

## **ABILITY TO PAY**

Section 109 of Public Law 111 – 24 (The Credit CARD Act) requires card issuers to consider the ability of a consumer to make required payments on an account before opening an account or increasing an existing line of credit. In attempting to codify this requirement, Federal Reserve Board staff has made proposals that could make it more difficult for retailers to offer credit or to increase credit lines at point of sale.

Section 109 of the new law simply says:

“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.”

The operative words are that the card issuer should “consider” the consumer’s ability to make “required” payments under the terms of the account (i.e. the required minimum payments). Fed staff was directed to prepare rules consistent with that language. It seems reasonable to believe that the Senate, which inserted this provision, wanted to ensure that consumers were not being saddled with credit where there was no reasonable expectation that they could repay it, and thus incur the numerous fees and other penalties that can arise from such situations.

However, the staff’s proposed language establishes a much higher standard. Under it, a card issuer must determine a consumer’s ability to make reasonably estimated minimum required payments by assessing either the consumer’s income or assets in light of the consumer’s current obligations. To meet their new required determination, the staff apparently believes the credit grantor will need to review that information in order to have accomplished the required consideration. Such an elaborate examination (such as the submission of a financial statement detailing the consumer’s assets and obligations) would essentially make instant credit obsolete.

It is possible that the Federal Reserve staff has conflated section 109’s modest requirements with the more elaborate requirements of new section 301, which governs credit granted to minors. Section 301 *specifically* requires a written signature of a legal guardian *or* the submission of information “through an application” indicating a minor’s independent means of repaying an obligation arising from an extension of credit. But the fact that Congress specifically required a detailed application when extending credit to those under 21, and did not ask for it in considering ability to pay for those older than 21, is evidence that Congress intended the situation between minors and adults to be treated differently.

Credit grantors have relied for years on credit bureau information as a valid predictor of consumers’ ability to pay. The use of credit scores, which are derived from consumer reports issued by credit bureaus, are an alternative that also reliably predicts consumers ability to pay. So long as a credit grantor honestly makes a determination based on credit bureau information, they should be deemed to have “considered” a consumer’s ability to pay as required by the new law. Federal Reserve staff should be encouraged to consider the original congressional intent and not needlessly burden the delivery of credit at point of sale.