers and these days it's something they expect to see when they sign up for a debit card . . . .").

104. McCarthy, *supra* note 94, at 79; Julia Kagan, *Durbin Amendment: What It Is, How It Works, Impact*, INVESTOPEDIA (Apr. 11, 2024), https://www.investopedia.com/terms/d/durbin-amendment.asp [https://perma.cc/GT4R-GM8Q]; Margarette Burnette, *The Durbin Amendment Explained*, NERDWALLET (Aug. 30, 2017), https://www.nerdwallet.com/blog/banking/durbin-amendment-explained/ [https://perma.cc/8GQ3-EJ7W]; *see also* Claire Tsosie, *Where Does the Money for Credit Card Rewards Come From?*, NERDWALLET (Mar. 28, 2024, 6:56 AM), https://www.nerdwallet.com/article/credit-cards/where-does-money-for-credit-card-rewards-come-from [https://perma.cc/75KE-XVXX] ("After the Durbin Amendment . . . capped interchange rates on debit cards, debit card rewards programs quickly vanished.").

105. *See supra* section I(A)(2).

106. *See infra* subsection II(A)(2)(a).

107. *See* Joe Resendiz, *How Credit Card Companies Make and Earn Money*, VALUEPENGUIN (July 10, 2024), https://www.valuepenguin.com/how-do-credit-card-companies-make-money

roughly 80% of its profitability,[108] there is still a risk that issuers will find ways to keep rewards programs afloat. Furthermore, while consumers extol the perceived benefits of rewards, evidence suggests that payment-card rewards programs are innately problematic, fueling regressive wealth redistribution and incentivizing consumers to overspend.[109] Thus, this Note proposes an alternative: The CFPB should inform consumer choice to quash the allure of credit card rewards programs.

Because many consumers feel capable of besting issuers when they open and use rewards credit cards, any proposed legislation to restrict rewards programs would be politically unpalatable at this time. The CFPB must reframe the conversation about rewards and invest in an active public-education campaign to inform consumers of the perils that reward cards pose at both the societal and cardholder levels. While critics of this proposal may contend that financial education fails to change consumer behavior,[110] the CFPB itself has found that light-touch financial education—or financial education that "reduce[s] the need for consumers to absorb, retain and apply extensive knowledge" and employs general guidelines such as "Don't swipe the small stuff: Use cash when it's under $20"—can be an agent of such change.[111]

The CFPB's website currently features a consumer education page that employs this light-touch method and provides information on credit card basics and key terms.[112] But the webpage does not focus on the hazards of credit card rewards programs (or even rewards programs generally).[113] At a minimum, the CFPB should highlight the following pitfalls of payment card rewards programs in its consumer education materials to give consumers pause and to render a legislative ban on payment card rewards programs an attainable solution. As an example of an initial rewards-oriented guideline, this Note suggests: "There's no such thing as a free reward."

[https://perma.cc/C9K3-9MH2] ("The primary way that banks make money is interest from credit card accounts.").

108. Adams et al., *supra* note 61.

109. *See infra* section II(A)(2).

110. *See* Lauren Willis, *Financial Education: Lessons Not Learned and Lessons Learned*, *in* LIFE-CYCLE INVESTING: FINANCIAL EDUCATION AND CONSUMER PROTECTION 125, 125 (Zvi Bodie, Laurence B. Siegel & Lisa Stanton eds., 2012) ("[N]o strong empirical evidence validates the theory that financial education leads to household well-being through the pathway of increasing literacy leading to improved behavior . . . .").

111. *See* CONSUMER FIN. PROT. BUREAU, THE POWER OF LIGHT-TOUCH FINANCIAL EDUCATION 6, 18 (2017), https://files.consumerfinance.gov/f/documents/201701_cfpb_Financial-Education-Research-Brief.pdf [https://perma.cc/A9M7-8YW2] (reporting that participants in a study who were exposed to light-touch guidelines had "lower credit card balances in the six months during which the rules were sent").

112. *Credit Cards*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/consumer-tools/credit-cards/ [https://perma.cc/J8BC-U9UB].

113. *Id.*

Rewards Programs Are Regressive and Economically Inefficient. Several scholars agree that retail price markups by merchants to recoup interchange fees from credit card sales result in the subsidization of credit card users by consumers who use any other method of payment.[114] In 2010, when studying the redistribution (from consumers who do not use credit cards to credit card users) effected by rewards programs, the Federal Reserve Bank of Boston found that households using non-credit payment mechanisms pay $149 to card-using households and each credit card-using household receives $1,133 from non-credit users every year.[115] Cross-subsidization is observed even among credit card users. When FICO scores are used as a proxy for cardholder sophistication, one can observe a wealth transfer from naive to sophisticated credit card users.[116] And of course, because higher interchange fees typically attach to premium rewards cards, there is likely a subsidization of premium credit cardholders by less-affluent consumers who swipe more affordable cards.[117]

Furthermore, economists have remarked that rewards programs are inefficient,[118] and a study by the Federal Reserve Bank of Kansas City supports this position, finding that "in most cases . . . [eliminating rewards] would enhance social welfare."[119]

Indeed, credit card reward programs appear to be loss leaders and function to increase revenue despite the direct cost they pose to issuers.[120] While the interchange fees[121] resulting from one cardholder's use of her card

114. *E.g.*, Dennis W. Carlton & Alan S. Frankel, *The Antitrust Economics of Credit Card Networks*, 63 ANTITRUST L.J. 643, 660–61 (1995); Marius Schwartz & Daniel R. Vincent, *The No Surcharge Rule and Card User Rebates: Vertical Control by a Payment Network*, 5 REV. NETWORK ECON. 72, 75 (2006); Scott Schuh, Oz Shy & Joanna Stavins, *Who Gains and Who Loses from Credit Card Payments? Theory and Calibrations* 3 (Fed. Rsrv. Bank of Bos., Public Policy Discussion Paper No. 10-03, 2010), http://dx.doi.org/10.2139/ssrn.1652260 [https://perma.cc/ANU8-VB3H].

115. Schuh et al., *supra* note 114, at 3.

116. Sumit Agarwal, Andrea Presbitero, Andre F. Silva & Carlo Wix, *Who Pays for Your Rewards? Redistribution in the Credit Card Market* 4, 6, 25 (Fed. Rsrv. Bd., Finance and Economics Discussion Series Working Paper No. 2023-007, 2022), https://www.federalreserve.gov/econres/feds/files/2023007pap.pdf [https://perma.cc/7EMP-RWNJ].

117. Chenzi Xu & Jeffrey Reppucci, *The Dirty Little Secret of Credit Card Rewards Programs*, N.Y. TIMES (Mar. 4, 2023), https://www.nytimes.com/2023/03/04/opinion/credit-card-rewards-points-poor-interchange-fees.html [https://perma.cc/P77U-L67S].

118. *E.g.*, Ian Thomsen, *Your Credit Card Rewards May Be in Danger. Here's Why That's a Good Thing.*, NE. GLOB. NEWS (Aug. 4, 2022), https://news.northeastern.edu/2022/08/04/credit-card-reward/ [https://perma.cc/M452-JFQG]; *see also* John Simon, *Payment Systems Are Different: Shouldn't Their Regulation Be Too?*, 4 REV. NETWORK ECON. 364, 367 (2005) ("[E]conomic efficiency can be impaired just as much by excessive subsidies as by excessive taxes. And all consumers, not just credit card users, ultimately pay for the rewards through higher prices for goods . . . .").

119. Hayashi, *supra* note 97, at 52.

120. Tsosie, *supra* note 104.

121. Issuers often rely on interchange fees to fund rewards programs. Egan, *supra* note 93.

may not fully cover that same cardholder's earned rewards, issuers hedge that her account will nevertheless accrue interest and generate a profit.[122]

Additionally, issuers *count* on consumers to not redeem all the rewards they earn.[123] Issuers' "forecasted earnings are often predicated on the assumption consumers will not redeem the full value of their rewards over the life of the account."[124] This assumption is all the more likely to manifest when consumers have poor credit scores. Over 80% of issuers' revenue on rewards cards held by super-prime consumers comes from interchange fees.[125] For subprime consumers, however, interest generates more than 60% of issuer revenue.[126] As a result, in recent years, credit card issuers have made rewards cards increasingly accessible to subprime and deep-subprime consumers.[127]

Rewards Programs Exploit Cardholders. Perhaps unsurprisingly, data also suggests that rewards-oriented consumers are at a greater risk of overspending on their credit cards. One study reveals that consumers who self-reported as "fully understand[ing] how to earn and redeem points" spent about 30% more on average than consumers who reported they do not fully understand their rewards programs.[128]

Moreover, many consumers who use rewards credit cards are not redeeming the rewards they earn.[129] In 2023, the CFPB remarked that

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122. Tsosie, *supra* note 104; *see also* Adams et al., *supra* note 61 (finding that "by the end of 2021[,] net transaction income—before taking out rewards expense—was approximately 1.3 cents per dollar of purchases, and rewards expenses were approximately 1.5 cents per dollar of purchases"); Bar-Gill, *supra* note 8, at 1378 ("Absent financing and penalty revenues, issuers would not be able to offer . . . generous benefit programs.").

123. Alex Morrell, *Credit Card Companies Thrive on People Not Redeeming Their Rewards—and a Surprising Number of People Never Do*, BUS. INSIDER INDIA (Aug. 14, 2024), https://www.businessinsider.in/credit-card-companies-thrive-on-people-not-redeeming-their-rewards-and-a-surprising-number-of-people-never-do/articleshow/58197204.cms [https://perma.cc/5RS5-KQ7C].

124. CONSUMER FIN. PROT. BUREAU, CREDIT CARD REWARDS 11 (2024), https://files.consumerfinance.gov/f/documents/cfpb_credit-card-rewards_issue-spotlight_2024-05.pdf [https://perma.cc/6EZH-JLVJ].

125. Stewart, *supra* note 70.

126. *Id.*

127. *See* CONSUMER FIN. PROT. BUREAU, THE CONSUMER CREDIT CARD MARKET 87 (2021), https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf [https://perma.cc/2X9A-H2GM] (reporting increases in reward card spending as a percentage of credit card purchase-volume for subprime and deep-subprime consumers from 2017–2020). Scholars have also found that near-prime and subprime cardholders usually pay more in interest on a rewards card than on a card without rewards (even after accounting for the value of earned rewards). Agarwal et al., *supra* note 116, at 3.

128. J.D. Power, *supra* note 64, at 1.

129. As established *supra* section I(B)(1), a majority of cardholders revolve a balance; and even when cardholders in this majority redeem their rewards, they pay "far more" in interest and fees than the value they receive in rewards. *See CFPB Report Finds Credit Card Companies Charged Consumers Record-High $130 Billion in Interest and Fees in 2022*, CONSUMER FIN. PROT. BUREAU

"consumers still forfeit *hundreds of millions* of dollars in rewards value each year,"[130] and one report found that 31% of cardholders have never—not once—redeemed their credit card rewards.[131] Another 2022 survey reported that 40% of rewards cardholders did not redeem any rewards in the preceding year.[132] And of course, credit card rewards depreciate in value as consumers delay in redeeming them because issuers and their partners regularly increase the points required to redeem a reward.[133] Additionally, some banks revoke earned rewards through expiration on open and active accounts.[134]

Issuers market reward offerings in simple but deceptive terms. Consider, for example, Chase's marketing for the Freedom Flex card. The webpage linked to the Freedom Flex application reads "EARN $200" in 54-point font.[135] However, a small asterisk a few inches away is hyperlinked to "Offer Details" which reveal that rather than receiving an automatic statement credit when she meets the terms of the sign-on bonus, the cardholder will receive 20,000 points which she must redeem for $200.[136] As another example, a U.S. Bank credit card webpage touts that cardholders can

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(Oct. 25, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-report-finds-credit-card-companies-charged-consumers-record-high-130-billion-in-interest-and-fees-in-2022/ [https://perma.cc/HF5Q-2DKC] ("Consumers with revolving debts on average pay far more in interest and fees than [what they] get back in rewards."); Meredith Hoffman & Seychelle Thomas, *Who Pays for Credit Card Rewards?*, BANKRATE (Sept. 30, 2024), https://www.bankrate.com/finance/credit-cards/who-pays-for-credit-card-rewards/#tips [https://perma.cc/9PSD-G4L7] ("[T]he key to making the most of your rewards credit card is to avoid paying interest, which will almost certainly outweigh your rewards yield."); Stewart, *supra* note 70 ("What many consumers don't like to think about are the trade-offs they make when they sign up for rewards cards . . . . [R]ewards cards also come at a cost for people, who, to put it plainly, aren't very good at using them."); *see also* Natalie Campisi, *Those Credit Card Rewards May Be Coming Out of Your Own Pocket, Says New Report; Card Fees Hit Record Highs*, FORBES (Oct. 27, 2023, 4:30 PM), https://www.forbes.com/advisor/credit-cards/card-rewards-your-money-high-card-fees/ [https://perma.cc/NL4K-YQYG] ("Consumers who paid only part of their monthly balance paid 94% of all interest and fees charged in 2022 by major credit card companies but earned just 27% of the total reward value.").

130. CFPB 2023 REPORT, *supra* note 36, at 5 (emphasis added).

131. Morrell, *supra* note 123.

132. Michelle Lambright Black, *Nearly 7 in 10 Rewards Credit Cardholders Sitting on Unused Cash Back, Points or Miles*, LENDINGTREE (Aug. 15, 2022), https://www.lendingtree.com/credit-cards/study/unused-rewards/ [https://perma.cc/F9NY-S7RR].

133. Lyle Daly, *Here's What Happens When You Don't Use Your Credit Card Points*, MOTLEY FOOL MONEY (Apr. 24, 2023), https://www.fool.com/the-ascent/credit-cards/articles/heres-what-happens-when-you-dont-use-your-credit-card-points/ [https://perma.cc/VQ4H-5CSP].

134. CONSUMER FIN. PROT. BUREAU, *supra* note 124, at 21.

135. *Welcome to Chase Freedom Flex*, CHASE, https://creditcards.chase.com/a1/freedomflex2023aff?CELL=6H8X&AFFID=SWlnSnn6x54-j4RnBkOw0dgk2XYXJtjmmQ&pvid=db55d99db8e248cdb7b3d3bc86743904&jp_cmp=cc/1460983/aff/15-31544/na [https://perma.cc/AZJ4-C26V].

136. *Id.*

earn up to 6% cash back at their favorite stores.[137] The fine print reveals that a cardholder "must enroll *each quarter* into two retailers and one purchase category of [her] choice," or her purchases will earn no more than 1.5% cash back.[138] Additionally, the CFPB has noted that "[c]onsumers rarely have access to the full terms of rewards programs prior to applying for a credit card" and that "[i]t is not always obvious where consumers can find the full terms and conditions of their rewards programs."[139]

In light of these examples, it is not surprising that a 2019 study by J.D. Power found that "66% of consumers completely understand rewards offerings" but just 36% understand the actual benefits to which they are entitled.[140] Another source found that 20% of consumers who do not redeem their rewards said they do not do so because they either do not know how to or found rewards programs "too confusing."[141]

Finally, data also suggests that rewards programs exploit consumers' inability to predict their financial fate, as well as the irrational tendency to prefer a smaller present reward rather than wait for a larger future one.[142] In 2015, the CFPB organized focus groups to discuss credit card rewards.[143] Participants initially remarked that APR was the most important variable in selecting a credit card; but when presented with five credit card products—four of which offered various rewards programs and one of which offered the lowest interest rate but no rewards—few participants selected the low-interest card as their preferred product.[144] Instead, participants

137. *U.S. Bank Shopper Cash Rewards Visa Signature Card*, U.S. BANK [hereinafter *U.S. Bank*], https://www.usbank.com/credit-cards/offers/shopper-cash-rewards-visa-signature-credit-card.html?cjdata=MXxOfDB8WXww&sourcecode=83158&ecid=AF_49604&PID=3842381&referral=commissionjunction&cjevent=2ac7c533932611ee800400320a1cb825 [https://perma.cc/38JQ-NPLK]. NerdWallet has compiled a list of cards with "confusing" reward programs. Sara Rathner, *Credit Cards with Potentially Confusing Rewards Programs*, NERDWALLET (Sept. 20, 2024, 10:32 AM), https://www.nerdwallet.com/article/credit-cards/credit-cards-with-confusing-rewards-programs [https://perma.cc/U2EX-G977].

138. *U.S. Bank*, *supra* note 137 (emphasis added).

139. CFPB 2015 REPORT, *supra* note 39, at 229–30.

140. Press Release, J.D. Power, Credit Card Rewards War Reaches Inflection Point as Competition Grows, J.D. Power Finds (Aug. 22, 2019), https://www.jdpower.com/system/files/legacy/assets/2019143_u.s._credit_card_study.pdf [https://perma.cc/8PCR-Y3V3].

141. Ana Staples, *A New Report Reveals Many Credit Card Holders Don't Claim Their Rewards—Here's How They're Missing Out on Free Money*, CNBC SELECT (July 3, 2024), https://www.cnbc.com/select/people-arent-claiming-credit-card-rewards/ [https://perma.cc/7TRJ-55B2].

142. *See* Tescher & Stone, *supra* note 63 (noting that consumers tend to be overly optimistic about how much they will borrow or how quickly they will be able to pay down debt in the future); Joe Hitchcock, *Present Bias—Everything You Need to Know*, INSIDEBE, https://insidebe.com/articles/present-bias/#:~:text=Present%20bias%20is%20the%20tendency,decision%20benefits%20us%20less%20overall [https://perma.cc/8TPN-VGN5] (explaining that "present bias" contributes to pursuit of immediate rewards rather than delayed gratification).

143. CFPB 2015 REPORT, *supra* note 39, at 235.

144. *Id.* at 235–36.

"overwhelmingly" indicated that the no-rewards, low-APR card was their least favorite offer.[145] Most troubling, however, is the fact that participants noted the higher interest rates on the rewards cards but did not attempt to assess the potential value of the low-interest card.[146] Because this is only one—albeit striking—example, further study by the CFPB may be helpful to corroborate the notion that issuers structure rewards programs to exploit consumers' cognitive biases.

B. Consumers Need Credit-Building Mechanisms Not Tied to Credit Card Use, and the Credit Scoring Formula Must Be Adjusted

Credit scoring aims to capture a consumer's "creditworthiness" or, plainly, the likelihood that a consumer can be trusted to pay her bills on time.[147] And while rewards are the primary driver of credit card originations, the next most popular reason consumers open a credit card is to improve their credit scores.[148] The same is true with respect to credit card use at the point of sale.[149] Because responsible credit card use is currently the most convenient way for a consumer to build credit,[150] these data points are not all that surprising. This Note proposes that avenues for credit building and a credit scoring formula that do not encourage credit card origination or use are essential to a framework that encourages consumers to reach for their debit cards.

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145. *Id.* at 236.

146. *Id.*

147. *What Is a Credit Score? Definition, Factors, and Ways to Raise It*, INVESTOPEDIA (Sept. 20, 2024), https://www.investopedia.com/terms/c/credit_score.asp [https://perma.cc/J6QB-XWVG].

148. *See* McGrath, *supra* note 64 ("The majority of consumers (55%) say they'd get a new card for cash back, travel or store rewards. Credit building (42%) is the next-biggest reason for getting a new card.").

149. *See Survey Findings*, *supra* note 66 (reporting that 70% of consumers surveyed indicated that they use credit cards either to earn rewards (36%) or build credit (34%)); Spector, *supra* note 65 ("[F]or nearly a quarter of people (24.78%), perks and rewards are their primary purpose for using a credit card, while 21.51% use them mostly to build or repair their credit . . . ."); *see also* Levitin, *supra* note 67, at 1346 ("Rewards cards are driving the increase in credit card usage."); *Chasing Points*, *supra* note 68 ("More than a third (47%) of American adults say they've used a credit card solely to rack up rewards points, according to the latest Chasing Points study from Finder, an annual study of roughly 1,800 American adults about their credit card spending habits.").

150. *See* Virginia C. McGuire, *Why Nearly Every Purchase Should Be on a Credit Card*, NERDWALLET (Oct. 28, 2024, 8:26 PM), https://www.nerdwallet.com/article/credit-cards/why-every-purchase-should-be-on-a-credit-card [https://perma.cc/ZEA3-CDJN] ("Responsible credit card use is one of the easiest and fastest ways to build credit."); Chauncey Crail, *Why Nearly Every Purchase Should Be on a Credit Card*, FORBES (Feb. 14, 2023, 5:47 PM), https://www.forbes.com/advisor/credit-cards/why-every-purchase-should-be-on-a-credit-card/ [https://perma.cc/J5XX-MWT4] ("Perhaps the most important benefit to owning and using a credit card responsibly is building a healthy credit history.").

1. Legislation Should Require Banks to Offer Debit Cardholders the Option to Report Account Activity to Credit Bureaus.—Banks do not report debit card activity to the credit bureaus because the use of a debit card draws on a consumer's own savings rather than a line of credit.[151] Nevertheless, a consumer's trustworthiness and the likelihood she will pay her bills on time can still be shown through her use of a debit card—i.e., by not bouncing debits from the account or by not overdrawing the account if it is enrolled in overdraft protection. Legislation enabling consumers to build credit with their debit cards would not only disincentivize credit card originations and use but would also directly encourage consumers to use their debit cards instead.

When a checking account has overdraft protection, the bank will approve a transaction initiated by the account holder even if the account has insufficient funds to cover the charge.[152] In other words, when a checking account holder overdraws her account, the bank extends her a loan. A consumer's access to this line of credit, absent reliance on it and combined with regular draws on her account, suggests the consumer spends within her means and creditors can trust her to pay her bills.

The CFPB's report on overdrafters also shows a negative correlation between consumers' overdraft frequency and their credit scores,[153] suggesting that overdraft frequency can be a proxy for creditworthiness. But most importantly, FICO and VantageScore, the two major credit-scoring companies in the U.S.,[154] accept this proposal, at least in part. The credit-scoring models of both companies compare how much credit a consumer uses to how much credit the consumer has access to and reward a low credit utilization ratio.[155]

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151. Elizabeth Gravier, *Only Having a Debit Card Can Actually Hurt Your Credit—Here's How*, CNBC SELECT (Aug. 28, 2023), https://www.cnbc.com/select/debit-cards-and-credit/#:~:text=But [https://perma.cc/2BKZ-4TV4].

152. Kevin Payne, *Understanding Checking Account Overdraft Protection and Fees*, FORBES (Sept. 4, 2024, 12:31 PM), https://www.forbes.com/advisor/banking/checking/understanding-checking-account-overdraft-protection-and-fees/ [https://perma.cc/T8SC-ZB98].

153. LOW ET AL., *supra* note 51, at 37.

154. *See VantageScore® vs. FICO®: Different Types of Credit Scores*, CAP. ONE (Oct. 24, 2024), https://www.capitalone.com/learn-grow/money-management/understanding-types-of-credit-scores/ [https://perma.cc/CB2L-JXHK] ("VantageScore and FICO are the credit-scoring companies most commonly used by lenders.").

155. Amounts owed on accounts—or how much debt a consumer carries in total—determines 30% of a FICO Score. *What Is Amounts Owed?*, MYFICO, https://www.myfico.com/credit-education/credit-scores/amount-of-debt [https://perma.cc/FV8U-N84Y]. However, FICO notes that "the amount of debt you have is not as significant to your credit score as your credit utilization." *Id.* The credit utilization ratio on revolving accounts is the percentage of available credit a consumer uses; thus, "[u]sing a high percentage of your available credit means you're close to maxing out your credit cards, which can have a negative impact on your FICO Scores," while "using a low percentage of your available credit can have a positive impact." *Id.* Credit utilization accounts for 20% of a VantageScore, and a "high credit utilization ratio indicates a heavy reliance on credit and

While encouraging consumers to use their debit cards to build credit increases the risk that they will incur expensive overdraft fees, the market and federal regulators have recently applied tremendous pressure to banks to reduce or eliminate such fees.[156] And many banks have responded by doing so.[157] Additionally, incurring overdraft fees may be less financially distressing on the whole than being in the credit card sweat box. The cost of borrowing via overdraft is typically a flat fee,[158] whereas the cost of borrowing on a credit card increases daily and can be exasperating for consumers to calculate. Finally, consumers will still have the choice to opt for a checking account that does not have overdraft protection.

Thus, Congress should pass legislation that requires depository banks to offer debit cardholders the option to report their account activity to major credit bureaus.

2. Legislation Should Enable and Incentivize Landlords to Report Rent Payments to Credit Bureaus.—As of 2016, most tenants paid rent by cash, check, or money order rather than by debit or credit card.[159] Thus, rent reporting might not directly encourage debit card use instead of credit card use. However, giving consumers other credit-building options not tied to a credit card will disincentivize credit card originations and use for credit-building purposes.

At the end of 2013, 48% of landlords surveyed by TransUnion said the results of a credit check were among the top three factors used when deciding whether to accept a tenant's rental application.[160] Yet, because a lease is not

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suggests that you might be living beyond your means." *The Complete Guide to Your VantageScore*, VANTAGESCORE (Oct. 11, 2019), https://www.vantagescore.com/press_releases/the-complete-guide-to-your-vantagescore/ [https://perma.cc/4E3B-84LR].

156. Zach Fox & Ronamil Portes, *More Banks Cut Overdraft Fees as Pressure Builds*, S&P GLOB. (Jan. 14, 2022), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/more-banks-cut-overdraft-fees-as-pressure-builds-68413658 [https://perma.cc/T7EE-S6QU].

157. Chanelle Bessette, *Why Banks Are Eliminating Overdraft Fees*, NERDWALLET (Jan. 28, 2022), https://www.nerdwallet.com/article/banking/why-banks-are-eliminating-overdraft-fees [https://perma.cc/QV98-FVB9].

158. While some banks may charge interest on the amount overdrawn in addition to a fee, most charge only a flat fee. *See, e.g.*, BANK OF AM., UNDERSTANDING BANK OF AMERICA INTEREST CHECKING 1 (2015), https://www.bankofamerica.com/content/documents/deposits/service/pdf/docrepo/00-53-5420NSB%20Interest%20Checking.pdf [https://perma.cc/S7LC-QNWZ] (showing that only a $35 fee is charged per overdraft).

159. David Hao Zhang, *How do People Pay Rent?* 2 (Fed. Rsrv. Bank of Bos., Research Data Reports Paper No. 16-2, 2016), https://www.bostonfed.org/publications/research-data-report/2016/how-do-people-pay-rent.aspx#:~:text=The%20dominant%20methods%20for%20paying,for%20debit%20and%20credit%20cards [https://perma.cc/D2Y6-NFZS].

160. *TransUnion Reveals Almost Half of Landlords Consider Renters' Credit Health as a Key Factor in Leasing Decision*, TRANSUNION (May 12, 2014), https://newsroom.transunion.com/transunion-reveals-almost-half-of-landlords-consider-renters-credit-health-as-a-key-factor-in-leasing-decision/ [https://perma.cc/X7P3-GWAK].

technically a loan, most tenants' on-time rent payments are not reported to the major credit bureaus.[161] In fact, one study revealed:

> Fewer than 5 percent of the roughly 80 million adults who live in rental housing had rental data in their credit files, and it was mostly negative data from missed payments . . . [which] can end up in credit files if a landlord reports delinquent accounts or sends them to a collection agency.[162]

But residential leases function similarly to secured installment loans—so much so that Uniform Commercial Code § 1-203 is devoted to clarifying when a transaction that parties explicitly label a "lease" is to be treated as a secured loan in court.[163] A residential lease involves the landlord providing property to the tenant for the duration of the lease in exchange for the tenant's promise to make monthly payments. If the tenant stops paying, she loses her rights in the property. Similarly, a secured, purchase-money installment loan involves the bank giving a consumer the funds to make a purchase in exchange for the consumer's promise to repay the amount borrowed in equal installments. If the consumer stops paying, she loses her rights in the item purchased. And while the subtle distinctions between leases and loans matter in contexts such as bankruptcy,[164] both leases and loans provide a yardstick by which consumers' financial responsibility can be measured. On-time payments in both scenarios underscore the integrity of the promisor.

Moreover, FICO and VantageScore have already developed credit-scoring models that consider rent payment data, and all three major credit bureaus accept rent payment history, signaling an acceptance of timely rent payments as an indicator of creditworthiness.[165]

161. Ann Carrns, *More Tenants Can Now Add Rent Payments to Their Credit Score*, N.Y. TIMES (Jan. 26, 2024), https://www.nytimes.com/2024/01/26/your-money/rent-payments-credit-score-report.html [https://perma.cc/YHY4-Y8L3]; *see also Gen Z Helps Drive More than One in Four Property Managers to Report Rent Payments*, TRANSUNION (Apr. 21, 2022), https://newsroom.transunion.com/gen-z-helps-drive-more-than-one-in-four-property-managers-to-report-rent-payments/ [https://perma.cc/K3WD-QKBZ] (reporting that "only 15% [of] all renters have their payments reported" and that only 27% of property managers "aware of the practice . . . report rent payments").

162. Carrns, *supra* note 161.

163. U.C.C. § 1-203 (AM. L. INST. & UNIF. L. COMM'N 2025); *see also* Pamela J. Martinson, *A Lease Is a Lease Is a Loan? Avoiding Recharacterization*, L.J. NEWSLS. (Nov. 19, 2012), https://www.lawjournalnewsletters.com/2012/11/19/a-lease-is-a-lease-is-a-loan-avoiding-recharacterization/?srsltid=AfmBOoqn0iZJxUmRlQKanHwKPB6UMchYuE-fmd0pCRI9_fNBzHfCvgQf [https://perma.cc/24WY-PMH9] (discussing the creation of U.C.C. § 1-203 to clarify the differences between leases and security interests).

164. Martinson, *supra* note 163.

165. Ben Luthi, *How to Add Rent Payments to Your Credit Reports*, MYFICO (Dec. 14, 2022), https://www.myfico.com/credit-education/blog/add-rent-credit-reports [https://perma.cc/X9D8-HCL7]; *Are Rent and Utility Payments Included in VantageScore 4.0?*, VANTAGESCORE, https://www.vantagescore.com/faq/are-rent-and-utility-payments-included-in-vantagescore-4/ [https://perma.cc/G22J-24LX]; Erik J. Martin & Raychelle Heath, *How to Report Your Rent*

In 2020, California enacted a law—the first of its kind—requiring landlords of subsidized multifamily units to offer tenants the option to report their rent payments to a major credit bureau.[166] The law requires landlords to inform tenants that their "rental payments will be reported, regardless of whether the payments are timely, late, or missed."[167] It also allows tenants to opt out of reporting, providing that they may elect to stop rent reporting at any time.[168] If a tenant opts out after initially opting in, she may not resume rent reporting for at least six months after such election.[169] While the law's effects on the California rental market, the landlords subject to the law, and the relevant tenants' credit scores remain unclear at this time, Congress should take notice and move to federalize similar legislation if California's proves successful.

Before requiring landlords to offer tenants the opportunity to report their rent payment data to a credit bureau, Congress should additionally ensure that landlords are able to report rent payment data directly to the bureaus. The majority of landlords are individuals who own a small number of units,[170] and these landlords must currently use third-party service providers to report rent payment data since the credit bureaus only allow direct reporting from "high-volume" landlords.[171] One popular third-party reporting service charges a $95 enrollment fee and subsequent monthly fees.[172]

Congress should also take measures to ensure that landlords will pay a price that reflects only the true cost of reporting and a reasonable profit margin for the credit bureaus. Because the credit reporting industry is

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Payments to Credit Bureaus, BANKRATE (May 17, 2024), https://www.bankrate.com/personal-finance/credit/how-to-report-rent-payments-to-credit-bureaus/#:~:text=Rent%20payments%20are%20not%20typically,you%20make%20sure%20that%20happens? [https://perma.cc/T6UR-GHCW].

166. CAL. CIV. CODE § 1954.06(a), (k)(1) (West 2025) (instituting this requirement for "any landlord of an assisted housing development"); CAL. GOV'T CODE § 65863.10(a)(3) (West 2025) (defining an assisted housing development as "a multifamily rental housing development of five or more units that receives governmental assistance" from a list of certain programs).

167. CIV. § 1954.06(c)(3).

168. *Id.* § 1954.06(c)(7).

169. *Id.*

170. Drew DeSilver, *As National Eviction Ban Expires, a Look at Who Rents and Who Owns in the U.S.*, PEW RSCH. CTR. (Aug. 2, 2021), https://www.pewresearch.org/short-reads/2021/08/02/as-national-eviction-ban-expires-a-look-at-who-rents-and-who-owns-in-the-u-s/ [https://perma.cc/D9P2-C6QS].

171. Dana Barrett, *How to Report Rent Payments to Credit Bureaus for Free*, PAYRENT (Dec. 7, 2021), https://www.payrent.com/articles/how-to-report-rent-payments-to-credit-bureaus-for-free/ [https://perma.cc/9GHC-4U9T].

172. Amanda Barroso, *How to Report Your Rent to Credit Bureaus: Rent-Reporting Services Guide*, NERDWALLET (Aug. 6, 2024), https://www.nerdwallet.com/article/finance/rent-reporting-services#:~:text=Rent%20Reporters%3A%20There%20is%20a,plan%20(%247.95%20per%20month) [https://perma.cc/8DHT-Q62X].

comprised of only three major credit bureaus (Experian, Equifax, and TransUnion),[173] there is a risk that landlords—who would have no choice but to pay one of those bureaus' fees—would be victims of anti-competitive pricing. Ultimately, Congress must ensure that landlords are able to report with ease, without unnecessary transaction costs, and at a reasonable price.

Additionally, California's law permits landlords to charge tenants a fee of up to $10 per month (depending on the cost of the service) if the tenant opts into credit reporting.[174] However, landlords should not be able to surcharge tenants for opting in, as even a small surcharge may deter tenants from doing so.[175] While a no-surcharge rule may cause an increase in overall rent prices, the aim is that if Congress evaluates the true cost of reporting and ensures that credit bureaus charge landlords accordingly, the increase will be trivial and far outweighed by the financial benefits the tenant will receive due to an increase in her credit score and her avoidance of the sweat box.

And while some may bridle at the suggestion that the landlord bear a new administrative burden of reporting, available data indicates that landlords who report already do not find the process burdensome. One survey by TransUnion, for example, reveals that 72% of property managers who report rent payments describe the process as "somewhat easy" or "very easy."[176]

Further, opponents to these proposals might argue that, in the event of negative reporting, tenants may face evictions, homelessness, or at the very least, difficulty getting future rental applications approved.[177] However,

173. Martin & Heath, *supra* note 165.

174. CIV. § 1954.06(f).

175. *See* SUMIT AGARWAL, WENLAN QIAN & RUTH TAN, HOUSEHOLD FINANCE: A FUNCTIONAL APPROACH 233 (2020) ("A small financial disincentive is enough to change consumer behavior."). Empirical studies of surcharging at the point of sale, for example, tend to indicate that consumers will abandon preferred payment methods to avoid surcharging. *See, e.g.*, Joanna Stavins, *Consumer Preferences for Payment Methods: Role of Discounts and Surcharges*, 94 J. BANKING & FIN. 35, 36 (2018) (finding that when offered a cash discount, "the probability that a cash transaction is conducted by a consumer who prefers noncash payments increases by 19.2 percent, after controlling for merchant category and dollar value of the transaction"); Wilko Bolt, Nicole Jonker & Corry van Renselaar, *Incentives at the Counter: An Empirical Analysis of Surcharging Card Payments and Payment Behaviour in the Netherlands*, 34 J. BANKING & FIN. 1738, 1743 (2010) (showing that debit card surcharging in the Netherlands steers consumers away from using debit cards and towards cash instead).

176. TRANSUNION, *supra* note 161.

177. *See, e.g.*, Chi Chi Wu & Stacey Tutt, *Why Rent Reporting Can Harm Rather than Help Vulnerable Tenants*, THE HILL (Feb. 26, 2023, 11:00 AM), https://thehill.com/opinion/finance/3872880-why-rent-reporting-can-harm-rather-than-help-vulnerable-tenants/ [https://perma.cc/G4AG-GKRV] (discussing how negative reporting could lead to a person's rental application being rejected); NAT'L CONSUMER L. CTR., EVEN THE CATCH-22S COME WITH CATCH-22S: POTENTIAL HARMS AND DRAWBACKS OF RENT REPORTING 1 (2022), https://www.nclc.org/wp-content/uploads/2022/10/IB_Catch_22_Rent.pdf [https://perma.cc/PBP8-ZCVQ] (noting that negative rent reporting could make vulnerable renters homeless and lead to difficulties with future rental applications).

several sources of data showing that most tenants experience an increase in their credit score[178] suggest that these consequences, although potentially devastating, would occur infrequently. Additionally, the voluntary nature of the reporting is intended to curb these risks. Tenants would not be obligated to report but instead should have access to a process that both allows them to opt in to rent reporting at the beginning of their lease and grants them the freedom to opt out at any point.

3. Credit Utilization Ratios Overweigh on Credit Scores, and Regulators Should Challenge Credit Scoring Models.—While FICO does not disclose exactly what percentage of a FICO score a cardholder's credit utilization ratio determines,[179] it notes that the amount of debt a cardholder has is not as significant to her credit score as her utilization[180] and that it is "crucial" for cardholders to maintain low ratios.[181] On the other hand, VantageScore is explicit, noting that credit utilization determines 20% of a cardholder's VantageScore.[182]

Credit utilization ratios are a blunt instrument for assessing debtor "trustworthiness." And both the FICO and VantageScore models needlessly penalize a consumer's credit score if her credit utilization ratio is zero percent.[183]

Experian (a developer of the VantageScore model[184]) and FICO claim that zero-percent utilization does not tell them enough about a consumer's

178. *See, e.g.*, BUREAU OF POL'Y & RSCH, N.Y.C. COMPTROLLER, MAKING RENT COUNT: HOW NYC TENANTS CAN LIFT CREDIT SCORES AND SAVE MONEY 4 (2017), https://comptroller.nyc.gov/wp-content/uploads/documents/Rent-and-Credit-Report.pdf [https://perma.cc/KA4C-M4BA] (finding that rent reporting would improve credit scores for approximately 76% of New York City tenants who elect to report their rent and that only 6% of tenants would see a decline in their scores); S. RULES COMM., SB 1157 06/01/20 SENATE FLOOR ANALYSES, 2019–2020 Sess., at 4 (Cal. 2020) ("Several studies and pilot programs have shown that reporting the full rental history of low-income tenants to the major consumer reporting agencies will have a positive impact on most of those tenants' credit scorability and credit scores.").

179. *See* Ben Luthi, *What Should My Credit Utilization Ratio Be?*, MYFICO (Feb. 9, 2022), https://www.myfico.com/credit-education/blog/credit-utilization-be#:~:text=Some%20financial%20experts%20recommend%20keeping,ratio%20crosses%20the%2030%25%20threshold [https://perma.cc/2ACZ-WK43] ("[Amounts owed] is an important factor in determining your FICO Scores, making up 30% of the total calculation. One of the elements that FICO considers in this factor is your credit utilization ratio.").

180. *What Is Amounts Owed?*, *supra* note 155.

181. Luthi, *supra* note 179.

182. *The Complete Guide to Your VantageScore*, *supra* note 155.

183. *See id.* ("You want to keep [your credit utilization ratio] under 30% if possible, as long as it remains above 0%."); Luthi, *supra* note 179 ("[B]e careful about having a utilization ratio of 0%. . . . [A] 0% utilization ratio . . . can prevent you from achieving maximum points for the amounts owed score ingredient.").

184. *The Complete Guide to Your VantageScore*, *supra* note 155.

credit habits.[185] As the saying goes, "garbage in, garbage out." The models calculate credit utilization ratios based upon snapshots of cardholders' balances on the revolving loans that attach to their credit cards.[186] Credit card issuers typically report card balances to the credit bureaus based on a cardholder's monthly statement balance.[187] And a consumer might make several purchases on her credit card during a billing cycle but pay the account balance in full shortly before the statement date. Thus, she will have zero credit utilization on that account (or zero utilization overall if the consumer has only one card or does the same for each card in her name). While high statement balances may signal financial irresponsibility,[188] a zero balance may reflect no differently on a consumer's spending habits than a low balance. In other words, a cycle-ending balance alone can be a poor indicator of how a consumer has managed her money throughout the month. Credit bureaus could cure their own vincible ignorance if they simply considered, in binary terms, whether a consumer has used her card during the billing cycle or since the last balance was reported. A similar practice can be adopted to determine whether a consumer is actively using her debit card but responsibly avoiding overdraft.

To be clear, because a statement balance alone is typically no indication of whether a user is transacting or borrowing (unless the balance is higher than the cardholder's credit limit), the FICO and VantageScore models are seemingly concerned with rewarding inactive account holders—rather than transactors—with credit score points. Thus, the models would likely agree that a consumer's active use of a debit card without overdrafting is an indicator of financial responsibility, and the presence or absence of card activity can easily be determined from the account's monthly statements.

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185. Louis DeNicola, *What Is a Credit Utilization Rate?*, EXPERIAN (Nov. 5, 2023), https://www.experian.com/blogs/ask-experian/credit-education/score-basics/credit-utilization-rate/ [https://perma.cc/AU92-9BNQ] ("Counterintuitively, however, a utilization rate of 0% is actually worse than 1%. That's because credit scoring models need some usage to go off of when calculating your score, and 0% utilization doesn't tell them much about your credit habits."); Luthi, *supra* note 179 ("[A] utilization ratio of 0% . . . signifies that you're not using your credit cards at all, giving FICO less information about how you manage your money.").

186. *See* Thomas Brock, *Credit Utilization Ratio: Definition, Calculation, and How to Improve*, INVESTOPEDIA (Mar. 22, 2023), https://www.investopedia.com/terms/c/credit-utilization-rate.asp#:~:text=To%20calculate%20your%20credit%20utilization,ratio%20as%20a%20percentage%20amount [https://perma.cc/E6CH-KF5T] (explaining that credit utilization ratios are based on multiple reports to credit agencies at various times over a monthly period).

187. Luthi, *supra* note 179; *Why Does My Credit Report Show Balances When They're Paid Off Each Month?*, MYFICO, https://support.myfico.com/hc/en-us/articles/360039242213-Why-does-my-credit-report-show-balances-when-they-re-paid-off-each-month-#:~:text=Each%20month%2C%20your%20credit%20card,statement%20to%20the%20credit%20bureaus [https://perma.cc/C95N-GAPM].

188. According to FICO, high statement balances can "indicate that [the cardholder is] having a hard time managing [her] money without the use of debt." Luthi, *supra* note 179. This may be untrue, however, if the consumer is paying her high balances on time and in full.

And because a credit utilization ratio is the percentage of the available credit used by a cardholder across all her credit cards, the major credit scoring models encourage consumers to open multiple credit cards. Put differently, consumers are perversely incentivized to put themselves at an increased risk of overspending and financial distress in the name of fiscal responsibility. When a consumer opens a new credit card account, her total credit limit increases by the credit limit on the account. All else equal, then, the cardholder's credit utilization decreases; without cutting back on spending or making payments toward her outstanding balances, the cardholder is rewarded with an increase to her credit score.

While one might counter that consumers are given pause by the credit score decrease that typically accompanies credit card origination, Equifax assures consumers that the game is worth the candle: "[O]pening a new account might be a good idea if you have only one card. In fact, your credit scores will be enhanced by getting a second line of credit, despite the initial decrease that results from a hard credit inquiry."[189]

Furthermore, although many components of the credit scoring algorithms are "guarded trade secrets,"[190] legislators could demand transparency, and it is likely that federal regulators would already have statutory authority to provide a check on the credit scoring models.[191] The Federal Trade Commission (FTC), for example, "can oversee credit-scoring systems under its authority to combat 'unfair' trade practices under . . . the Federal Trade Commission Act."[192]

A policy reducing the weight accorded to revolving credit utilization ratios by the credit scoring models—like rent reporting—may not specifically cause a shift to debit, but it can disincentivize credit card originations and use. And, in terms of sheer probability, the fewer credit cards a debit cardholder has in her wallet, the more likely it is that she reaches for her debit card at the point of sale.

C. TILA Fraud Protections Should Be Guaranteed for Debit Users

Many issuers currently offer zero-fraud liability for both debit and credit cards;[193] however, issuers are not required by law to do so. TILA caps a credit

189. *Is It Better to Seek a Credit Card Limit Increase or Open a New Account?*, EQUIFAX, https://www.equifax.com/personal/education/credit-cards/articles/-/learn/credit-limit-increase-new-credit-account/ [https://perma.cc/XY8A-LH7R].

190. Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 5 (2014).

191. *Id.* at 23, 32.

192. *Id.* at 23; 15 U.S.C. § 45.

193. *E.g.*, *Frequently Asked Questions: Am I Liable for Unauthorized Charges Made with Click to Pay?*, CHASE, https://www.chase.com/digital/digital-payments/visa-checkout/faqs/data-security-questions#:~:text=Purchases%20made%20with%20your%20Chase,Certain%20limitations%20apply [https://perma.cc/GX4P-VSKR]; *Fraud Prevention FAQs*, BANK OF AM.,

card user's liability at $50 of losses due to fraud.[194] A cursory reading of the EFTA, which addresses unauthorized debit card use, may lead one to believe that debit cardholders are only liable for up to $50 as well.[195] However, the EFTA limits the circumstances in which this cap applies. If a debit cardholder fails to report a lost or stolen card within two business days after she learns of the loss or theft, she is liable for up to $500.[196] Moreover, if the cardholder fails to report within sixty days of the statement being sent, she is liable for all fraudulent charges made on the card.[197]

If policies are adopted to shift consumers away from credit cards, debit-fraud protection programs may be revoked by issuers, and debit cardholders may incur losses due to unauthorized use to the fullest extent permitted under the EFTA. Issuers no longer have debit card rewards programs to eliminate[198] to make credit cards relatively more attractive,[199] and issuers face considerable backlash if they reinstate or increase checking fees, which have been trending downward.[200]

Thus, this Note proposes that, at a minimum, debit card user protections should match those for credit card users under TILA. The distinctions between debit and credit cards do not call for disparate legal treatment with respect to unauthorized use protection,[201] and bringing debit users under TILA protections is a principled and long-overdue decision. Despite issuers offering zero-fraud liability programs for debit cardholders, these cardholders still incur losses due to fraudulent charges.[202] While this proposal

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https://www.bankofamerica.com/security-center/faq/data-compromise/#:~:text=You're%20 protected%20by%20Bank,security%20page%20for%20additional%20details [https://perma.cc /85MY-8LKH].

194. 15 U.S.C. § 1643(a)(1)(B).

195. *See id.* § 1693g(a)(1) (providing that liability for an unauthorized electronic fund transfer be capped at $50).

196. *Id.* § 1693g(a)(2).

197. *Id.*

198. *See supra* note 94 and accompanying text.

199. *See* McGuire, *supra* note 150 (discussing rewards programs as a significant advantage of using credit cards); Crail, *supra* note 150 ("Earning . . . rewards through credit cards is an appealing part of applying for and using credit cards.").

200. *See, e.g.*, Ylan Q. Mui, *Bank of America Backs Off Debit Card Fee After Consumer Backlash*, WASH. POST (Nov. 1, 2011, 7:32 PM), https://www.washingtonpost.com/business /economy/bank-of-american-drops-debit-card-fee/2011/11/01/gIQADvugcM_story.html [https://perma.cc/GG68-2BQN] (discussing a successful instance of consumer resistance to fee increases).

201. Robertson, *supra* note 28, at 513–14.

202. *Id.* at 515; *see also* Teresa Murray, *The Dangers of Debit Cards*, U.S. PIRG (Mar. 2, 2023), https://pirg.org/edfund/resources/the-dangers-of-debit-cards/#:~:text=In%20one%20study%2C% 20the%20typical,linked%20to%20someone's%20bank%20account [https://perma.cc/A8T9-5U2J] (noting that "consumers spend 28 hours" dealing with a "typical case of debit card fraud" and that in one study, a "typical case of debit card fraud amount exceeded $2,500," with consumers having to pay "$800 out of pocket").

may not entice credit card users to switch to debit, it will aid in preventing banks from counteracting the policies this Note proposes to incentivize a shift to debit.

Conclusion

Credit card issuers continue to deploy tactics to entrap Americans in expensive debt cycles despite acts of Congress and the CFPB's twelve-year effort to make credit cards safer for consumers. And a staggering number of Americans succumb to issuers' schemes, taking on unanticipated and unnecessary debt. This Note does not call on the CFPB to abandon its current mission to make credit safer but proposes a framework for policymakers to consider that would encourage the average consumer to put down her credit card and instead reach for her debit card—an inherently safer payment product—at the point of sale.

Confronting the two most popular reasons that consumers cite for opening and using credit cards—earning rewards and building credit—is the first step in this framework. The CFPB must lay the groundwork, via a public education campaign, for Congress to pass legislation that dismantles credit card rewards programs by changing the narrative around rewards. Additionally, federal legislation and regulators must make it easier for consumers to demonstrate financial responsibility and improve their credit scores without opening and using credit cards.

Finally, while many issuers currently offer zero-fraud liability for both debit and credit card issuers, they are not legally required to do so. The proposed framework urges Congress to act to protect the card users who will be encouraged to use their debit cards. Legislation protecting debit card users to the same extent as credit card users is long overdue but will become even more critical if debit use is to be increased.