

January 7, 2013

**Submitted electronically at [www.regulations.gov](http://www.regulations.gov)**

Ms. Monica Jackson  
Office of the Executive Secretary  
Consumer Financial Protection Bureau  
1700 G Street NW  
Washington D.C 20552

Re: **Docket No. CFPB-2012 - 0039**  
**Proposed Rule: “ability to pay” on credit card account**  
**Regulation Z (Truth in Lending Act)**  
**77 FR 66748**

The American Bankers Association (ABA)<sup>1</sup> applauds the Consumer Financial Protection Bureau (Bureau) on its proposal to reconsider the Federal Reserve Board’s (Board) interpretation of the Truth in Lending Act (TILA) requirement that lenders consider the ability of the borrower to make payments before opening a credit card account. The proposal amends the implementing regulation, Regulation Z, to eliminate the current requirement that those 21 or older demonstrate an “independent” ability to obtain a credit card. ABA supports the proposed amendments as they will help to ensure that stay-at-home spouses and partners have access to credit cards in their own names, as well as the ability to build their credit history, without having to rely on the approval or control of their spouse or partner.

Under TILA, as amended by the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit Card Act), cards issuers may not open credit card accounts to those under 21 unless such applicants have provided information showing an “independent” means of repaying any obligation. In contrast, before opening a credit card account for those 21 or older, card issuers must consider the “ability,” (without the qualifier “independent”) of the borrower to make the required payments. Notwithstanding the statutory distinction, on March 18, 2011, the Board adopted a rule that applied the “independent” ability-to-repay requirement to all consumers, regardless of age. Based on concerns raised by Congress and others, including the ABA, that the current interpretation limits the ability of stay-at-home spouses and partners who are 21 or older to obtain a credit card or build a credit history, the Bureau is now reconsidering the standard for credit card applicants who are 21 or older.

#### ***General discussion.***

As discussed in our comment letter of January 3, 2010, and ABA’s President Frank Keating’s *Huffington Post*’s [op. ed.](#) of June 4, 2012, ABA strongly supports the Bureau’s approach to apply the broader, unqualified “ability to pay” standard to those 21 or older and limit application of the “independent” ability to pay standard to those under 21. Simply put, the adoption of the existing regulation was a step back in the effort to promote the financial self-sufficiency of stay-at-home spouses

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<sup>1</sup> ABA represents banks of all sizes and charters and is the voice for the nation’s \$13 trillion banking industry and its two million employees. The majority of ABA’s members are banks with less than \$165 million in assets.

and partners, especially women, and those working part-time. Moreover, the interpretation was inconsistent with both the Equal Credit Opportunity Act (ECOA) and the Card Act.

ECOA not only prohibits discrimination on the basis of sex and marital status, it is intended to help promote the self-sufficiency of stay-at-home spouses, who are predominantly women, by helping them obtain credit in their own name and build a credit history. The current mistaken requirement that stay-at-home spouses and partners or those working part-time demonstrate *independent* income in order to obtain a credit card means they may not be able to obtain credit in their own name or build a credit history without the income-earning spouse's or partner's consent or control notwithstanding their contribution to managing household finances. Thus, if they become widowed or divorce, they may find themselves without access to credit, as existing accounts are closed and new ones unavailable. This current approach encourages and reinforces stay-at-home spouses' dependence on the income-producing spouse, contrary to the intent and goal of ECOA.

Indeed, at a June 6, 2012 Congressional hearing, members of Congress expressed concern about the negative impact of the regulation on stay-at-home spouses', especially women's, access to credit. Representative Carolyn Maloney, one of the authors of the Credit Card Act, noted that the current rule impairs stay-at-home mothers' ability to build credit histories and establish financial self-sufficiency and added that she "certainly didn't come to Congress to roll back women's access to credit in any way, shape or form."<sup>2</sup> Representative Shelley Moore Capito, Chairwoman of the Subcommittee on Financial Institutions and Consumer Credit of the House Financial Services Committee expressed similar concerns:

This rule could be especially punitive for women who are in a failing marriage or an abusive relationship. . . financial independence is absolutely necessary to building a new life. Similarly, stay-at-home spouses whose husband or wife dies unexpectedly or divorces them could face similar challenges if they have not maintained a credit history.<sup>3</sup>

Moreover, TILA, as amended by the Credit Card Act, does not support a conclusion that those 21 or older must demonstrate an independent ability to repay. The qualifier "independent" was only linked to the ability to repay standard applied to those under 21 and notably omitted from the standard assigned to those 21 or older. Indeed, Representative Maloney stated at the June 6, 2012 hearing that the Federal Reserve Board "was wrong, and misinterpreted the congressional intent in the area of the consumer's ability to repay their credit obligation." She explained that the Credit Card Act provided "two standards for assessing a consumer's ability to pay; one for consumers under 21 year of age; and one for everyone else . . . [and] the Federal Reserve really did not keep the two standards. . ."<sup>4</sup>

It has been asserted that not requiring non-income producing spouses and partners to demonstrate an independent ability to pay will burden stay-at-home spouses who subsequently divorce with large, unmanageable debts. However, as Representative Maloney observed at the June 6, 2012 hearing, "The same is true if a spouse loses their job, gets sick or has some other change in their financial circumstances."<sup>5</sup> In any case, such theoretical concerns are outweighed by the goals of promoting the financial self-sufficiency of stay-at-home spouses and recognizing the value of their role in managing household finances. Moreover, credit history is more reliable than income in predicting how well a

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<sup>2</sup> Congress, House, Committee on Financial Services, Subcommittee on Financial Institutions and Consumer Credit, *Examination of the Federal Reserve's final rule on the card act's 'ability to repay' requirement: Hearing before the Subcommittee on Financial Institutions and Consumer Credit*, 112<sup>th</sup> Cong., sess., June 6, 2012. (p.3).

<sup>3</sup> *Ibid.* p.2.

<sup>4</sup> *Ibid.* p.3.

<sup>5</sup> *Ibid.* p.4.

borrower manages credit: there is no reason to believe that stay-at-home spouses who have successfully managed car and student loans, a mortgage, and even another credit card will suddenly and dramatically alter their behavior and mismanage a credit card. Relying on the established predictability of credit history in determining the applicant's eligibility will help keep debt at manageable levels.

In brief, given the history and goals of ECOA, the Congressional intent of the Credit Card Act, and the potential harm to qualified borrowers who happen to be stay-at-home spouses or partners, the Bureau should proceed in eliminating the requirement that credit card applicants 21 or older demonstrate an "independent" ability to pay before they may obtain a credit card and allow card issuers to consider other income on which the stay-at-home spouses and partners may rely to pay the credit card.

While ABA strongly approves the direction of the proposal, we offer suggestions to help ensure that applicants can quickly understand and correctly interpret the application, to address practical considerations, and to facilitate compliance and avoid violations or challenges to implementation of the proposed regulation.

### ***Summary of proposal.***

The proposal eliminates the requirement that applicants 21 or older have an independent ability to pay and replaces that provision with special requirements for applicants who rely on income and assets of "authorized users," "household members," and others not liable for the debt. Specifically, proposed Section 1051.(a)(1)(ii) permits card issuers to consider for such applicants income and assets which "may include any income and assets to which consumers have a reasonable expectation of access."

The proposed Commentary clarifies that card issuers may "consider" the consumer's income and assets based on information provided through the application process. For example, they may rely on information provided by the consumer, e.g. on the application, in response to requests for "salary," "income," "assets," "available income," accessible income" or similar language regarding income and assets or income and assets to which the applicant has a reasonable expectation of access. However, issuers may not rely solely on applicants' statements if they ask for "household" income. "Instead the card issuer would need to obtain additional information about an applicant's income (such as by contacting the applicant)."

The proposed Commentary allows three ways for issuers to consider household income in its examples of "considering income":

1. If the household member's salary is deposited into a joint account shared by the applicant.
2. The household member's salary is deposited into an account to which the applicant does not have access, but a portion of that salary is regularly transferred into an account to which applicant has access.
3. No portion of the household member's salary is deposited into an account to which the applicant has access but the "household member regularly uses that salary to pay for the applicant's expenses."

The proposed Commentary specifically provides that if no portion of the household member's salary is deposited into an account to which the applicant has access, the household members does not regularly used that salary to pay for the applicant's expenses, and no statute or regulation grants the

applicant an ownership interest in that salary, the issuer may not consider the household members' salary.

The rule for those under 21 is different. Issuers may consider the applicant's income, but not income to which the applicant has "only a reasonable expectation of access." Under proposed Comment 3 to Section 1051(b)(1)(i), issuers may ask about "accessible" "available" or "household" income, but must obtain additional information, such as by contacting the applicant. Issuers may consider a household member's salary deposited into a joint account held with the applicant, but not the salary of the household member transferred into applicant's account or used to pay the applicant's expenses unless the applicant has a statutory ownership in the account.

It is not intended that issuers **must** consider income to which those 21 and over have a "reasonable expectation of access."<sup>6</sup>

### ***Recommendations.***

**Generally.** In finalizing the rule, the Bureau should take into account important goals in designing applications and the practical aspects of the credit process. For example, applications and instructions must be clear, easily understood, uncluttered, and visually pleasing. Otherwise, potential applicants are likely to be distracted, confused and/or frustrated. In addition, the final rule should recognize that the application process is not limited to a written application, but may involve other interaction between the card issuer and applicant, such as oral interaction in the branch or by phone or online chats between lender representatives and applicants. Both the need for uncluttered, understandable applications and the possibility of direct interaction between the card issuer and applicant are important factors for determining the lenders' policy about the type of income and/or assets to consider and the means of inquiring about income at the various potential customer touch points. The challenge is more complicated because the type of income to be considered may vary based on whether the applicant is under 21 or 21 or older.

**Clarification about reliance on income and asset information requested with the application.** We appreciate the Bureau's flexibility under proposed Comment 5.i. to Section 10051(a)(1) to allow card issuers to rely on information provided by the consumer in response to a request for "available" and "accessible" income or other language to determine income/assets to which the applicant has a reasonable expectation of access. It appears that issuers may rely on such information provided by the consumer without further inquiry. However, proposed Comment 6, which provides "examples of considering income," (e.g., considering a household member's salary deposited into a joint account shared with the applicant) has caused some confusion about this assumption. To be clear that consideration of the information contemplated under proposed Comment 6 is not necessary, either on the application or in a follow-up contact with the applicant, when applications request "income," "available income," "accessible income," or other language asking for current or reasonably expected income and/or assets, we suggest that the Bureau insert in Comment 5.i to Section 1051(a)(1) "without further inquiry," or "solely" after the words "issuers may rely." Including such inquiries and explanations as contemplated in proposed Comment 6 on an application would unnecessarily clutter and complicate the application. In addition, requiring separate follow-up contacts to obtain such information would be inconvenient to the consumer, impractical, and time-consuming and unnecessarily delay processing. In effect, the proposal would change little and not achieve its goal.

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See: Footnote 30 (77 FR 66753); Part IV, Paperwork Reduction Act (77 FR.66754).

For similar reasons, we recommend that the Bureau re-label proposed Comment 6 as “Examples of income that may be considered.” “Examples of considering income” is too broad and may suggest that card issuers should be considering such information for all applications, regardless of inquiry or information provided on the application.

***Adding examples of income qualifiers.*** We suggest that the final rule provide in Comment 5.i. additional examples of the type of income applications may request in order to distinguish between the types of income permitted to be considered for those under 21 and for those 21 or older. Other examples will be helpful if it is found that terms such as “accessible” or “available” income might be misunderstood, for example, to mean after-tax or discretionary income.

Easily understood terms are critical because explanations, particularly in the context of a credit card application, may clutter the application and potentially distract or confuse the applicant or invite supervisory criticism. In addition, issuers may want to avoid separate inquiries based on age that create a bifurcated application, further clutter and length, and potential distraction.

Therefore, we recommend that the final regulation recognize the use of the terms “personal income,” “individual income,” and “independent income” as terms issuers may use to capture the concept of “independent” income, meaning income personally earned or received directly by the applicant. Such terms could be coupled with, for example, “other income on which you rely.” Issuers could then consider only the “personal,” “individual,” or “independent” income for applicants under 21 and all income for those 21 or older. The words “personal income,” and “individual income” when juxtaposed with “other income” capture the distinctions in the two types of income and guide the applicant on the meaning of “other income.” As the applicant provides a date of birth, it may not be necessary to have separate questions based on age, allowing a cleaner, simpler application.

The Bureau should also include as examples of the type of income that may be considered for applicants 21 or older “income on which the applicant can rely” and “total income you have access to” or words to that effect. These phrases suggest to applicants 21 or older that something more than their independent income may be considered and might be more quickly grasped than the proposed phrases.

***Complications with requesting “household” income.*** While we appreciate that the proposal permits credit card issuers to consider household income for applicants 21 or older, the proposed condition to contact the customer for additional information poses practical and potentially legal challenges, so its use may be limited. The proposal appears to contemplate that the additional contact involves asking the applicants whether they receive regular payments from, share an account with, or have expenses paid by a spouse or other person. Because the questions can become very personal and sensitive, applicants may be offended. In addition, trying to control the script for compliance, particularly on the branch level, is challenging. Accordingly, card issuers may be reluctant to use this option, notwithstanding that “household income” is a phrase consumers understand well and quickly.

***Including other types of income in examples of income.*** Proposed Comment 6 offers examples of income that might be considered, such as a household member’s “salary” deposited into a joint account shared with the applicant. The four examples all refer to “salary.” However, other types of income are eligible, such as government benefits and investment and retirement income. We suggest that the Bureau also include those types of income in the examples.

***Clarification that treating those under 21 differently does not violate ECOA.*** Card issuers are concerned about potential complaints of illegal discrimination under ECOA on the basis of age for treating those under 21 differently under Regulation Z. While we believe that the Credit Card Act’s

provisions which followed ECOA and treat credit card applicants under 21 differently from those 21 or older override ECOA's general prohibition against discrimination on the basis of age, a statement to that effect in the Supplementary Information as well as an amendment to Regulation B, which implements ECOA, would avoid debate and reduce concerns about charges of ECOA violations.

***Conclusion.***

ABA strongly supports the Bureau's proposal to ensure that stay-at-home spouses and partners continue to have access to credit cards in their own names and the opportunity to build their credit history without having to rely on the approval or control of their spouse or partner. Given the history and goals of ECOA, the Congressional intent of the Credit Card Act, and the potential harm to qualified borrowers who happen to be stay-at-home spouses or partners, the Bureau should proceed with its proposal to eliminate the requirement that 21 or older demonstrate an "independent" ability to pay before they may obtain a credit card account.

We are pleased to offer additional information.

Sincerely,

A handwritten signature in black ink, reading "Nessa Feddis". The signature is written in a cursive, flowing style.

Nessa Eileen Feddis