

**COMMENTS**  
**of the**  
**National Consumer Law Center**  
**on behalf of its low-income clients**  
**and**  
**Consumer Action**  
**to**  
**Consumer Financial Protection Bureau**  
**Regarding Regulation Z, 12 C.F.R. Part 1026**  
**(Credit Card Ability-to-Pay Requirements and Household Income)**  
**[Docket No. Bureau-2012-0039, 77 Fed. Reg. 66,748 (Nov. 7, 2012)]**

Submitted January 7, 2013

The National Consumer Law Center<sup>1</sup> and Consumer Action<sup>2</sup> respectfully submit the following comments on behalf of its low-income clients. We welcome the opportunity to comment on the Bureau's proposal to amend the ability-to-pay requirement of Regulation Z, 12 C.F.R. § 1026.51(a), which was promulgated pursuant to the Credit Card Accountability, Responsibility and Disclosures (CARD) Act of 2009, 15 U.S.C. § 1665e.

We oppose the Bureau's proposal to remove the requirement that credit card borrowers have independent income and assets that support their ability to repay the credit extended. We believe that the standard could be clarified without removing it altogether. Indeed, two of the three new illustrations that the Bureau has proposed are consistent with an independent ability to pay standard.

The third proposed illustration, which effectively classifies a third party's contributions to the consumer's expenses as income, is a problematic precedent that

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<sup>1</sup> The **National Consumer Law Center, Inc. (NCLC)** is a non-profit Massachusetts Corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of eighteen practice treatises and annual supplements on consumer credit laws, including *Truth in Lending* (7<sup>th</sup> ed. 2010), as well as bimonthly newsletters on a range of topics related to consumer credit issues and low-income consumers. NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low-income people, conducted training for thousands of legal services and private attorneys on the law and litigation strategies to address predatory lending and other consumer law problems, and provided extensive oral and written testimony to numerous Congressional committees on these topics. NCLC's attorneys have been closely involved with the enactment of the all federal laws affecting consumer credit since the 1970s, and regularly provide extensive comments to the federal agencies on the regulations under these laws. These comments were written by NCLC attorney Chi Chi Wu, with assistance from Lauren Saunders.

<sup>2</sup> **Consumer Action** has been a champion of underrepresented consumers nationwide since 1971. A nonprofit 501(c)3 organization, Consumer Action focuses on financial education that empowers low to moderate income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change.

should be removed. If it is retained, it is essential that a parallel change be made to require issuers to consider expenses when determining ability to pay. Indeed, that change should be made regardless of other changes.

We also urge the Bureau to plug loopholes in the ability-to-pay requirement in two other areas. Issuers of deferred interest credit cards (which ideally should be banned) must be required to assess the consumer's ability to pay off the entire balance within the deferred interest period. Also, student loans should not be considered as income for purposes of ability to pay.

#### 1. Ability-to-Pay from Actual Income and Assets Must be the Bedrock Principle for Underwriting Credit Card Accounts.

The requirement that credit card issuers must consider an applicant's ability to make payments on a credit card account before opening the account was a central principle of the Credit CARD Act. This standard must be as meaningful and vigorous as possible.

In order to address the purported problems of stay-at-home spouses who seek credit cards based on their spouse's income, the Bureau has proposed to remove the requirement that issuers consider the consumer's "independent income and assets."<sup>3</sup> We believe that this both is a mistake and is unnecessary.

Issuers should be required to consider ability-to-pay based solely on the income and assets controlled by the consumer or consumers who are liable on the account. Eliminating that requirement presents risks for both consumers and the safety and soundness of credit card accounts. It is better to get a co-signer on a card than to take on debt based on potentially unreliable income of another person who has no obligation on the card. The same ability-to-pay rule prohibits adult children from relying on income from a parent without their consent, or roommates from basing their ability-to-pay on other household members. We will not repeat the reasons discussed in our prior comments why we believe that this rule does not deny stay-at-home spouses the ability to build or access credit.<sup>4</sup>

Nonetheless, we believe that the ability-to-pay rule can be clarified to make clear that a person can have income or assets that do not come from that person's individual wages. Along with the removal of the phrase "independent income and assets," the

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<sup>3</sup> 77 Fed. Reg. 66,748.

<sup>4</sup> National Consumer Law Center (NCLC), Supplemental Comments to the Consumer Financial Protection Bureau regarding Streamlining Inherited Regulations, Docket No. CFPB -2011-0039 (June 4, 2012), available at [www.nclc.org/images/pdf/rulemaking/cm\\_cfpb\\_reply\\_comments\\_4\\_june\\_2012.pdf](http://www.nclc.org/images/pdf/rulemaking/cm_cfpb_reply_comments_4_june_2012.pdf); NCLC, Comments to the Consumer Financial Protection Bureau regarding Streamlining Inherited Regulations, Docket No. CFPB -2011-0039 (March 5, 2012), available at [www.nclc.org/images/pdf/legislation/cfpb-streamlining-comments.pdf](http://www.nclc.org/images/pdf/legislation/cfpb-streamlining-comments.pdf); NCLC, et al., Comments to the Federal Reserve Board's NPRM Amendments to Regulation Z Provisions Implementing the Credit Card Accountability, Responsibility and Disclosures Act of 2009, Docket No. R-1393 (January 3, 2011), available at [www.nclc.org/images/pdf/credit\\_cards/comments-credit-cards-jan-2011.pdf](http://www.nclc.org/images/pdf/credit_cards/comments-credit-cards-jan-2011.pdf).

Bureau has proposed three examples to illustrate when consideration of income of a non-obligated household member is acceptable. We have no quarrel with two of those examples:

1. When a household member's salary is deposited into a joint account.
2. When the household member regularly transfers a portion of his or her salary into an account that the applicant has access to.

As we noted in our earlier comments, income deposited into a joint account becomes an asset of the applicant and is available to repay the credit. This example is perfectly permissible under a requirement to consider "independent income or assets."

The second example is similar to the concept of providing the applicant with an allowance, which we believe would also be permissible under a requirement to consider "independent income or assets." That is, the consumer does have regular income that is available to repay debt.

We do have concerns, however, about the Bureau's third proposed example:

3. When the household member regularly uses his or her salary to pay for the applicant's expenses.

This example would not have been permissible under a requirement to consider "independent income or assets." Most critically, payment of expenses by another says nothing whatsoever about the applicant's ability to pay a credit card bill. If the household member is expected to pay the credit card bill, then that member should be obligated on the bill. If not, then the consumer still needs income. The fact that some of the consumer's other expenses are being paid says nothing about the consumer's cash flow.

Permitting consideration of payments on other expenses has implications far beyond stay-at-home spouses. It would permit an adult child with no income,<sup>5</sup> or a destitute senior whose children pay some of the bills, to take on credit without having any ability to pay that credit.

In addition, as we discuss in detail in the next section below, considering payment of expenses without consider the size and impact of the expenses themselves is fundamentally inconsistent with ability to pay.

Finally, we reiterate our request that the issuer should be required to obtain some verification of whatever income sources that he or she relies upon, whether his/her own income, funds deposited into a joint account, or an allowance from a household member.

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<sup>5</sup> We note that the Bureau proposes not to apply this illustration to consumers under 21, but it would still apply to an adult child who is 21 or older.

## 2. Issuers Should Be Required to Consider Household Expenses as Part of the Ability-to-Pay Standard Under Section 1026.51(a)(1)(ii)

If the Bureau is going to permit the payment of expenses by a household member to be considered as “income” for an applicant, then it should also establish a parallel requirement that issuers consider those *expenses* when determining an applicant’s ability to pay. In other words, if payment of household expenses by another constitutes income, then those household expenses should be included in the analysis required by Section 1026.51(a)(1)(ii). Otherwise, an individual with high expenses, who receives help with those expenses from another person, would be deemed inaccurately to have sufficient income to pay the credit card debt.

Currently, Section 1026.51(a)(1)(ii) requires an issuer to consider at least one of the following:

The ratio of debt obligations to income; the ratio of debt obligations to assets; or the income the consumer will have after paying debt obligations.

The phrase “debt obligations” appears to only require consideration of credit obligations (e.g., mortgages, car loans), without explicit consideration of other non-debt expenses, such as food, utilities, clothing, and medical expenses. One might argue that the term “ratio” implicitly includes consideration of non-debt household expenses because monetary debt payments would be only a percentage of income. However, the problem is that Section 1026.51(a)(1)(ii) does not explicitly require any particular debt-to-income ratio. Thus, an issuer could use a debt-to-income ratio of 95%, which leaves only 5% of the applicant’s income available for non-debt household expenses.

We recommend that an explicit allowance for household expenses be included in the overall analysis of ability to pay. Section 1026.51(a)(1)(ii) should be amended to state:

(ii) Reasonable policies and procedures. Card issuers must establish and maintain reasonable written policies and procedures to consider a consumer’s income or assets and current obligations. Reasonable policies and procedures to consider a consumer’s ability to make the required payments include a consideration of at least one of the following: The [ratio of debt obligations to] *amount of household expenses and debt obligations in comparison to* income; the [ratio of debt obligations to] *amount of household expenses and debt obligations in comparison to* assets; or the income the consumer will have after paying debt obligations *and household expenses*. It would be unreasonable for a card issuer to not review any information about a consumer’s income, assets, [or current] *debt obligations, or household expenses*, or to issue a credit card to a consumer who does not have any income or assets.

(Additional text in italics; delete text in [brackets])

A simple method of approximating household expenses for an applicant would be to use the Internal Revenue Service's Collection Financial Standards.<sup>6</sup> The Official Staff Commentary for Regulation Z could note that one acceptable measure of household expenses would be these standards.

### 3. The Ability-to-Pay Standard Should Be Revised For Deferred Interest Cards.

One situation that has been prominent in the discussion of stay-at-home spouses and the ability-to-pay requirement is retail credit cards, because of the concern that the requirement for "independent income and assets" could result in denials at the point of sale in retail storefronts. A particular segment of retail credit cards about which we have heightened concerns – as evidenced by many of our comments<sup>7</sup> -- are deferred interest cards, which are often offered when big ticket items such as electronics and furniture are involved.<sup>8</sup>

Deferred interest cards promote "no interest" until a certain date, but then retroactively assess that interest starting from the purchase date if the consumer does not pay off the entire balance by the specified date. Many consumers do not understand that they could be charged interest retroactively for the entire deferred interest period if they

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<sup>6</sup> These are a set of national and local expense standards that the IRS has developed for food, clothing, housing, utilities, and transportation. See <http://www.irs.gov/Individuals/Collection-Financial-Standards>. Of course, if the applicant is a homeowner, mortgage expenses should be deducted from these amounts if they are already included in the calculation of debt payments, so that they are not double-counted.

<sup>7</sup> NCLC, Comments to the Consumer Financial Protection Bureau regarding Streamlining Inherited Regulations, Docket No. CFPB -2011-0039 (March 5, 2012), available at [www.nclc.org/images/pdf/legislation/cfpb-streamlining-comments.pdf](http://www.nclc.org/images/pdf/legislation/cfpb-streamlining-comments.pdf); NCLC, et al., Comments to the Federal Reserve Board's NPRM Amendments to Regulation Z Provisions Implementing the Credit Card Accountability, Responsibility and Disclosures Act of 2009, Docket No. R-1393 (January 3, 2011), available at [www.nclc.org/images/pdf/credit\\_cards/comments-credit-cards-jan-2011.pdf](http://www.nclc.org/images/pdf/credit_cards/comments-credit-cards-jan-2011.pdf); NCLC, et al., Comments to the Federal Reserve Board's NPRM Regulation Z Provisions Implementing the Credit Card Accountability, Responsibility and Disclosures Act of 2009, Docket No. R-1370 (November 20, 2009), available at [www.nclc.org/images/pdf/credit\\_cards/card-regulationsto-fed1109.pdf](http://www.nclc.org/images/pdf/credit_cards/card-regulationsto-fed1109.pdf); NCLC, et al., Comments to the Federal Reserve Board's Interim Final Rule and Request for Comments, Docket No. R-1364 (September 21, 2009), available at [www.nclc.org/images/pdf/credit\\_cards/comments-reg-z-0909.pdf](http://www.nclc.org/images/pdf/credit_cards/comments-reg-z-0909.pdf); NCLC, et al., Comments to the Federal Reserve Board, et al., NPRM Unfair or Deceptive Acts or Practices in Connection with Consumer Credit Card Accounts and Truth in Lending, Docket No. R-1286 (June 5, 2009), available at [www.federalreserve.gov/SECRS/2009/June/20090625/R-1286/R-1314\\_060509\\_21165\\_409074961683\\_1.pdf](http://www.federalreserve.gov/SECRS/2009/June/20090625/R-1286/R-1314_060509_21165_409074961683_1.pdf); NCLC, et al., Comments to the Federal Reserve Board, et al., NPRM Unfair or Deceptive Acts or Practices in Connection with Consumer Credit Card Accounts and Overdraft Loans Docket No. R-1314 (August 4, 2008), available at [www.nclc.org/images/pdf/credit\\_cards/archive/comments\\_aug2008.pdf](http://www.nclc.org/images/pdf/credit_cards/archive/comments_aug2008.pdf); NCLC, et al., Comments to the Federal Reserve Board's Revised Notice of Proposed Rulemaking--Review of the Open-End (Revolving) Credit Rules of Regulation Z, Docket No. R-1286 (July 18, 2008), available at [www.nclc.org/images/pdf/credit\\_cards/archive/comments\\_july2008.pdf](http://www.nclc.org/images/pdf/credit_cards/archive/comments_july2008.pdf).

<sup>8</sup> A study by the website CardHub found that 62.2 percent of the major retailers they studied who offered financing provide a deferred interest option. CardHub also reported that 54.1 percent of the retailers that made financing available were not transparent about their policies, and their employees were generally ill prepared to properly explain their financing options to customers. CardHub, Credit Card Deferred Interest Study – 2012 available at <http://www.cardhub.com/edu/deferred-interest-study/> (visited November 21, 2012).

do not pay off the balance at the end of the period, even if they have been making regular payments.

We believe that such cards are unfair, deceptive and abusive, and should be banned. But at a minimum, in order to better protect stay-at-home spouses, and all consumers, the ability-to-pay standard should be revised for deferred interest credit cards. We urge that it be based on the applicant's ability to make the payments that would be required to pay off the entire deferred interest balance before the end of the deferred interest period, as opposed to being based only on the minimum payment. This is because almost all consumers enter into these plans with the intent of paying off the balance before they are assessed interest, *i.e.*, before the end of the deferred interest period. Indeed, that is the only reason to accept these plans, because they are often more expensive than general-purpose credit cards.

Revising the ability-to-pay analysis in this manner will protect consumers who intend to and believe they can pay off the entire balance during the deferred interest period, but do not realize they have insufficient means to do so. This will give some additional protection to stay-at-home spouses, who tend to be more financially vulnerable.<sup>9</sup>

Better yet, the CFPB should ban deferred interest credit cards. They are based on the inherent deception, unfairness and abusiveness of tricking consumers into thinking they are paying “no interest” when in fact many will be hit with a large back bill.

#### 4. We Support a Separate Ability-to-Pay Analysis For Younger Consumers, But It Should Exclude Student Loans.

The Bureau has proposed making conforming amendments to Section 1026.51(b), which governs the ability-to-pay standard for consumers under 21 years of age. The conforming amendment removes the reference to general ability-to-pay provision of Section 51(a), thus creating a separate standard for younger consumers, in order to avoid household income from being attributed to students. We support this amendment, and indeed have always believed that using the same ability-to-pay standard for the general population and younger consumers did not make sense.

However, we think that students need additional protection in another important way – by excluding student loans as a source of income. Studies and media reports have indicated that some credit card issuers have been considering student loans in their analysis of ability-to-pay.<sup>10</sup> A study of students at two different universities found that over a quarter of students who applied for credit cards listed student loans as a source of

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<sup>9</sup> As discussed in our prior comments, data from the U.S. Census Bureau indicates that stay-at-home mothers tend to be less educated, younger, more likely to be in poverty, more likely to be Hispanic, and more likely to be foreign-born than other mothers. Rose M. Kreider and Diana B. Elliott, U.S. Census Bureau, *America's Families and Living Arrangements: 2007*, September 2009, at 14, available at [www.census.gov/prod/2009pubs/p20-561.pdf](http://www.census.gov/prod/2009pubs/p20-561.pdf).

<sup>10</sup> See Susan Tompor, *Credit Card Offers Still Contain Trouble Spots for Consumers*, DETROIT FREE PRESS, Sept. 30, 2010, at B4 (noting that “students [are] reporting a college loan as ‘income’ and some card issuers accepting that claim”).

income in order to qualify for approval.<sup>11</sup> This is unacceptable. Student loans are intended to pay the cost of college tuition, not to pay off credit card debt.

At a minimum, the Bureau should exclude any student loans up to the amount of the consumer's college tuition. If a student has taken out loans above the amount of tuition to cover living expenses, only the latter amount should be considered in the analysis of ability-to-pay.

## 5. Conclusion

Thank you for the opportunity to submit these comments. Please feel free to contact us if you have any questions.

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<sup>11</sup> Jim Hawkins, *The CARD Act on Campus*, 69 *Washington and Lee L. Rev.* 1514 (Summer 2012), available at <http://ssrn.com/abstract=2102433>. See also Eboni S. Nelson, *From the Schoolhouse to the Poorhouse: The Credit CARD Act's Failure to Adequately Protect Young Consumers*, 56 *VILL. L. REV.* 1 (2011) at 28 (“Moreover, if this incoming student takes out student loans to fund his or her educational expenses, these loans can be treated as ‘income’ to independently qualify for a card - a disconcerting practice that some student consumers have already begun to implement.”)