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January 3, 2011

BY FEDERAL E-RULEMAKING PORTAL

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: Docket No. R-1393 and RIN No. 7100-AD55; Proposed Revisions to Ability-to-Pay Requirements for Individual Credit Accounts

Dear Ms. Johnson:

On behalf of the Retail Industry Leaders Association (RILA), I offer the following comments in response to the Board of Governors of the Federal Reserve System's (FRB) Proposed Rule regarding a requirement that credit card issuers assess a consumer's ability to pay before opening a new credit card account or increasing the credit limit on an existing account (Proposed Rule).[1]

RILA is the trade association of the world's largest and most innovative retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than $1.5 trillion in annual sales, millions of American jobs and more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

The Proposed Rule would implement provisions of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (the Credit CARD Act), which primarily amended the Truth in Lending Act (TILA) and require that "[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." Credit CARD Act § 109, amending TILA § 150. Under the Proposed Rule, credit card issuers would no longer be permitted to rely on a consumer's household income, along with other factors, when determining the consumer's ability to pay the obligations incurred by the consumer under the account. A credit card issuer would be required to consider only the individual applicant's independent income, along with other factors. Furthermore, the Proposed Rule would permit a credit card issuer to consider spousal income where the applicant's spouse is not a joint applicant or joint accountholder *only* to the extent that a federal or state statute or regulation grants the applicant an ownership interest in such income or assets.

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[1]Federal Reserve System, 12 CFR Part 226, Regulation Z; Docket No. R-1393.

RILA members – with their financial services partners – offer millions of consumers a wide variety of credit options every year. We strongly support the need for our customers to understand fully the nature and responsibilities of all credit products they sign up for, and are supportive of extending credit only to individuals who can show an ability to repay debts through income or assets. However, the Proposed Rule goes well beyond what Congress intended and would have the effect of shutting off credit availability to wide swaths of the population if household income cannot be used in determining credit worthiness. RILA appreciates this opportunity to share these comments with the FRB and hopes that the FRB will amend the Proposed Rule to permit credit card issuers to consider household income when making ability-to-pay decisions.

Proposed Rule Inconsistent with Congressional Intent

RILA supports the Proposed Rule's requirement that a credit card issuer have reasonable procedures to consider an applicant's ability to pay when making a decision about whether to extend or increase credit to the applicant. It is RILA's view, however, that the Proposed Rule appears to go further than the legislative language adopted by Congress or the legislative history of the Credit CARD Act. RILA does not believe that requiring a credit card issuer to consider only a consumer's ***independent*** income when evaluating the consumer's ability to pay is a fair or reasonable interpretation of the requirements of the Credit CARD Act. Where Congress intended to limit use of particular income sources, or require independent means of debt repayment as it did in the case of applicants/cardholders under the age of 21 years, it expressly did so and laid out specific requirements such as a creditworthy co-signer or proof of independent income.

Conversely, this was not the case with respect to general credit consideration. The Credit CARD Act merely required that the creditor consider the *ability* of the consumer to pay the debt. We assume that this difference in language as to what must be considered was deliberate and left open the door to consideration of household income as evidence of the ability of the consumer to pay the debt. RILA believes that the FRB is putting undue restrictions where none were expressed or intended by Congress.

In addition, the Proposed Rule requires the issuer to consider all debt reflected on an individual applicant's credit bureau report, notwithstanding that much of that debt is in the form of joint obligations such as mortgage loans or auto loans, for example. In light of the household debt burden that would be evaluated against an individual's ability to pay, it simply does not make sense for the Proposed Rule not to allow household income that is used to service that debt to be included. To do less is unfair to the individual consumer and risks a host of unintended consequences.

We note that the purpose of the Equal Credit Opportunity Act (ECOA) is to make credit available to all creditworthy applicants without regard to race, sex, marital status or age. It appears the proposed "independent ability to pay" requirement runs contrary to the purpose of the ECOA.

Impact of Proposed Rule on Stay-at-Home Moms, Retirees, and Military Families

With respect to making credit available at the point of sale in retail establishments, the Proposed Rule, if enacted as drafted, will cause consumers to have to change the way they shop. Most consumers share household duties, including shopping and obtaining credit. Restricting the use of household income will preclude members of the same household from efficiently performing their shared duties by requiring the presence of both income earners in a typical dual-income household to shop together, or effectively preventing the low/no income member of the household from shopping alone, such as non-working spouse and/or stay-at-home moms. The non-working spouse is more likely to be responsible for running the household and, therefore, the person who does the shopping. The Proposed Rule would greatly diminish the ability of a non-working spouse to have access to credit that is offered at a retail location. Thus, the effect of the Proposed Rule will be far more disruptive than we believe was intended or envisioned by Congress.

Moreover, the Proposed Rule would greatly curtail or eliminate the long-standing current credit granting practices that are compliant with the FRB's current regulations, including the Credit Card Act, that are considered safe and desirable by both retailers and their customers. The Proposed Rule would unfairly limit the ability of a spouse not employed outside the home to access consumer credit. Such a person would likely have no independent income and, when all joint household debt is taken into consideration, would have no "ability to pay" (as defined under the Proposed Rule) any obligations incurred under credit extended to that person. As a result, a spouse not employed outside the home would not be granted access to revolving credit products offered by credit card issuers.

Since women are more likely than men to be the low- or non-income earning spouse in a household, and minorities are more likely to be in the lower income ranges of two income households, this practice would have the effect of creating a disparate impact on women and minorities. This would run afoul of the ECOA and other regulations, which as noted above were designed to promote equal access to credit, and would also create legal uncertainty. Disallowing consideration of household income would inappropriately limit the income upon which these applicants/cardholders have traditionally and should reasonably be able to rely – that is, the income of the other member of the household – in applying for credit.

Additionally, the Proposed Rule, if enacted as drafted, is unfair to spouses of active duty members of the military and may severely restrict such individuals' access to credit. Even if a military spouse is employed and has independent income, he or she may be able to qualify for credit products jointly with their active duty spouse, but individually he or she may not. This problem would be exacerbated if the active duty member of the military is stationed overseas and his or her spouse remains in the United States. Such a states-side spouse who could not qualify on his or her own would have no access to credit because he or she would be unable to apply without the presence and signature of his or her active duty military spouse.

Furthermore, the Proposed Rule would restrict retirees' access to credit. A retiree with a small stream of pension benefits or similar type of income, or a retiree who relies on his or her spouse's stream of income, would likewise not be able to show sufficient independent, individual ability to pay. The credit card issuer would be required, under the Proposed Rule, to deny such retiree's credit application where it otherwise would be approved on the basis of household income today. RILA believes that none of the aforementioned cases was envisioned by Congress when the new requirements of the Credit CARD Act were adopted, and we urge the FRB to modify the Proposed Rule to allow consideration of household income to avoid such unintended consequences.

Compliance Challenges with Point of Sale Credit Environment

The additional guidance offered by the FRB about collection of income information or a card issuer's ability to consider the spouse's income or assets to the extent that a federal or state statute or regulation grants the applicant an ownership interest in that income or those assets is impractical and unrealistic in a point-of-sale credit environment. While the Proposed Rule would allow creditors to accept whatever the applicant discloses as income, applicants will interpret this requirement differently, and some applicants will disclose household income and others individual income, yielding wildly differing results for applicants with the same individual credit profile.

In addition, before issuing a credit card to a married applicant without sufficient "independent" income, a retailer would need to determine the applicant's state of residence under the Proposed Rule. Based on such residency information, the retailer would then need to determine whether the particular state is a community property state and the applicable state rules with respect to whether the married applicant has an ownership interest in his or her spouse's income or assets. This requirement seems to be inconsistent with other non-community property states (such as Massachusetts), which may treat assets acquired during the marriage as joint assets whether or not titled as such. This requirement also raises complex consideration concerning the effect of pre- and post-nuptial agreements governing spousal assets.

With these new requirements, under the proposed rule, the determination of "independent" income would become an impossible operational challenge for retailers to handle effectively in a point-of-sale credit environment. Retailers could not adequately train their employees on the nuances of the complex, multiple state laws governing community property or spousal assets, and customers would undoubtedly not be willing to delay the purchase transaction to try to work through these issues. Furthermore, customers may well refuse to divulge personal information in an environment where the privacy necessary to explain these complex issues cannot be assured. As a result, retailers and their credit-granting partners would be forced to deny the application, which would further restrict consumers' access to credit, a result that Congress assuredly did not intend when requiring consideration of an applicant's ability to pay.

Finally, we note that the Proposed Rule substitutes a "mechanical" methodology for the more rigorous typical credit assessment that creditors currently use to evaluate how family income meets the test of predicting the credit worthiness of an individual spouse. We believe that this frustrates the risk assessment and management processes and will inevitably result in a diminution of credit availability for a large population who are otherwise eligible today – and at a time when these individuals and the retail industry would benefit from credit availability.

Conclusion

RILA strongly believes that prohibiting credit issuers from considering household income when making an ability-to-pay decision about an applicant will present a significant and practical obstacle to many American's access to credit. By limiting credit issuers to considering only the individual income of an applicant, the Proposed Rule would essentially cut off consumer credit to many Americans with little or no income individually but whose household income would be more than sufficient to repay the credit for which they are applying. The restriction is particularly salient in the examples mentioned above in this letter. We believe the Proposed Rule goes far beyond Congressional intent of requiring an ability to repay credit obligations. RILA, therefore, strongly urges the FRB to permit credit card issuers to continue to consider household income when making ability-to-pay credit decisions.

RILA appreciates the opportunity to share its comments on the Proposed Rule. We would be pleased to discuss the views expressed in this comment letter with you further at your convenience. Please feel free to contact me at doug.thompson@rila.org or (703) 600-2065.

Respectfully submitted,

Doug Thompson
Vice President, Government Affairs