CREDIT CARD DEBT AND CONSUMER BANKRUPTCY: CAN WE 'NUDGE' OUR WAY OUT?

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TABLE OF CONTENTS

INTRODUCTION

Consumer bankruptcy reform has been a matter of debate among policymakers and academics since the enactment of the Bankruptcy Code in 1979.[1] In most debates over the last several decades, the increasing consumer bankruptcy filings

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[1] *See, e.g.*, Jay Lawrence Westbrook, *Empirical Research in Consumer Bankruptcy*, 80 TEX. L. REV. 2123, 2128 (2002) (noting the two-decade debate over consumer bankruptcy since passage of the Bankruptcy Code); Steven H. Kropp, *The Safety Value Status of Consumer Bankruptcy Law: The Decline of Unions as a Partial Explanation for the Dramatic Increase in Consumer Bankruptcies*, 7 VA. J. SOC. POL'Y & L. 1, 27–28 (1999) (recognizing the on-going debate).

were the fuel to the fire of the debate.[2] However, over the last number of years, consumer bankruptcy filings have actually declined as we get further from the recession of 2008.[3] Following the recession, consumer filings peaked to just over 1.5 million in 2010 and have declined each year since then to 767,721 filings in 2017, nearly one-half the number of filings when compared to 2010.[4]

Various reasons have been offered for the decline including an improving economy,[5] healthcare reform,[6] and the effect of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005[7] (the "BAPCPA").[8] The exact basis for the decline is beyond the scope of this article, but even with the reduced number of filings, the incidence of consumer bankruptcy is still quite prevalent when considered on a per capita or household basis. For example, on a household basis, 1 out of every 164 households sought consumer bankruptcy relief in 2017.[9] Therefore, even though annual filing numbers have decreased, the effort to improve the consumer bankruptcy system and to help more households avoid filing for consumer bankruptcy should not be tabled.

As we move away from the infatuation of academics and policymakers with increasing consumer bankruptcy filing numbers, efforts to reform and improve consumer bankruptcy need to recognize that any reform is not a singular event,[10] but rather an ongoing process to improve. In this mind-set, bankruptcy reform efforts should focus less on nuances and mechanics of the bankruptcy process as seen with the BAPCPA.[11] The focus should be on policy initiatives that address the root causes

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[2] *See* Corrine Ball & Jacqueline B. Stuart, *The Battle Over Bankruptcy Law for the New Millennium*, 55 BUS. LAW. 1487, 1489 (2000) (observing the "drive" to reform the Bankruptcy Code was rooted in increasing filings rates while the economy was strong).

[3] *See* ADMIN. OFFICE OF THE U.S. CTS., JUST THE FACTS: CONSUMER BANKRUPTCY FILINGS, 2006-2017 (Mar. 7, 2018), https://www.uscourts.gov/news/2018/03/07/just-facts-consumer-bankruptcy-filings-2006-2017 [hereinafter JUST THE FACTS] (illustrating the decrease of bankruptcy filings in recent years).

[4] *See id.*; *see also* Angela Littwin, *Adapting to BAPCPA*, 90 AM. BANKR. L.J. 183, 225 (2016) (noting the steady decline in filings from 2010 until 2015).

[5] *See* Ed Flynn, *Why Are Filings Still Falling?*, 33 AM. BANKR. INST. J., Oct. 2014 at 46 ("The fact that there has been a decline [in filings] is not too surprising, given the improved economy.").

[6] For a thoughtful analysis of the arguments on both sides of the debate of whether healthcare reform will reduce consumer bankruptcy filings, see Ashley Koenen, Note, *The Patient Protection and Affordable Care Act: A Cure for Medical Bankruptcy?*, 20 ANNALS HEALTH L. ADVANCE DIRECTIVE 78, 80–84 (2011).

[7] *See generally* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (stating the relevant bankruptcy provision and the legislative history for the act).

[8] *See* Littwin, *supra* note 4, at 227–32 (recognizing BAPCPA's direct barriers and increased costs of filing may play a role in the decline in filings).

[9] Total consumer bankruptcy filings in 2017 was 767,721. *See* JUST THE FACTS, *supra* note 3, at tbl.1. Total households in 2017 was 126.22 million. *See Number of Households in the U.S. from 1960 to 2017*, STATISTA, https://www.statista.com/statistics/183635/number-of-households-in-the-us/ (last visited Jan. 29, 2019).

[10] In the healthcare reform debate, one scholar has appropriately characterized the healthcare reform as "not a singular event." Jacqueline Fox, *Reforming Healthcare Reform*, 50 U. RICH. L. REV. 557, 557 (2016). This viewpoint is applicable to the bankruptcy reform debate. *See id.*

[11] The BAPCPA was the most comprehensive overhaul of the bankruptcy system in the United States since the enactment of the Bankruptcy Code in 1979 focusing on detailed mechanics and requirements of the Bankruptcy Code. The means test is an example of the BAPCPA's focus on nuances and mechanics of bankruptcy law. Since the BAPCPA, scores of scholarly articles trying to explain and analyze the means test

of most consumer bankruptcies and employ innovative policy tools, rather than the traditional command and control ("C & C") regulatory techniques[12] as used in the BAPCPA.[13]

It is generally well accepted that credit card debt is a primary causal factor of consumer bankruptcy filings.[14] As such, policymakers in the consumer bankruptcy domain should focus their efforts, alongside policymakers in the consumer finance domain, on reducing the credit card debt of consumers rather than focusing on technical aspects of consumer bankruptcy law. An approach that fosters reducing consumer credit card debt can enhance a household's well-being[15] so that families do not need to rely on consumer credit card debt to the extent they have in the past.

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have been produced. *See* Eugene R. Wedoff, *Means Testing in the New 707(b)*, 79 AM. BANKR. L.J. 231, 231 (2005) ("[M]eans testing has a simple purpose: to measure the ability of Chapter 7 debtors to repay debt and then, if they have sufficient debt-paying ability, to make them repay at least some of their debt . . . in order to receive a bankruptcy discharge."); *see also* Robert J. Landry, III & Nancy H. Mardis, *Consumer Bankruptcy Reform: Debtors' Prison Without Bars or "Just Desserts" for Deadbeats?*, 36 GOLDEN GATE U. L. REV. 91, 107–12 (2006) (presenting the means test "as a tool to determine whether the debtor has sufficient disposable income to preclude proceeding under Chapter 7"); Robert J. Landry, III, *The Means Test: Finding a Safe Harbor, Passing the Means Test, or Rebutting the Presumption of Abuse May Not Be Enough*, 29 N. ILL. U. L. REV. 245, 251–75 (2009) (offering an overview of the means test and the presumption of abuse).

[12] Traditional C & C is typically associated with regulatory actions that involve setting standards and state-sponsored or governmental sanctions for non-compliance with such standards. *See* Jodi L. Short, *The Paranoid Style in Regulatory Reform*, 63 HASTINGS L.J. 633, 659–60 (2012) (discussing the various definitions and uses of C & C in the literature). C & C regulatory strategies are those "where legal authority and the command of law is used to pursue policy objectives." ROBERT BALDWIN, MARTIN CAVE & MARTIN LODGE, UNDERSTANDING REGULATION 106, 106 (Oxford, 2d ed. 2012). The command can be in the form of a prohibition of certain activities, a demand for action or be in the form of "conditions for entry into a sector." *Id.* There are advantages to C & C strategies in that it has the force of law and has an immediate effect in setting standards, screening entry or prohibiting conduct. *See id.* at 134 tbl.7.1. From a political vantage point, C & C is viewed as strong because regulators are "acting forcefully" and protecting the interest of the public. *See id.* at 107, 134 tbl.7.1. However, C & C has its critics, particularly in the 1980s, and there were calls for lighter regulation and more friendly approaches, i.e. alternatives to C & C strategies. *See id.* at 107, 110–11. Criticisms of C & C include capture, legalism, problems in standard setting, responding to change, and enforcement is costly. *See id.* at 107–11 (explaining the types of criticisms and the costs of each). For a thoughtful summary of the critique of C & C techniques in the environmental sphere, see Reagan M. Marble, *The Law Frontier: Regulating Factory Farms*, 43 TEX. ENVTL. L.J. 175, 188–90 (2013). One alternative of C & C strategies is the nudge, the focus of this paper. *See* Robert Baldwin, *From Regulation to Behaviour Change: Giving Nudge the Third Degree*, 77 MOD. L. REV. 831, 837 (2014) [hereinafter Baldwin, *Giving Nudge the Third Degree*] (noting many politicians view the nudge as an alternative to C & C).

[13] The BAPCPA set up certain standards, i.e. means testing, that individuals must satisfy in order to be eligible for consumer bankruptcy relief. *See* David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 226–27 (2007) (providing a detailed analysis of the means testing and consequences of not satisfying the test). These standards are effectively C & C techniques to limit access to bankruptcy relief with the ability of the government to enforce non-compliance with the standards through motions to dismiss or convert the bankruptcy case. *See id.*

[14] *See infra* Part II.

[15] There are a host of attributes or factors that can contribute to an assessment of a household's financial well-being, including: confidence in ability to obtain mortgage; having three months of emergency funds; adequate retirement savings; skipping medical care due to costs; and living pay check to pay check. *See* Flynn, *supra* note 5, at 47, 80.

This effort can help reduce the incidence of consumer bankruptcy in some cases, but more importantly, has the potential to enhance consumers' long-term welfare.

Innovative regulatory tools should be employed in this endeavor to reduce consumer credit card debt. To this end, this paper explores whether the time has come to fully embrace nudging—"interventions that steer people in particular directions but that also allow them to go their own way"[16]—to reduce consumer credit card debt. Nudging has been used in limited ways in consumer finance with some success, such as nudging individuals to save for retirement[17] and with enhancement of credit card disclosures,[18] but policymakers need to build on this and embrace the benefits of nudging as it can be a powerful regulatory tool. Nudging is not the panacea to reducing consumer credit card debt and decreasing consumer bankruptcy filings, but it can be used in conjunction with other more traditional C & C regulatory tools to help reduce credit card debt, enhance consumers' long-term welfare, and possibly reduce consumer bankruptcy rates.

Following this introduction, Part I provides a brief review of consumer bankruptcy filing types, rates and composition of filings. Part II examines the causal connection between credit card debt and consumer bankruptcy. With that foundation, Part III explores nudging generally—the degrees, tools, and targets of nudges. Part IV examines the prior use of nudging in two policy domains—retirement savings and credit card disclosures. Then, in Part V, a framework to employ the nudge to help reduce consumer credit card debt is detailed. Finally, conclusions and the potential of the nudge in this policy domain is provided.

I. CONSUMER BANKRUPTCY FILING TYPES, RATES, AND COMPOSITION

A. Filing Types

Most consumer bankruptcies are filed under chapter 7 of the Bankruptcy Code.[19] Under chapter 7, a debtor typically receives a discharge of most unsecured debts within a short time—a matter of months—from the petition date.[20] Post-petition wages are not subject to the bankruptcy.[21] The debtor can retain exempt assets, but

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[16] Kiran Iyer, *Nudging Virtue*, 26 S. CAL. INTERDISC. L.J. 469, 469 (2017).

[17] *See* Jacob Hale Russell, *The Separation of Intelligence and Control: Retirement Savings and the Limits of Soft Paternalism*, 6 WM. & MARY BUS. L. REV. 35, 35 (2015). For a thoughtful discussion of nudging to increase contributions to retirement plans, see *id.* at 50–53.

[18] *See infra* Part IV.B.

[19] *See* William C. Smith, *Debts and Taxes: Student Loan Case Will Determine Whether Debtors May Discharge State Obligations*, 90 A.B.A. J. 16, 16 (2004) ("[M]ost cases are individual Chapter 7 bankruptcies.").

[20] *See* Stuart P. Gelberg, *Amending Fair Debt Collection Act*, 4 AM. BANKR. INST. L. REV. 518, 518 (1996) (finding the relatively short time it takes under a chapter 7 for a debtor to receive a discharge makes it easier for the debtor to reestablish credit).

[21] *See* Michaela M. White, *The Effects of Chapter 13 Plan Confirmation and Case Conversion on Property*, 26 CREIGHTON L. REV. 785, 810 (1993) ("Furthermore, if the case had originally been commenced as a Chapter 7 proceeding, the post-petition wages would not be part of the Chapter 7 estate under section 541(a)(6).").

must surrender non-exempt assets for liquidation.[22] However, in most chapter 7 cases there are no non-exempt assets available for liquidation.[23] The discharge of most unsecured debts, the retention of post-petition wages and exempt assets, and the relatively quick process provides the typical debtor the opportunity for a fresh start.[24]

About 30% of consumer bankruptcies are filed under chapter 13 of the Bankruptcy Code.[25] The traditional reason offered for a debtor choosing chapter 13 is to retain non-exempt assets the debtor wishes to retain, such as a home or vehicle.[26] The debtor will formulate a repayment plan and continue making payments on the non-exempt assets, and possibly repay a portion of their debt to unsecured creditors.[27] After the completion of the repayment plan, the debtor will receive a discharge of unsecured debts.[28]

B. Filing Rates and Composition

Consumer bankruptcy filings are on the decline. Following the surge of filing leading up to the BAPCPA in 2006, filing tapered off dramatically to just under 600,000 annually, but grew from 2007 to 2010, peaking at just over 1.5 million.[29] Since that peak filing have declined each year with total consumer filings falling to just under 766,000 in 2017.[30]

The composition of filings—chapter 7 versus chapter 13—are about the same as they have been for several decades. In 2000, about 69% of cases were filed under

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[22] *See* Charles M. Foster & Stephen L. Poe, *Consumer Bankruptcy: A Proposal to Reform Chapters 7 and 13 of the U.S. Bankruptcy Code*, 104 DICK. L. REV. 579, 581 (2000) (explaining a chapter 7 debtor usually surrenders all non-exempt assets to a trustee, who then liquidates the property and uses the proceeds to pay off creditors).

[23] *See* Smith, *supra* note 19, at 16 (noting most chapter 7 bankruptcies provide no distribution to creditors).

[24] *See* Robert J. Landry, III, *Ten Years After Consumer Bankruptcy Reform in the United States: A Decade of Diminishing Hope and Fairness*, 65 CATH. U. L. REV. 693, 701–04 (2016) (discussing the role that the discharge, the automatic stay, and retention of exempt assets plays in facilitating a fresh start).

[25] *See* JUST THE FACTS, *supra* note 3, at tbl.1. (detailing 31.94% of the total number of nonbusiness bankruptcies filed between 2006 and 2017 were chapter 13).

[26] *See* Mark Goldman, *The Rising Number of Chapter 7 Filings: Understanding the Swing from Chapter 13 to Chapter 7*, ASPATORE, May 2010, at *1, WL 1976163 ("In the past, [retaining a home] was the primary reason why an individual would choose to file a Chapter 13.").

[27] *See* David A. Carpenter, *Chapter 13 - An Overview*, 47 CONSUMER FIN. L.Q. REP. 394, 395–96 (1993) (examining the requirements of a chapter 13 plan).

[28] *See* David G. Epstein & Christopher Fuller, *Chapters 11 and 13 of the Bankruptcy Code–Observations on Using Case Authority from One of the Chapters in Proceedings Under the Other*, 38 VAND. L. REV. 901, 904 (1985) (discussing the broad discharge typically available upon completion of a chapter 13 repayment plan).

[29] *See* ADMIN. OFFICE OF THE U.S. CTS., *Tbl. F-2—Bankruptcy Filings* (Dec. 31, 2017), https://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2017/12/31 (archiving all business and nonbusiness cases filed, the U.S. courts published the statistical tables, of which this bankruptcy data was compiled; data compilation is available on request from the author).

[30] *See id.* (stating the exact number of total consumer filings at 765,863).

chapter 7.[31] That composition has fluctuated some, particularly leading up to and after the BAPCPA in 2005, but has trended downward in recent years.[32] In 2010, about 71% of filings were under chapter 7, whereas in 2017 about 61% of filings were under chapter 7.[33]

As a result of these trends—fewer overall consumer filings and less filings under chapter 7—there arguably is no reason to be concerned about the consumer bankruptcy filing rate.

However, when the filings are considered on a per capita basis, and the filing is put in context that the filing impacts an entire household, the consumer bankruptcy rate is still problematic.

For example, in Alabama in 2017, there were 5.66 filings per 1000 people, which was down from 2009 when the rate was 7.37 filings per 1000 people.[34] Among the states, the filing rate per 1000 varies greatly with Alabama on the high end. Nationally, the overall incidence was much lower. In 2017, there were 2.47 filings per 1000 people, which was down from 2009 when the rate was 4.68 filings per 1000 people.[35]

Importantly, filing represents an individual or a whole household in financial distress. Each filing is a significant life event and often does not occur in isolation. For example, a bankruptcy filing and a divorce are often linked.[36] The underlying financial stress leading to a bankruptcy filing should be addressed to further reduce the incidence of bankruptcy, which may impact the incidence of other events, such as divorce.

The consumer bankruptcy filing must be considered beyond a mere legal process; it is a phenomenon that impacts lives—the lives of the debtor and his entire family. Even though numbers are lower, policymakers must not be complacent and should work to address the underlying causes in innovative ways, including nudging. One such cause, as detailed in Part II, is credit card debt.

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[31] *See* ADMIN. OFFICE OF THE U.S. CTS., *Tbl. F-2—Bankruptcy Filings* (Sept. 30, 2000), https://www.uscourts.gov/sites/default/files/statistics_import_dir/f02sep00.pdf (archiving all chapter 7 filings for the year 2000).

[32] The bankruptcy data was compiled from various statistical tables published by the Administrative Office of the U.S. Courts. *See supra* note 29 (displaying the number of business and nonbusiness bankruptcy cases commenced in U.S. bankruptcy courts for the year 2017). Data compilation is available on request from the author.

[33] *See* July 2018 Bankruptcy Statistics – State and District, AM. BANKR. INST., https://www.abi.org/newsroom/bankruptcy-statistics (last visited Aug. 8, 2018) (displaying the national percentage of bankruptcy cases that were filed under chapter 7 for the years 2009 and 2017).

[34] *See id.* (displaying the number of chapter 7 and chapter 13 filings per capita in the state of Alabama for the years 2009 and 2017).

[35] *See id.* (displaying the national average number of chapter 7 and chapter 13 filings per capita for the years 2009 and 2017).

[36] *See, e.g.*, Daniel A. Austin, *For Debtor or Worse: Discharge of Marital Debt Obligations Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 51 WAYNE L. REV. 1369, 1374–75 (2005) (recognizing the correlation between financial stress and divorce and noting that post-divorce financial stress can continue).

II. CAUSES OF CONSUMER BANKRUPTCY AND ROLE OF CREDIT CARD DEBT

Consumer bankruptcy filings are often said to be driven by the "big three"—"job loss, illness, and divorce."[37] Although, these types of calamities can be and often are consumer bankruptcy drivers,[38] there is a direct relationship between consumer debt and a bankruptcy filing.[39] At its core, an individual typically files for consumer bankruptcy relief to deal with a debt problem[40]—an inability to service the debt.[41] For most individuals that file bankruptcy, this debt is mainly an unsecured debt that is subject to discharge.[42] Recent data indicates that approximately 65% of the liabilities reported by debtors in their consumer bankruptcy filings are general unsecured debts.[43] Most of these general unsecured debts are credit card debts, and therefore the root cause of most consumer bankruptcy filings is credit card debt.[44]

III. NUDGING

Nudging has been offered by economists as a technique to enhance consumer welfare in a wide array of policy domains, particularly in enhancing consumer

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[37] Jean Braucher, *Middle-Class Knowledge*, 21 EMORY BANKR. DEV. J. 193, 207 (2004) (book review) (pinpointing the three main reasons why debtors file for bankruptcy).

[38] It is important to recognize that the impact of these drivers can be overstated, particularly in the area of medical debt as a primary cause of consumer bankruptcy. *See, e.g.*, Amy Y. Landry & Robert J. Landry, III, *Medical Bankruptcy Reform: A Fallacy of Composition*, 19 AM. BANKR. INST. L. REV. 151, 160–64 (2011) (debunking the conclusory rhetoric that most consumer bankruptcies are "medical bankruptcies").

[39] *See* Robert M. Lawless, *The Paradox of Consumer Credit*, 2007 U. ILL. L. REV. 347, 362 (2007) (citing several other sources reaching the same conclusion); *see also* Littwin, *supra* note 4, at 227 ("As a general matter, the most effective long-term predictor of bankruptcy filings is the amount of debt consumers are carrying."); Flynn, *supra* note 5, at 47 ("The primary motivation of most people filing for bankruptcy is to obtain a discharge of some of their debt, much of which is delinquent at the time of filing.").

[40] *See* Robert M. Lawless, *supra* note 39, at 363 (recognizing while this statement may be an overgeneralization, it explains the relationship at its most basic level).

[41] *See* Daniel A. Austin, *Medical Debt as a Cause of Consumer Bankruptcy*, 67 ME. L. REV. 1, 22 (2014) (explaining one study of consumer chapter 7 filings found an average annual income of $40,920 while average unsecured debt reached $55,967.79 making it difficult, if not impossible, to service the debt).

[42] *See* Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 364 (2013) (explaining exceptions that allow education loans to be dischargeable due to undue hardship in both chapter 7 and chapter 13 cases).

[43] *See* ADMIN. OFFICE OF THE U.S. CTS., BAPCPA Report – 2016, http://www.uscourts.gov/statistics-reports/bapcpa-report-2016 (last visited Jan. 24, 2019) (providing comparative statistics for various types of debt).

[44] *See* Hosea H. Harvey, *Opening Schumer's Box: The Empirical Foundations of Modern Consumer Finance Disclosure Law*, 48 U. MICH. J.L. REFORM, 59, 72 (2014) ("Various studies from this period also suggested that rising consumer debt, specifically credit card debt, was the primary cause of consumer bankruptcy.") (citing Michelle J. White*, Bankruptcy Reform and Credit Cards*, 21 J. ECON. PERSPECTIVES 175, 178-79 (2007)); *see also* Littwin, *supra* note 4, at 227–28 ("The long-term growth in . . . consumer bankruptcies closely tracks the long-term growth in . . . consumer debt. When the financial crisis hit, consumer credit dried up, and outstanding consumer debt experienced unprecedented declines. There are fewer reasons to file bankruptcy today because there was less borrowing two to three years ago.") (quoting Bob Lawless, *Debt Causes Bankruptcy (But Sometimes in Counter-Intuitive Ways)*, CREDIT SLIPS BLOG (Jan. 7, 2011), http://www.creditslips.org/creditslips/2011/01/debt-causes-bankruptcy-but-sometimes-in-counter-intuitive-ways.html).

protections in the consumer finance domain.[45] However, before considering ways to employ nudging to combat credit card debt specifically, we must examine what nudging is and is not; the three dimensions of the nudge—the degrees of nudge, nudge tools, and the nudge target; and the limitations of the nudge. An understanding of this framework is fundamental to effectively employing nudging in any policy domain, including consumer credit card debt.

A. Nudging Generally

"'Nudging' involves structuring the choices that people make in order to lead them towards particular outcomes."[46] As Thaler and Sunstein discuss, relying on behavioral economics and decision-making theories, the premise behind nudging is that individuals do not make good choices because of issues with processing information, being biased or too optimistic.[47] This "bounded rationality" leads to choices that are not in the welfare of the individual.[48] Nudging embraces individuals' "cognitive biases and dysfunctions to steer them toward better choices."[49]

Nudging essentially is designed to guide the individual to the "sensible decision," but, importantly, the nudge is rooted in "libertarian paternalism."[50] Paternalistic in that it guides the individual to a better choice, but libertarian in that the individual has the choice to ignore or opt-out of the nudge.[51] There is no coercive intervention or imposition of other costs, such as fees or taxes, associated with the

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[45] *See* Brett J. Travers, *Why Reinvent the Wheel?—Protecting Consumers in the Wake of the Subprime Mortgage Meltdown without the Consumer Financial Protection Bureau*, 55 ST. LOUIS U. L.J. 457, 469–70 (2010) (explaining ways to protect against unfair, deceptive, and abusive acts carried out in relation to various consumer laws); *see also* David S. Evans & Joshua D. Wright, *The Effect of the Consumer Financial Protection Agency Act of 2009 on Consumer Credit*, 22 LOYOLA CONSUMER L. REV. 277, 310-11 (2010) (recognizing some scholars "suggest that stronger consumer protection regulation could make these consumers better off by regulating the design of these products, mandating various disclosures, restricting consumer choice, and 'nudging' consumers toward certain standardized financial products").

[46] Baldwin, *Giving Nudge the Third Degree*, *supra* note 12, at 831.

[47] *See* BALDWIN ET AL., UNDERSTANDING REGULATION, *supra* note 12, at 123 (elaborating on tendency of people to make poor choices due to shorthand ways in processing information that make decision-making susceptible to immediate concerns and experiences) (internal citations omitted).

[48] *See* Baldwin, *Giving Nudge the Third Degree*, *supra* note 12, at 832–33.

[49] *See* Mark D. White, *Nudging Debt: On the Ethics of Behavioral Paternalism in Personal Finance*, 28 J. FIN. COUNSELING & PLAN. 225, 226 (2017). As succinctly stated, "[t]he core concept behind nudging is designing the environment in which people make choices so as to facilitate decisions that enhance wellbeing." Jeffrey J. Rachlinski, *How I Learned to Stop Worrying and Love Nudges*, 95 TEX. L. REV. 1061, 1064 (2017) (book review).

[50] *See* BALDWIN ET AL., UNDERSTANDING REGULATION, *supra* note 12, at 123 (highlighting, as an example, an established presumption that all citizens consent to be organ donors unless they register their unwillingness to donate).

[51] *See id.* at 123 (combining an element of paternalism with the preserving of freedom of choice when decisions are merely manipulated by public authorities while decision-makers retain the power to choose how to behave); *see also* Baldwin, *Giving Nudge the Third Degree*, *supra* note 12, at 833 ("[N]udge is said to possess a paternalistic dimension in stimulating choices that are seen as welfare enhancing for the individual but it combines this with a libertarian aspect in so far as it purports to leave the target person or firm free to choose to take the non-sensible course of action.").

nudge.[52] It is critical, according to Thaler and Sunstein, to be able to opt-out of the nudge with ease, and if it does, the nudge can be a useful regulatory technique that does not require legislative action.[53]

Such a simple characterization of the nudge makes the nudge appear to be the cure-all to the myriad of challenges facing regulators in employing other regulatory strategies. In fact, there are a host of positive attributes of the nudge when compared to other regulatory techniques,[54] particularly in regard to the cost-effectiveness of nudging across a panoply of policy and regulatory domains.[55] With the nudge appearing quite effective as a regulatory strategy, it is not surprising that the nudge is quite vogue in the United Kingdom with the Behavioural Insights Team,[56] with the Obama Administration in the United States,[57] and is continuously gaining traction around the globe.[58] The nudge certainly has potential as a tool for the regulator to complement other regulatory strategies such as C & C, but it has limitations that the simple, benign characterization of nudging ignore.[59] To implement an effective nudge, these limitations must be considered throughout the regulatory process.

B. Three Dimensions of Nudging

The limitations (and potential) of the nudge can only be appreciated by a more nuanced view of nudging.[60] The literature points to essentially three dimensions of nudging that we must consider so that the impact and potential of a nudge can be

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[52] *See* White, *supra* note 49, at 226 (explaining the purpose behind nudging is to create a specific environment prone to decision making that enhances well-being); *see also* Rachlinski, *supra* note 49, at 1064–65.

[53] *See* BALDWIN ET AL., UNDERSTANDING REGULATION, *supra* note 12, at 123 (stating the nudge allows for decisions to be manipulated slightly by public authorities, while still allowing the decision-makers to freely choose as they see fit).

[54] *See* Arden Rowell, *Once and Future Nudges*, 82 MO. L. REV. 709, 710 (2017) (noting the nudge can offer advantages over other regulatory approaches including "administrability benefits, welfare benefits, cost-effectiveness and autonomy benefits").

[55] *See* Shlomo Benartzi, et al., *Should Governments Invest More in Nudging?*, 28 PSYCHOL. SCI. 1041, 1044–51 (2017) (detailing the cost-effective approach of nudging in several policy fields through empirical research).

[56] *See* Baldwin, *Giving Nudge the Third Degree*, *supra* note 12, at 831 (noting the U.K. government has set up specific teams to implement the nudge technique).

[57] *See id.* at 856 (indicating the U.S. government has started implementing the nudge in the last decade). *See generally* Exec. Order No. 13707, 80 Fed. Reg. 181, 56365 (Sept. 15, 2015) (authorizing U.S. government agencies to research and implement behavioral science techniques to better serve the American people).

[58] *See* Benartzi et al., *supra* note 55, at 1041 (detailing a variety of countries, other than the U.K. and U.S., have started to implement the nudge approach); *see also* White, *supra* note 49, at 227 (noting the popularity of nudges among countries to address public policy issues).

[59] *See* Baldwin, *Giving Nudge the Third Degree*, *supra* note 12, at 856–57 (concluding while the nudge has become popular, criticisms include the lack of conceptual clarity and lack of precise terms under which the nudge may be used).

[60] *See id.* at 831 ("The governmental endorsement of nudging has not, however, been based on clear positions regarding the nature of 'nudge' or the role of nudge in the array of state control devices.").

analyzed: (1) degree (type) of nudge; (2) nudge tool employed; and (3) the model of the target (intention and capacity).[61] Each of the three dimensions affects the others and ultimately the analysis of the impact and potential of nudging to achieve a particular objective.

1. Three Degrees of Nudge

There are three degrees of nudge.[62] A First Degree nudge typically involves merely providing simple reminders or information to the target so that the target can "make an informed, rational and conscious choice."[63] Importantly, the autonomy of the target is not infringed upon.[64] Typical examples include health warnings on products such as cigarettes, reminders to complete tax returns,[65] reminders to use car seats for children or to get vaccinations. These types of nudges are benign and are not a serious intervention into the target's decision making,[66] as opposed to other more traditional regulatory tools that involve economic incentives (fines or subsidies) or include mandates or banning of activities.[67]

Unlike the First Degree nudge, the Second Degree nudge does infringe upon the autonomy of the target.[68] The Second Degree nudge exploits the volitional and behavioral limitations of the target "so as to bias decisions in a favoured direction."[69] Typical examples include placing a smoking area some distance away from a work area or organ donor programs that employ an opt-out regime.[70] Both examples rely on the volitional limitations (human inertia) to steer the target to the desired choice.[71] Thus, the autonomy of the target is impacted because the response to the nudge

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[61] *See id.* at 833 (describing the seven nudge tools); *see also id.* at 835–37 (distinguishing between the three degrees of nudge); *id.* at 840–42 (examining the differences in the different impacts of nudges on different targets); *id.* at 841 tbl.2; *id.* at 856–57 (summarizing the distinctions between the three degrees of nudge and the article's overall goal).

[62] *See id.* at 838 tbl.1 (organizing the First, Second, and Third Degrees of nudge and categorizes their respective characteristics, examples, and impacts).

[63] *Id.*

[64] *See id.* (explaining the First Degree nudge's impact on autonomy as "[r]espects the autonomy of the decision-maker and enhances target's rationality").

[65] *See id.* (examining examples of the First Degree nudge).

[66] *See id.* at 835, 838 tbl.1 (typical characteristics of a First Degree nudge include a "[s]upply of simple information or a reminder with the aim of improving the target's capacity to make an informed, rational and conscious choice").

[67] *See* Benartzi et al., *supra* note 55, at 1044–51 (traditional interventions are intended to change behavior by altering the cost-benefit calculation individuals undertake when focusing on a particular decision).

[68] *See* Baldwin, *Giving Nudge the Third Degree*, *supra* note 12, at 836 ("The Second Degree nudge involves a greater impact on individual autonomy than the First Degree nudge since the targeted individual's behavioral or volitional limitations and 'automatic' responses will in practice lead him or her to accept the nudge with limited awareness and reflection.").

[69] *Id.* at 836, 838 tbl.1.

[70] *See id.*

[71] *See id.* at 836 (explaining a target is unlikely to reflect and unearth the nature and effect of the nudge because of behavioral limitations and the tendency to exhibit an automatic response).

likely will be automatic. However, theoretically, the target could discover the nudge upon reflection.[72]

The Third Degree nudge relies on behavioral manipulation to illicit emotional responses that effectively erode or block any autonomy of the target.[73] The classic example is the use of shocking images, such as graphic pictures of cancer victims[74] or pictures of wrecked cars and tombstones of teenagers to combat drinking and driving or texting and driving. The lack of autonomy in the target to "unpack the nature and extent of the decision or preference shaping" is the hallmark distinction between Second Degree and Third Degree nudging,[75] and moves the Third Degree nudge quite a distance away from the relatively benign First Degree nudge.

2. Nudging Tools

Another dimension to consider in analyzing the limitations and potential of the nudge are the various nudge tools available.[76] The tools include: (1) default mechanisms such as opt-out regimes; (2) design mechanisms such as placement of elevators away from entrance to public building; (3) information mechanisms or warnings; (4) campaigns or commitments to persuade; or (5) mechanisms that reduce transactional costs.[77] The different nudge tools can be employed among the degrees of nudging, with some having applicability in all three degrees of nudging, such as information mechanisms.[78] The importance of the tool employed is that it will influence the effectiveness of the nudge degree employed on achieving the desired outcome, particularly in conjunction with consideration of the model of the target dimension.[79]

3. Model of the Target

Whether a particular degree of nudge and nudge tool will be effective (or the degree of effectiveness) will depend, in part, on the intention and capacity of the target.[80] The intention of the target (the extent the target has the "same objective as the nudger") and the capacity (ability of the target to "gain, receive absorb and act

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[72] *See id.* at 838 tbl.1 (distinguishing the passive nature of a First Degree nudge from the more intrusive, yet indirect, Second Degree nudge).

[73] *See id.* at 836 (explaining a Third Degree nudge is a more serious intrusion on autonomy).

[74] *See id.* at 836, 838 tbl.1.

[75] *Id.* at 837 n.25, 838 tbl.1 (utilizing the example of subliminal messaging to distinguish Third Degree nudges from the opportunity to assert personal autonomy that is inherent in Second Degree nudges).

[76] *See id.* at 835 (differentiating the tools of nudging, such as a "default rule, an exercise in information supply or some other approach," from the desired effect of each level of nudge).

[77] *See id.* at 833 (referencing the broad categories of potential nudge tools that can be used to stimulate welfare enhancing choices).

[78] *See id.* at 835 (exemplifying the use of supplying information as a multi-level tool).

[79] *See id.* at 839–40, 842 (discussing types of nudges and the varied effectiveness of these nudges on different targets).

[80] *See id.* at 840 (addressing the target of the nudge correlates to the effectiveness of the nudge); *see also* BALDWIN ET AL., UNDERSTANDING REGULATION, *supra* note 12, at 126.

on information")[81] will impact the outcome of different nudges and tools employed.[82] For example, a high capacity and well-intentioned target will likely respond well to all three degrees of nudge and a variety of tools.[83] Whereas a low capacity and ill-intentioned target will have varied responses to the three degrees of nudge or tools employed.[84] In addition, a high capacity and ill-intentioned target will present difficulties in employing the nudge regardless of the degree or tool.[85] As such, any analysis of nudging must include an analysis of the type and characteristics of the target to work to employ the most appropriate degree of nudge and tool to achieve the desired goal.

C. Limitations

Limitations of nudges are apparent when we consider nudges across the three dimensions. First, the opt-out must be easy, otherwise the libertarian element is lost and freedom undermined.[86] The degree of nudge employed will impact whether the autonomy (ability to make own decision and opt-out) of the target is maintained. First Degree nudges are easy on this front, but moving from Second to Third Degree nudges are more problematic.[87] As Luc Bovens wrote: "nudges 'typically work better in the dark.'"[88] The very nature of the nudge works when the ability to opt-out is lost and so for the nudge to work effectively the ability to opt-out needs to not be easy.[89] The degree, type of tool, and a target's intention and capacity will affect whether the opt-out is actually easy or not.

Bovens' quote leads into a second and related limitation. Transparency and accountability are of concern because deciding what particular choice (outcome) to nudge is a value judgment.[90] Under the umbrella of nudging, there is a concern that

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[81] Baldwin, *Giving Nudge the Third Degree*, *supra* note 12, at 840.

[82] *See id.* at 840–42, 841 tbl.2 (describing and demonstrating the effectiveness of the nudge as it relates to the target's capacity and intentions).

[83] *See id.* at 841 tbl.2 (visualizing the anticipated impact of nudges on different targets).

[84] *See id.*

[85] *See id.* at 842 (discussing ill-intentioned targets may not adopt such objectives of the nudger and may be opposed to engaging in the behavior the nudger sees as virtuous).

[86] *See* BALDWIN ET AL., UNDERSTANDING REGULATION, *supra* note 12, at 123–24, 136 tbl.7.1 (explaining the "nudging approach thus allows for decisions to be manipulated by public authorities, provided that it leaves decision-makers free to choose to behave as they, rather than the public authorities, see fit[,]" but if the opt-out becomes too difficult, the nudge threatens freedoms of choice).

[87] *See* Baldwin, *Giving Nudge the Third Degree*, *supra* note 12, at 845 ("[N]udges (of Second and Third Degree) are applied on occasions that allow the exploitation of an individual's weaknesses or willpower, emotion and rationality and this is not a context likely to encourage advertence to the fact or extent of a nudge.").

[88] *Id.* (internal citation omitted).

[89] *See id.* at 847 (explaining when a target is "blocked" from an opt-out, the target will "simply stick with the default") (internal citation omitted).

[90] *See* BALDWIN ET AL., UNDERSTANDING REGULATION, *supra* note 12, at 124, 136 tbl.7.1 (highlighting whether a nudge is "good" or "beneficial" is not always clear and noting that the nudging process is more hidden from view, than a government prohibition, and thus, "the danger of nudging is that, under the banner of neutrality, control regimes become less overt, less accountable, and more paternalistic").

"control regimes become less overt, less accountable, and more paternalistic."[91] This lack of transparency can lead to a lack of trust, and a lack of trust will impact the effectiveness of nudging.[92] Couple the lack of transparency with implications on trust and a limited ability to opt-out and the nudge presents serious worries.

Third, a particular nudge may not address the actual cause of, or offer a solution to, a problem.[93] For example, nudges to combat obesity may not address root causes of obesity. The degree of nudge, the tool, and the dispositions of the target will impact whether the nudge employed will address the actual cause of a problem or work toward a solution of the problem.

Fourth, nudging does not work well to control corporate behavior because of the limitations of rationality of a group.[94] If a nudge is addressing behaviors that are the "product of collective process and policies" of a group or organization, the ability to rely on the intentions, and capacities of the individuals in the group to affect the desired outcome is limited.[95]

Fifth, the counter-nudge can present another limitation.[96] If the regulator relies on a nudge to control certain behaviors (limitations on alcohol sales for example), such nudge may be met by counter-nudges from retailers, which can undermine the effectiveness of the nudge.[97] The degree of nudge,[98] the particular tool employed, and the capacities of the targets will affect the magnitude of the counter-nudge response, and ultimately the effectiveness of the nudge.[99]

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[91] *See id.* at 124 (noting the process used to affect a nudge—the determination of what to nudge and how to nudge it—is often hidden from view).

[92] *See* Baldwin, *Giving Nudge the Third Degree*, *supra* note 12, at 843 (explaining the use of information selectively or emotively through nudging may alienate the nudgee and therefore undermine the underlying relationship).

[93] *See id.* at 839 (focusing on the decision-making of the individual, the nudge achieves its result of changing behavior without addressing the possible causes of the problem).

[94] *See* BALDWIN ET AL., UNDERSTANDING REGULATION, *supra* note 12, at 125 ("Where potential harms may emerge from the cumulative actions of numbers of decision-makers, the nudging of particular decision-makers may not suffice to control the harm's emergence.").

[95] *See* Baldwin, *Giving Nudge the Third Degree*, *supra* note 12, at 839–40 (discussing individually-targeted nudges aimed at individuals will rarely be effective when addressing undesirable group behavior resulting from competing interests and pressures).

[96] *See id.* at 842 (indicating, rather than comply with a nudge, interested parties may respond by coming up with ways to creatively comply with or disregard the nudge altogether).

[97] *See id.* (positing actors in the marketing and advertising sector could be worthy opponents to governmental actors in the nudge game).

[98] *See id.* at 843 (arguing a higher degree of nudge will require a more severe response to counter that nudge).

[99] Closely related to the counter-nudge is the concept of "nudge-nudge interactions." Rowell, *supra* note 54, at 719. As nudging becomes more popular a regulatory technique, nudge strategies may conflict or compete with other nudges and those interactions must be considered by agencies, Congress, and the courts. *See id.* at 726.

IV. NUDGING AND CONSUMER FINANCE GENERALLY

Nudging has been used in consumer finance with some success, particularly in increasing retirement savings and enhancing disclosures related to credit cards. These two areas where nudges have been employed are examined in this section. Then we build on these efforts, explicitly employing the dimensions of the nudge discussed in Part III, and offer a framework to nudge individuals in an effort to reduce credit card debt in Part V.

A. Nudging and Retirement Savings

In the workplace, nudges have been successfully used to enhance savings in retirement accounts.[100] The nudge tools successfully employed have been an automatic enrollment in a retirement plan, an automatic increase in the rate of contribution, or, in some instances, a combination of these tools.[101] For example, in an empirical study of a large Fortune 500 U.S. company, the implementation of a default opt-in enrollment in a retirement plan for new employees increased participation by 48% in 15 months.[102] A host of other studies have found that opt-in or automatic increase in contribution rates have increased participation and enhanced savings for retirement.[103]

We can analyze these two types of nudges across the three dimensions of nudges. First, these two types of nudges are default based tools—i.e. individuals have to opt-out. They are Second Degree nudges because they rely on volitional limitations of individuals—lack of inertia—to steer away from the default choice of enrolling in a retirement plan or increasing savings rates in retirement plans.[104]

The third dimension, consideration of the target, indicates these default nudges can work on different targets with varying success.[105] A successful default nudge depends on the capacity and the intention of the target.[106] On one end of the spectrum, a high capacity and well-intentioned individual will probably respond

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[100] *See* Benartzi et al., *supra* note 55, at 1046.

[101] *See id.* ("Automatic enrollment is effective because people exhibit inertia, which favors sticking to defaults . . . .").

[102] *See* Russell, *supra* note 17, at 51 (finding in particular the effects of the "'opt-in' systems" were strong for populations that had previously participated in the company's 401(k) plans) (internal citation omitted). For the complete empirical study results, see Brigitte Madrian & Dennis Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q.J. ECON. 1149, 1149–50 (2001) (studying the 401(k) savings behaviors of employees in large U.S. corporations prior to and after a corporation-wide change in the company's 401(k) plan).

[103] *See* Benartzi et al., *supra* note 55, at 1046 tbl.2. (collecting and summarizing studies of the "relative effectiveness of interventions targeting retirement savings").

[104] *See id.* at 1046 (discussing effectiveness of automatic enrollment because "people exhibit inertia, which favors sticking to the defaults").

[105] *See id.* at 1051 (comparing nudging effectiveness in rushed decision-makers versus careful decision-makers).

[106] *See* Baldwin, *Giving Nudge the Third Degree*, *supra* note 12, at 840 (describing capacity as the target's ability to understand information and intention as the target's objective).

well to the default nudges and not opt-out. On the other end of the spectrum, the default nudge may work well for the low capacity and ill-intentioned because even though the ill-intentioned may not have the same desire to save as the nudger, they may not have the capacity to act on the information and reject the default rule. This default nudge likely works well for the low capacity and well-intentioned as they likely would not reject the default rule. The default nudge likely will have the least effectiveness on the high capacity and ill-intentioned because that individual will not have the same objective of increasing savings as the nudger, and being a high capacity individual the target can understand the nudge and act to opt-out of the default rule.

B. Nudging and Credit Card Disclosures

One example of a successfully employed nudge is the Credit Card Accountability Responsibility and Disclosure Act ("CARD").[107] CARD requires certain disclosures showing the savings for credit card debtors if they pay the balance owed in thirty-six months on credit card statements.[108] CARD also requires enhanced disclosures of "fees, penalties, and the consequences of paying only the minimum amounts due."[109] Evidence shows that this disclosure effort reduced interest payments by $74 million a year.[110]

Other similar disclosure nudges have resulted from policies enacted by the Consumer Financial Protection Board ("CFPB"), which requires credit card issuers to clearly and prominently disclose interest rates and late fees in credit card offers.[111] These types of nudges are generally viewed in a positive light.[112]

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[107] Pub. L. No. 111–24, §§ 201–204, 123 Stat. 1734, 1743–46 (2009). CARD was "codified in relevant part to 15 U.S.C. §§ 1601–1667(f), 1681 et seq. and 1693 et seq." *Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act)*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/statutes/credit-card-accountability-responsibility-and-disclosure-act-2009-credit-card (last visited Jan. 21, 2019).

[108] *See* Cass R. Sunstein, *Nudges vs. Shoves*, 127 HARV. L. REV. 210, 213 (2014) (discussing potential value of "a small nudge" like interest savings disclosures).

[109] Carey Alexander, Note, A*busive: Dodd-Frank Section 1031 and the Continuing Struggle to Protect Consumers*, 85 ST. JOHN'S L. REV. 1105, 1129 (2011) (explaining one of the most dangerous feature of credit cards is issuer's ability to change the interest rate).

[110] *See* Sunstein, *supra* note 108, at 214. However, other scholars suggest the disclosure reforms' success is less certain. *See* Harvey, *supra* note 44, at 103 ("[T]he GAO study concluded that customized minimum payment disclosures would provide more information to consumers but that the impact of these disclosures was not consistent across different sets of consumer groups."). Further, the effectiveness of certain nudges that move beyond mere disclosure, i.e. default rules required by CARD, are still the subject of debate. *See* Sunstein, *supra* note 108, at 214–16 (discussing default rules under CARD that ban banks from enrolling people automatically in overdraft protection programs). The concern is that even though the default rules pertaining to overdraft protection require a consumer opting in, banks "subtly coerce their customers into opting in to overdraft protection services." Adam C. Smith & Todd Zywicki, *Behavior, Paternalism, and Policy: Evaluating Consumer Financial Protection*, 9 N.Y.U. J.L. & LIBERTY 201, 225 (2015).

[111] *See* White, *supra* note 49, at 230 (contrasting the mild nudge of requiring credit card issuers to make interest rates and late fees clear and prominent in offers to more coercive policies enacted by the CFPB).

[112] *See id.* ("One largely positive change made in consumer financing was requiring credit card issuers to make interest rates and late fees clear and prominent in offers.").

These types of nudges can be analyzed across the three dimensions of a nudge. First, these types of nudges are merely disclosure tools. They are minor nudges of the consumer and are transparent.[113] We view these type of nudges as First Degree nudges. These nudges do not infringe upon the autonomy of the target of the nudge, but rather "engages deliberative, conscious decision making" of the target.[114] It is this dimension of the nudge—a First Degree nudge—that allows those examining the particular nudge to view it favorably. Outside affirmation of a nudge is important to continued use and/or expansion of a particular nudge.[115]

In terms of the third dimension—model of the target—the extent the disclosure nudge will work will depend on the target's capacity to understand the disclosure information so that the target can act on it. And, even if the target has that capacity, the target will need to have the same objective, or intention, as the nudger so that the nudge is actually successful. CARD disclosures did not distinguish among the target[116] and, therefore, the nudge likely was ineffective to a great number of targets that were not well intentioned and/or had a low capacity.

V. A FRAMEWORK TO EMPLOY THE NUDGE TO SUCCESSFULLY COMBAT CREDIT CARD DEBT

A. The Framework of a Successful Nudge

As can be seen from reviewing the above two examples of nudges employed in consumer finance, the degree of success of any nudge depends on careful understanding of how the three dimensions of the nudge interact with each other. We can see this in developing a nudge with the goal or objective of reducing consumer credit card debt.

To have a nudge that achieves this objective we need to employ the correct nudge tool; ideally it would be directed at a target that is well intentioned and has the capacity to act on the nudge, and we need to ensure the degree of nudge is acceptable—both politically and socially. All three dimensions must be in sync with each other. If the nudge employed fails in any one of the three dimensions, it may not achieve its objective.[117]

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[113] *See id.* ("This [requirement] is a very mild nudge because it is transparent.").

[114] *Id.*

[115] *See* Cass R. Sunstein, *Do People Like Nudges?*, 68 ADMIN. L. REV. 177, 184 (2016) ("Moreover, transparency about nudging does not, in general, reduce the effectiveness of nudges, because most nudges are already transparent and because people will not, in general, rebel against nudges.").

[116] *See* Alexander, *supra* note 109, at 1128–30 (explaining the "Act requires the Fed to post copies of all credit card contracts on the Internet" and fails to distinguish among targets).

[117] The three dimensions of a nudge coinciding to achieve a nudge objective is similar to the streams analogy of Kingdon in his theory of problem definition. Kingdon recognized that the political stream, policy stream, and problem stream must all coincide in order for a policy or legislative reform to materialize. *See* Robert J. Landry, III, *The Policy and Forces Behind Consumer Bankruptcy Reform: A Classic Battle Over Problem Definition*, 33 U. MEM. L. REV. 509, 526 (2003). Similarly, for a nudge to achieve its objective, the three dimensions of the nudge—the tool, the degree and the target—must all coincide. *See id.*

B. Rule of Thumb—An Informational Reminder Nudge

The goal we wish to achieve is a reduction in consumer credit card debt. We must consider the tool, the target, and the degree of nudge as we design a nudge to achieve this goal. Although there is limited research, some research has shown that information campaigns that employ rules of thumb type nudges can be effective.[118] A rule of thumb campaign is a type of information reminder nudge ("IRN"),[119] which may work well to achieve our goal. It has had some success in at least one nudge campaign as discussed in the next section.

1. Arizona Campaign

Rules of thumb focus not on why a consumer should do something, but what they should do.[120] For example, in Arizona, a campaign (the "Arizona Campaign") to reduce credit card debt for credit card revolvers the following rule of thumb was employed: "Don't sweat the small stuff. Use cash when it's under $20."[121] The rule of thumb was delivered to credit card revolvers via email, a banner on a bank webpage, and in the mail (fridge magnet) no more than twice a month.[122] The campaign went on for six months[123] and data showed that revolving debt was reduced modestly, with the most impacted group being individuals under the age of 40 having fewer new credit card purchases and higher savings.[124] The results do not appear dramatic, but they are promising when we consider that the "light touch" approach of the nudge employed,[125] and the cost per a person in the campaign was only about fifty cents.[126] The success of this campaign can be built upon to try to improve outcomes.

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[118] *See* URBAN INSTITUTE, AN EVALUATION OF THE IMPACTS OF TWO "RULES OF THUMB" FOR CREDIT CARD REVOLVERS XV (Sept. 2016), https://www.urban.org/research/publication/evaluation-impacts-two-rules-thumb-credit-card-revolvers [hereinafter "REVOLVERS"] (using data from a study on the rules of thumb to show that one of the rules helped reduce consumer debt).

[119] *See id.* at 7–8 (describing the various ways in which rules of thumb were delivered to consumers to nudge their behavior in the right direction).

[120] *See id.* at 1 (explaining rules of thumb can be used to improve credit card behavior because they are "repetitive and frequent, making it easier for the behavior to turn into a habit").

[121] *See id.* at XII.

[122] *See id.* at 25–26 (describing how each method was utilized to convey the rules).

[123] *See id.* at 28.

[124] *See id.* at 70–71, 87 (suggesting the reduction in credit card debt was likely due to "both a reduction in purchases and a partial substation of savings for credit"). Those 40 years old and younger had a 5% reduction in credit card balance after the six-month campaign. *See id.* at 87.

[125] *See id.* at 70 (detailing how the rule caused participants to reduce their credit card revolving debt).

[126] *See id.* at 89 (indicating costs would be even lower without the need to randomize samples).

2. Attributes of Successful IRN Campaign

First Degree Nudge. A rule of thumb campaign similar to the one in Arizona could be developed and work to enhance achieving the objective—reducing consumer credit card debt. First, the rule of thumb technique is a First Degree nudge and this enhances the potential success of the nudge.[127] As noted, the First Degree nudge does not infringe upon the autonomy of the individual[128] and, just as in the Arizona Campaign, individuals can opt-out of messaging.[129] Since a First Degree nudge does not rely on volitional limitations, it is likely to be more acceptable from a social and political perspective, as seen with CARD disclosures[130] and the Arizona Campaign.[131]

Tool. Second, the rule of thumb technique is an appropriate nudge tool. This tool will ensure we stay within the dimension of a First Degree nudge, as within this degree our tool choices are somewhat limited to disclosure or reminder type nudges.[132] If we move away from disclosure and reminder nudges to more intrusive tools, we likely infringe upon individual freedom of choice and are susceptible to more criticism from society or politics.[133] As such, a disclosure—more aptly a reminder with information to enhance a choice—would be ideal. This is exactly what a rule of thumb attempts to do—it is an IRN.[134]

The tool selection includes several discreet sub-dimensions: the type of information to convey, the timing, and the mode of delivery.[135] The type of information included in the IRN should be simple, but persuasive to the target. Simplicity is at the heart of a rule of thumb nudge.[136] The rule of thumb employed in the Arizona Campaign proved effective, simple and could be employed again, as well as other variations so as to analyze what works best at achieving our goal.

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[127] *See* Baldwin, *Giving Nudge the Third Degree*, *supra* note 12, at 831, 842 (explaining First Degree nudges' success is due to the potential to be more effective on low capacity targets).

[128] *See id.* at 838 tbl.1 (noting a First Degree nudge "respects the autonomy of decision-maker and enhances target's rationality").

[129] *See* REVOLVERS, *supra* note 118, at 7.

[130] *See* White, *supra* note 49, at 230 (describing disclosure of interest rates and late fees as a "very mild nudge" and a "largely positive change").

[131] *See* REVOLVERS, *supra* note 118, at XII ("Partnered with Arizona Federal Credit Union (Arizona Federal), a large credit union based in Phoenix, Arizona, to draw a sample and deliver the rules. We created two rules of thumb and sent them to revolvers in their customer base.").

[132] *See* Baldwin, *Giving Nudge to the Third Degree*, *supra* note 12, at 835 (discussing three degrees of nudging, specifically First Degree nudging as providing information and reminders).

[133] *See id.* at 847 ("[N]udges have been said to be, on their face, as threatening to liberty, broadly understood, as is overt coercion.").

[134] *See id.* at 835 (discussing how First Degree nudges give information through reminders).

[135] *See* REVOLVERS, *supra* note 118, at 7 (discussing the different concepts one must consider when implementing a rule of thumb, such as the timing options, the frequency, and the delivery method); *see also* Sabrina Karl, *If card payment is late, we'd prefer a nudge by email or text*, NASDAQ (Dec. 27, 2017), https://www.nasdaq.com/article/if-card-payment-is-late-wed-prefer-a-nudge-by-email-or-text-cm897218 (analyzing statistical data to show which mode of delivery individuals prefer).

[136] *See* REVOLVERS, *supra* note 118, at 2 (emphasizing the importance of simplicity by defining a rule of thumb as a "simple heuristics").

The timing of the IRN should occur before individuals incur consumer credit card debt. CARD disclosures are after the fact nudges when credit card debt has already been incurred,[137] and although effective to some extent, a nudge prior to incurring consumer credit card debt likely would be more effective. The Arizona Campaign was directed at individuals already with revolving debt.[138] Changing the time of the IRN to before the consumer credit card debt is incurred may enhance the effectiveness of the message.

The IRN should be delivered in a mode that would be most effective to convey the message clearly to the target. The Arizona Campaign showed that younger customers were more impacted by the rule of thumb than older customers.[139] The mode should likely be email or a banner on the web. These can be repetitive in nature, particularly the banner, with the email limited so as to not bring about message fatigue.

Target. The exact implementation of the tool—the rule of thumb IRN—is linked closely to the target. The target we seek to influence are individuals that have not incurred credit card debt. The Arizona Campaign showed that those under 40 were more influence in their campaign, but they already had credit card debt.[140] The target for this campaign should be much younger individuals who are likely to be presented with the option to incur credit card debt. Such a group needs to be identifiable and able to be targeted. An ideal target population would be freshman in college that open new bank accounts. This population could receive the rule of thumb IRN in a similar fashion as in the Arizona Campaign, but receive this information upon opening a bank account and continue to receive regular reminders through various modes.

For example, upon opening a college bank account the bank could provide something akin to a magnet as provided to the Arizona customers,[141] but more likely to be used and seen by the college student. For this population, a web banner or something on the bank's mobile app with the rule of thumb IRN would be useful and likely reach the target. And, if a student applies for a credit card from the bank, the rule of thumb IRN should be delivered throughout that process.

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[137] *See* Pub. L. No. 111–24, §§ 201, 123 Stat. 1734, 1743–44 (2009) (requiring enhanced disclosure of information regarding the repayment of debt once a consumer already has an outstanding balance).

[138] *See* REVOLVERS, *supra* note 118, at XIV (stating the campaign was tested on individuals who carried a credit card balance for at least two of the six preintervention months).

[139] *See id.* at 83–84 (explaining the Arizona Campaign sample was separated into three age groups of participants and finding that "the rules tended to work better for participants who were 40 years or younger" because "[p]articipants in this age group who were exposed to either rule had lower credit card balances and fewer purchases than their control group counterparts").

[140] *See id.* at 50 (stating "[b]efore the intervention, participants 40 or younger had on average $3,400 per month in revolved credit card balances").

[141] *See id.* at 67 (explaining Arizona Federal sent customers magnetic calendars for the upcoming year with a rule printed on it as part of the study).

As with CARD disclosure and with the Arizona Campaign, the exact nature of the target—i.e. the capacity and intention—is not known.[142] However, if the rule of thumb IRN is employed to all in the target population it will encompass the greatest possible chance of success.

CONCLUSION

Nudging has the potential to be an effective regulatory mechanism to help combat credit card debt. The effectiveness of nudging to reduce consumer credit card debt depends on the target, the degree employed, and specific nudging tool utilized. College students are ideal targets because they likely have incurred either none or very little debt. Therefore, the nudge may have some positive effect. The First Degree nature of the nudge, in that it maintains the autonomy of the targets, enhances the need for serious consideration of this type of policy tool.

The rule of thumb IRN cannot replace C & C techniques entirely in the credit card policy domain such C & C techniques that ban automatic enrollment in overdraft protection, but it may be able to be used in conjunction with C & C or other regulatory techniques. For example, as seen in certain areas outside of the credit card policy domain, we may need hard and fast rules where serious public safety is at play or the risks have catastrophic consequences. We may be able to have some nudging employed, but a stopgap measure to avoid serious consequences may require the use of C & C techniques. When employing nudging with other techniques we must be cognizant of conflicts among the choices,[143] but that should not detract from working to find the mix of regulatory techniques, including nudging, that best achieves the outcomes desired. We can employ this approach in protecting consumers and reducing credit card debt—finding a mix of regulatory techniques with an emphasis on "light touch" techniques first.

Nudging is not the silver bullet to solving any regulatory problem including high levels of consumer credit card debt. Just as in the Arizona Campaign, this rule of thumb IRN will not solve the consumer credit card debt problem, but it may just help.[144] Nudging should be on the table as an option along the continuum of regulatory techniques from less intrusive to more intrusive.[145] We should start with less intrusive tools, such as the one offered here.

Importantly, before employing this or any other nudge, we must consider the nudge with clarity among all three dimensions outlined herein and limitations

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[142] *See id.* at 24–25 (outlining the similarities of revolvers as defined in CARD and the Arizona Campaign in relation to choosing the sample and explaining using a "strict definition of someone who revolved just once would place some people in [the Arizona Campaign] sample who may not be problematic revolvers").

[143] *See* Baldwin, *Giving Nudge the Third Degree*, *supra* note 12, at 855 (combining a nudge and other regulatory techniques, such as commands, can be problematic because they may undermine each other and therefore, reduce their effectiveness).

[144] *See* REVOLVERS, *supra* note 118, at 70–72, 87 (estimating the rules of thumb would improve overall financial standing of consumers).

[145] BALDWIN ET AL., UNDERSTANDING REGULATION, *supra* note 12, at 256–57 (discussing mixes of strategies in modifying the regulatory approach).

thereto, so that the nudge is not treated as just "another tool in the [regulatory] box . . . ."[146] Only with that clarity of analysis and consideration can any nudge have true potential.

[146] Baldwin, *Giving Nudge the Third Degree*, *supra* note 12, at 855 (discussing the conclusions that are drawn about the nudge tool).