

## Client Alert.

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# CFPB Proposed Amendments to Reg. Z Ability-to-Pay Requirements

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On October 17, 2012, the Consumer Financial Protection Bureau (“CFPB”) issued a proposed rule (“Proposed Rule”) to amend the Truth in Lending Act’s (“TILA”) ability-to-pay requirements, as added by the Credit Card Accountability Responsibility and Disclosure Act of 2009 (“CARD Act”) and implemented by Regulation Z. The requirement has been the topic of frequent criticisms from lawmakers, the industry and consumer groups as preventing non-working spouses from obtaining credit. Echoing previous statements from his Congressional testimony, the CFPB’s press release quotes Director Cordray as saying “[w]hen stay-at-home spouses or partners have the ability to make payments on a credit card, they should be able to obtain a card in their own name,” and “[t]oday the CFPB is proposing common-sense changes that would facilitate credit access for spouses or partners who do not work outside the home.”<sup>1</sup>

In the Proposed Rule, the CFPB states that it “believes that § 1026.51(a), as currently in effect, may unduly limit the ability of certain individuals who are 21 or older to obtain credit and is proposing amendments to Regulation Z that it believes are more consistent with the plain language and intent of the [CARD] Act.” Accordingly, the Proposed Rule would remove the word “independent” from the ability-to-pay requirement for consumers who are 21 and older, and would permit issuers to consider income to which consumers have a reasonable expectation of access. The CFPB also proposes to make technical amendments to Section 1026.51(b) of Regulation Z, which addresses requirements for consumers who are under the age of 21, as well as each section’s corresponding Commentary. Comments will be due 60 days after publication of the Proposed Rule in the *Federal Register*.

### BACKGROUND ON THE CFPB’S PROPOSED RULE

The Proposed Rule addresses the rules adopted by the Board of Governors of the Federal Reserve System (“FRB”) relating to TILA Section 150 and Section 127. Section 150 requires credit card issuers to consider a consumer’s ability to pay prior to issuing a card. Section 127 requires applicants who are under the age of 21 to demonstrate an independent ability to pay. The FRB implemented Sections 150 and 127 by requiring issuers to consider the “independent” ability to pay for all consumers, not only consumers under the age of 21 pursuant to Section 127 but also consumers 21 or over pursuant to Section 150, despite the fact that the CARD Act limited the independent ability-to-pay requirement to consumers under age 21. Further, the FRB stated that assessing a consumer’s independent ability to pay requires that any treatment of income by an issuer not include income and assets of a person who is not also liable for debts incurred on the account.

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<sup>1</sup> See <http://www.consumerfinance.gov/pressreleases/cfpb-proposes-making-it-easier-for-stay-at-home-spouses-and-partners-to-get-credit-cards/>.

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## PROPOSED AMENDMENTS TO REGULATION Z SECTION 1026.51(A)

The CFPB proposes to alter the FRB's extension of the independent ability-to-pay requirement to applicants age 21 or older by amending Section 1026.51(a) in two ways. First, the Proposed Rule would remove all references to the "independent" ability to pay, as that requirement currently applies to applicants who are 21 or older. Second, the Proposed Rule would amend Section 1026.51(a)(1)(ii) to allow credit card issuers to consider income and assets to which an applicant who is 21 or older has a "reasonable expectation of access."

The CFPB also proposes to amend the Commentary to Regulation Z to provide that a credit card issuer may consider *any* income or assets to which an applicant has a reasonable expectation of access. Additional proposed amendments to Commentary Section 1026.51(a)(1)-5.i would provide guidance on the meaning of "a reasonable expectation of access," and permit a credit card issuer to rely on information provided by the applicant in response to a request for "salary," "income," "assets," "available income" or "accessible income." The proposed comment should allow an issuer to rely on such information without having to determine whether an applicant has a reasonable expectation of access to income under the obtuse standards found elsewhere in the Proposed Rule.

The proposed Commentary Section 1026.51(a)(1)-6 contains three examples providing that it would be permissible to consider income as shared or "accessible" where:

- The other household member's salary is deposited into a joint account shared with the applicant;
- The other household member regularly transfers a portion of his or her salary into an account that the applicant can access and uses for the payment of household or other expenses; or
- The other household member does not transfer any portion of his or her salary to the applicant, but instead regularly uses the salary to pay the applicant's expenses.

Section 1026.51(a)(1)-6 also contains an example providing that a credit card issuer may not consider another household member's salary as the applicant's income, where (1) no portion of the household member's salary is deposited into a shared or accessible account, (2) the household member does not regularly pay the applicant's expenses and (3) no statute or regulation grants the applicant an ownership interest in the household member's salary.

The Proposed Rule notes the CFPB "is retaining...existing guidance regarding requests by issuers for 'household income,'" which requires an issuer to obtain additional information about an applicant's income. In this regard, the Proposed Rule expressly does not equate the concept of a "reasonable expectation of access" with the phrase "household income." Nor does the proposal address modeled income or industry concern about asking for income at the point-of-sale.<sup>2</sup>

## PROPOSED AMENDMENTS TO REGULATION Z SECTION 1026.51(B)

The CFPB also proposes several technical amendments to remove the references contained in Regulation Z's current Section 1026.51(b) that link the independent ability-to-pay requirement to those persons age 21 or older, as detailed in Section 1026.51(a). The proposed amendments are not designed to alter the current independent ability-to-pay requirements for persons under the age of 21.

<sup>2</sup> However, footnote 19 of the Proposed Rule indicates that the CFPB continues to consider additional proposals to address the comments it has received on other aspects of Regulation Z, including other aspects of Section 1026.51.

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The CFPB also proposes new comments to explain how the ability-to-pay standard for underage applicants differs from the proposed standard for those applicants over the age of 21. Specifically, the CFPB's proposed Commentary Section 1026.51(b)(1)(i) provides that for underage applicants:

- The card issuer may only consider the current or reasonably expected income and assets of the applicant;
- The card issuer may not consider income or assets for which the applicant, or any cosigner under the age of 21, merely has a reasonable expectation of access;
- The card issuer may rely on an applicant's response to requests for "salary," "income" or "assets," as well as requests that are made to determine current or reasonably expected income and assets; and
- The card issuer must obtain additional information, such as by contacting the applicant, when requesting responses for "available income," "accessible income" or "household assets."

## PRACTICAL CONSIDERATIONS RELATED TO THE PROPOSED RULE

Credit card issuers should consider how the Proposed Rule may impact their application procedures and practices. For example, issuers who only ask applicants to provide information about income will need to consider whether they also want to inquire about accessible income. Those issuers who do decide to inquire about accessible income will have to consider how best to structure their application process in order to continue to assess the independent ability-to-pay of applicants who are under the age of 21.

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