

# The CFPB Amends Regulation Z's Credit Card Issuer Ability-to-Pay Requirements

By Obrea O. Poindexter and Matthew W. Janiga\*

The Credit Card Accountability Responsibility and Disclosure Act of 2009 (“CARD Act”)<sup>1</sup> included provisions designed to protect younger consumers. This survey examines recent amendments by the Bureau of Consumer Financial Protection (“CFPB”) to Regulation Z’s ability-to-pay requirements, which implemented the CARD Act’s protections for younger consumers.

## BASIS FOR ABILITY-TO-PAY PROTECTIONS

During the debate and passage of the CARD Act, several members of Congress specifically identified a need to require credit card issuers to substantiate a younger consumer’s income as part of the application process.<sup>2</sup> Section 301 of the CARD Act created new requirements to address Congress’s concerns about the marketing of credit cards to underage consumers.<sup>3</sup> Specifically, subparagraph B of section 301 requires card issuers to consider whether an applicant under the age of twenty-one has an “independent means of repaying.”<sup>4</sup> Separately, section 109 of the CARD Act was included to prohibit card issuers from opening accounts or increasing credit lines on existing accounts for an adult consumer if the card issuer has not first considered the consumer’s ability to make required payments on the account.<sup>5</sup> Though it is a subtle distinction, section 109 does not use the term “independent” as section 301 does.

Congress authorized the Federal Reserve Board (“Board”), the agency initially charged with CARD Act implementation, to further interpret and clarify the pro-

---

\* Obrea O. Poindexter is a partner at Morrison & Foerster LLP in Washington, D.C. and Chair of the Privacy Subcommittee of the Committee on Consumer Financial Services Law of the American Bar Association Business Law Section. Matthew W. Janiga is an associate with the firm.

1. Pub. L. No. 111-24, 123 Stat. 1734 (2009) (codified as amended in scattered sections of 15 U.S.C.).

2. For example, Sen. Carper noted that his own teenage sons had “been receiving preapproved credit card applications for a number of years, including when they were in high school.” See 155 CONG. REC. S5468, S5470 (May 14, 2009). Sen. Dorgan spoke of similar experiences with his own underage son. *Id.* at S5469.

3. 15 U.S.C. § 1637(c)(8) (2012).

4. *Id.* § 1637(c)(8)(B).

5. *Id.* § 1665e.

visions of the CARD Act through rulemaking and guidance.<sup>6</sup> Using this authority, the Board issued a final rule implementing sections 109 and 301 of the CARD Act (“January 2010 Rule”).<sup>7</sup> However, the Board’s January 2010 Rule prompted several questions from industry participants concerning information provided by a consumer in response to a request for household income, including whether a consumer’s response could be used by an issuer to satisfy the ability-to-pay requirements.<sup>8</sup> In an attempt to clarify the application of the ability-to-pay requirements of sections 109 and 301 of the CARD Act, the Board issued further amendments to Regulation Z (“April 2011 Rule”).<sup>9</sup> Notably, the April 2011 Rule required an issuer to assess a consumer’s independent ability to repay credit card obligations prior to opening a new account or increasing a line of credit, regardless of the consumer’s age.<sup>10</sup> The Board’s interpretation generated controversy and also drew the attention of a bipartisan group of members of Congress.<sup>11</sup>

## CFPB ACTIONS ON ABILITY-TO-PAY PROTECTIONS

### CFPB PROPOSES A NEW STANDARD

After interpretive authority over the CARD Act and its implementing Regulation Z was transferred from the Board to the CFPB,<sup>12</sup> several constituencies eagerly awaited an amendment to Regulation Z’s ability-to-pay requirements.<sup>13</sup> The CFPB continued to study the issue well into 2012.<sup>14</sup> As a result of the regulatory inaction, the House Financial Services Committee called a hearing in

---

6. *Id.* § 1607(d).

7. 12 C.F.R. § 226.51 (2013); see *Truth in Lending*, 75 Fed. Reg. 7658 (Feb. 22, 2010) (to be codified at 12 C.F.R. pt. 226). Authority over the CARD Act and Regulation Z officially transferred to the CFPB on July 21, 2011 and this provision was recodified as 12 C.F.R. § 1026.51 (2012). See *Designated Transfer Date*, 75 Fed. Reg. 57252 (Sept. 20, 2010).

8. The Board discussed these concerns in its April 2011 rulemaking. See *Truth in Lending*, 76 Fed. Reg. 22947, 22974 (Apr. 25, 2011).

9. *Id.*; see generally Obrea O. Poindexter, *Summary of 2011 CARD Act Clarifications*, 67 *Bus. Law.* 663, 663–66 (2012) (in the 2012 *Annual Survey*).

10. See *Truth in Lending*, 76 Fed. Reg. at 22975.

11. For example, Sens. Blumenthal and Gillibrand requested that the CFPB study whether the Board’s ability-to-pay rule had “unintended, negative consequences for stay-at-home spouses.” See Letter from Sens. Blumenthal & Gillibrand to Raj Date, Special Advisor to the Sec’y of the Treasury (Oct. 28, 2011), available at <http://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-gillibrand-call-on-cfpb-to-study-credit-rules-that-discriminate-against-stay-at-home-spouses>. On the House side, calls for reform were fully supported by the CARD Act’s principal author. See Letter from Rep. Maloney to Raj Date, Special Advisor to the Sec’y of the Treasury (Dec. 5, 2011), available at <http://goo.gl/mzLR4l>.

12. See *supra* note 7.

13. The CFPB contributed to these expectations, releasing a request for comments on ways the CFPB could streamline regulations that were outdated, unduly burdensome, or unnecessary. See *Streamlining Inherited Regulations*, 76 Fed. Reg. 75825 (Dec. 5, 2011). In its request, the CFPB specifically highlighted the Board’s ability-to-pay interpretations. *Id.* at 75828.

14. See Obrea O. Poindexter, *Credit Card Developments in 2012*, 68 *Bus. Law.* 613, 613–16 (2013) (in the 2013 *Annual Survey*).

June 2012 to examine what further efforts were needed to correct the Board's ability-to-pay interpretation.<sup>15</sup>

On November 7, 2012, the CFPB proposed amendments to Regulation Z's ability-to-pay requirements for credit card issuers ("Proposed Rule"),<sup>16</sup> which would remove the independent ability-to-pay requirement for those consumers age twenty-one and older and also would permit issuers to consider "income to which such consumers have a reasonable expectation of access."<sup>17</sup> The tone of the Proposed Rule suggested that the CFPB clearly understood the concerns of Congress, consumers, and industry participants.<sup>18</sup> However, the CFPB provided less certainty as to whether key details of the final rule would truly expand access to credit, prompting several comments from industry participants and trade groups.<sup>19</sup>

One of the most significant clarifications sought was whether compliance with the CFPB's proposed interpretations of sections 109 and 301 of the CARD Act would subject a lender to fair lending claims under the Equal Credit Opportunity Act ("ECOA").<sup>20</sup> The Board had previously written that while section 109 of the CARD Act could be interpreted in a manner to view a consumer as having an ability to make payments based off of his or her spouse's income, such an interpretation would treat unmarried consumers in a manner that "would be inconsistent with the Equal Credit Opportunity Act."<sup>21</sup> The CFPB appeared to recognize some of the same concerns with its Proposed Rule, asking for comments on how guidance related to the treatment of married couples and partners under the age of twenty-one could be provided in a manner that is consistent with the requirements of the ECOA.<sup>22</sup>

---

15. See *An Examination of the Federal Reserve's Final Rule on the CARD Act's "Ability to Repay" Requirement: Hearing Before the H. Comm. on Fin. Servs., Subcomm. on Fin. Insts. & Consumer Credit*, 112th Cong. (2012).

16. *Truth in Lending*, 77 Fed. Reg. 66748 (proposed Nov. 7, 2012) (to be codified at 12 C.F.R. pt. 226) [hereinafter Proposed Rule].

17. *Id.* at 66750.

18. For example, the preamble to the Proposed Rule stated that the "[CFPB] believes that the most appropriate reading of [the CARD Act ability-to-pay provisions] is that the 'independent' ability-to-pay standard . . . was intended to apply only to consumers who are under the age of 21." *Id.* at 66748-49.

19. See, e.g., Letter from Nessa Feddis, Vice President & Senior Counsel, Am. Bankers Ass'n, Ctr. for Regulatory Compliance, to Monica Johnson, Consumer Fin. Prot. Bureau (Jan. 7, 2013) [hereinafter ABA Letter], available at <http://goo.gl/vKTy2z>; Letter from Bill Himpler, Exec. Vice President, Am. Fin. Servs. Ass'n, to Monica Johnson, Consumer Fin. Prot. Bureau (Jan. 7, 2013) [hereinafter AFSA Letter], available at <http://goo.gl/ivUB4f>; Letter from Jeffrey P. Bloch, Assoc. Gen. Counsel, Consumer Bankers Ass'n, to Monica Johnson, Consumer Fin. Prot. Bureau (Jan. 7, 2013) [hereinafter CBA Letter], available at <http://www.regulations.gov/#!documentDetail;D=CFPB-2012-0039-0346>; Letter from Rick Fischer, Partner, Morrison & Foerster LLP, to Monica Johnson, Consumer Fin. Prot. Bureau (Jan. 7, 2013) [hereinafter Fischer Letter], available at <http://goo.gl/AJo6r1>.

20. Pub. L. No. 93-495, tit. V, 88 Stat. 1500, 1521-25 (1974) (codified as amended at 15 U.S.C. §§ 1691-1691f (2012)); see ABA Letter, *supra* note 19, at 4; AFSA Letter, *supra* note 19, at 2; CBA Letter, *supra* note 19, at 5; Fischer Letter, *supra* note 19, at 6.

21. *Truth in Lending*, 76 Fed. Reg. 22975 (Apr. 25, 2011) (to be codified at 12 C.F.R. pt. 226).

22. Proposed Rule, *supra* note 16, at 66753.

## CFPB ISSUES A FINAL RULE

On May 3, 2013, the CFPB published the final version of its rule eliminating the Regulation Z independent ability-to-pay standard as then applied to consumers age twenty-one or older ("Final Rule").<sup>23</sup> The Final Rule tracked closely the language of the CFPB's Proposed Rule, and included several key provisions that had been requested by industry participants.<sup>24</sup> For example, the CFPB retained the broad examples of accessible income from the Proposed Rule, allowing an issuer to rely on income that is in an account to which the applicant does not have legal title but that is regularly used to pay household bills.<sup>25</sup> Importantly for military spouses and other spouses and partners who may at times reside in different households, the Final Rule did not include a co-residency requirement.<sup>26</sup> This means that an applicant may rely on income from a spouse, partner, or family member to which he or she may have access, even if that person is located elsewhere, such as in training in another state or in combat.

Of significance for card issuers, the CFPB clarified that compliance with Regulation Z's amended ability-to-pay requirements would not constitute a violation of the ECOA or Regulation B standards on age discrimination.<sup>27</sup> In formalizing this clarification in the Official Interpretations to Regulation Z, the CFPB agreed with commenters that section 301 of the CARD Act requires card issuers to make a distinction when considering an applicant's ability to pay.<sup>28</sup> The CFPB's clarification is particularly important given the safe harbors for civil liability under the Truth in Lending Act and the ECOA, both of which prevent an issuer from incurring civil liability for good-faith compliance with rules or guidance from the CFPB.<sup>29</sup> The clarification also sets a bright-line standard for the banking regulatory agencies to adhere to, which should prevent different interpretations of the Final Rule by the supervision and fair lending staffs at those agencies.<sup>30</sup>

The Final Rule directs card issuers to maintain policies and procedures that consider an applicant's ability to pay required monthly minimum obligations, including the treatment of income or assets to which the consumer has a reason-

---

23. Truth in Lending, 78 Fed. Reg. 25818 (May 3, 2013) (to be codified at 12 C.F.R. pt. 226) [hereinafter Final Rule].

24. See *id.* at 25823.

25. *Id.* at 25837 (to be codified at 12 C.F.R. § 1026.51(a)(1)(i)).

26. See *id.* at 25827.

27. *Id.* at 25837 (to be codified at 12 C.F.R. pt. 1026, supp. I, cmt. 51(b)(1)-1).

28. *Id.* at 25835.

29. The ECOA provides:

No provision of this subchapter imposing liability shall apply to any act done or omitted in good faith in conformity with any official rule, regulation, or interpretation thereof by the Bureau or in conformity with any interpretation or approval by an official or employee of the Bureau of Consumer Financial Protection duly authorized by the Bureau to issue such interpretations.

ECOA § 706(e), 15 U.S.C. § 1691e(e) (2012). The Truth in Lending Act contains a similar provision. See Truth in Lending Act § 130(f), 15 U.S.C. § 1640(f) (2012).

30. See Final Rule, *supra* note 23, at 25835, 25838 (to be codified at 12 C.F.R. pt. 1026, supp. I, cmt. 51(b)(1)-1).

able expectation of access.<sup>31</sup> In addition, the Final Rule makes some amendments to the ways in which issuers may consider the independent ability to pay of an applicant under the age of twenty-one that may require modifications to the issuer's policies and procedures.<sup>32</sup> This includes amended language that permits an issuer to increase an underage cardholder's credit limit without a cosigner's written guarantee of the increase if the cardholder has an independent ability to meet the minimum repayment obligations of the increased credit line.<sup>33</sup> There also are new obligations if an issuer has knowledge that an underage applicant is reporting student loan income as a source of income.<sup>34</sup>

Card issuers were required to comply with these new requirements by November 4, 2013.<sup>35</sup> In doing so, issuers effectively had four different paths for compliance. First, card issuers could simply request that applicants provide their income, without any explanation of the new standard or requirement.<sup>36</sup> Understanding, however, that merely asking for income may be confusing to the consumer or prevent the consumer from taking advantage of the new standard, the CFPB provided a second compliance option.<sup>37</sup> Specifically, card issuers also are permitted to rely on an adult applicant's response to prompts for "available income," "accessible income," or other language requesting that the applicant provide information regarding current or reasonably expected income or assets" without verification.<sup>38</sup>

As a third compliance option, the CFPB's Final Rule permits a card issuer to continue to use the independent income standard for both consumers under the age of twenty-one and those age twenty-one and older.<sup>39</sup> As a fourth compliance option, the new ability-to-pay standard permits issuers and retailers to request an applicant's household income.<sup>40</sup> However, if a credit card issuer or retailer prompts an applicant to provide household income, the issuer or its retail partner must conduct additional diligence to verify the consumer's response.<sup>41</sup> The operational differences between the new accessible income standard and the household income standard, including the opportunities to fall into technical compliance traps, are likely to steer creditors away from application prompts for household income.

---

31. *Id.* at 25838 (to be codified at 12 C.F.R. § 1026.51(a)(1)(ii)).

32. *See generally id.* (to be codified at 12 C.F.R. § 1026.51(b)).

33. *See id.* (to be codified at 12 C.F.R. § 1026.51(b)(2)).

34. Specifically, the CFPB permits card issuers to treat student loans as income, so long as the issuer only considers the amount of funds remaining after tuition and other expenses. *Id.* at 25839 (to be codified at 12 C.F.R. pt. 1026, supp. I, cmt. 51(b)(1)(i)-1).

35. *Id.* at 25818.

36. *See id.* at 25838 (to be codified at 12 C.F.R. pt. 1026, supp. I, cmt. 51(a)(1)(i)-5.i), which permits an issuer to rely on responses to prompts for "income," "salary," and even "assets," without further explanation of the new standard.

37. *See id.* at 25837 (to be codified at 12 C.F.R. § 1026.51(a)(1)).

38. *Id.* at 25838 (to be codified at 12 C.F.R. pt. 1026, supp. I, cmt. 51(a)(1)(i)-5.i).

39. The Official Interpretations to Regulation Z provide that an issuer may consider accessible income "but is not required to do so." *See id.* at 25837 (to be codified at 12 C.F.R. pt. 1026, supp. I, cmt. 51(a)(1)(i)-4.i).

40. *See id.* at 25838 (to be codified at 12 C.F.R. pt. 1026, supp. I, cmt. 51(a)(1)(i)-5).

41. *Id.*