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How America's Newest Consumer Credit Statute Fails to Protect Its Oldest Consumers: A Critique of the Credit CARD Act of 2009

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COMMENT

How America's Newest Consumer Credit Statute Fails to Protect Its Oldest Consumers: A Critique of the Credit CARD Act of 2009*

I. Introduction

Facing off against a number of credit card industry executives before the United States Senate Committee on Banking, Housing, and Urban Affairs on January 25, 2007, Harvard Law Professor and consumer advocate Elizabeth Warren[1] made her position unmistakably clear: "The credit card market is broken."[2] Professor Warren's comprehensive testimony included sharp criticism of credit card marketing practices which target the elderly, who "have the dark distinction of being the fastest growing age group filing for bankruptcy."[3] She concluded by urging the Senate to enact Senator Christopher Dodd's Credit Card Accountability Responsibility and Disclosure (Credit CARD) Act as "an important first step to reign in abusive lending practices."[4] In so doing, Professor Warren lent her voice to a growing chorus of legal commentators arguing in favor of enhanced statutory protections for elderly credit card consumers.[5]

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1. President Obama later appointed Elizabeth Warren, a native of Oklahoma, as Assistant to the President and Special Advisor to the Secretary of the Treasury to assist in launching the newly created Consumer Financial Protection Bureau, a Department of Treasury agency which will implement the Credit CARD Act of 2009 and other consumer financial protection statutes. *See Meet Elizabeth Warren*, CONSUMER FIN. PROTECTION BUREAU, http://www.consumer finance.gov/the-bureau/meet-Elizabeth-Warren (last visited Feb. 13, 2011).

2. *Examining the Billing, Marketing, and Disclosure Practices of the Credit Card Industry, & Their Impact on Consumers: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 110th Cong. 1-2 (2007) [hereinafter *Warren Testimony*] (statement of Elizabeth Warren, Leo Gottlieb Professor of Law, Harvard Law School).

3. *Id.* at 6.

4. *Id.* at 7.

5. *See, e.g.*, Donna S. Harkness, *When Over-the-Limit Is Over the Top: Addressing the Adverse Impact of Unconscionable Consumer-Credit Practices on the Elderly*, 16 ELDER L.J.

Following "a long process of negotiations between consumer groups, credit card companies, elected officials, regulators, and other interested parties," Congress enacted the Credit CARD Act in 2009.[6] Although the Credit CARD Act was signed by President Obama on May 22, 2009, the final regulations promulgated pursuant to the Act were not effective until August 2010.[7] In addition, the new Consumer Financial Protection Bureau, which will enforce the provisions of the Credit Card Act, was not fully operational until summer 2011.[8] As a result, the Credit CARD Act's effects are only beginning to be felt. Nevertheless, some elder consumer credit reform advocates already accord it high praise.[9] Others are more cautious, stressing that the Act is "not a panacea," but expressing hope that it "does provide welcome relief as it portends a new, more consumer oriented direction for the credit card industry."[10]

In the years leading up to the passage of the Credit CARD Act, consumer credit reform advocates presented increasingly persuasive and alarming evidence that the elderly represent a uniquely vulnerable class of credit card consumers who face constant bombardment from a greedy industry focused almost exclusively on profit-maximization.[11] To the extent that this assessment is accurate, it is worth examining whether the Credit CARD Act sufficiently protects elderly credit card consumers from predatory lending.

1, 22 (2008) (arguing that existing consumer credit protections "should again be revised to add substantive protections to address the abuses currently rampant in the area of open-ended credit"); Deanne Loonin & Elizabeth Renuart, *The Life and Debt Cycle: The Growing Debt Burdens of Older Consumers and Related Policy Recommendations*, 44 HARV. J. ON LEGIS. 167, 190-93 (2007) (presenting "seven principles" that purport to provide guidance to legislators when drafting consumer credit reform statutes for the elderly).

6. Stanton Koppel, Nicole Ibbotson, & Helen Y. Lee, *Credit CARD Act of 2009: Implementation Guidelines*, 63 CONSUMER FIN. L.Q. REP. 205, 206 (2009).

7. Donna S. Harkness, *The Credit CARD Act of 2009: Welcome Relief or Too Little, Too Late for Vulnerable Seniors?*, BANKING & FIN. SERVICES POL'Y REP., Sept. 2010, at 12, 12.

8. *See Learn About the Bureau*, CONSUMER FIN. PROTECTION BUREAU, http://www.consumerfinance.gov/the-bureau (last visited Feb. 13, 2011).

9. *See* Harkness, *supra* note 7, at 12 (noting enthusiastic AARP approval of the Credit CARD Act).

10. *Id.* at 20 (expressing the author's own view).

11. *See, e.g.*, HEATHER C. MCGHEE & TAMARA DRAUT, DĒMOS, RETIRING IN THE RED: THE GROWTH OF DEBT AMONG OLDER AMERICANS 1-7 (2004), *available at* http://archive.demos.org/pubs/retiring_2ed.pdf; Loonin & Renuart, *supra* note 5, at 168-89; Nathalie Martin, *Consumer Scams and the Elderly: Preserving Independence Through Shifting Default Rules*, 17 ELDER L.J. 1, 1-4 (2009); Jeffrey Kimball Paulsen, Note, *Credit Card Disclosures and the Elderly: Will the Proposed Amendments to Regulation Z Help the Elderly Understand Credit Card Documents?*, 17 ELDER L.J. 125, 126-34 (2009).

Unfortunately, it does not. While the Credit CARD Act is a step in the right direction, it ultimately fails to provide adequate consumer protection to elderly credit card consumers and may actually do more harm than good. Thus, the passage of the Credit CARD Act will not end the victimization of elderly credit card users by unscrupulous lenders. To the contrary, elderly credit card consumers will not have the substantive statutory protections they deserve until Congress enacts an elder-specific consumer credit protection statute.

Part II of this comment reviews and reaffirms the position of consumer credit reform advocates regarding the vulnerabilities of elderly credit card consumers, the predatory lending practices prevalent in the credit card industry, and the nexus between the two. Part III traces the historical legislative and regulatory response to abusive lending practices. Part IV summarizes the substantive protections that the Credit CARD Act provides. Part V explains why these provisions, while helpful to a limited extent, ultimately fail to protect elderly credit card consumers and may actually harm them. Part VI proposes substantive statutory consumer protections for elderly credit card consumers and also offers some suggestions for obtaining the best protection for elderly credit card consumers under existing law.

II. Credit Cards and the Elderly: A Tale of Use and Abuse

Credit card use among the elderly is on the rise in the United States.[12] Approximately 75% of the elderly are credit card consumers.[13] The average amount of credit card debt for elderly consumers represents about 20% of the average income for the elderly.[14] The elderly experienced the largest growth in credit card debt of any age group in the years between 1989 and 2004.[15] These troubling statistics prompt a number of questions. What unique factors are causing elderly had credit card consumers to acquire ever-increasing amounts of credit card debt? How is the credit card

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12. *See* Loonin & Renuart, *supra* note 5, at 168 ("Average credit card debt for Americans between the ages of sixty-five and sixty-nine rose a staggering 217% between 1992 and 2001, to $5,844.").

13. *See* MCGHEE & DRAUT, *supra* note 11, at 2.

14. *See* Paulsen, *supra* note 11, at 128 (citing statistics that indicate that in 2001, credit card consumers over the age of sixty-five had an average credit card indebtedness of $4041 and an average annual income of $18,938 (21% ratio) and that credit card consumers aged 65-69 had an average credit card indebtedness of $5844 and an average annual income of $26,796 (22% ratio)).

15. *Id.*

industry persuading elderly credit card consumers to take on more debt? In the end, has the net result of increased credit card use by the elderly had positive or negative effects on society?

The personal experience of each elderly credit card consumer is surely unique. Nonetheless, an examination of several factors and trends unique to elderly credit card consumers the helps to illuminate the problematic relationship between this segment of the population and the credit card industry.[16]

A. A Portrait of an Elderly Credit Card Consumer

Today's elderly credit card consumer is retired or nearing retirement.[17] As such, he or she confronts a number of difficult economic challenges. An increasing number of elderly persons rely on Social Security as their sole source of retirement income.[18] The recent economic downturn has made an already difficult situation even worse as the value of retirement investments continues to decline.[19] Meanwhile, housing costs (including property taxes), medical expenses, and energy prices continue to rise.[20] In short, today's elderly person faces "declining income and wealth coupled with rising costs."[21] One possible bright spot in an otherwise bleak financial picture is home ownership: "Many older Americans . . . have a great deal

16. The argument no doubt will be made that the Credit CARD Act significantly ameliorates many of the problems inherent in elderly credit card use that are depicted in this section. Nonetheless, an accurate presentation of the status quo in the years directly preceding the passage of the Credit CARD Act provides an essential starting point for an analysis of its likely effectiveness. Unfortunately, the Credit CARD Act is demonstrably ineffective at solving the myriad problems surrounding credit card use by the elderly.

17. Defining "elderly" with respect to a specific age is a complex matter. Nonetheless, the simple fact of Social Security eligibility age brackets causes most older Americans to make the shift from full-time employment to retirement sometime during their sixties. *See* SSA Federal Old-Age, Survivors & Disability Insurance, 20 C.F.R. § 404.409 (2010) ("Full retirement age has been 65 but is being gradually raised to age 67 beginning with people born after January 1, 1938."). Given that retirement tends to be the most significant factor of economic change in the lives of most older Americans, it functions as a useful proxy for drawing a precise line between "elderly" and "non-elderly." Indeed, credit card use appears to spike significantly after the age of sixty-five. *See* Paulsen, *supra* note 11, at 128 (citing statistics that indicate that in 2001-2002, the average credit card indebtedness of individuals aged 55-64 was $4088, while the average credit card indebtedness of individuals aged 65-69 was $5844, a difference of $1756).

18. *See* Loonin & Renuart, *supra* note 5, at 170-71.

19. *See* Harkness, *supra* note 7, at 12 (noting that "senior citizens . . . have found themselves increasingly strapped for cash during the current economic downturn").

20. Loonin & Renuart, *supra* note 5, at 171-73.

21. Paulsen, *supra* note 11, at 129.

of equity in their homes, but not much else."[22] Thus, the home has become the "primary asset of many retirees."[23] Home equity is an illiquid asset, however, with no immediate financial use to an elderly person except as collateral for a mortgage or other type of debt.[24]

Elderly credit card consumers frequently face physical and mental challenges which render them more vulnerable than the general population to various forms of financial abuse.[25] Indeed, "vulnerability to abuse can be due to cognitive impairment, physical impairments, sensory impairments, or socioemotional vulnerabilities" or any combination of these.[26] Physically, elderly persons often spend a majority of their time at home due to lack of mobility, rending them vulnerable to aggressive and enticing sales pitches via phone, mail, and direct solicitation.[27] Meanwhile, neurological research indicates that "older people have difficulty in processing new information" and "retain less detail about the information they do process . . . ."[28]

Socio-culturally, the elderly credit card consumer tends to have "old-fashioned" values that may conflict with modern-day business practices:

> [T]he generation that is currently aged sixty-five to eighty-four was either born or came of age during World War II. This generation is known for individuals that are both trusting and trustworthy; they value promises and consider one's word to be

22. Martin, *supra* note 11, at 20.

23. *Id.* at 21 (praising California for providing a greater homestead exemption to "people over age sixty-five").

24. *See id.* at 22-25 (suggesting that a reverse mortgage can be a useful solution for an elderly person seeking to "discharge a great deal of debt"). The reverse mortgage should probably best be regarded as an extreme option of last resort due to its high long-term costs and consequences, including its limited usefulness (it can only be used once) and the negative effects it has on inheritance. *See id.* at 24. Attorneys and their clients should approach the reverse mortgage option with caution. *But see* Celeste M. Hammond, *Reverse Mortgages: A Financial Planning Device for the Elderly*, 1 ELDER L.J. 75, 76-77 (1993) (arguing that reverse mortgages are a desirable tool that should be widely used).

25. Shelby A.D. Moore & Jeanette Schaefer, *Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse*, 41 SAN DIEGO L. REV. 505, 517-20 (2004) (noting that "senior citizens living independently . . . are especially vulnerable to financial abuse").

26. *Id.* at 518.

27. *See id.* at 518 n.50 (referencing Senator Tom Daschle's statement, and noting that "the elderly are frequently targeted by criminals because they lack mobility, they are isolated, and they are dependent on others").

28. Harkness, *supra* note 5, at 19.

> one's bond. . . . [T]his generation tends to be loath to leave any obligation they have incurred unmet.[29]

In addition, elderly credit card consumers are frequently lonely and as a result are more willing to let their guard down—approaching interpersonal interactions with less healthy suspicion than they might once have done.[30]

Educationally, elderly persons are overall less literate than other age groups: in a 2003 study "adults ages 65 and older had the lowest average prose, document, and quantitative literacy."[31] Prose literacy involves "[t]he knowledge and skills needed to search, comprehend, and use information from continuous texts," such as a newspaper article.[32] Document literacy involves the same ability with respect to non-continuous texts, such as a schedule.[33] Quantitative literacy involves "[t]he knowledge and skills needed to identify and perform computations using numbers that are embedded in printed materials," such as a credit card statement.[34] While the percentage of elderly persons aged sixty-five and older who had "Below Basic" literacy declined from 33% in 1992 to 23% in 2003, elderly persons still had almost double the rate of "Below Basic" literacy compared to any other age group.[35]

B. Offers of Credit and Acceptance by the Elderly

Credit card companies aggressively target offers of credit to individuals of all ages, including over six billion "pre-approved" credit offers alone.[36] This seemingly equal-opportunity marketing strategy obscures the credit card industry's "two-tier business model," under which credit card companies categorize their customers in terms of regular payers and non-regular payers.[37] Regarding the first tier:

> For each of these [regularly-paying] customers, the card issuer can count on a stream of revenue—money from the merchants each time the customer used the credit card [known as interchange fees], annual fees from some of the customers, and a

29. *Id.* at 3-4.
30. *See* Martin, *supra* note 11, at 4-5.
31. U.S. DEP'T OF EDUC., LITERACY IN EVERYDAY LIFE: RESULTS FROM THE 2003 NATIONAL ASSESSMENT OF ADULT LITERACY 27 (2003).
32. *Id.* at iii.
33. *Id.*
34. *Id.*
35. *Id.* at 28.
36. *Warren Testimony*, *supra* note 2, at 3.
37. *Id.*

> chance to sell enhancements, such as credit insurance and tax preparation assistance. It is a profitable business.[38]

Indeed, in 2005, interchange fees, annual fees, and enhancements generated a total of nearly $25 billion in revenue for credit card companies.[39]

But the latter category of "second tier" customers is even more valuable. In addition to contributing their share of the $25 billion of "first tier" revenues:

> [T]he customers who generate the real profits for the credit card companies are those who stumble and slide, who make payments and miss payments, and who end up paying default rates of interest and penalty fees. To maximize profits from this group, the credit card issuers have a second tier to their business model: they load their initial card agreements with tricks and traps so that they can maximize income from interest rates and fees.[40]

Again, in 2005, interest rates and penalty fees generated nearly $80 billion in revenue for credit card companies.[41] In other words, "[n]early eight out of every ten dollars of revenue comes from the customers who cannot pay off their bills in full every month."[42]

A typical offer of credit contains one or more "bait and switch" terms and conditions, such as "teaser rates" and "deferred interest."[43] Prior to the passage of the Credit CARD Act, terms and conditions like these were fully legal, no matter how "egregiously unfair," as long as required pre-lending disclosures had been made.[44] Shifting interest rates and surprise fees associated with carefully-crafted credit cards enable credit card companies to market offers which simultaneously entice and baffle consumers.[45] Sadly, "[a]fter experiencing the tricks and traps of these forms of credit,

38. *Id.*

39. *See id.* at 2.

40. *Id.* at 2-3.

41. *See id.* at 2.

42. *Id.* Only time will tell what effect, if any, the Credit CARD Act will have on this ratio.

43. Martin, *supra* note 11, at 12.

44. Harkness, *supra* note 5, at 9. Note that the Credit CARD Act has limited, but has not eliminated, these practices.

45. *See* Martin, *supra* note 11, at 8-11 (citing behavioral research that suggests that optimism regarding ability to pay is widespread among financial consumers and creates vulnerability to highly-enticing offers).

younger individuals have time to get back on their feet, but the elderly have no such luxury."[46]

Credit card companies are well aware of the unique vulnerabilities of various classes of credit card users, including elderly credit card users. For example, one Bank of America executive admitted that "last year the bank had conducted more than 500 experiments and sent out 111 million pieces of mail to test consumer behavior with credit cards."[47] Unfortunately for the elderly consumer, "[t]here is a darker side to these data than mere profit maximization. Creditors are well aware of the numerous errors of cognition committed by consumers and capitalize on the errors in order to increase bottom lines."[48]

No great inferential leap is required to perceive a nexus between (1) the unique financial, physical, mental, and cultural vulnerabilities of the elderly, (2) hyper-aggressive credit card lending practices, and (3) increased credit card debt by the elderly:

> [T]he world of marketing, advertising, and financial product design is changing so rapidly that it is hard for anyone to keep up. For the elderly, the fastest growing demographic in America, it is particularly difficult to cope. Many of the products being offered to consumers today simply were not available a decade ago, when many older clients were full participants in the economy.[49]

Thus, it is little wonder that the elderly credit card consumer, squeezed by financial need on the one hand and enticed by the false promise of easy and low-cost credit on the other, turns to credit card use without full awareness of the potential consequences.

C. Results of Credit Card Use by the Elderly

Credit card use by the elderly does not have to be harmful. Indeed, credit card use can prove beneficial for the elderly, but only to a limited extent. Credit cards can provide needed liquidity for an elderly individual on a fixed income because that person can use the card when everyday purchases need to be made or bills need to be paid and then pay off the card's monthly balance when Social Security and other funds become available. Credit cards can also function as a helpful "safety net" for

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46. *Id.* at 9.
47. *Id.* at 11 (referencing remarks by Elizabeth Warren).
48. *Id.* at 12.
49. *Id.* at 2.

emergency purchases such as minor medical expenses or home and automobile repairs.[50] Of course, should an elderly person use their credit card for the former purpose, then the "safety net" potential of that card is reduced, increasing the temptation to take out yet another credit card for "emergencies."

Unfortunately, credit card use by the elderly can easily result in astronomically mounting debt with little or no ability to pay it down. For example, the Ohio case of *Discover Bank v. Owens* involved an elderly consumer who charged less than $2000 on her credit card and yet was sued for $5564.28 of debt, in spite of having made payments totaling $3492 over the course of six years.[51] While cases such as this are admittedly anecdotal, the mathematical nature of interest charges and fees strongly implies that elderly persons in similar situations are certain to face similar results.[52] Living on a fixed income only exacerbates the problem of mounting finance charges because payment due dates may not coincide with benefit payments, thus causing the elderly credit card consumer to fall further behind.[53]

Credit card debt can have negative consequences for anyone, but the consequences for elderly credit card consumers are often severe. Indebtedness can have immediate consequences to an elderly person because of creditor garnishment laws, which permit creditors to garnish the

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50. *See* Paulsen, *supra* note 11, at 129. *But see* Harkness, *supra* note 5, at 20-21 (acknowledging the "safety net" potential of credit cards, but arguing that going into debt at a time of emergency is ultimately a harmful choice).

51. 822 N.E.2d 869, 872 (Cleveland Mun. Ct. 2004). Ms. Owens, who represented herself pro se, received a judgment in her favor after the judge held that Discover Bank's actions had been "unreasonable, unconscionable, and unjust." *Id.* at 875.

52. *See Warren Testimony*, *supra* note 2, at 5-6 (referencing several more cases with similar facts). *But see* Harkness, *supra* note 7, at 18-20 (arguing that under the Credit CARD Act, elderly credit card consumers in similar situations might endure less severe consequences, but admitting that they would suffer significant consequences nonetheless).

53. *See Discover Bank*, 822 N.E.2d at 871-72. Ms. Owens's answer to Discover Bank's complaint stated the following:

> 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 . . . and sometimes it isn't enough. If my situation was different I would pay. I just don't have it. I'm sorry.

Id. at 871. Recall that Ms. Owens had already tendered $3492 in payments; however, "[s]ince many of the payments were below the minimum monthly payment required and because other monthly payments were in fact not timely made, Owens further was assessed numerous late-payment fees, which over the six-year period totaled $1,160." *Id.* at 872.

bank accounts of debtors.[54] Although Social Security and certain other exempt funds cannot be lawfully garnished, banks frequently freeze accounts containing these funds when presented with a garnishment order because of the difficulty of distinguishing between exempt and non-exempt funds.[55] The impact that this practice has on elderly persons living on fixed incomes is easy to imagine: "Social Security recipients whose bank accounts are frozen often experience major difficulties during the weeks or even months it may take to prove their funds are exempt and regain access to the federal benefits they rely upon for subsistence."[56]

Unfortunately, bankruptcy is increasingly becoming the only way out for elderly persons struggling with credit cards and other forms of debt. In 2001, Americans aged sixty-five and older increased their bankruptcy filings by 213%, "the largest rate growth within any age group."[57] And in 2008, a follow-up study showed that "a much larger fraction of the people filing for bankruptcy in 2007 were retirement age or older than in 1991."[58] Even worse, "since 1991, the bankruptcy risk for older Americans has increased substantially."[59] While credit card debt is certainly not the only cause of increased bankruptcy filings, its prevalence among the elderly is certainly a contributing factor.

III. Legislative and Regulatory Responses to Abusive Lending Practices

No federal consumer credit protection statutes or regulations provide explicit provisions targeting the specific needs of elderly credit card users. Prior to the passage of the Credit CARD Act, federal regulation of credit

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54. Paula Burkes, *New Rules May Guard Seniors' Benefits*, DAILY OKLAHOMAN, Aug. 15, 2010, at 1C.

55. *See* John Infranca, *Safer than the Mattress? Protecting Social Security Benefits from Bank Freezes and Garnishments*, 83 ST. JOHN'S L. REV. 1127, 1129 (2010). Banks "risk incurring liability for the full amount" of a garnishment order if they refuse to garnish non-exempt funds. Burkes, *supra* note 54, at 6C. Thus, "[w]hen funds from more than one source [including Social Security] are combined in one account, it is impossible for a bank to know what funds . . . are exempt from being garnished" and banks invariably err on the side of caution and freeze the entire account. *Id.*

56. Infranca, *supra* note 55, at 1130.

57. Teresa A. Sullivan, Deborah Thorne, & Elizabeth Warren, *Young, Old, and In Between: Who Files for Bankruptcy?*, NORTON BANKR. L. ADVISER, Sept. 2001, at 1, 2 (issue no. 9A).

58. Teresa Sullivan, Deborah Thorne, & Elizabeth Warren, *Bankruptcy Ages*, NORTON BANKR. L. ADVISER, Nov. 2008, at 1, 3 (issue no 11).

59. *Id.* at 4. The authors concluded that "the economic news for seniors is unambiguously grim." *Id.*

card lending practices consisted of the Truth-In-Lending Act of 1968 (TILA)[60] and the Federal Reserve Board of Governors' Regulation Z, which implemented TILA's provisions.[61] Neither of these contained any age-specific regulations. However, a brief historical analysis is helpful in understanding the foundation on which the Credit CARD Act rests and in providing a starting point for new reform proposals.

It is important to note that federal law preempts state law in this area for essentially all purposes because of two Supreme Court decisions which almost entirely stripped states of the ability to regulate the lending industry.[62] In *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, the Court held that "[s]ection 85 [of the National Bank Act] . . . plainly provides that a national bank may charge interest 'on any loan' at the rate allowed by the laws of the State in which the bank is 'located.'"[63] This holding, labeled by some commentators as the "exportation doctrine,"[64] had the effect of "set[ting] off two races: first for credit card lenders to move their operations to states with no interest rate caps, and second for legislatures to remove their usury laws in order to attract or hold onto rapidly expanding credit card companies."[65] Later, in *Smiley v. Citibank (South Dakota), N.A.*, the Court upheld the Comptroller of the Currency's decision to define "interest" to include penalty fees, thus curtailing states' abilities to regulate fees as well.[66] Having thereby limited

60. Pub. L. No. 90-321, 82 Stat. 146 (codified at 15 U.S.C. §§ 1601-1667(e) (West, Westlaw through 2011)).

61. 12 C.F.R. § 226 (2010).

62. While the Supreme Court decisions presented here render it nearly impossible for states to impose direct regulations on lending institutions which are not located within their borders, oversight of abusive lending practices is still possible to a limited extent through application of traditional contract doctrines such as unconscionability. *See, e.g.*, Discover Bank v. Owens, 822 N.E.2d 869, 875 (Cleveland Mun. Ct. 2004); Harkness, *supra* note 5, at 14-15 (cautioning that "the unconscionability doctrine tends to be reserved for the harshest and severest terms and cannot be relied upon to protect vulnerable consumers who are victimized to a lesser extent"); *see also infra* Part VI.C.

63. 439 U.S. 299, 308 (1978).

64. Loonin & Renuart, *supra* note 5, at 174 (defining the "exportation doctrine" as a rule allowing "banks to locate in a state with no usury caps and few consumer protections and make loans to borrowers beyond its borders under the legal regime of the home state . . . thus, effectively federaliz[ing] the absence of usury protections in the few states . . . that were willing to completely deregulate").

65. Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 FLA. L. REV. 807, 873 (2003).

66. 517 U.S. 735, 740-47 (1996).

most aspects of lending regulation, the Court left states that do not host major banks with few tools to regulate consumer credit.

A. The Truth-in-Lending Act of 1968

By 1968, Congress had grown concerned that consumers were not adequately informed regarding the range of terms and conditions being offered by lenders, including credit card companies.[67] Lenders were exploiting this weakness by using confusing offers of credit to trap unwary consumers under unmanageable amounts of debt.[68] After eight years of debate, the Senate Banking Committee approved the Truth-in-Lending Act, which was quickly passed by the Senate and the House.[69] TILA mandated the "disclosure of the cost of credit based on standard uniform requirements set out by the act and by the Federal Reserve Board."[70] By design, TILA regulated much in the way of disclosure, but little in the way of substance.[71]

TILA, as initially enacted, quickly became the subject of criticism.[72] After a mere twelve years, its disclosure requirements had engendered a complex body of regulatory law which required nearly "1500 advisory opinions interpreting what the rules meant."[73] Complaints came from the industry and its lobbyists, academic analysts, and even the Governor of the Federal Reserve Board himself, who suggested that if TILA was so challenging for experts to parse, it could hardly be expected to promote clarity in consumer decision-making.[74] Thus, in 1980, Congress passed the Truth in Lending Simplification and Reform Act,[75] which streamlined a number of disclosure requirements and, more significantly for the lending industry, eliminated some of TILA's more stringent penalties.[76] Consumer

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67. Paulsen, *supra* note 11, at 134.

68. *See* Peterson, *supra* note 65, at 876.

69. *Id.* at 879. The full bill was formally termed the "Consumer Credit Protection Act," but the "Truth in Lending" label was the popular name at the time and has persisted to this day. *See id.*

70. *Id.* at 880.

71. *See id.* at 881.

72. *See id.* at 886-90.

73. *Id.* at 886.

74. *Id.* at 888.

75. Pub. L. No. 96-221, tit. VI, 94 Stat. 168 (1980). "The Truth in Lending Simplification and Reform Act was passed as part of the Depository Institutions Deregulation and Monetary Control Act which preempted state interest rate caps on first mortgage home loans." Peterson, *supra* note 65, at 889 n.623.

76. *See* Peterson, *supra* note 65, at 889 (noting that the changes to TILA were so significant that the Federal Reserve Board of Governors termed the 1980 revisions as a "new" TILA).

lawsuits, which had been both frequent and successful under the original TILA, stopped almost immediately.[77]

B. Federal Reserve Board of Governors' Regulation Z

Regulation Z is "issued by the Board of Governors of the Federal Reserve system to implement the federal Truth in Lending Act . . . ."[78] The stated purpose of the regulation is "to promote the informed use of consumer credit by requiring disclosures about its terms and costs."[79] The regulation "divides the world of credit into two parts: open-end credit and closed-end credit."[80] Credit cards are classified as open-end credit, which is covered in Subpart B of Regulation Z.[81] Significantly, "Regulation Z imposes different disclosure requirements for open-end plans and for closed end-plans [which primarily include secured loans, such as home mortgages]. Those for the former are less strict than those for the latter."[82]

Although its structure remains the same, Regulation Z was thoroughly overhauled in the Credit CARD Act of 2009, so a detailed presentation of the specifics of the original Regulation Z is not useful here.[83] In 2004, the Federal Reserve Board of Governors proposed amending Regulation Z for the first time since 1981, beginning with its provisions governing open-ended credit accounts.[84] While the proposed changes were sweeping in scope, affecting "all stages of the creditor-consumer relationship," they were nonetheless limited by TILA's sole emphasis on disclosure and included no new substantive regulations.[85] In 2005, passage of the Bankruptcy Abuse Prevention and Consumer Protection Act prompted the Board to consider another round of amendments on top of those already under consideration.[86] After much testing and input from a wide array of groups, which notably did not include any groups representing the specific interests of elderly credit card consumers,[87] the Board promulgated its

77. *Id.* at 890.
78. 12 C.F.R. § 226.1(a) (2010).
79. *Id.* § 226.1(b).
80. Paulsen, *supra* note 11, at 135.
81. 12 C.F.R. § 226.1(d)(2).
82. Paulsen, *supra* note 11, at 135-36.
83. *See* Mary Beth Matthews, *The Credit CARD Act of 2009 — What Is It, and What Does It Do?*, 2010 ARK. L. NOTES 65, 65 n.4 (referencing the hundreds of pages of revisions to Regulation Z which were promulgated after the passage of the Credit CARD Act).
84. Paulsen, *supra* note 11, at 139.
85. *Id.*
86. *Id.* at 140.
87. *See id.* at 145-46 (noting that "only two of the participants in the Board's consumer

revisions in January 2009.[88] Given that "[e]ach of these January 2009 Revisions contains provisions that are affected by the Credit CARD Act," a detailed discussion of these revisions would be superfluous here.[89]

C. Praise and Criticism of the Truth-in-Lending Act and Regulation Z

Any proposed reform or revision to existing consumer credit protection law begs the question of why the existing law is inadequate. Legal historian Christopher Peterson argues that TILA's emphasis on disclosure to the exclusion of other substantive regulations has proven "unusually attractive in the American political climate."[90] Conservatives support disclosure requirements because they are "directed at fixing a breakdown in the private decision-making process which guides markets to optimal outcomes."[91] Liberals, on the other hand, support disclosure regulations because they "provide consumers with an important opportunity to protect themselves from credit bargains that are not truly in their own best interests."[92] Even the lending industry, "rarely welcoming government oversight, has still come to a grudging acceptance of TILA."[93] In short, TILA was well-received by many in spite of its flaws.

Nevertheless, consumer credit reform advocates came to view TILA and Regulation Z as hopelessly inadequate to protect consumers. In her 2007 Senate testimony, consumer advocate Elizabeth Warren alleged that under the existing law, "credit card agreements are incomprehensible."[94] And the problem has only worsened under the TILA regime: "in the early 1980s, the typical credit card contract was a page long. But by the early 2000s, that contract had grown to more than 30 pages of incomprehensible text."[95]

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research were over the age of sixty, and those two only participated in a single, early-stage focus group"). Interestingly, the AARP does not appears to have lobbied for greater involvement for the elderly in the Board's consumer research. Perhaps this should come as no surprise, given that the front page of the AARP website frequently features a prominent advertisement for an AARP-Chase credit card. *See* AARP, http://www.AARP.org (last visited Jan. 18, 2011).

88. Koppel et al., *supra* note 6, at 206.

89. *Id.*

90. Peterson, *supra* note 65, at 881.

91. *Id.* at 883.

92. *Id.* at 884. Peterson notes that political liberals "hope for additional regulations that more completely clamp down on high-cost lending," but that they approve of disclosure regulations as "at least a palatably good start." *Id.*

93. *Id.* at 881 ("In particular, high-cost creditors have advocated disclosure rules to deflect legislative pressure for more substantive rules.").

94. *Warren Testimony*, *supra* note 2, at 1.

95. *Id.* at 4.

Christopher Peterson, who has an overall favorable view of TILA, still admitted that:

> [T]o date, Truth in Lending has not lived up to its potential. The challenge for consumer advocates is to rhetorically recapture disclosure law from industry lobbyists. To do so, consumer advocates must recast the goal of disclosure law as aiming not merely to truthfully describe contracts, but as aiming to create practical contractual understanding on the part of vulnerable debtors. Anything less risks wasting the historically unique opportunity of credit disclosure law as yet another demobilizing illusion of debtor protection.[96]

TILA's inadequacies raised even more alarm among consumer credit protection advocates who focused on the unique vulnerabilities of elderly credit card consumers. For example, recognizing that revising TILA to add substantive consumer protections for all might be an uphill political battle, one commentator even suggested limiting additional protections "only to those aged sixty or over."[97] But whether their proposals were for elder-specific rules or protections for all, the efforts of consumer credit reform advocates eventually began to catch the attention of Congress.

IV. Credit Card Accountability, Responsibility, and Disclosure Act of 2009

While the Federal Reserve Board of Governors was undertaking its multi-year revision of Regulation Z's open-end credit rules, legislative efforts to enact substantive credit card reform began percolating through Congress.[98] These legislative efforts, spearheaded by Senator Christopher Dodd and his colleagues on the Senate Committee on Banking, Housing, and Urban Affairs, culminated in the passage of the Credit CARD Act of 2009, which was signed into law by President Obama on May 22, 2009.[99] The Act has been praised as "provid[ing] more clarity" than the January 2009 Revisions promulgated by the Federal Reserve Board of Governors.[100]

The Act strengthens disclosure requirements across the board and, for the first time, adds a number of substantive protections for credit card consumers. What follows is a summary of those provisions which seem

96. Peterson, *supra* note 65, at 903.
97. Harkness, *supra* note 5, at 23.
98. Koppel et al., *supra* note 6, at 205-06.
99. *Id.*
100. *Id.* at 206.

most likely to impact, for better or worse, elderly credit card consumers.[101] These provisions may be broken down into the following six categories: changes in terms, finance charges, payments and due dates, ability to pay, enhanced disclosures, and special protections for targeted groups. Where appropriate, new Regulation Z rules will also be summarized.

A. Changes in Terms

The overarching goal of changes in terms regulations is to prevent surprise changes that affect the cost of credit, whether those changes are made to existing accounts or spring up as a result of a "bait and switch" offer of new credit. The Credit CARD Act requires that all interest rate increases (which are permitted, subject to some regulation) and all "significant changes" be preceded by forty-five days of notice, which includes the right to close the account before the changes go into effect.[102] The Federal Reserve Board of Governors is tasked with defining "significant changes" and has adopted a broad definition.[103] With a few exceptions, changes in terms cannot be applied retroactively to any outstanding balance.[104] If an interest rate is increased due to the "credit risk of the obligor, market conditions, or other factors," then the creditor must review the account "once every six months" to determine if it is eligible for an interest rate reduction.[105] Finally, the Act prohibits changing most terms during the first year of a credit card account, and requires promotional interest rates to continue for a six-month minimum.[106]

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101. Several sections of the Credit CARD Act are omitted from the summary to follow. This is because the Act contained regulations of gift cards and other prepaid cards, a number of miscellaneous provisions that bear little or no relationship to credit card regulation, and a number of "housekeeping" sections with no substantive content.

102. Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009, Pub. L. No. 111-24, sec. 101(a), § 127(i)(1), 123 Stat. 1734, 1735 (to be codified in scattered sections of 15 U.S.C.).

103. *See* 12 C.F.R. § 226.9(c)(2)(ii) (2010).

104. Credit CARD Act sec. 101(b), § 171(b). The exceptions are (1) increases "upon the expiration of a specified [and disclosed] period of time"; (2) increases in a variable annual percentage rate (an APR that is tied to an indexed rate) due to changes in the index; (3) increases "due to the completion of a workout or temporary hardship arrangement"; and (4) penalty increases due to failure of the credit card holder to tender a minimum payment for 60 days. *Id.*

105. *Id.* sec. 101(c), § 148.

106. *Id.* sec. 101(d), § 172.

B. Finance Charges

The Credit CARD Act places limits (some stringent and some not-so-stringent) on several fees commonly charged by credit card companies. Fees for failure to pay in full during an interest-free period are prohibited.[107] Over-the-limit fees are also prohibited unless the credit card consumer has expressly elected to allow over-the-limit charges to be approved after having been advised of the fee.[108] Payment fees are prohibited unless "such payment involves an expedited service by a service representative of the creditor."[109] Finally, all "penalty" fees (such as late fees) must be "reasonable or proportional to [the] omission or violation" that gave rise to the fee.[110]

The Federal Reserve Board of Governors is tasked with defining "reasonable or proportional."[111] The definition, as promulgated in March 2010, is extraordinarily complex, but does contain at least a few clear-cut rules: "penalty fees may not exceed the dollar amount of the violation" (meaning that if a credit card user goes over the limit by five dollars, the over-the-limit fee cannot exceed five dollars) and "multiple fees may not be assessed for a single violation."[112] Notably, while the Act regulates those fees that fall into one of the above fee categories, it does not impose an across-the-board ban on the development of new fees, or promulgate a schedule of approved fees.

C. Payments and Due Dates

The Credit CARD Act contains a number of practical changes which help credit card users attain the most beneficial application of their payments and make it easier for customers to make payments on time. First, payments that are received by 5:00 p.m. on the due date must be classified as on time.[113] Second, payments must be applied to whatever

107. *Id.* sec. 102(a), § 127.

108. *Id.* Copies of sample opt-in forms are available at Truth in Lending, Regulation Z, Final Rule, 75 Fed. Reg. 37526-01, 37583 (June 29, 2010) (to be codified at 12 C.F.R. pt. 226).

109. Credit CARD Act § 102(a).

110. *Id.* sec. 102(b), § 149.

111. *Id.*

112. Matthews, *supra* note 83, at 72-73. Professor Matthews has accomplished the Herculean task of condensing multiple pages of Federal Regulations into a single paragraph, which presents a useful summary of the Federal Reserve Board of Governors' highly intricate definition of "reasonable and proportional."

113. Credit CARD Act sec. 104, § 164.

balance on the card bears the highest rate of interest.[114] Third, payments that are late within sixty days of a "material change in the mailing address, office, or procedures for handing cardholder payments" cannot cause a late fee or other finance charge to be assessed.[115] Fourth, payment of fees (other than over-the-limit fees, late fees, or insufficient funds fees) during the first year of an account can only be charged against 25% of the available credit.[116] It appears that the goal of this regulation is to force credit card companies to close delinquent accounts rather than piling on fees. Unfortunately, exempting over-the-limit fees, late fees, and insufficient funds fees takes most of the bite out of this regulation. Fifth, payment due dates must be on the same date each month, unless that date is a weekend or holiday, in which case the due date must be the next business day.[117] Finally, billing statements must be sent at least twenty-one days before the due date.[118]

D. Ability to Pay

One of the Credit CARD Act's most noteworthy provisions is § 109: "A card issuer may not open any credit card account for any consumer . . . or increase any credit limit applicable to such account, unless the card issuer considers the ability of the consumer to make the required payments under the terms of such account."[119] This provision, while vague, is probably intended to have a chilling effect on indiscriminate lending practices, especially with respect to highly-profitable non-regular payers. To the extent that it is used to accomplish that purpose, this statute could become one of the Credit CARD Act's most useful and significant substantive consumer protections because it has the potential of shifting the risk of predatory lending away from consumers by holding lenders accountable for indiscriminate offers of credit.

E. Enhanced Disclosures

The Credit CARD Act requires each billing statement to contain a payoff notice.[120] The notice must contain four pieces of information: (1) the

114. *Id.*
115. *Id.*
116. *Id.* sec. 105, § 127(n).
117. *Id.* sec. 106, § 127(o).
118. *Id.* § 163(a).
119. *Id.* sec. 109, § 150.
120. *Id.* sec. 201, § 157(b)(11). Anyone who receives a monthly credit card statement has no doubt seen one of the new payment notice boxes. They were one of the first and most noticeable changes to take place immediately after the passage of the Credit CARD Act.

number of months to pay off the entire balance if only the minimum payment is made; (2) the minimum that would have to be made in order to pay off the entire balance in thirty-six months; (3) the total cost of choosing one of these two payment options; and (4) "a toll-free telephone number at which the consumer may receive information about accessing credit counseling and debt management services."[121] The information must be "in a conspicuous and prominent location on the billing statement" and must be "clear and concise."[122] Also, each billing statement must disclose the consequences of late payments.[123]

F. Special Protections for Targeted Groups

The Credit CARD Act acknowledges the need of certain targeted groups for extra consumer protection. First, Title III of the Act is devoted to additional protections for students, defined as those under the age of 21.[124] Pre-screened offers to students are prohibited.[125] No credit card may be issued to a student unless signed by a cosigner or unless the student indicates an independent means of making payment.[126] Second, the Act mandates a "Report on Federal Financial and Economic Literacy Education Programs"[127] and a "GAO Study and Report on Fluency in the English Language and Financial Literacy."[128] These reports demonstrate congressional interest in providing protections for those with limited financial and English language skills.

In an effort to ensure that all consumers receive adequate protection, the Act requires the Federal Reserve Board of Governors to review consumer credit plans and revise its regulations as needed every two years.[129] Regular reviews of consumer credit regulations will keep consumer credit protection issues before the Board of Governors on a consistent basis. It is to be hoped that the Act's neglect of certain consumer groups, such as the elderly, may be remedied over time as the biennial reviews reveal which consumers have fallen through the cracks of existing regulations.[130]

121. *Id.*
122. *Id.*
123. *Id.* sec. 202, § 127(b)(12).
124. *Id.* sec. 301, § 127(c).
125. *Id.* sec. 302, § 604(c)(1)(B).
126. *Id.* sec. 303, § 127.
127. *Id.* § 510.
128. *Id.* § 513.
129. *Id.* § 502.
130. A word of caution is in order here. While regular reviews may have the effect of strengthening consumer credit protections, they can have a weakening effect as well. Credit

V. Analysis: The Credit CARD Act and the Elderly

The Credit CARD Act unquestionably provides a number of significant new protections to credit card consumers. For example, the Act's requirements of greater consistency, predictability, and disclosure from credit card companies go a long way toward protecting all credit card users, including the elderly. And while nothing in the Act directly speaks to the unique needs of elderly credit card consumers, many of its provisions have the potential of preventing elderly persons from becoming weighed down by credit card debt in the first place and even providing some relief to those who are already struggling with credit card debt.[131]

Nonetheless, the Act contains a number of provisions that, while positive on their face, contain hidden costs for unwary elderly credit card consumers. The Act simply fails to provide adequate protections to elderly credit card consumers threatened by lending practices that are aggressive, predatory, and unconscionable. In many ways, the Act represents little more than a cobbling together of a few good ideas and lacks a well-developed framework designed to ensure that needed protections were not omitted. As two attorneys from the National Consumer Law Center remarked in 2007, "major substantive policy changes are not likely to occur any time soon. At best, they will be adopted piecemeal."[132] A detailed examination of the Act reveals that this prediction has unfortunately proven to be correct. Given the unique position of elderly persons with respect to credit cards, the Act both could and should have done more to ensure that elderly credit card consumers receive adequate protection.

A. Changes in Terms Regulations

Credit card contracts are adhesion contracts.[133] As such, they generally give credit card companies sweeping options to change contract terms.[134]

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card industry participation at the biennial reviews is not likely to diminish over time and industry lobbying will inevitably entail requests for lighter regulations and weaker enforcement. Thus, consumer credit advocates must also remain unflagging in their efforts to keep the needs of consumers before the Federal Reserve Board of Governors. The watering-down over time of the original TILA may serve as a cautionary tale here. *See* Peterson, *supra* note 65, at 886-90.

131. *See* Harkness, *supra* note 7, at 19.

132. Loonin & Renuart, *supra* note 5, at 200.

133. "Adhesion Contract. A standard-form contract prepared by one party, to be signed by another party in a weaker position, usu. a consumer, who adheres to the contract with little choice about the terms." BLACK'S LAW DICTIONARY 143 (3d pocket ed. 1996).

134. *See* Peter A. Alces & Michael M. Greenfield, *They Can Do What!? Limitations on the Use of Change-in-Terms Clauses*, 26 GA. ST. U. L. REV. 1099, 1101 (2010).

Given that a defining trait of the current generation of elderly credit card users is "trust," the ability of credit card companies to "pull the rug" out from under an unsuspecting consumer by means of changes to the terms of a credit card contract can have a highly unsettling impact on an elderly credit card user and his financial security.[135] Unfortunately, while the Credit CARD Act requires disclosure of changes in terms, there is no substantive regulation restricting or limiting the time and manner in which terms may change, eliminating any sense of security for credit card consumers.[136] For instance, the Act's requirement of forty-five days of notice of changes in terms, as opposed to the former requirement of fifteen days,[137] provides cold comfort when the notice includes "take it or leave it" terms that are adverse to the elderly credit card consumer.[138] Because the Act imposes almost no limit on changes in terms as long as credit card companies comply with disclosure and timing requirements, the only constant in the world of credit will continue to be change.

The Act's only remedy for changes in terms which are unsatisfactory to a consumer is to close the account.[139] Indeed, under the Act, a credit card company may effectively force a consumer to terminate his account by presenting a Hobson's choice between accepting intolerable new terms and conditions or foregoing access to credit entirely. An elderly credit card consumer faced with this choice may not feel that he is able to close the account (due to need for credit) even if an announced change in terms might prove problematic for him. Whether the credit card functions as a "safety net" or as a liquidity device to ameliorate the challenges of living on a fixed income, outright account closure may not be a viable option. The elderly person may fear that if he rejects the change in terms and closes the account then no further credit will be available to him from any source because of his age. In spite of this possibility, the Act fails to provide any means other than account closure for an elderly credit card consumer to protest, reject, or renegotiate a unilateral and unsatisfactory change in terms.

To the extent that risk-averse elderly credit card consumers are unable or unwilling to close accounts upon notification of changes in terms, the

135. *See* Harkness, *supra* note 5, at 3-4.

136. *See* Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009, Pub. L. No. 111-24, sec. 101(a), § 127, 123 Stat. 1734, 1738 (to be codified in scattered sections of 15 U.S.C.).

137. *See* Paulsen, *supra* note 11, at 138.

138. *See* Credit CARD Act sec. 101(a), § 127.

139. *Id.*

elderly are more likely to bear the costs of changes in terms than younger credit card consumers who are in a better position to close unsatisfactory accounts and apply for cards with more consumer-friendly terms. Indeed, if one assumes along with Elizabeth Warren that credit card terms and conditions are based on "a price the company believes it can charge without causing the consumer to cancel the card," then it seems inevitable that credit card companies will continue to charge the most of those who are least able to cancel: elderly credit card consumers.[140]

The Act does impose one limitation on creditors who increase interest rates on accounts based on "the credit risk of the obligor, market conditions, or other factors."[141] Creditors who do so are required to review the account every six months to see if it is eligible for an interest rate reduction.[142] If the interest rate was raised due to failure to make minimum payments and the consumer establishes six months of good payment history, the Act requires the creditor to lower the interest rate to its pre-penalty level:

> This statutory cure provision, which enables delinquent debtors to reinstate the non-default contract interest rates, is among the strongest of the consumer protections afforded by the CARD Act; although most defaulting debtors may not be in a position to avail themselves of it, for those who are, it will be a definite benefit.[143]

Outside of this narrow relief provision, however, nothing in the Act prohibits creditors from imposing interest rate increases based on "credit risks" that are tied to elder-specific factors which will never go away precisely because they are tied to the age of the elderly credit card user—a quintessentially irreversible factor. For example, creditors might raise interest rates when an elderly customer begins to receive Social Security benefits because this signals a "risk" that the elderly person's income may be reduced from former levels and that a reduction in payments may follow. Or creditors might choose to label age itself as a "risk" factor, raising interest rates on every customer who reaches the age of sixty-five, with adjustments for further risk every five years thereafter.[144] In such cases, no

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140. *Warren Testimony*, *supra* note 2, at 4.

141. Credit CARD Act sec. 101(c), § 148.

142. *Id.*

143. Harkness, *supra* note 7, at 13.

144. This is not an implausible scenario. Because credit card debt is unsecured, a primary factor affecting repayment is time—either time for the credit card consumer to pay voluntarily or time for the credit card company to sue for repayment and obtain a judgment against a

matter how many times and with no matter how much assiduousness the creditor performs the mandatory six-month review, the review process will never have the effect of reducing the elderly credit card consumer's interest rate for the duration of that consumer's life.

B. Finance Charges Regulations

The Credit CARD Act regulates, to some extent, all of the major creditor-originated fees, including penalty fees (such as late fees), over-the-limit fees, and payment fees.[145] The Act fails to regulate fees that are debtor-originated, including over-the-limit fees that result once the debtor "opts-in" to over-the-limit extensions of credit,[146] and third party billing charges that result from a number of debtor missteps.[147] While both of these types of charges can impact any credit card user, their impact on elderly credit card users is particularly severe.

The Act allows credit card companies to provide an "opt-in" option for over-the-limit transactions.[148] Basically, the credit card consumer must give permission for the credit card company to allow an over-the-limit transaction.[149] This permission is only valid if the credit card company has disclosed any over-the-limit fees that may result.[150] In spite of this required disclosure, the interest of credit card companies in profit maximization will result in aggressive attempts by credit card companies to "sell" consumers on the idea of over-the-limit transactions. These sales attempts will have a disparate impact on elderly credit card consumers, given elderly persons' propensity to be confused by complex financial information and high-

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delinquent debtor. Even then, payment may be difficult to obtain if the credit card consumer simply lacks assets necessary for repayment. The lesser the debtor's assets, the longer repayment will take. It is a fact of life that old age, which frequently entails a reduction in income and assets, is also accompanied by a reduction in the time remaining during which a credit card consumer can tender payment. Of course, after the death of a debtor, the creditor may present a claim against the debtor's estate, but there is no guarantee of repayment if estate assets are simply lacking or are protected from creditor claims through estate planning devices such as trusts and statutory protections such as homestead. *See* Harkness, *supra* note 5, at 26 ("[I]f the estate is insolvent, the creditor will then be the one that must ultimately bear the loss."). Thus, furnishing unsecured credit to elderly persons presents a direct risk of loss to credit card companies.

145. *See* Credit CARD Act sec. 102, § 127.

146. *See id.*

147. *See* Prentiss Cox, *The Invisible Hand of Preacquired Account Marketing*, 47 HARV. J. ON LEGIS. 425, 425 (2010).

148. Credit CARD Act § 102.

149. *See id.*

150. *See id.*

pressure sales techniques.[151] The Act fails to regulate the extent to which credit card companies may attempt to entice consumers to agree to over-the-limit transactions and their accompanying fees. The Act also continues to allow credit card companies "to extend credit in excess of consumer credit limits in the absence of this election, but only if they are willing to do so without charging any over the limit fees."[152] Thus, elderly credit card consumers, believing that by opting-out they will avoid exceeding their credit limit entirely, may be surprised when their credit card company simply sidesteps their decision to opt-out by approving over-the-limit transactions (without the fee) in order to increase their total indebtedness.

The Act also fails to regulate third party billing practices. In brief, a definition of third party billing is:

> [A] sales practice that allows companies to charge consumers for services they do not know they have ordered and do not use. The practice depends on a seller's ability to access a consumer's financial account without the consumer directly providing her account number to that seller. This is possible because the seller has paid either a financial institution, such as a bank, or another seller who retains consumer account numbers for the right to charge the consumer's account.[153]

A typical third party billing involves some sort of gimmick, such as a "free trial offer," which if not rejected, constitutes acceptance of an offer for a subscription to a product or service.[154] Very frequently, these "services" are of little or no value to elderly credit card consumers. While the origin of the third party charge is usually an outside enterprise, credit card companies also market similar "services" directly. For example, the court in *Discover Bank v. Owens* found that:

> [Owens'] account was debited $10.43 for a Discover card product called CreditSafe Plus, which evidently would put her payments and finance charges on hold without affecting her credit rating should she become unemployed, hospitalized, or disabled. Presumably, since Owens was on Social Security

151. *See* Moore & Schaefer, *supra* note 25, at 518-19; *see also* Harkness, *supra* note 7, at 15 (criticizing the Credit CARD Act's over-the-limit opt-in provision for failing to require that customers who have opted-in be notified that a particular transaction will put them over their credit limit).

152. Harkness, *supra* note 7, at 15.

153. Cox, *supra* note 147, at 425.

154. *See id.* at 428-37 (detailing a number of third party billing schemes).

> Disability and already unemployed, the CreditSafe product pertained only to the eventuality of her becoming hospitalized. . . . At what point in the life of an unemployed, disabled, impoverished person was such a product ever designed to be used?[155]

It is precisely because of the tricky nature of third party and direct product billing practices that elderly credit card consumers are highly vulnerable to such schemes.[156] In the case of a third party billing, the credit card company itself escapes the "appearance of evil" by simply billing the credit card account for the third party service and reaping the benefits of fees charged to the third party company for account access and also finance charges stemming from the increase in total account debt. In the case of direct product billing, the credit card company also enjoys almost pure profit by charging consumers for nearly-useless "products." While analysis of third party billing has prompted calls for separate legislative treatment,[157] the Credit CARD Act could and should have tackled the credit card industry's use and abuse of this practice. As the law stands today, credit card companies are not even required to disclose third party billing practices, let alone put a stop to them.

The Act contains two provisions regarding creditor-originated fees which are likely to have a disproportionate impact on elderly credit card consumers. First, the Act allows payment fees when payments "involve an expedited service by a service representative of the creditor."[158] In practice, this provision means that payments made over the phone within a few business days of the due date can incur a payment charge.[159] But elderly credit card consumers, especially those that are homebound, are much more likely than other age groups to use the phone to make their credit card payments, thus incurring the fee.[160] Second, the Act's requirement that

155. 822 N.E.2d 869, 871-72, 874 (Cleveland Mun. Ct. 2004). Ms. Owens was eventually charged $369.52 for the CreditSafe Plus product. *See id.* at 872.

156. *See* Cox, *supra* note 147, at 438-61 (presenting a detailed analysis of how third party billing practices are intentionally designed to be confusing).

157. *See id.* at 425.

158. Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009, Pub. L. No. 111-24, sec. 102(a), §127(l), 123 Stat. 1734, 1740 (to be codified in scattered sections of 15 U.S.C.).

159. *See Written Testimony of Michael D. Donovan: Hearing Before the S. Comm. On Banking, Hous. & Urban Affairs*, 110th Cong. 9 (2007) [hereinafter *Donovan Testimony*] (statement of Michael D. Donovan, Partner, Donovan Searles, LLC).

160. *See* Moore & Schaefer, *supra* note 25, at 518 (noting that senior citizens "depend on the telephone for contact with . . . the outside world").

certain fees be "reasonable and proportional" to the violation that gave rise to the fee will almost certainly prompt credit card companies to raise minimum payments so that a higher dollar amount will then be associated with certain violations, such as late payments.[161] To the extent that a cash-strapped elderly credit card consumer is unable to make these higher minimum payments, he will accrue even more fees.

Finally, the Act's failure to prohibit the creation of new fees or to promulgate a list of approved fees has prompted credit card companies to develop a number of new fees. Credit card companies are infamous for their endless creativity in devising new fees.[162] With no limitations on fees outside of those explicitly covered by the Act, creditors may be expected to develop a number of new revenue-raising techniques: "The card companies employ teams of people whose sole job is to jigger and re-jigger credit card terms so that more money drains out of consumers' pockets—and, with a little luck, the consumer won't even notice until it is too late."[163]

For example, credit card companies are compensating for lost revenue caused by Credit CARD Act provisions by "product changing" customers into cards that have annual fees.[164] Typically, a consumer is not aware that an annual fee has been added to his card until after it is charged to his account. Given elderly persons' difficulties with understanding financial documents and reading small print, the addition of an annual fee to an elderly credit card consumer's account is likely to go undetected by that consumer. Elderly credit card consumers who keep their card as a "safety net" for emergencies may expect that nothing will be charged to their card without their knowledge and consent. If such consumers are unaware that an annual fee has been added to their account, they will neglect to tender payment and late fees and other charges soon follow. As another example, the Credit CARD Act does not prohibit credit card companies from charging fees to receive a paper bill.[165] While credit card companies may assert that paper bill fees are prompted by altruistic environmental concerns related to reducing creation of paper waste,[166] the reality is that e-billing

161. Credit CARD Act sec. 102(b), § 149(a).

162. *See Donovan Testimony*, *supra* note 159, at 9-10 (listing over thirteen fees charged by credit card companies, including set-up fees charged to open a credit card account and fees for furnishing credit card customers with the actual plastic card required to make purchases).

163. *Warren Testimony*, *supra* note 2, at 6.

164. Don Mecoy, *Credit CARD Act of 2009: Taking the Good with the Bad*, DAILY OKLAHOMAN, Sep. 5, 2010, at 6C.

165. After logging on to almost any credit card account management website, customers must click through a screen asking them to enroll in e-billing.

166. *See, e.g.*, *Get Paperless Statements & Save Trees*, DISCOVER FIN. SERVICES, http://

saves credit card companies postage costs while simultaneously increasing the chance that a consumer may forget or be unable to access and read their statement online, thus allowing late fees to kick in. Penalizing paper bill use has a disparate effect on those elderly persons who are unable or unwilling to transact financial business over the Internet and on those who simply prefer, for personal reasons, to receive hard copies of their financial statements.

C. Payment and Due Date Regulations

Some of the Credit CARD Act's payment and due date regulations are helpful to elderly credit card consumers. In particular, the regulations governing payment procedure provide much-needed certainty regarding exactly when payments are due.[167] The simple fact of a mandatory regular due date will help elderly consumers remember when payments are due and avoid late fees. The "next business day" provision for due dates falling on a weekend or holiday are beneficial to those elderly credit card consumers who, for cultural or personal reasons, may not expect businesses to be open on those days and may time their payment accordingly.[168] Unfortunately, while the Act's payment and due date regulations provide some basic relief to paying customers on the micro level, it is on the macro level that the Act's protections for elderly credit card consumers are potentially non-existent, as the next section shows.

D. Ability to Pay Requirement

Section 109 of the Credit CARD Act requires credit card companies to consider "ability to pay" before extending credit.[169] Yet this requirement is so vague that it provides little real protection to elderly credit card consumers. Elderly credit card consumers' abilities to pay may be limited by a number of financial factors including high costs of living, low incomes, and overall reduced wealth. Because many of these factors may be new and unfamiliar to elderly credit card consumers, their own ability to furnish a credit card company with an accurate assessment of their ability to pay may be limited. In addition, issues of capacity and identity may impair

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www.discovercard.com/customer-service/statements/paperless.html (last visited Feb. 13, 2011).

167. *See* Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009, sec. 104, 106, §§ 164, 127, Pub. L. No. 111-24, 123 Stat. 1734,1741-43 (to be codified in scattered sections of 15 U.S.C.).

168. *See id.* § 106.

169. *Id.* sec. 109, § 150.

the ability of a credit card company to fulfill its duties under the Act. Issues of capacity implicate the need for credit card companies to assess whether an elderly credit card applicant is competent to enter into a credit card contract.[170] Issues of identity implicate the need for credit card companies to ensure that applications in the name of an elderly person in fact originated with that person.

Perhaps because of these challenges, the Federal Reserve Board of Governors did not promulgate a strict regulation to implement § 109 of the Credit CARD Act: "the Board's regulations provide that the reasonable measure of the consumer's ability to pay centers around the ability to make minimum payments."[171] This regulation is so deferential to creditors as to have the effect of rendering this section of the Credit CARD Act nearly moot. While the Act has the apparent effect of shifting the risk of lending away from borrowers and onto credit card companies, its vagueness largely eliminates any additional burden for creditors because in the absence of specific rules, it is simply too easy for creditors to rebut an allegation that they did not consider a particular elderly credit card consumer's "ability to pay." Weakened by its own vagueness and feeble regulatory implementation, § 109 of the Credit CARD Act, while having the potential to be greatly helpful in preventing improvident extensions of credit to vulnerable elderly persons, in fact lacks the necessary teeth to accomplish its purpose.

E. Enhanced Disclosures

The Credit CARD Act requires credit card companies to include a complex payoff disclosure with each billing statement.[172] The disclosure includes two payoff options (minimum payment and thirty-six-month payoff payment) along with the total amount that the consumer will pay under either option.[173] Thus, at least four dollar amounts are listed next to one another for comparison purposes, one of which matches the minimum payment due. Elderly credit card consumers confronting this disclosure may become confused and remit more payment than is actually due. While paying more than the minimum payment is generally beneficial to any credit card holder, paying more than the minimum because of confusion may not be beneficial for someone on a fixed income.

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170. *See* Paulsen, *supra* note 11, at 133.

171. Harkness, *supra* note 7, at 16. Professor Harkness opines that "resort to the ability to make minimum payments as the criterion for creditworthiness seems ill-advised." *Id.*

172. *See* Credit CARD Act sec. 201, § 127(b)(11).

173. *Id.*

The Act further requires the payoff disclosure to include a "credit counseling" phone number.[174] Elderly credit card consumers are likely to conduct business over the phone and may inaccurately conclude that the credit counseling number is a regular customer service number. Yet phoning a credit counseling service can open up an elderly credit card consumer to additional financial trouble and potential exploitation:

> Despite their promises of debt relief, many of these counseling agencies exploit their customer's vulnerabilities and leave them deeper in financial trouble. For starters, credit counseling agency fees are often excessive, depriving consumers of funds that they could otherwise use to pay off debts. After receiving a superficial financial analysis, many consumers are pushed into debt management plans ("DMPs") that they cannot afford. These DMPs generally are developed through arrangements between credit counseling agencies and creditors. They can help consumers if the concessions offered by the creditors are meaningful, but creditors have persistently cut back on their concessions in recent years.[175]

Thus, the Act's required payoff disclosure may actually harm elderly credit card consumers more than help them.

F. Special Protections for Targeted Groups

The Credit CARD Act includes protections for young people[176] and mandates financial literacy studies.[177] While the studies may have some tangential benefits to elderly persons, the Act as a whole lacks special protections for elderly credit card consumers.

On the one hand, including special protections for a specific age group, but not including protections for the elderly sets an unfortunate precedent for omitting protections for elderly credit card consumers from future consumer credit protection legislation. Such a precedent is dismaying, given that many characteristics of elderly credit card users strongly indicate a need for special protections. On the other hand, the inclusion of special protections for a segment of population based on their age (young people) implies that Congress might be willing to consider special protections for elderly credit card users. Improvements to the special protections for young

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174. *Id.*
175. Loonin & Renuart, *supra* note 5, at 189 (footnotes omitted).
176. *See* Credit CARD Act sec. 301-305, §§ 127, 604(c)(1)(B), 140.
177. *See id.* §§ 510, 513.

people will almost certainly be considered in the future, given that criticism is already being leveled against them.[178] When such improvements are considered, Congress can and should also consider enacting statutory protections for elderly credit card consumers.

As long as elderly persons lack a consumer credit protection statute specifically targeted to their needs and vulnerabilities, credit card companies, facing potential losses from their reduced ability to issue cards to young consumers, will compensate for these losses by shifting them to current account holders. Thus, in addition to enjoying no special protections under the Act, the elderly will ultimately bear part of the cost of protecting other favored groups.

VI. Finding Protection for Elderly Credit Card Consumers: A Proposed Solution

In the years leading up to the passage of the Credit CARD Act, there were many calls for reform of existing law, some of which examined the problem of consumer credit protection through the lens of the unique needs of elderly credit card consumers.[179] These proposals highlighted the challenges of passing special consumer credit protections for the elderly. Indeed, some questioned whether the elderly required any special protections at all.[180] A proposal for an elder-specific consumer credit protection statute must begin by acknowledging this debate and explaining why such a statute is necessary. Therefore, some responses to various criticisms of the alleged need for an elder-specific consumer credit protection statute are presented below.

In addition, several valuable contributions have already been made regarding protections for elderly credit card consumers. Unfortunately, many well-intentioned recent proposals fall short for one of two reasons. First, some proposals consist almost entirely of ideas which were fully incorporated into the Credit CARD Act.[181] Yet, as has been shown, the Act

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178. *See* Regina L. Hinson, *Credit Card Reform Goes to College*, 14 N.C. BANKING INST. 287, 288, 307-08 (2010) (criticizing the Credit CARD Act's protections for young people for making it "extremely difficult, and in some cases impossible, for young consumers to establish and maintain credit in a safe and responsible manner" and suggesting that the real problem confronting young credit card users is a lack of financial literacy, not predatory lending).

179. *See, e.g.*, Harkness, *supra* note 5, at 22-23; Loonin & Renuart, *supra* note 5, at 189-93.

180. Loonin & Renuart, *supra* note 5, at 190.

181. Elizabeth Warren's and Donna Harkness's proposals fall into this category. *See Warren Testimony*, *supra* note 2, at 7-8 (urging enactment of the Credit CARD Act, but emphasizing that the Act would only be effective when accompanied by robust regulatory

not only fails to protect elderly credit card consumers but also imposes a number of significant new costs on them. Second, some proposals focus on solving a narrow issue while overlooking the big picture need for a comprehensive statutory solution to the problems facing elderly credit card consumers. For example, one proposal recommends statutory regulation of third-party billing alone.[182] While these proposals may be quite useful, some synthesis needs to be done in order to prevent further legislative work from merely extending the ad hoc approach that has characterized consumer credit protection statutes thus far.

Ultimately, adding provisions to the existing Act or passing piecemeal statutes that address a smattering of elder-specific issues will not result in robust consumer protections for elderly credit card consumers. Instead, Congress should enact a consumer protection statute that specifically targets the needs of elderly credit card consumers. This section contains a number of statutory recommendations that aim to resolve some of the concerns addressed above regarding the unique vulnerabilities of elderly credit card consumers under existing law.

Finally, although existing law is clearly inadequate to protect elderly credit card consumers, it does provide some protection. Elderly credit card consumers should take full advantage of the few substantive protections the Credit CARD Act and Regulation Z actually provide. Meanwhile, a small but growing cohort of judges are leading the way in applying traditional contract doctrines in new ways in order to prevent financial exploitation of elderly credit card consumers. For the practitioner and her elderly client, a review of existing statutory and judicial resources is far more helpful than calls for future reform. For that reason, this section concludes with a brief summary of how attorneys and their elderly credit card holding clients can find some limited protection under existing law.

A. The Need for Elder-Specific Consumer Credit Protection

Some commentators have proposed that general consumer protections are sufficient to protect the elderly.[183] They suggest that the real problem is that existing consumer protection statutes are adequate in *content* but

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oversight); Harkness, *supra* note 5, at 23-28 (limiting her proposal to "four revisions to TILA").

182. *See* Cox, *supra* note 147, at 481-82.

183. *See, e.g.*, Loonin & Renuart, *supra* note 5, at 189-90 ("Generally, we favor policy reforms that apply to the general public unless the problem to be addressed affects only elders. Where an issue rises to the level of public concern and impacts the larger society, we think any regulatory solution should protect the public as a whole and not just a select segment.").

inadequate in *enforcement*, leaving all persons, including the elderly, vulnerable.[184] In 2007, Elizabeth Warren agreed that "[e]ncouraging more vigorous oversight from regulatory commissions so that they use the tools at their disposal more effectively would make a difference."[185] Certainly, stronger enforcement would have the effect of protecting all consumers, regardless of age. Nonetheless, given that many credit card industry practices have a disproportionately harmful effect on elderly credit card consumers, elder-specific statutory protections are necessary regardless of how existing laws are enforced. In fact, regulators may be more likely to enforce a specifically-tailored statute, given the ability to target enforcement efforts to a specific population.

Some commentators have expressed concern regarding the potential for elder-specific consumer protection laws to be paternalistic—shielding competent elderly consumers from full participation in the market: "The key question is whether the benefits of special protections for vulnerable elders outweigh the loss of autonomy for those who are competent and able to make independent decisions."[186] The concern here is one of balance. Certainly, consumer protection laws which unduly cabin the rights of fully competent elderly persons to engage freely in financial decision-making and market participation are excessive in one direction. The current state of the law, however, with its lack of meaningful protections for elderly credit card consumers, shows a lack of balance in the other direction. While the drafter of an elder-specific consumer credit protection statute must remain sensitive to the need for balance, this sensitivity should not prompt him to abandon the endeavor entirely. While some have even suggested that robust elder-specific consumer protection could result in elderly persons being squeezed out of the market, it is important to remember that "additional credit is not beneficial to borrowers if its terms are unfair."[187]

A final concern regarding elder-specific consumer credit protection legislation is the notion that the difficulties that elderly persons face under the current state of the law are largely of their own making: "Spending sprees and living beyond one's means can leave someone in a deep hole with credit card debt. For those mistakes, people need to take responsibility."[188] One must consider the bigger picture, however, before passing judgment on struggling credit card debtors:

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184. *See id.*
185. *Warren Testimony*, *supra* note 2, at 8.
186. Loonin & Renuart, *supra* note 5, at 190.
187. *Id.* at 193.
188. *Warren Testimony*, *supra* note 2, at 5.

> In a world in which real incomes are not rising, while mortgage costs, health insurance, child care and transportation continue their upward climb, credit card debt is not just about the profligate. It is about hard-working, play-by-the-rules families who are doing their best but who, in the ups and downs of everyday life, sometimes need credit. Only after they have seized the rope offered by the credit card companies, do some of them discover that the other end is tied to an anchor.[189]

It is precisely to protect this second kind of consumer that elder-specific consumer credit protection statutes are necessary. Elderly persons are much more likely to find themselves in the latter category of "sometimes needing credit" than in the former category of "profligate spenders."[190] Unfortunately, regardless of the reason why an elderly person acquires credit card debt in the first place, that person will quickly discover that the law affords little more than the most barebones protections.

Thus, contrary to the assertion that the elderly do not need or deserve special consumer credit protections and may actually be harmed by any such laws, it is clear that the unique position of elderly persons with respect to credit cards compels the conclusion that elder-specific protections are in fact necessary.

B. Suggestions for an Elder-Specific Consumer Credit Statute

Drafting a comprehensive elder-specific consumer protection statute is beyond the scope of a single article. Regulation in this area is staggering in its length and its complexity.[191] Indeed, the impenetrability of consumer credit law has been a frequent complaint of consumer advocates, who believe that vital protections are choked by a maze of superfluous regulations.[192] Therefore, it is not the intent of this proposal to draft a thorough legislative blueprint or to impose limits on what ought to be considered. Rather, this proposal draws on lessons learned during the last half-century from American consumer credit protection law to suggest some fundamental and practical elder-specific protections that should not be omitted from any substantive elder-specific consumer protection statute.

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189. *Id.* at 7.

190. *See* Harkness, *supra* note 7, at 12-13 (explaining that although elderly persons are reluctant to relinquish a "lifetime of self-sufficiency and financial independence," the slippery slope of credit card use claims many elderly victims).

191. *See* Matthews, *supra* note 83, at 65 (noting that regulations promulgated pursuant to the Credit CARD Act are "complicated, detailed, and lengthy").

192. *See* Peterson, *supra* note 65, at 814-15.

1. Changes in Terms

There are two approaches to changes in terms regulations for elderly credit card consumers that seem particularly sound. The first involves an outright ban on changes in terms absent cardholder consent once consumers reach a certain age. The second, more creditor-friendly approach, involves imposing on creditors a duty of good faith and fair dealing.[193] Both approaches involve shifting some of the risk of lending back onto the creditor by requiring both borrower and lender to maintain original terms throughout the life of the loan. The simplicity of either of these approaches would cut through the complex changes in terms rules that apply today, enabling elderly credit card consumers to understand their financial positions better.

The first approach has the advantage of being both simple and elegant: a statutory provision adopting this approach would simply ban changes in terms after a specified age (seventy-five, for example) on existing accounts unless the cardholder consented to the change. If terms were changed in a manner adverse to the cardholder during the twenty-four months preceding the cardholder's reaching the statutory age, the burden would be on the credit card company to establish that the reason for changing terms was not based on the upcoming age deadline.

This approach is not without its shortfalls. It is so strict that it would necessitate giving credit card companies the option to close the account outright in certain specified circumstances, since a flat ban would prevent them from using a change in terms to ensure that problematic accounts remained profitable. For example, no credit card company should be forced to keep an account open when payments are not being made. The negative impact that such account closure might have on the elderly credit card consumer, however, should be cushioned by extending the required notice to a period of substantial length, perhaps six months. This would provide the elderly credit card consumer time to make other financial arrangements before the account was closed.

The second approach of imposing a statutory duty of good faith and fair dealing on changes in terms has the advantage of being more flexible for both the creditor and the debtor. On the creditor's side, the ability to change terms allows the creditor to retain profitability in the face of changes in debtor behavior. On the debtor's side, the ability for the lender to change terms means that the lender may be more willing to extend credit in larger amounts and over longer periods of time, as needed. To avoid

193. *See* Loonin & Renuart, *supra* note 5, at 192.

reentering the morass of tricks and gimmicks that exists under current law, however, the statutory duty would be accompanied by a cause of action for a debtor to assert that the creditor has breached this duty with respect to a particular change in terms.[194] While a return to the flurry of litigation that followed the 1968 enactment of TILA might be unhelpful,[195] a solid increase in successful litigation by elderly credit card consumers could go a long way toward putting the credit card industry on notice that mistreatment of their elderly customers is unacceptable.

Undoubtedly other methods of preventing unpredictable and disadvantageous changes in terms for elderly credit card consumers are available. What is clear is that an elder-specific consumer credit protection statute must impose substantive limitations on such changes.

2. Finance Charges

Presumably, changes in terms regulations would prohibit the surprise introduction of new fees—one of the most serious problems discussed above. But an elder-specific consumer credit protection statute must also address "debtor-originated" fees such as over-the-limit opt-in fees[196] and third party billing fees.[197]

The Credit CARD Act's consent-based approach to over-the-limit fees is useful. However, substantive protections are needed to ensure that marketing techniques designed to sell this option are fair and reasonable. Creditors should be limited to offering over-the-limit opt-ins to their elderly consumers to only a few times a year, perhaps every six months. Such a limitation would help prevent elderly consumers from being harassed into accepting over-the-limit charges. An occasional statement insert, modeled after the Federal Reserve Board of Governor's recommendations,[198] would allow elderly credit card consumers time to reach a thoughtful decision as to whether this option might be right for them. Meanwhile, full disclosure of the results of such a decision should be mandatory. If the elderly credit

194. *See id.* at 195-96 (noting that strengthening consumer credit protection laws and providing causes of action requires additional legislative efforts to ensure that elderly persons have real access to the justice system).

195. *See* Peterson, *supra* note 65, at 886-87.

196. *See* Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009, Pub. L. No. 111-24, sec. 102(a), § 127, 123 Stat. 1734, 1738 (to be codified in scattered sections of 15 U.S.C.).

197. *See* Cox, *supra* note 147, at 480 ("Preacquired account marketing [third party billing] should be banned.").

198. *See* Truth in Lending, Regulation Z, 75 Fed. Reg. 37526-01, 37583 (June 29, 2010) (to be codified at 12 C.F.R. pt. 226).

card consumer decides to accept over-the-limit transactions and fees, he should be informed as to the consequences of that decision, including whether or not the credit card company will notify him when an over-the-limit transaction has occurred. If the elderly credit card consumer decides to reject over-the-limit transactions and fees, he should be advised as to how the credit card company will treat attempts to use a credit line beyond its limit.

Unlike over-the-limit fees, which may be a helpful option for some consumers, the economic consequences of third party billing are extreme:

> Preacquired marketing [third party billing] works like an invisible hand. Not the sort that magically aligns buyers and sellers in equilibrium to promote maximum wealth. Rather, an invisible hand that selectively reaches into the pockets of those consumers who fall victim to this practice. . . . It appears that almost none of the consumers whose accounts are charged are aware of or want the service, and the deceptive effect of this type of marketing falls hardest on those with the least defenses against marketplace misconduct—people with limited English language skill or mental diminishment.[199]

Given the foregoing statement, it seems obvious that an elder-specific consumer credit protection statute must simply ban third party billing outright. Elderly credit card consumers should not be burdened with the frustration of sorting out legitimate from illegitimate charges and attempting to reverse charges that they never approved in the first place. On this point, a page of anecdote is worth a volume of logic.[200]

3. Financial Literacy

While the American tradition of consumer credit regulation has strongly favored disclosure,[201] it makes no difference whether a consumer receives reams of detailed financial guidance or a single well-drafted tip sheet if that consumer lacks the literacy skills necessary to understand and make beneficial use of the information. Indeed, "only 4% of Americans have sufficient quantitative literacy skills to compare and contrast credit card offers . . . ."[202] Therefore, while acknowledging that consumer credit education is not a "panacea" for every ill that plagues the unfortunate

199. Cox, *supra* note 147, at 479-80 (internal citations omitted).
200. *See, e.g.*, Discover Bank v. Owens, 822 N.E.2d 869 (Cleveland Mun. Ct. 2004).
201. *See* Peterson, *supra* note 65, at 814-15.
202. Loonin & Renuart, *supra* note 5, at 197.

relationship between elderly persons and the credit card industry,[203] an elder-specific consumer protection statute must nonetheless provide for substantial resources to be devoted to educating elderly credit card consumers. Such education should be accompanied by consumer research that focuses on the unique characteristics and vulnerabilities of elderly credit card consumers. While the two literacy studies mandated by the Credit CARD Act are a helpful starting point,[204] they should be supplemented by ongoing consumer research of the elderly and their relationship to the credit industry.[205]

4. Extensions of Credit

It is imperative that an elder-specific consumer protection statute strengthen the mandate of § 109 of the Credit CARD Act requiring credit card companies to consider ability to pay.[206] Elderly credit card consumers face unique financial circumstances—while most of them are guaranteed a regular income through Social Security, retirement benefits, or pensions, that income is often quite small, especially compared to the income enjoyed by most elderly persons prior to retirement. The following statement of principle from two National Consumer Law Center staff attorneys articulates a balanced approach:

> [L]enders should make loans only when they are suitable for the consumer's purposes and circumstances, and only after ensuring the consumer's ability to repay the loan from future income. Lenders are generally in the position of understanding the short-term and long-term costs and risks of credit to the consumer and should be required to use that knowledge to avoid damaging the consumer. Lenders must realistically evaluate the consumer's ability to afford not just the loan in question, but also all other necessities of life.[207]

This approach would shift some of the risk of lending to elderly persons back onto the lenders themselves. It should be accompanied by an

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203. *Id.*

204. *See* Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009, Pub. L. No. 111-24, §§ 510, 513, 123 Stat. 1734, 1762, 1765-66 (to be codified in scattered sections of 15 U.S.C.).

205. *See* Paulsen, *supra* note 11, at 163 (concluding that elder-specific consumer research is necessary in order to insure that consumer credit regulations adequately protect that age group).

206. Credit CARD Act sec. 109, § 150.

207. Loonin & Renuart, *supra* note 5, at 192 (internal citations omitted).

affirmative defense that an elderly person could raise if they could not meet their credit card obligations and were faced with a lawsuit, namely, that the lender did not conduct a good faith ability-to-pay analysis before extending credit to the elderly consumer. If substantive "ability to pay" regulations were put into place and firmly enforced with respect to elderly credit card consumers, the need for other regulatory solutions would gradually diminish as predatory lending fell by the wayside.

C. Seeking Refuge Under Existing Law

Since the goal of this article is elder consumer protection, it would be remiss to conclude without stating the protections and remedies available to elderly credit card consumers under existing law. While elderly credit card consumers should not be satisfied with the Credit CARD Act, they should not hesitate to take full advantage of what protections it does offer. Similarly, elderly credit card consumers, and their attorneys, should be aware that limited remedies do exist through the courts.

Elderly credit card consumers confronting changes in terms should first and foremost be admonished to take their time. The Credit CARD Act's requirement of forty-five days of notice provides some time for the elderly person to make sure that they understand the implications of a change to their account or to seek assistance if they do not understand.[208] Also, elderly credit card consumers should confirm with their credit card company what date is to be the regular due date for payments and keep track of this due date, preferably using a calendar. Because the due date cannot be arbitrarily changed without notice, it is now possible to plan several months in advance.[209] Finally, most elderly credit card consumers should be encouraged to opt-out of over-the-limit transactions or revoke if they have already opted-in.[210] Opting-in to over-the-limit transactions will almost certainly remain an option and the elderly credit card consumer can choose to opt-in at a later time in order to make a specific purchase or when he otherwise believes it is in his best interest to do so.

Elderly credit card consumers should be educated regarding their rights under the Credit CARD Act and encouraged to contact their credit card company when they believe those rights have been violated. To that end, elderly credit card consumers should also be encouraged to keep thorough records of their dealings with their credit card company, including statements and other mailings, telephone conversations, and so on. Even if

208. *See* Credit CARD Act sec. 101(a)(1), § 127(i).
209. *See id.* sec. 106, § 127(o).
210. *See id.* sec. 102(a), § 127(k).

the elderly credit card consumer cannot put his finger on what has gone wrong with his account, detailed records will help an attorney or financial advisor assist the elderly credit card consumer in determining whether a violation of the Credit CARD Act has occurred.

While judicial empathy for the plight of elderly credit card users has been tepid at best,[211] elderly credit card consumers have begun to win limited victories using contract law theories. For example, *Discover Bank v. Owens* was an important decision for elderly victims of abusive credit card industry practices.[212] The Ohio judge in that case applied several contract doctrines including duty to mitigate damages, unjust enrichment, and unconscionability in reaching a judgment for an elderly defendant who could not repay her credit card debt.[213] In reaching his unconscionability holding, the judge sharply criticized Discover Bank for continuing to pile on charges which had no connection to any value received by the cardholder.[214] Notably, Ohio's consumer protection unconscionability statute lists the following factor designed to protect vulnerable groups: "[w]hether the supplier has knowingly taken advantage of the inability of the consumer reasonably to protect his interests because of his physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of an agreement."[215]

Commentators have acknowledged that "[u]nconscionability as a remedy for the elderly has its own limitations."[216] Nonetheless, attempts to introduce the *Discover Bank* decision as persuasive authority in other jurisdictions have been encouraged.[217] Unconscionability and other contract doctrines provide a rare opportunity—in a post-*Marquette* world dominated by federal regulation and the exportation doctrine—for states to hold lenders accountable. Other states could adopt an unconscionability statute similar to that of Ohio, requiring judges to consider the vulnerability of an elderly consumer when evaluating a credit card contract. Robust

211. *See* Robyn L. Meadows, *Unconscionability as a Contract Policing Device for the Elder Client: How Useful Is It?*, 38 AKRON L. REV. 741, 758 (2005).

212. *See* 822 N.E.2d 869, 873-74 (Cleveland Mun. Ct. 2004); *see also* Harkness, *supra* note 5, at 14 (explaining how *Discover Bank* has the potential to encourage other judges to decide credit card collection suits in favor of elderly debtors).

213. *Discover Bank*, 822 N.E.2d at 873-74.

214. *Id.* at 874.

215. OHIO REV. CODE ANN. § 1345.03(B)(1) (West 2010).

216. Meadows, *supra* note 211, at 758; *see also* Harkness, *supra* note 5, at 14-15.

217. *See, e.g.*, Harkness, *supra* note 5, at 30-31 (detailing efforts to introduce the *Discover Bank* decision as persuasive authority in Tennessee).

application of consumer-friendly contract statutes would contribute to creating a safer world for elderly credit card consumers.

VII. Conclusion

For elderly credit card consumers, it is time to move beyond the historically limited disclosure requirements of TILA and to strengthen and expand the Credit CARD Act's tentative steps toward substantive protections. While substantial regulation of the credit card industry will require a balancing of interests, Congress would do well to give more weight to the interests of elderly consumers than to those of the credit card industry. Until Congress acts, however, consumer advocates must remain active in their efforts for reform and work to ensure that elderly credit card consumers enjoy the best protections that existing law has to offer. A consumer credit protection statute of real substance might be a rarity, but it is a necessity.

Michael A. Furlong