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The Credit Cardholders' Bill of Rights: Providing New Protections for Consumers

Written Testimony
of

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Witness Background

I am an Associate Professor of Law at the University of Iowa College of Law.[1] I joined the faculty in 2005. I received my J.D. degree *magna cum laude* from Harvard Law School and my B.A. degree *cum laude* from Yale College. I teach bankruptcy, commercial law, and consumer law and have published empirical research on consumer credit in several respected journals, including the *Michigan Law Review*, the *Cornell Law Review*, the *Wisconsin Law Review*, and the *American Bankruptcy Law Journal*.[2] My research on credit cards has examined how credit card practices affect a household's financial well-being and how families who have filed for bankruptcy use credit cards. I served as Project Director of the 2001 Consumer Bankruptcy Project and am one of the principal investigators in the ongoing 2007 Consumer Bankruptcy Project. I also am a co-investigator in the Mortgage Study, a national empirical study of mortgages in consumer bankruptcy cases.

I have not received any federal grants or contracts relevant to this testimony.

Introduction

Credit cards are an extremely popular financial product in America. More than three-fourths of consumers have one or more credit cards,[3] and by dollar volume, total credit card spending exceeds 13% of the United States' gross domestic product.[4] While card-based payment systems have substantial advantages over traditional products like paper checks,[5] credit cards present particular challenges because of their complexity.[6] Most consumer financial products are either payment-only devices (cash, debit cards, etc.) or borrowing-only devices (mortgages, signature loans, etc.). Credit cards are unique because they combine the ability to spend and borrow in a single financial instrument.[7] The proposed legislation, The Credit Cardholders' Bill of Rights (H.R. 5244),[8] preserves the rights of credit card issuers to control risk and earn profits while giving consumers the tools they need to understand and comply with credit card contracts.

My testimony focuses on two aspects of H.R. 5244. First, I explain how the bill's modest regulations would empower consumers to exercise self-discipline in their financial practices. If enacted, the bill would help consumers avoid over-the-limit fees, late charges, and inappropriate subprime cards by giving consumers the opportunity to manage their card use in a responsible manner. Second, I describe the lack of reliable, neutral data about credit card practices and explain why such data are critically important to enabling Congress and regulatory agencies to monitor our nation's credit card practices, thus ensuring the stability of the financial markets and the well-being of American families.

Part I
Allowing Consumers To Manage Their Card Use Responsibly

On an aggregate level, credit cards are associated with financial distress.[9] At the household level, however, millions of families benefit from credit cards. The goal of credit card reform is to retain the advantages of credit cards while limiting their harmful effects. H.R. 5244 achieves this goal by giving consumers the ability to manage their credit cards responsibly. It does so in three key ways: it allows consumers to control their credit card limits; it establishes standardized due date practices so that consumers can pay on time; and it requires the riskiest consumers to bear the costs of opening a credit card account. These regulations would reduce consumer mismanagement in using credit cards, while retaining the ability of issuers to manage risk.

A. Over-the-limit Fees

In 2004, penalty fees represented an estimated 9% of revenue for card issuers.[10] Most commonly, these fees include charges for exceeding a credit limit or for late payment. H.R. 5244 does not ban the imposition of such fees when a consumer engages in the trigger behavior nor does it cap the amount of such fees. Instead, the bill would put consumers in charge of avoiding such fees. By improving the ability of consumers to manage their credit card practices, the bill rewards responsible consumer behavior. Better financial practices by consumers will reduce risk to credit card issuers and reduce the likelihood that credit cardholders suffer serious financial distress.

Section four of H.R. 5244 pertains to over-the-limit fees.[11] It allows consumers to elect in advance whether they want to avoid receiving credit in excess of the amount authorized on the account. In this way, the bill helps consumers use their accounts responsibly by limiting their available credit and avoiding escalating debts. Issuers who complain about charge-off rates and losses when consumers mismanage their debts should support a system that would encourage consumers to stay within the limits of their credit agreements.

If a consumer makes an election not to exceed the credit limit, the issuer may not complete the over-the-limit transaction and may not charge an over-the-limit fee if such a transaction is processed despite the consumer's election. This provision ensures that issuers do not have a financial incentive to exceed the prearranged terms of card agreements. Issuers currently have the ability to deny credit card transactions that exceed the limit; H.R. 5244 merely requires them to avoid penalizing a consumer who did not wish to receive additional credit. Under the bill, if issuers voluntarily authorize an over-the-limit transaction, they bear the risk. An issuer cannot impose an expense on a consumer when an over-the-limit transaction results from a mistake or the issuer's own choice to authorize such credit over the consumer's stated preference for a fixed amount of credit. In particular, older and younger Americans may be more likely to make mistakes in monitoring their credit card accounts and to exceed their limits.[12] Yet, these very same consumers are more likely to have fixed incomes and low assets than middle-aged consumers, making it harder for older and younger Americans to pay over-the-limit fees and cope with penalty interest rates. These vulnerable groups would particularly benefit if H.R. 5244 were enacted into law because they could elect to avoid exceeding their credit limits.

H.R. 5244's other provision on over-the-limit transactions would restrict the number of times that an issuer could impose an over-the-limit fee. The bill preserves the right of issuers to collect an initial penalty if a consumer exceeds a limit but bans the practice of churning over-the-limit fees for profit. Specifically, the bill would permit an over-the-limit fee to be imposed only one time during each billing cycle. Under current law, consumers may be charged an over-the-limit fee each time they conduct a transaction after initially exceeding their limit.[13] Such fees can amount to hundreds of dollars after only a handful of transactions. Yet, because current law does not require point-of-sale disclosures when a purchase would exceed a credit limit, consumers may not be aware that they have exceeded their limits.[14] Recognizing the difficulty that consumers face in monitoring their account balances, H.R. 5244 puts some responsibility on issuers to control transactions. Issuers have nearly complete and instantaneous computerized access to consumers' account charges and are better positioned to enforce agreed-upon credit limits.

H.R. 5244 also takes aim at an over-the-limit fee practice that some courts have already determined is unconscionable and unfair under longstanding principles of contract law.[15] Under

current law, if consumers exceed their limits, they can be assessed an over-the-limit fee each month that their accounts remain over the limit, even if the consumers are making the required minimum payments and avoiding any further transactions. In some instances, consumers pay thousands of dollars in over-the-limit fees as a consequence of a single, modest, over-the-limit transaction.[16] If enacted, the bill would permit issuers to impose over-the-limit fees in only two subsequent billing cycles after the initial over-the-limit transaction (assuming the consumer did not make additional transactions). Given that the issuer does not put any further capital at risk during the subsequent months, it is hard to justify even the additional two months of fees as necessary elements of risk management. In my judgment, an over-the-limit fee should be permitted only in the initial month of such a transaction and should not be allowed in subsequent months when it serves as a penalty that is unrelated to additional risk. However, the bill merely seeks to eliminate the most egregious practices that violate traditional contract law.

The over-the-limit provisions of H.R. 5244 would empower consumers to control their card spending by establishing firm credit limits. Over-the-limit fees remain available to issuers as a legitimate risk-management technique, but issuers cannot penalize consumers for the issuers' own decisions to approve transactions that exceed credit limits. In these ways, the bill encourages cardholders and industry to work together to engage in responsible card practices that reduce the potential of credit cards to increase financial distress.

B. Due Date and Billing Practices

Credit card late fees have generated considerable consternation in recent years. In 2006, about half of consumers mad a late payment.[17] The amount that issuers charge as a late fee has escalated sharply in the last decade.[18] In the United Kingdom, regulators have responded with a fixed cap on late fees that is designed to ensure that such fees actually compensate for risk.[19] In America, the industry has claimed that it must have flexibility in assessing late fees to manage risk.[20] H.R. 5244 permits issuers to set the amount of late fees and trusts the market to price this term appropriately. The bill merely seeks to make sure that consumers who have the means and desire to pay on time are able to do so. It would accomplish this by eliminating confusing and complicated due date and billing practices. Such changes to current card contracts would encourage consumers to pay on time by protecting them from fees and default charges that are incurred despite responsible efforts to meet billing deadlines.

H.R. 5244 would create standardized rules for due dates. First, the bill establishes uniform rules for timely payment. Consumers who mail their bills not less than seven days before the due date or whose payments reach the issuers by 5 p.m. EST on the due date would be protected from late fees. Because these are clear rules, consumers would know what they must do if they wish to avoid late fees. The multiplicity of due date rules in current card contracts makes it very difficult for even the most diligent consumers to know with any assurance that they can avoid late fees. Consumers who want to pay on time should be able to do so without the harms of due date traps. Fees from mere mistakes or arbitrary rules are not an element of legitimate risk-based pricing. Late fees should reflect circumstances that correspond to actual consumer difficulty in meeting payment obligations. As Professor Ronald Mann has concluded, "[i]t is hard to see that a bright-line rule [for repayment deadlines] would impose any burden on legitimate business models."[21]

The second standardized term in H.R. 5244 would require issuers to mail billing statements twenty-five days before the due date. Current law already imposes an industry-wide standard on the mailing of billing statements.[22] The bill would expand the time for consumers to

open, read, and submit payment from fourteen days to twenty-five days. By giving consumers ample time to respond to periodic statements, consumers who have the means to pay on time are empowered to do so. The bill would also require issuers to provide a phone and internet address for the consumer to access a payoff balance. This is particularly useful for consumers who wish to prepay their accounts in advance of a billing statement but otherwise have to wait for a statement and respond within the tight timeline under current law. It is sound policy to encourage consumers to use their cards responsibly by paying them off on time and in full. H.R. 5244 supports consumers' efforts to manage their cards successfully and would help prevent Americans from becoming trapped in default-based pricing by accident or confusion when the consumers have the intention and ability to repay their charges.

C. Subprime Card Fees

The moderate approach of H.R. 5244 is exemplified in its proposals on subprime credit cards. Rather than banning such cards or limiting their marketing, the legislation requires consumers to demonstrate that they can afford the costs of a subprime card. Like the provisions on over-the-limit fees and billing practices, H.R. 5244's focus is on helping consumers use financial products in ways that are appropriate for their circumstances.

Subprime cards are issued to high-risk borrowers, including those with adverse credit reports or low incomes. The availability of such cards has exploded in recent years.[23] In my research, I found that in the first year after filing Chapter 7 bankruptcy 96% of debtors received credit card offers.[24] While new credit may be useful to such families, there is a grave risk of harm if families do not understand or manage the high-cost credit that is heavily marketed to them.

Subprime cards usually have very low initial credit limits, often $250 or $500. Because of the very small amount of credit extended, issuers will earn few dollars from merchant fees. To compensate for this lost revenue, issuers impose very high upfront fees on subprime cards.[25] In addition to an annual fee, such cards often charge a one-time account "set-up" fee, a "program" fee, and monthly "service" fee.[26] These fees reduce the available amount of credit. For example, the Gold Tribute Mastercard offers a maximum credit limit of $300 but has initial fees of $150. Under current practice, the available credit at account opening is only $150.[27]

H.R. 5244 does not tackle the issue of whether the very high fees for subprime cards are appropriate devices for managing risk. Instead, it seeks to ensure that consumers can afford such fees. Thus, it encourages responsible use of credit without regulating the market for card pricing. The bill specifies that if card fees exceed 25% of the total amount of credit authorized under the account, the card could not issue until the consumer paid such fees.[28] The payment of these fees could not be financed by the card itself. If a consumer cannot or does not pay such fees, the card cannot be issued.

This rule would impose an obligation on consumers to fund their decision to obtain a subprime card. Consumers would remain free to choose the high-cost credit of subprime cards; issuers would remain free to earn the profits from such customers. The bill's focus on upfront fees merely requires consumers to bear the cost of obtaining a card before it is issued. Such a rule would ensure that consumers understand the full cost of subprime costs.

H.R. 5244 would prevent the issuer from reporting the opening of a subprime card account to credit reporting agencies until the upfront fees were paid. This rule prevents consumers from being trapped into maintaining a card that they cannot afford for fear of worsening their credit. Such a rule would also deter issuers from marketing these cards merely to

earn fees. Such industry behavior does not legitimately expand access to credit to low-income or high-risk consumers. The bill's balanced approach acknowledges and respects the industry's assertions about the importance of default-based pricing, while ensuring that the most vulnerable consumers can bear the cost of a subprime card.

The bill's prohibition on an issuer sending a card and reporting the card to credit reporting agencies until the consumer has paid the upfront fees is analogous to the cooling-off periods used in other consumer contexts. The point of such regulation is not to hinder the freedom to contract contracts but to ensure that consumers have adequate time to digest the costs and benefits of their decisions. The complexity of credit card contracts and the unusual fee structure of subprime cards make it particularly appropriate to eliminate the adverse consequences of applying for a high-fee card. If a consumer cannot afford the upfront costs of such a card, the responsible path is to allow the consumer to avoid receiving the card without an adverse consequence to their credit for merely completing an application.

D. Disclosure Cannot Substitute for the Benefits of Standardized Terms

The general approach to credit card regulation in America is disclosure.[29] While the Truth in Lending Act mandates disclosures in credit card solicitations, agreements, and periodic statements, disclosure is an inappropriate response to practices that are fundamentally unfair or that consumers do not understand or consider in selecting and using cards.[30] Rather than mandate disclosures, H.R. 5244 regulates in other narrow ways. It singles out the most egregious industry practices, and it gives consumers the tools that they need to use their cards responsibly.

Disclosure suffers from several well-documented problems. Consumers may not read the disclosures. If they do, they may not alter their behavior in light of the disclosures.[31] Serious cognitive barriers hinder consumers from making effective use of disclosures, including a tendency to underestimate the likelihood that they will encounter a penalty under the contract.[32] To overcome the limits of disclosure, the bill proposes to standardize certain key terms of credit card agreements. For example, under current law, consumers must know, understand, and remember numerous rules in order to pay their bills on time. Rather than having to master the different due date policies on each of several cards (timely if paid by 10 a.m. EST; timely if paid by midnight CST, etc.), H.R. 5244 would require consumers to know only a single, standardized rule—that by law, a payment is timely if made before 5 p.m. EST.[33] Similarly, a consumer need not study each issuer's definition of "prime rate" because the bill would create a standardized definition for the term. By limiting the ability of issuers to impose irregular and varying administrative practices or contract terms, H.R. 5244 should improve cardholders' understanding of the terms of their contracts.

Credit card agreements in America are truly unique for their lack of standard terms.[34] The focus in H.R. 5244 on standard terms is an appropriate adjunct to disclosure. It does not supplant the importance of consumers taking responsibility for honoring their contracts but rather helps consumers to achieve that outcome. Standardizing just a few modest terms of credit card contracts would eliminate unwitting mistakes by consumers, empower consumers to comply with their obligations, and focus consumer attention on comparing the key aspects of cards such as interest rates that could vary. In these ways, standardized terms will improve the usefulness and efficacy of disclosure. Merely giving consumers additional information at the time of contracting would be much less effective in improving consumers' financial practices.

Part II
Improving Policymakers' Understanding of Credit Card Markets

Credit cards have a tremendous impact on the health of America's economy and on the well-being of individual American families. In 2004, total bank credit card debt in the United States amounted to $800 billion.[35] Given their economic importance, regulators and policymakers need access to timely and reliable information about credit card markets. Section five of H.R. 5244 would require financial institutions to disclose information about credit card practices to the Board of Governors of the Federal Reserve System (Federal Reserve), who would make such information available to Congress.

A. Existing Data on Credit Card Practices Are Woefully Inadequate

The existing data on credit cards are woefully inadequate to assess the functioning of the market and its impact on consumers. The current provisions of the Truth in Lending Act require select financial institutions to disclose to the Federal Reserve only one specific piece of information about actual, completed credit card transactions—the annual percentage rate.[36] The remaining disclosures can be read, and apparently are so interpreted by the Federal Reserve, to apply only to data about credit card offers.[37] While that information may be useful to evaluate credit card marketing, it is wholly insufficient to assess *actual* credit card practices.

The existing data on credit card offers are inadequate because credit card contracts permit issuers to raise fees or rates after the initial contract. Current data only inform us about the charges made in credit card solicitations. No data measure whether the industry routinely raises fees on such accounts or on how many consumers actually pay the fees. Additionally, card issuers may impose new types of fees by amending the terms of the contracts. Such changes are not captured by data on initial credit offers. Regulators also have inadequate information about the actual interest rates imposed on consumers. These rates may be sensitive to market fluctuations but in a way that is too opaque to allow regulators to reliably measure how a change in costs of funds may relate to consumer rates. Additionally, many card issuers offer introductory "teaser" interest rates or impose "default" interest rates. The current data provisions do not capture how frequently or for how long consumers pay at a teaser or default rate or the extent to which issuers rely on such rates for revenue. Merely knowing the base rate that the largest financial institutions offer customers is inadequate.

The second problem with existing credit card data is that they do not capture information on actual habits of consumers. That is, even if the fees or rates in credit card offers did not change, such data still do not reflect how often such fees or rates are imposed. Under the existing disclosure regime, regulators cannot answer basic questions such as "how many cardholders pay late fees each month?" or "how many consumers revolve balances and incur interest rate charges?" Yet, answering these questions is essential for regulators to monitor the economic health of American families. Policymakers are also handicapped in assessing the relative advantages and disadvantages in the expansion of the consumer credit market if they do not know how many consumers are paying subprime interest rates or penalty fees. Congress cannot determine whether alternate payment systems such as debit cards would impose fewer costs on American consumers and businesses and should be encouraged by federal policy if they do not know the true costs to consumers of using credit cards.

The third problem is that existing data do not facilitate the Federal Reserve's oversight of the actual practices of issuers. This issue is distinct from knowing how consumers use their

cards. The focus here is on enabling regulators to identify particular issuers whose business models may be unusually reliant on particular revenue streams. To ensure the stability of such issuers, the Federal Reserve needs to know how card issuers earn revenue. On an aggregate level, such data would help policymakers safeguard against undue risk-taking and could aid in preventing financial instability. In the event of an overall market downturn, available and consistent data on credit card profits would save valuable time in deciphering the functioning of the market before designing effective responses to help issuers and consumers.

Congress and regulatory agencies cannot effectively monitor credit card markets with the existing data gathered under the Truth in Lending Act. The Federal Reserve currently produces a "Survey of Credit Card Plans,"[38] which contains information only on the largest issuers and others who "wish to participate."[39] The data points are very few—annual fee, grace period, and interest rate.[40] Frankly, an internet search produces in a few seconds more complete information on the variety of available credit card terms than the Federal Reserve chooses to collect under the existing Truth in Lending Act. The Federal Reserve's interest in studying credit cards has been consistently lackluster. For example, despite a statutory mandate in the 2005 amendments to the Bankruptcy Code to study the card industry's practices of soliciting and extending credit "indiscriminately" or "in a manner that encourages consumers to accumulate additional debt," the Federal Reserve's final report contained not a shred of new data and has no citations to support many of its assertions.[41] Congress needs and deserves better information.

The federal government cannot rely on private actors or agencies to fill these information gaps. Neither industry nor academic researchers nor administrative agencies can ensure that Congress gets the data that it needs. The most prudent course of action is for Congress to enact H.R. 5244 to arm itself with a robust understanding of credit card markets.

The credit card industry will not voluntarily provide data on its practices in a useful and reliable format. First, no particular issuer has an incentive to disclose if other issuers will not follow. That issuer may fear that it will put itself at a competitive disadvantage, attract negative publicity, or become a target for regulatory intervention. Second, even when and if issuers do disclose information about their practices, the emerging picture will be incomplete and potentially deceptive. For example, while some issuers have publicly promised that they do not engage in double-cycle billing,[42] this admission does not mean that the same issuer does not rely on other punitive practices to earn a disproportionate share of its revenue. Allowing issuers to have complete control over disclosures sets the stage for manipulative marketing or disclosures driven only by public relations concerns. Third, issuers will not use uniform and consistent methodology in making voluntary disclosures. Without clear rules for when and how the data must be revealed, issuers' practices cannot be compared fairly against each other. If consumers are going to engage in free choice to select a particular issuer, they must have access to comparable information about issuers' practices to make an informed decision. The industry's occasional and self-serving disclosures are neither transparent nor complete enough to be useful.

Academic researchers are unable to provide policymakers with a robust picture of credit card markets without federal data. Credit card agreements are private contracts; they are not publicly available. Issuers are not obligated to comply with requests from researchers to provide information. They may either flatly refuse to do so or may selectively provide data to only selected researchers whose proclivities they perceive to be favorable to the industry. If the industry will not disclose, the remaining option for researchers is to rely on consumers themselves to provide data about credit card use. While some researchers have proceeded this

way,[43] the costs of original data collection are very high. Further, the risks of sampling bias are significant.[44]

The same criticism can be leveled against the government's data collection from consumers about credit cards. The Federal Reserve Board's Survey of Consumer Finances (SCF) is a triennial survey of households' financial practices.[45] Although the SCF may be the best and most popular data on credit card use,[46] it has serious shortcomings.[47] Further, the SCF's focus on household behavior does not provide insights on different issuers. The identities of issuers or their practices are not covered in SCF data collection.

An additional barrier to government data collection is the fractured regulatory framework for credit card issuers. States frequently have to contend with arguments about federal preemption, even when just seeking to gather data.[48] At the federal level, regulators may refrain from investigating credit card practices because they believe it is appropriate to defer to another agency. Because credit card issuers may be different types of financial institutions, several separate agencies have oversight authority for credit card practices.[49] A cycle of non-action results with no agency thus far having taken the lead in gathering detailed credit card data. The result is that Congress remains deprived of uniform, consistent data about credit card practices. Indeed, American lawmakers operate with much less information about card markets than their peers in other countries.[50]

B. Improvements in Data Collection under H.R. 5244

Section five of H.R. 5244 would strengthen our collective knowledge about credit card markets. The additional data would remedy many of the inadequacies with existing data. With more information about card practices, Congress would be better equipped to evaluate any future legislative proposals about credit cards. The bill would require the Federal Reserve to gather three key kinds of information from issuers: 1) a list of the types of transactions that incur fees or interest rates; 2) the number of cardholders who are subject to such fees or rates; and 3) a breakdown of the revenue that issuers earn from such practices.

H.R. 5244 would require the Federal Reserve to obtain a list of each type of transaction or event for which card issuers impose a separate interest rate[51] and a list of each type of fee that card issuers impose upon cardholders.[52] If enacted into law, these provisions would permit Congress to understand the pricing mechanism for credit cards and to assess the extent to which credit card pricing is risk-based.[53] Further, the language about "each type" ensures that the Federal Reserve's data would stay abreast of changing credit card practices rather than attempt to anticipate in advance the names of new fees or the reasons that issuers impose them.[54] As credit card issuers implement new practices, Congress would be aware of such fees.

The second kind of information that H.R. 5244 would require to be disclosed is the extent to which consumers are being charged certain interest rates or fees. For each different rate, issuers would have to report how many cardholders were charged a particular interest rate during the prior calendar year.[55] A similar provision applies to fees.[56] These data could be used to monitor whether a growing proportion of American consumers are paying late fees, an early indicator of rising household financial distress. These data would also reveal how Americans use their cards by documenting the number of cardholders who take out cash advances, exceed their credit limits, or use their card to obtain foreign currency. Such information is useful for measuring the extent to which credit cards are being used for borrowing, rather than as spending devices for convenience. This knowledge is critically important to determining whether Americans' preference for credit cards over debit cards is optimal.[57]

If enacted, H.R. 5244 would give Congress timely and regular information about the overall revenue structure of credit card issuers. The Federal Reserve would gather data on the total amount of interest and the total amount of fees that each issuer imposed upon cardholders.[58] These data would be supplemented with an annual, public report by the Federal Reserve of the approximate, relative percentage of income that each issuer derives from interest, cardholder fees, merchant fees, or other material sources of income. Existing research suggests that late fees alone are the third largest revenue stream for card issuers,[59] and that overall fee income may be 35% of total revenues.[60] The economic importance of such revenue sources to the financial stability of issuers requires that the Federal Reserve and Congress be knowledgeable about any dramatic changes in issuers' profits.

C. Effective Regulatory Oversight Requires Information

The sheer size of the credit card market makes it vitally important to the stability of the American economy. To monitor the health of card issuers and American households, Congress needs basic information about actual credit card use and revenue. Without such information, Congress cannot fairly evaluate the functioning of the credit card market, and regulators cannot effectively exercise their duties. For example, regulators must know how issuers actually earn revenue if they are to monitor issuers' risk and to protect consumers against unconscionable practices.[61] Data on rates and fees at the time of application or solicitation are not appropriate for such tasks, which require the improved data that H.R. 5244 would collect. Data on how many consumers pay certain interest rates or fees is useful to Congress as it assesses the overall economic health of American families and considers proposals to reform the laws pertaining to credit cards. Such data reflect how successfully American families are managing their access to credit and the extent to which issuers are relying on financial distress to earn revenue.

The industry should welcome the data provisions in H.R. 5244. Issuers have repeatedly asserted that certain legislative reforms such as price controls would do severe harm to the business model for credit cards,[62] but Congress has been hamstrung in assessing the validity of such concerns by a lack of reliable, neutral government data about card revenue. Neither consumers nor industry should be content with legislative activity that is the result of confusion or misunderstanding. Indeed, the industry should benefit if Congress understands its practices because lawmakers will regulate with a fuller appreciation of the consequences of changes. H.R. 5244's improvements to data collection would enrich the debates about consumer credit by creating shared data that could used to assess the soundness of proposed reforms.

Conclusion

Credit cards can be useful spending and borrowing devices. However, their complexity and their widespread use in America impose heightened risks on consumers and create additional challenges for regulators. H.R. 5244 would improve the ability of consumers to successfully manage their card use. By standardizing administrative practices, consumers can pay on time. By allowing consumers to set firm credit limits, consumers can avoid over-the-limit fees and stay within their means. Such responsible credit card practices not only limit the risks to individual consumers of financial distress from credit card use but also help insulate the economy from an overall credit bubble that could occur if consumers become highly leveraged with credit card debt. If enacted, H.R. 5244 would give Congress and regulators improved data about credit cards with which they could monitor the industry's stability and better weigh the impact of further regulation on credit card markets and consumers.

[1] Additional biographical information and my curriculum vitae are available at my faculty page at the University of Iowa College of Law at http://www.law.uiowa.edu/faculty/katie-porter.php.
[2] My research papers may be downloaded from my SSRN author page at http://ssrn.com/author=509479.
[3] Brian K. Bucks et al., *Recent Changes in U.S. Family Finances: Evidence from the 2001 and 2004 Survey of Consumer Finances*, FED. RES. BULL., Mar. 22, 2006, at A1, A31, *available at* http://www.federalreserve.gov/Pubs/oss/oss2/2004/bull0206.pdf; Liz Pulliam Weston, *The Truth about Credit Card Debt*, MSN MONEY, http://moneycentral.msn.com/content/Banking/creditcardsmarts/P150744.asp (last visited Mar. 10, 2008); José A. Garcia, *Borrowing to Make Ends Meet: The Rapid Growth of Credit Card Debt in America*, DĒMOS: A NETWORK FOR IDEAS & ACTION 5 (2007), *available at* http://demos.org/pubs/stillborrowing102407.pdf .
[4] RONALD J. MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS 77 fig.6.4 (2006).
[5] *Id.* at 39.
[6] Credit Card Practices: Current Consumer and Regulatory Issues: Hearing Before the H. Comm. on Fin. Servs., Subcomm. on Fin. Insts. and Consumer Credit, 110th Cong. (Apr. 26, 2007) (statement of Oliver Ireland) ("[T]he flexibility and features that support the benefits of credit cards also result in credit cards being inherently complex products.").
[7] MANN, *supra* note 4, at 23.
[8] H.R. 5244, 110th Cong. (2008).
[9] MANN, *supra* note 4, at 66 ("Even if credit card spending and consumer debt are held constant, an increase in credit card debt—a shift of consumer borrowing from noncard borrowing to card borrowing—is associated with an increase in bankruptcy filings."). This effect was consistent in five large economies, suggesting that the risks of credit cards cannot merely be attributed to cultural factors.
[10] MANN, *supra* note 4, at 23.
[11] H.R. 5244, 110th Cong. § 4 (2008).
[12] Sumit Agarwal, John Driscoll, Xavier Gabaix & David Laibson, *The Age of Reason: Financial Decisions Over the Lifecycle* (Feb. 11, 2008), *available at* http://ssrn.com/abstract=973790. The researchers controlled for observable risk characteristics such as income levels and credit scores, yet still found measurable age-related effects in over-the-limit transactions.
[13] MANN, *supra* note 4, at 162 n.34 (citing U.S. Overlimit Fees Monthly Averages Among > $100M Portfolios – Current, *available at* http://www.cardweb.com/carddata/charts/overlimit_fees.amp (subscription only) (last visted Mar. 10, 2008) ($31.29 average in December 2005 for issuers with portfolios greater than $100 million)).
[14] Professor Ronald Mann proposes that issuers be required to disclose whether a consumer would exceed the limit and the amount of the over-the-limit fee at the point-of-sale. He notes that such "[d]isclosures would help to the extent those fees reflect an imperfect ability to manage the credit card account." MANN, *supra* note 4, at 162.
[15] Discover Bank v. Owens, 822 N.E.2d 869, 873–74 (2004).
[16] *Id.* at 872 (bank assessed Ms. Owens $1518 in over-the-limit fees over a period of six years despite no new customer activity on the account).
[17] Walechia Konrad, *How Americans Really Feel About Credit Card Debt*, Bankrate.com (Survey 2006).
[18] U.S. Gov't. Accountability Office, *Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures*, 18 & 19, Fig. 4 (2006), *available at* http://www.gao.gov/new.items/d06929.pdf?source=ra_.
[19] MANN, *supra* note 4, at 152.
[20] Jonathan M. Orszag & Susan H. Manning, *An Economic Assessment of Regulating Credit Card Fees and Interest Rates*, Oct. 2007, at 11.
[21] MANN, *supra* note 4, at 152.
[22] 15 U.S.C. § 1637(b) (fourteen days).
[23] Interview of Andrew Kahr, *Frontline: Secret History of the Credit Card*, Jan. 5, 2005, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/credit/interviews/kahr.html (describing emergence of subprime card market in last ten years).
[24] Katherine Porter, *Bankrupt Profits: The Credit Industry's Business Model for Postbankruptcy Lending*, 94 IOWA L. REV. (forthcoming 2008).
[25] *See, e.g.*, Continental Finance Mastercard terms, *at* https://www.cfcapply.com/classic1mc/fbd-terms.htm; Cor Trust Banker Mastercard terms, *at* https://www.cortrustcard.com/Terms/.
[26] *See, e.g.,* Centennial card terms, *at* https://www.centennialapplication.com/Default.aspx?appid=PI0803091734SC6GR (stating that the following fees

will be billed to the first statement: Annual Fee of $48, Account Set-Up Fee of $29, Program Fee of $95, Monthly Servicing Fee of $7, and an Additional Card Fee of $20 per card (if applicable)).

[27] Gold Tribute Mastercard terms, *at* https://www.mytributecard.com/apply/?xml=%3CCSCODE%3E5QLBC1%3C/CSCODE%3E. However, the card advertises that a consumer will have a $170 of "available credit" because the consumer is required to make a $20 minimum payment before the card may be used. I do not see how a $20 payment by a consumer constitutes a credit extension by the issuer, but that is how the card is marketed.

[28] H.R. 5244, 110th Cong. § 6 (2008).

[29] MANN, *supra* note 4, at 140 (concluding that the lack of existing law to regulate credit card agreements is "striking" in light of general approach to consumer contracts in American law).

[30] *Id.* at 145.

[31] William C. Whitford, *The Functions of Disclosure Regulation in Consumer Transactions*, 1973 WIS. L. REV. 400 (1973).

[32] Thomas Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARVARD L. REV. 1393 (1983); Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q.J. OF ECON. 500 (2006).

[33] H.R. 5244, 110th Cong. § 3(e) (2008).

[34] MANN, *supra* note 4, at 149 ("Credit card agreements stand out as one of the rare types of consumer financial transactions that do not proceed on some set of preapproved terms.").

[35] Mark Furletti & Christopher Ody, *Measuring U.S. Credit Card Borrowing: An Analysis of the G.19's Estimate of Consumer Revolving Credit*, FEDERAL RESERVE BANK OF PHILADELPHIA, Apr. 2006, *available at* http://www.philadelphiafed.org/pcc/papers/2006/DG192006April10.pdf.

[36] 15 U.S.C. § 1646(a) ("The Board shall collect, publish, and disseminate to the public, on a demonstration basis in a number of standard metropolitan statistical areas to be determined by the Board, the annual percentage rates charges for representative types of nonsale credit by creditors in such areas.").

[37] 15 U.S.C. § 1646(b) (requiring Board to collect "credit card price and availability information, including the information required to be disclosed under section 1637(c) of this title, from a broad sample of financial institutions which offer credit card services"). The reference to "credit card price information" could include a variety of data about actual charges to consumers, but the Federal Reserve Board has restricted its efforts to the specific credit card offer information in 1637(c), thus doing the bare minimum required by the statute.

[38] Federal Reserve Board, *Survey of Credit Card Plans*, *available at* http://www.federalreserve.gov/pubs/shop/survey.htm.

[39] Issuers who charge unusually steep rates or penalties can apparently escape public scrutiny by refusing to complete the survey. Thus, the Survey of Credit Card Plans is totally useless as a tool for identifying egregious practices.

[40] The rate information consists of the annual percentage rate, whether such rate is fixed, variable or tiered, and the index used for variable rates.

[41] Federal Reserve Board, *Report to Congress on Practices of the Consumer Credit Industry in Soliciting and Extending Credit and Their Effects on Consumer Debt and Insolvency* (June 2006), *available at* http://www.federalreserve.gov/boarddocs/rptcongress/bankruptcy/bankruptcybillstudy200606.htm; Post of Elizabeth Warren to *Credit Slips* blog, *Fed Says We're All Doing Great with Credit Cards* (Aug. 8, 2006), *at* http://www.creditslips.org/creditslips/2006/08/fed_says_were_a.html.

[42] Testimony of John P. Carey, Chief Administrative Officer of Citi Cards, 9 at Credit Card Practices: Current Consumer and Regulatory Issues: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the Committee on Financial Services, 110th Cong. 2 (2007).

[43] *See, e.g.,* Angela Littwin, *Beyond Usury: A Study of Credit-Card Use and Preference Among Low-Income Consumers*, 86 Tex. L. Rev. 451 (2008); TERESA A. SULLIVAN, ELIZABETH WARREN, JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT (2000); Katherine Porter, *Bankrupt Profits: The Credit Industry's Business Model for Postbankruptcy Lending*, 93 IOWA. L. REV. (forthcoming 2008); Michael S. Barr, *Detroit Area Study on Financial Services: What? Why? How?*, Law Quadrangle Notes 48(1), 72–77 (Summer 2005), *available at* http://wwwpersonal.umich.edu/~msbarr/2005_Law_Quad_Notes_ Detroit_Area_Study_on_Financial_Services.pdf; Joseph Lupton & Frank Stafford, *Five Years Older: Much Richer or Deeper in Debt?*, INSTITUTE FOR SOCIAL RESEARCH (Jan. 2000), *available at* http://psidonline.isr.umich.edu/Publications/Papers/FiveYearsOlder.pdf.

[44] MANN, *supra* note 4, at 61 ("The problem with survey data, however, is that they are likely to be inaccurate for families that do not understand the significance of the amounts that they are spending and borrowing.").
[45] Federal Reserve Board, About the Survey of Consumer Finances, http://www.federalreserve.gov/pubs/oss/oss2/about.html.
[46] Arthur B. Kennickell, *Currents and Undercurrents: Changes in the Distribution of Wealth, 1989-2004*, FEDERAL RESERVE BOARD (Jan. 2006), *available at* http://www.federalreserve.gov/pubs/oss/oss2/papers/concentration.2004.5.pdf; Ian Domowitz & Robert L. Sartain, *Determinants of the Consumer Bankruptcy Decision*, 54 J. Fin. 403 (1999); Jennifer Wheary & Tamara Draut, *Who Pays?: The Winners and Losers of Credit Card Deregulation*, DĒMOS: A NETWORK FOR IDEAS & ACTION 2 (2007), *available at* http://www.demos.org/pubs/whopays_web.pdf.
[47] MANN, *supra* note 4, at 61 ("[A] study by an independent research organization found that data from the SCF appear to understate credit card receivables by about 25%.").
[48] In a recent example, several mortgage servicers declined to provide data on loss mitigation activity to the Foreclosure Prevention Working Group of state attorneys general, saying that they were acting on the advice or direction of the Office of the Comptroller of the Currency to refuse to provide data. *See* Ruth Simon, *States Say Mortgage Companies Fall Short on Loan Modification*, WALL ST. J. D3 (Feb. 7, 2008).
[49] The primary federal regulator could be the Federal Deposit Insurance Corporation, the Federal Reserve, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Trade Commission, or the National Credit Union Administration. *See* Fed'l Trade Comm'n, *Choosing and Using Credit Cards, available at* http://www.ftc.gov/bcp/conline/pubs/credit/choose.shtm (listing agencies with jurisdiction over credit cards).
[50] MANN, *supra* note 4, at 261 n.35 ("We have little empirical data about the operation of the card system in the United States. The regulatory authorities in other countries (Australia and the United Kingdom in particular) have considerably more accurate historical and current information about payment systems than we have in the United States.").
[51] H.R. 5244, 110th Cong. § 5(1)(B) (2008).
[52] *Id.*
[53] *Cf.* Adam Levitin, *All But Accurate: A Critique of the American Bankers Association's Study on Credit Card Regulation* (2007) *available at* http://ssrn.com/abstract=1029191, with Jonathan M. Orszag & Susan H. Manning, *An Economic Assessment of Regulating Credit Card Fees and Interest Rates* (commissioned by American Bankers Ass'n) (2007), *available at* http://www.aba.com/aba/documents/press/regulating_creditcard_fees_interest_rates 92507.pdf.
[54] Additionally, the bill would permit the Board to collect "any other information related to interest rates, fees, or other charges that the Board deems of interest." H.R. 5244, 110th Cong. § 5(1)(B) (2008).
[55] *Id.*
[56] H.R. 5244, 110th Cong. § 5(1)(B) (2008).
[57] MANN, *supra* note 4, at 120.
[58] H.R. 5244, 110th Cong. (2008).
[59] Mark Furletti, *Credit Card Pricing Developments and Their Disclosure*, FEDERAL RESERVE BANK OF PHILADELPHIA, Jan. 2003, *available at* http://www.philadelphiafed.org/pcc/papers/2003/CreditCardPricing_012003.pdf.
[60] MANN, *supra* note 4, at 23 fig.2.2.
[61] Katherine Porter, *The Debt Dilemma*, 106 MICH. L. REV. 1167, 1189 (2008) (arguing that agencies charged with regulating credit cards cannot intelligently evaluate the utility and safety of credit cards if they do not have meaningful knowledge of how those products are used).
[62] Testimony of James A. Huizinga, 2 at Improving Credit Card Consumer Protection: Recent Industry and Regulatory Initiatives: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the Committee on Financial Services, 110th Cong. 2 (2007) ("I think it is critically important that, for the most part, the proposal avoids price controls and similar restrictions. Price controls seldom work.").