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Card Act's Ability to Pay Proposal Ignites Public Policy Debate

CARD ACT’S ABILITY TO PAY PROPOSAL IGNITES PUBLIC POLICY DEBATE

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INTRODUCTION¹

The credit crisis, spawned by the implosion of investments in exotic mortgage securities, provided the impetus for Congress and the

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1. On March 18, 2011, the Federal Reserve Board adopted the amendments to Regulation Z discussed in the article below generally as proposed. For more information, see Press Release, Bd. of Governors of the Fed. Reserve Sys. (Mar. 18, 2011), *available at* <http://www.federalreserve.gov/newsevents/press/bcreg/20110318b.htm>.

financial regulatory agencies to take a fresh look at the way American consumers obtain and use credit—and in particular, credit cards. Americans had racked up more than \$975 billion in credit card debt by September 2008, with more than fifty-four million households having such debt.² Growth in the use of credit cards by students has been particularly rapid. As of 2008, 84% of undergraduates had at least one credit card with an average balance of over \$3000, and many left school with heavy debt loads.³

Credit card companies were among the chief targets of consumer and media criticism during the peak of the credit crisis. They were accused of perceived wrongs ranging from increases in interest rates to undesired reductions in credit limits and high fees for overlimit spending and late payments.⁴ Reacting to these criticisms, Congress enacted the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act),⁵ which President Obama signed into law on May 22, 2009.

The CARD Act is intended to increase the disclosures associated with credit cards⁶ and to prevent some of the practices thought to have contributed to overuse and possible misuse of cards by consumers.⁷ Among the provisions of the CARD Act is a requirement that credit card issuers notify consumers of changes to the annual percentage rates (APR) on their cards at least forty-five days in advance,⁸ giving them the opportunity to stop making new charges

2. See Jeremy M. Simon, *Consumer Credit Card Debt Falls for 20th Straight Month*, CREDITCARDS.COM (July 8, 2010), <http://www.creditcards.com/credit-card-news/federal-reserve-g19-consumer-credit-may-10-1276.php> (discussing further that in the face of the ongoing economic recovery, credit card debt for the average American household has declined approximately \$2,683 since 2008, due to either the accrued debt being paid off or being charged off as uncollectable).

3. See *Study Finds Rising Number of College Students Using Credit Cards for Tuition*, SALLIE MAE (Apr. 13, 2009), https://www1.salliemae.com/about/news_info/newsreleases/041309.htm (noting that the number of undergraduates with at least one credit card increased 8% between 2004 and 2009, while the average credit card debt for graduating college seniors increased \$1200 during the same period).

4. See, e.g., Editorial, *Credit Card Buyer Beware*, N.Y. TIMES, July 31, 2007, at A18 (characterizing some credit card issuer practices as “despicable” and calling for greater federal oversight and regulation of the credit card industry).

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

6. See H.R. REP. NO. 111-88, at 9 (2009), *reprinted in* 2009 U.S.C.C.A.N. 453, 454 (explaining that the CARD Act prohibits deceptive credit card practices by requiring, *inter alia*, advance notice to customers of annual percentage rate increases and periodic balance statements).

7. See 155 CONG. REC. H4964 (daily ed. Apr. 29, 2009) (statement of Rep. Keith Ellison) (expressing concern that “some people have gotten credit cards who perhaps should not have them”).

8. 15 U.S.C. § 1637(i)(1) (Supp. III 2010).

before the rate changes. Creditors may not increase the APR on existing balances except under specific limited conditions, such as an account that is sixty-days past due,⁹ or the expiration of a promotional rate.¹⁰ Billing statements must be sent at least twenty-one days before the next payment due date,¹¹ and statements must include a disclosure of how many months it will take to repay the balance if only minimum payments are made each month.¹² Another notable feature of the CARD Act is its prohibition on extending credit to a consumer under the age of twenty-one unless that young consumer either demonstrates an independent means of repaying the credit or obtains a co-signer age twenty-one or older who has the ability to repay the debt.¹³

Early indications suggest that the CARD Act has been successful in eliminating some of the more controversial practices of card issuers. Indeed, Elizabeth Warren, President Obama's choice to head the Consumer Financial Protection Bureau, praised bankers on their cooperation with the CARD Act a year after its enactment, noting that "much of the industry has gone further than the law requires in curbing repricing and overlimit fees."¹⁴

Despite Ms. Warren's optimism, the CARD Act has generated its fair share of criticism. In particular, there has been considerable opposition to the recent amendments to the "ability to pay" rule proposed by the Federal Reserve Board (Fed) under the CARD Act. The Fed is authorized to implement the CARD Act's ability to pay provisions through the Truth in Lending Act's Regulation Z.¹⁵ The Fed adopted a rule implementing the ability to pay provisions¹⁶ and then proposed a further amendment to the rule, which unleashed a firestorm of commentary from card issuers, the public, consumer groups, and other industries, including retailers, bankers, and providers of card processing services.¹⁷

9. *Id.* § 1666i-1(a), (b)(4).

10. *Id.* § 1666i-2(b).

11. *Id.* § 1666b(a).

12. *Id.* § 1637(b)(11)(B)(i).

13. *Id.* § 1637(c)(8)(A)–(B).

14. Jennifer Liberto, *Bank Critic Praises Credit Card Companies*, CNNMONEY (Feb. 22, 2011, 11:06 AM) (internal quotation marks omitted), http://money.cnn.com/2011/02/22/news/economy/credit_card_act/index.htm.

15. See 15 U.S.C. § 1604(a) (2006) (providing the Fed's regulatory authority over the disclosure guidelines); Regulation Z, 12 C.F.R. § 226.1(a) (2010) (describing the Fed's authority under the Truth in Lending Act).

16. Ability to Pay, 75 Fed. Reg. 7658, 7818 (Feb. 22, 2010) (to be codified at 12 C.F.R. pt. 226.51).

17. See, e.g., Fed. Reserve Bd., *Regulation Z—Truth in Lending Act [R-1393]*, FREEDOM OF INFO. OFFICE (last updated Jan. 20, 2011), http://www.federalreserve.gov/generalinfo/foia/index.cfm?doc_id=R%2D1393&do

Much of the commentary on the Fed's proposed amendments to the ability to pay rule extended beyond financial or credit considerations, or the legal or administrative consequences of implementing the rule. Rather, the proposed amendments generated controversy on the propriety, from a social and even political perspective, of adults having credit cards if they lack independent income from which to pay their bills.¹⁸ This dialog was frequently couched in language suggesting that the proposed changes to the ability to pay rule are offensive, dismissive, or discriminatory toward women—especially non-working wives—servicemembers, and the retired, among others.¹⁹

This Article outlines the CARD Act's recent ability to pay controversy. In doing so, it attempts to demonstrate that attitudes about access to individual consumer credit implicate firmly-held, but often non-financially-based, beliefs that reflect very different approaches to financial responsibility. Part I outlines the relevant provisions of the Truth in Lending Act and its requirements regarding the ability of a consumer to pay. Part II discusses the response of financial institutions and consumers to the ability to pay provisions. Part III demonstrates that much of the criticism of the ability to pay provisions surround their social and policy implications,

c_ver=1&ShowAll=Yes (collecting public commentary received by the Fed regarding the proposed rule changes to the Truth in Lending Act).

18. *Compare* Comment Letter from David R. Jaffe, President & Chief Exec. Officer, Dress Barn, Inc., to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. 2–3 (Dec. 6, 2010) [hereinafter Dress Barn comment], *available at* http://www.federalreserve.gov/SECRS/2010/December/20101223/R-1393/R-1393_121710_56689_590146136876_1.pdf (suggesting that failure to consider household income when determining whether to issue credit cards to stay-at-home mothers undercuts the substantial value such individuals contribute to society as a whole), *with* Comment Letter from Nat'l Consumer Law Ctr. et al. to Bd. of Governors of the Fed. Reserve Sys. 10–11 (Jan. 3, 2011) [hereinafter NCLC comment], *available at* http://www.federalreserve.gov/SECRS/2011/February/20110210/R-1393/R-1393_010311_59372_557879101327_1.pdf (arguing that considering income in which a credit card customer does not have an ownership interest in the determination of whether to issue a credit card would expose non-labile spouses and others to aggressive collection tactics from issuers, and further noting that the ability to pay provisions are not limited to stay-at-home mothers but apply equally to other individuals who have limited individual income but could report higher household income).

19. *See, e.g.*, Comment Letter from Carl V. Howard, Deputy Gen. Counsel, Citigroup, Inc., to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. 3 (Dec. 20, 2010), *available at* http://www.federalreserve.gov/SECRS/2010/December/20101228/R-1393/R-1393_122310_57486_465011606032_1.pdf (asserting that the proposed changes are likely to have a “disproportionately negative impact based on gender, ethnicity, marital status, and national origin”).

rather than their financial impact. Finally, this Article concludes that the financial industry and consumer advocates have divergent views regarding who should ultimately be able to obtain individual credit.

I. THE TRUTH IN LENDING ACT AND THE ABILITY TO PAY

Two separate provisions of the Truth in Lending Act (TILA)²⁰ require card issuers to consider the ability of the consumer to repay the credit extended. The CARD Act amended TILA by adding section 150, which requires credit card issuers to consider a consumer's repayment ability before opening an account.²¹ TILA section 150 applies to *all* consumers:

A card issuer may not open any credit card account for *any* consumer under an open end consumer credit plan, or increase any credit limit applicable to such account, unless the card issuer considers the ability of the consumer to make the required payments under the terms of such account.²²

On the other hand, TILA section 127(c)(8), which was also added by the CARD Act, prohibits opening credit card accounts for consumers under age twenty-one *unless* the consumer's application either: (1) is co-signed by a joint obligor of age twenty-one or older who has the means to repay the debt, *or* (2) indicates the consumer's independent means of repaying the obligation.²³ This section applies only if the applicant for credit is under twenty-one years of age.²⁴

To implement these provisions, on February 22, 2010 the Fed adopted an "ability to pay" rule.²⁵ On November 2, 2010, the Fed published a proposal to amend certain aspects of this rule and to clarify standards regarding income and assets.²⁶ The proposed amendments would require card issuers to consider the applicant's *independent* ability to pay when issuing individual credit, regardless of the applicant's age.²⁷ Card issuers would not be able to rely on

20. 15 U.S.C. §§ 1601–1667j (2006 & Supp. III 2010).

21. *Id.* § 1665e; *see also* Pub. L. No. 111-24, § 109(a), 123 Stat. 1734, 1743 (codified as amended at 15 U.S.C. § 1665e).

22. § 1665(e) (emphasis added).

23. *Id.* § 1637(c)(8); *see also* Pub. L. No. 111-24, § 301, 123 Stat. 1734, 1747–48 (codified as amended at 15 U.S.C. § 1637(c)(8)).

24. § 1637(c)(8).

25. Truth in Lending, 75 Fed. Reg. 7658, 7818 (Feb. 22, 2010). This rule was later codified at 12 C.F.R. § 226.51 (2011).

26. Truth in Lending, 75 Fed. Reg. 67,458, 67,458 (proposed Nov. 2, 2010) (to be codified at 12 C.F.R. pt. 226).

27. *Id.* at 67,473–74 (explaining that the Fed's general intent was to establish consistent standards in considering a consumer's ability to pay and finding it unreasonable for a card issuer not to review a consumer's income or asset information at all).

“spousal” or “household” income when considering whether to extend credit to adults over twenty-one, unless the spouses are joint applicants on the account or the spouse applying alone lives in a community property state.²⁸ In proposing this amendment, the Fed acknowledged that “the proposed amendments . . . could prevent a consumer without income or assets from opening a credit card account despite the fact that the consumer has access to (but not an ownership interest in) the income or assets of a spouse.”²⁹ These particular provisions have provoked commentary from financial institutions and consumers alike.

II. RESPONSE TO THE FED’S ABILITY TO PAY PROPOSAL

The response to the Fed’s proposed amendments to its ability to pay rule was immediate and polarized. Most financial companies and associations representing retail and commercial interests pointed out that the statutory requirement to evaluate a consumer’s ability to pay did not include a requirement for independent income of the applicant unless he or she was under twenty-one years of age. The American Bankers Association (ABA) comment letter more bluntly explained that the statutory distinction between how the CARD Act treats those under twenty-one is based on the assumption that younger consumers are less mature and are less able to handle credit cards.³⁰ The comment letter from the Financial Services Roundtable explained that Congress intended separate rules and a different underwriting standard for consumers under twenty-one than for others, which is what led to a law that included the term “independent” only in connection with young people’s ability to pay.³¹

28. *Id.* at 67,474.

29. *Id.* (concluding that not requiring a credit card applicant to have an independent income or assets would be inconsistent with the intent of the CARD Act).

30. Comment Letter from Nessa Feddis, Vice President & Senior Counsel, Ctr. for Regulatory Compliance, Am. Bankers Ass’n, to Jennifer J. Johnson, Sec’y, Bd. of Governors of the Fed. Reserve Sys. 4 (Jan. 3, 2011) [hereinafter ABA comment], available at http://www.federalreserve.gov/SECRS/2011/February/20110201/R-1393/R-1393_010311_59193_570782784823_1.pdf.

31. Comment Letter from Richard Whiting, Exec. Dir. & Gen. Counsel, Fin. Servs. Roundtable, to Jennifer J. Johnson, Sec’y, Bd. of Governors of the Fed. Reserve Sys. 2 (Jan. 3, 2011) [hereinafter Roundtable comment], available at http://www.federalreserve.gov/SECRS/2011/February/20110208/R-1393/R-1393_010311_59189_570777159715_1.pdf.

Some commenters noted the CARD Act's legislative history, pointing out that Congress acted deliberately in declining to apply an "independent means" standard to all consumers.³² Amy Friend, chief counsel of the Senate Banking Committee during the drafting and negotiations on the CARD Act, noted that because of their "vulnerability," Congress explicitly treated individuals under twenty-one differently.³³ This legislative history and the final statutory language certainly suggest that in enacting the CARD Act, Congress intended to treat individuals under twenty-one differently to prevent them from starting out in life with a great deal of debt.

In addition to the distinction between consumers under twenty-one and others, creditors had other reasons to oppose the requirement for evaluating a consumer's independent income and assets as a condition to credit card issuance. The most prominent of these reasons is what was described in many comment letters as the justifiable dependence of many prospective cardholders on "household income" to repay debts.³⁴ Those opposing the requirement for evaluation of independent sources of income argue that in most households, household income is shared among members of the household.³⁵ Data on American households comprised of more than one individual is hard to find, but one

32. See, e.g., *id.* at 2–3; Comment Letter from Thomas J. Ryan, Senior Counsel, Am. Express Travel Related Servs. Co., to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. 3 (Jan. 3, 2011) [hereinafter American Express comment], available at http://www.federalreserve.gov/SECRS/2011/February/20110208/R-1393/R-1393_010311_59186_570763253198_1.pdf. Senator Menendez had proposed just such an amendment, see 155 CONG. REC. S5530, S5532 (daily ed. May 14, 2009) (detailing Senator Menendez's proposal), but the Senate instead approved amendments sponsored by Senators Dodd and Shelby, which included a general ability to pay standard, see 155 CONG. REC. S5570–73 (daily ed. May 19, 2009) (approving the Dodd-Shelby amendment).

33. Telephone Interview with Amy Friend, Chief Counsel, Senate Banking Comm. (Feb. 25, 2011).

34. See, e.g., Comment Letter from Stacie E. McGinn, Deputy Gen. Counsel, Consumer & Small Bus. Banking, Bank of Am. Corp., to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. 2 (Jan. 3, 2011) [hereinafter BoA comment], available at http://www.federalreserve.gov/SECRS/2011/February/20110201/R-1393/R-1393_010311_59191_570778722245_1.pdf (warning of unintended consequences and characterizing the proposed rule as unfair and harsh); Comment Letter from Shawn Miles, Grp. Head, Global Pub. Policy, MasterCard Worldwide, to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. 4 (Jan. 3, 2011), available at http://www.federalreserve.gov/SECRS/2011/February/20110208/R-1393/R-1393_010311_59144_570757159331_1.pdf (pointing out that "[a] consumer's obligations on a credit report are very likely to include household obligations," such as a mortgage or car loan).

35. See American Express comment, *supra* note 32, at 2 (arguing that most domestic partners, including married couples, "pool their resources").

estimate suggests that more than 70% of American consumers live in such households.³⁶

Comments from the financial services community noted that lenders' credit applications often request "household income" and that there is no practicable, simple substitute for this inquiry that would reveal the assets available to repay card charges.³⁷ Joint accounts, those where two people are jointly responsible for repayment, may be a workable alternative to individual accounts for cardholders who rely on the income of others for repayment.³⁸ According to Wells Fargo's comment, "[p]eople should be able to apply for credit jointly, as a unit, and have their qualifications assessed on the basis of that application unit rather than reverting to any individual test."³⁹ The National Association of Federal Credit Unions, on the other hand, said that for couples where one spouse works and the other does not, "joint accounts are not a practical or efficient manner to open a credit account."⁴⁰ Bank of America noted that a non-working spouse relying on household income might want an individual rather than a joint account to avoid liability for a joint account.⁴¹

36. *SF1.1: Family Size and Household Composition*, ORG. FOR ECON. CO-OPERATION & DEV., <http://www.oecd.org/dataoecd/62/22/41919509.pdf> (last updated Jan. 7, 2010) (finding that 72.7% of American consumers live in private households, which the Organisation for Economic Co-operation and Development defines as either: "(a) a single-person household, i.e. a person who lives alone in a separate housing unit or who occupies a separate room in a housing unit but does not form a multi-person household with other occupants of the housing unit; [or] (b) a multi-person household, i.e. a group of two or more persons who occupy the whole or part of a housing unit and share resources to cover living expenses").

37. See, e.g., BoA comment, *supra* note 34, at 2–3 (explaining that a preliminary study of the impact of removing "total household income" from its application would cause over 10% of applications that currently pass to fail under the proposed rule, and further noting that the proposed rule would unfairly burden retired applicants and non-working spouses).

38. Truth in Lending, 75 Fed. Reg. 67,458, 67,474 (proposed Nov. 2, 2010) (to be codified at 12 C.F.R. pt. 226) (rationalizing its proposal by asserting that "a consumer without independent income or assets could still open a credit card account by applying jointly with a spouse or household member who has sufficient income or assets").

39. Comment Letter from James Douglas Crowell, Senior Counsel, Wells Fargo & Co., to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. 3 (Jan. 3, 2011), *available at* http://www.federalreserve.gov/SECRS/2011/February/20110209/R-1393/R-1393_010311_59070_577529669623_1.pdf.

40. Comment Letter from Dillon Shea, Assoc. Dir. of Regulatory Affairs, Nat'l Ass'n of Fed. Credit Unions, to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. 2 (Jan. 3, 2011), *available at* http://www.federalreserve.gov/SECRS/2011/January/20110126/R-1393/R-1393_010311_59195_570788097425_1.pdf.

41. BoA comment, *supra* note 34, at 2 (explaining that many non-working

While credit issuers, retailers, and the financial community generally oppose the Fed's independent ability to pay proposal, consumer groups and consumer advocates generally support it. The National Consumer Law Center (NCLC), joined by other consumer groups, commented in favor of the proposal, claiming that credit card issuers should be required to only factor in the ability to pay of those consumers liable on the account.⁴² The NCLC also wanted card issuers to be required to verify the consumer's income, saying, "if a stay-at-home mother incurs debt that she has no ability to repay, and she cannot access the spouse's income or assets to repay the debt, she will be in a far worse position than if she had never incurred the debt."⁴³ The NCLC's comment also suggested that cards issued at "point-of-sale," which account for a significant portion of cards issued to persons without independent income, encourage "impulse buy" transactions.⁴⁴ The consumer advocates evidently prefer that some consumers not indulge their impulses with credit cards.

Outside of the context of the Fed proposal, many consumer advocates have warned against individuals combining their credit profiles. Consumer advocates regard this practice as particularly dangerous for the joint debtor without separate income. Adam Levin, co-founder of Credit.com and a former New Jersey consumer affairs official, was quoted on The Street's website questioning whether it is good policy for people to combine credit:

I don't know if it's ever really good to combine credit . . . I think it's a natural tendency that couples want to do it as part of the process of bringing themselves closer together. But I think that couples must always maintain separate credit files because death, illness or divorce requires that each member of the couple be able to stand on his or her own feet.⁴⁵

Gerri Detweiler, Credit.com's personal finance expert, agrees with the business community's position that the correct ability to pay test

spouses would also lose the opportunity to build credit in his or her own name).

42. NCLC comment, *supra* note 18, at 10.

43. *Id.* at 10–11 (arguing that the comment allows for consideration of the income of stay-at-home mother who is legally entitled to her spouse's income, and that the issuers' concerns are thus invalid).

44. *Id.* at 11 (noting that the point-of-sale card "approval process . . . relies heavily on the 'impulse buy' nature of the transaction"). Additionally, the NCLC suggested that unlike issuers' ability regarding general purpose cards, the nature of point-of-sale transactions may not permit an issuer to later "follow up" with an "applicant unable to qualify on his or her own income" at the point of sale, and thus for that reason issuers may push to make point-of-sale cards easier to approve. *Id.*

45. Joe Mont, *5 Financial Miscues in the Name of Love*, THE STREET (Feb. 8, 2011, 8:45 AM) (internal quotation marks omitted), <http://www.thestreet.com/story/10999512/1/5-financial-miscues-in-the-name-of-love.html#>.

is household income rather than individual income, on the theory that helping to provide income (for example, by working in the home without pay) is actually itself a kind of income.⁴⁶ She nevertheless recommends that everyone have a major credit card in his or her own name to avoid the possibility of one's credit being irrevocably tied to someone else's.⁴⁷ The risk of having only joint accounts, or of being the authorized user of someone else's account, says Ms. Detweiler, is that in case of death or divorce, if the accounts are closed, the newly-divorced person or surviving spouse may have trouble reopening accounts.⁴⁸

The consequences of severed relationships on credit availability is one of the top ten complaints made by consumers on the Credit.com website.⁴⁹ Gail Cunningham, Vice President of Public Relations for the National Foundation for Credit Counseling, whose mission is "promot[ing] the national agenda for financially responsible behavior,"⁵⁰ says "[d]on't do it" in response to suggestions that boyfriends and girlfriends get credit cards together to build credit profiles.⁵¹ Getting tied into one another's bills "isn't advisable," writes Joe Mont in "5 Financial Miscues in the Name of Love."⁵² These consumer advocates certainly do not seem as optimistic about household income-sharing tendencies as the credit card issuers. In short, there are many social and policy implications associated with the CARD Act that must be examined when considering its utility.

46. Telephone Interview with Gerri Detweiler, Pers. Fin. Expert, Credit.com (Feb. 25, 2011); *cf.* Comment Letter from Elizabeth A. Eurgubian, Vice President & Regulatory Counsel, Indep. Cmty. Bankers of Am., to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. 3 (Jan. 3, 2011), *available at* http://www.federalreserve.gov/SECRS/2011/January/20110126/R-1393/R-1393_010311_61475_556190212316_1.pdf (discussing the potential impact on stay-at-home spouses by stating that "[t]his proposed rule, however, would limit the lesser earning spouse from independently obtaining credit because he or she may not have a sufficient income independent from their spouse").

47. Telephone Interview with Gerri Detweiler, Pers. Fin. Expert, Credit.com (Feb. 25, 2011).

48. *Id.*

49. *Id.*

50. NAT'L FOUND. FOR CREDIT COUNSELING, <http://www.nfcc.org/index.cfm> (last visited Apr. 11, 2011).

51. Mont, *supra* note 45 (adding that often it is the person in the relationship with a poor credit rating who advocates for the joint card).

52. *See id.* (advocating instead that couples add partners or family members as "authorized users" on credit cards, which enables the main card holder to remove the other person from the card should the need arise and allows the main card holder to retain control of the card).

III. READING BETWEEN THE LINES: SOCIAL AND POLICY CONSIDERATIONS

The financial community is evidently willing to accept the risk of non-payment of some credit card debt in exchange for the ability to rely on household income in establishing the cardholder's ability to pay. However, that group's letters to the Fed contained other, less economically-focused reasons for opposing the ability to pay amendment. For example, the ABA's comment letter referred to "policy[] and social considerations" that "compel an interpretation [that] allow[s] creditors to consider household income over which the borrower might not have exclusive or absolute control."⁵³

What are these policy and social considerations? First and foremost, the financial industry identifies non-working women as being the losers under the Fed's proposal. Card issuers claim that non-working spouses, predominantly women, will see a sharp reduction in access to credit in their own names.⁵⁴ In addition, card issuers claim that in the event that married women who do not earn wages and do not have independent credit become widowed or divorced, they may be unable to establish credit because they lack a credit history.⁵⁵

Retailers say that depriving stay-at-home mothers (their core customers) of individual credit cards puts "core values" of society at risk because these women "opted to stay at home to raise children and care for family members."⁵⁶ In fact, retailers David's Bridal and

53. ABA comment, *supra* note 30, at 3 (reiterating that TILA will require all card holders over age twenty-one to demonstrate an independent ability to pay their debt and arguing that such a scheme is impractical).

54. Cf. John Ulzheimer, *How the CARD Act Hurts Stay-at-Home Moms*, MINTLIFE BLOG (Jan. 17, 2011), <http://www.mint.com/blog/trends/cards-act-stay-at-home-mom-01172011/> (addressing how "[z]ero individual income means zero credit card approval, despite the possibility that the applicant does, in fact, have access to funds through a working spouse").

55. This proposition is explicitly asserted on the Federal Trade Commission's website:

A good credit history . . . often is necessary to get credit. This can hurt many married, separated, divorced, and widowed women. Typically, there are two reasons women don't have credit histories in their own names: either they lost their credit histories when they married and changed their names, or creditors reported accounts shared by married couples in the husband's name only.

Equal Credit Opportunity: Understanding Your Rights Under the Law, FED. TRADE COMM'N (May 2009), <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre15.shtm>.

56. Comment Letter from Phillip C. Galbo, Senior Vice President & Treasurer, David's Bridal, Inc., to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. 3 (Dec. 10, 2010), *available at* http://www.federalreserve.gov/SECRS/2010/December/20101230/R-1393/R-1393_121710_56690_590146449378_1.pdf.

Dress Barn called the Fed's proposed rule amendments "demeaning" and "detrimental" to non-working spouses.⁵⁷

Others in the financial community said that the amended rule would result in lawsuits against issuers because evaluating independent income undermines the Equal Credit Opportunity Act and Regulation B.⁵⁸ These rules were designed in part to help promote credit for applicants, including those on public assistance, who might have trouble getting credit in their own names.⁵⁹ Banks worry whether inquiring into the independent income of proposed cardholders will put them afoul of Regulation B's anti-discrimination rules.⁶⁰

The ABA's letter invoked abused women as potential victims of reduced access to credit and maintained that depriving non-income-producing spouses of the right to build credit can result in financial dependence and make it "more difficult for the abused spouse to exit the relationship."⁶¹ Bank of America chastised the Fed for this in its comment letter, claiming that the amended rule may make non-working wives more qualified for credit when they draw alimony than when they are in a marriage in which they share household income—a result the bank views as "contrary to public policy."⁶²

Another comment claimed the independent ability to pay rule adversely affects military families because the military member's spouse must manage household finances alone, sometimes without a power of attorney.⁶³ The insurance company USAA, which insures

57. *Id.* at 2–3; Dress Barn comment, *supra* note 18, at 2–3.

58. Under the Act, which is implemented by Regulation B, it is illegal for creditors to

discriminate against any applicant with respect to any aspect of a credit transaction (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract); (2) because all or part of the applicant's income derives from any public assistance program; or (3) because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

Bd. of Governors of the Fed. Reserve Sys., *Federal Fair Lending Regulations and Statutes: Equal Credit Opportunity (Regulation B)*, CONSUMER COMPLIANCE HANDBOOK (last updated Dec. 2010), available at http://www.federalreserve.gov/boarddocs/supmanual/cch/fair_lend_reg_b.pdf.

59. *Id.* (explaining that the Equal Credit Opportunity Act "requires . . . firms engaged in the extension of credit to 'make credit equally available to all creditworthy customers without regard to sex or marital status'").

60. See Fed. Reserve Bd., *supra* note 17 (collecting comment letters).

61. ABA comment, *supra* note 30, at 4–5.

62. BoA comment, *supra* note 34, at 2.

63. See Comment Letter from Steven L. Franks, Senior Counsel, Macy's, Inc., to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. 2 (Jan. 3, 2011), available at http://www.federalreserve.gov/SECRS/2011/February/20110207/R-1393/R-1393_010311_59188_570774503414_1.pdf (implying that the new ability to

military members and their families, says military spouses are more likely than others to be under-employed and therefore more likely to depend on spousal income.⁶⁴ This makes the analysis of an independent ability to pay a particular hardship on military spouses.⁶⁵

Bank of America's analysis suggested that in addition to women, non-working spouses, and military members and their spouses, retired people would also be much less likely to get credit cards if the independent ability to pay rule amendments were adopted.⁶⁶ Other public policy arguments leveled against the amended rule included claims that restricting credit will damage the economic recovery, the undesirable "unwarranted and unnecessary intrusion" on creditors' underwriting practices, and the likelihood of an overall contraction in credit card availability.⁶⁷ While many of the criticisms of the ability to pay provision have been grounded in financially-based beliefs, it is clear that its social policy implications have raised grave concerns as well.

CONCLUSION

The common thread in the business community's response to the ability to pay proposal is that creditors depend on all kinds of customers to apply for and use their cards, while acknowledging that some customers repay their credit with the funds of others. Card issuers are more concerned with whether cardholders have *access to* repayment funds than whether they earn their own income or have *independent* assets. Issuers take an expansive view of credit availability,

pay rule may effectively force spouses of service members to "put their lives and the lives of their children on hold").

64. USAA's statistics indicate 50% of military wives do not work outside the home, far less than the figure for the overall population. See Comment Letter from Ronald K. Renaud, Assistant Vice President Exec. Attorney, USAA Fed. Sav. Bank, to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. 5 (Jan. 3, 2011), available at http://www.federalreserve.gov/SECRS/2011/January/20110131/R-1393/R-1393_010311_59571_577054495880_1.pdf (reciting that wives of servicemen are more likely than their civilian counterparts to not be in the labor force, and noting that even when they are, they are more likely to be underemployed). The USAA comment letter included a mathematical computation demonstrating that a couple with one working spouse would be eligible for a lower credit card limit than a single person, even if the couple has higher credit scores, an example intended to illustrate the punitive nature of the ability to pay rule on non-working wives. *Id.* at 2-5.

65. *Id.* at 5-6.

66. See BoA comment, *supra* note 34, at 2-3.

67. *Id.* at 2. Bank of America conducted tests predictive of the effects of eliminating total household income from the qualifications for credit, which showed more than 10% of applications that pass today would not pass under the ability to pay calculation of the proposed rules. *Id.*

saying, in effect, “we can decide whether to extend credit, and to whom.”

Consumer advocates, on the other hand, ever-protective of the public and ever-suspicious of the financial industry, would rather certain consumers not get credit cards at all—especially not in point-of-sale transactions—even if a creditor would find them creditworthy. They would reduce the availability of individual credit, most particularly for non-working adults. In short, consumer advocates apparently do not share the business and credit community’s optimism that American households are a good credit risk.