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November 20, 2009

Via Electronic Mail & Online Filing

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

Docket No. R-1370

Re: Notice of Proposed Rulemaking: Truth in Lending. 74 Fed. Reg. 54124 (Oct. 21, 2009) Implementing the Credit Card Accountability Responsibility and Disclosure Act (the "CARD Act").

Dear Ms. Johnson:

Pepper Hamilton LLP appreciates this opportunity to comment on the above cited Notice of Proposed Rulemaking (the "Proposal"), proposed by the Federal Reserve Board ("FRB" or the "Board"). Pepper Hamilton LLP is a law firm which represents financial institutions in connection with financial services regulatory concerns. The views expressed herein are based upon our representation of credit card issuing banks (collectively, the "Institutions"), as well as upon our views of the issues that these Institutions will face under the Proposal. While we believe that most of the provisions contained in the Proposal reflect sound consideration on the part of the FRB, and provide clear direction for Institutions on compliance with Regulation Z, there are several points that warrant either revision or clarification.

Ability to Repay

Proposal

The proposed rule would require a card issuer to consider the consumer's ability to make required minimum payments before the issuer may open a new account or increase the credit limit.[1] The proposed rule also offers guidance on making that determination, as well as a safe harbor for compliance. Because a creditor will not know the exact amount of a consumer's minimum payments at the time it is evaluating the consumer's ability to make the required payments, the proposal requires creditors to "have reasonable policies and procedures in place" for estimating a consumer's minimum payments and would provide a safe harbor that creditors could use to satisfy this requirement. With respect to the opening of a new credit card account, the safe harbor would provide that it would be reasonable for a creditor to estimate minimum payments based on a consumer's utilization of the full credit line using the minimum payment formula employed by the creditor with respect to the credit card product for which the consumer is being considered. The proposed rule clarifies the types of factors creditors should review in considering a consumer's ability to make the required minimum payments. Specifically, an evaluation of a consumer's ability to pay must include a review of the consumer's income or assets as well as the consumer's current obligations. When considering a consumer's income or assets and current obligations, a creditor would be permitted to rely on information provided by the consumer or information in a consumer's credit report.[2]

Comment

The Institutions believe that the Proposal's guidance on consideration of the consumer's "current obligations" as indicators of the consumer's ability to pay requires additional clarification and explanation. Specifically, the proposed guidance states: "A card issuer may consider the consumer's current obligations based on information provided by the consumer or in a consumer report."[3] The Proposal, including the Staff Interpretations, does not provide card issuers with guidance on what constitutes a consumer's "current obligations" for

1 Proposed 12 C.F.R. § 226.51; 74 Fed. Reg. at 54225.

2 Proposed FRB Official Staff Interpretations, 74 Fed. Reg. at 54313 (Comment 51(a)(5)).

3 74 Fed. Reg. at 54313.

purposes of the rule. The Proposal also does not indicate what specific credit report information the Board believes should reflect ability to repay.

The Institutions believe that additional clarification is required in the Proposal as to what aspects of the credit report should be taken into account. For example, the Institutions believe that the consumer's income and other information about ability to pay may be reflected in the consumer's credit score or from internal, proprietary scoring models and therefore should be an acceptable method to evaluate a consumer's ability to pay. The Institutions believe that they should be able to rely solely upon credit scores, credit reports, or internal proprietary scoring models, in evaluating a consumer's ability to pay, rather than having to make further inquiry of the consumer's income, assets, or current obligations. If this is correct, the Staff Interpretations should clearly reflect this fact.

The burden of requiring verification (beyond a credit report or proprietary modeling) of the underlying income and assets would place on the card issuer and on the consumer was described in a recent report from the Auriemma Consulting Group on the CARD Act.[4] The Auriemma Report indicates that a change in the current practice of relying on information provided by the consumer or on credit reports, to a requirement that the card issuer review and verify the consumer's income, assets, and current obligations, "would impede an issuer's ability to render 'instant decisions' to open new accounts, especially at retail or bank point of sale."[5] According to the Auriemma Report, the "significant amount of new infrastructure and process to go further in verifying ability to repay," would "slow the underwriting process considerably and increase costs. Higher processing and servicing costs may initially be reflected in higher initial APRs."[6]

This increased burden on card issuers is reflected in the Auriemma Report, which notes: "In order to obtain accurate income information, issuers may need to contact consumers directly. We have heard from many in the industry that the only consumers likely to respond would be those who need credit, generally a riskier group. This contrasts with a more across-the-

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4 The CARD Act of 2009: Implications & Analysis by Auriemma Consulting Group, Inc. (Nov. 18, 2009) (hereafter the "Auriemma Report"). A copy of the Auriemma Report is attached.

5 Auriemma Report at pg. 6

6 *Id.*

board credit line increase approach used today which is generally based on credit bureau and other scores. The latter results in a more representative group of cardholders getting a line increase and thus more good balance growth to offset some of the riskier balance growth."[7] The Institutions expect that the Board would want to avoid the unintended consequence of increasing the risk in credit card portfolios that the Board's Proposal might create. In fact, such a consequence could be easily be avoided by allowing the use of credit bureau and/or other sources that have a demonstrated history of success in predicting those cardholders who have the ability to handle the increased credit line.

Comment on Ability to Pay for Young Consumers

The Proposal also provides special rules on credit extensions to consumers under 21 years of age. Specifically, the Proposal would provide that card issuers may consider financial information indicating an independent ability to make the minimum payments on the proposed extension of credit in connection with the account.[8] The proposed Staff Interpretation does not indicate the type of information a card issuer would have to collect from consumers under 21 years old. Collecting detailed information from young consumers would be especially burdensome for both the consumer and the card issuer. Many young consumers rely on seasonal/temporary employment, parental support, and work that does not generate evidence of employment (informal work for neighbors and family), to make payments on their credit card accounts, and therefore it may not be practical for this type of young consumer to produce income documentation or indicate more specific income information. To address this concern, we suggest that the Board clarify in its Staff Interpretation that for purposes of applying the "independent ability" test, issuers may require a young consumer to certify that he or she has the ability to pay a specified minimum monthly payment based on use of the entire available credit. Given the unique obstacles to income information and documentation that young consumers, especially college students, may face, we believe this provision is appropriate for young consumers. Alternatively, we suggest that the Board consider allowing *de minimus* information requirements for accounts that have a credit limit of $500 or less because the amount of credit is low and the cost to process such credit with more significant information requirements would be high. Another alternative we suggest is that young consumers can indicate their ability to make the minimum payments based on information in their credit reports.

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7 Auriemma Report at pg. 6.

8 Proposed 12 C.F.R. § 226.51(b)(1)(ii).

While the Institutions appreciate the goal of the Board in proposing regulations that will ensure the responsible use of credit for young consumers, the uncertainties and impracticalities remaining under the Proposal will result in an account origination and credit line increase process that will be significantly prolonged, which will be particularly burdensome on consumers who need to access credit on an emergency basis. According to the Auriemma Report: "This protraction would increase costs and restrict access to credit for young consumers. Again, existing procedures seem to largely satisfy the spirit of the legislation and new requirements would seem to create a large burden with limited incremental benefit."[9]

Prospective Application

Comment

Among the issues identified in the Proposal is the potential to label as unfair or deceptive acts or practices how certain credit card overlimit fees are assessed. The Board explicitly suggests that certain approaches to imposing overlimit charges in consecutive months would constitute a UDAP practice.[10] The Institutions are concerned that some examiners might interpret the Board's statements as definitive pronouncements that consecutive overlimit charges when an account continues in overlimit status are *per se* unlawful as an unfair and deceptive practice violating Section 5 of the Federal Trade Commission Act ("FTCA"). Further, some examiners might believe that the Board's labeling of consecutive overlimit fees in certain cases reflects an attempt by the Board to apply Regulation Z to past practices, in effect to apply it retroactively. In cases such as consecutive overlimit fees, where prior to the enactment of the CARD Act, no statute, regulation, agency guidance, or case law suggests that certain overlimit fee practices might be unfair or deceptive, retroactive application of a new Regulation Z rule would be particularly inappropriate. In fact, such retroactive application of UDAP prohibitions would be unfair, bad policy, and contrary to our country's finest juridical traditions.[11]

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9 Auriemma Report at pg. 7.

10 *See, e.g.*, 74 Fed. Reg. at 54182 and 54183.

11 The Supreme Court cautioned against retroactive application of legal prohibitions in its "antiretroactivity principle" – the principle that the "legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). Though this doctrine was pronounced in the context of the retroactive application of legislation, its application to rulemaking – either through notice-and-comment rulemaking or rulemaking by enforcement – is relevant in that an agency (continued...)

We therefore ask that the Board clarify in its Staff Interpretations that the final rule that emerges from this rulemaking is intended to have a prospective effect only, and should not be interpreted as stating or implying that past practices are violative of the FTCA merely because they are inconsistent with the new Regulation Z. Moreover, we suggest that the Board specifically state in the preamble to the final rule, as the Board did in its UDAP rulemaking, that the regulation is to be applied prospectively and is not intended to suggest that practices engaged in prior to the effective date are per se unlawful.[12]

FTCA Analysis

Comment

The Board has included in its proposed rulemaking a detailed analysis of the application of FTCA law to the practice of imposing consecutive overlimit fees. While the Institutions appreciate the Board's thoughtful deliberation on the issue of certain mid-cycle overlimit fees in arriving at its view that such may constitute an unfair or deceptive practice, the Institutions believe that it would be poor regulatory policy for the Board to codify its analytical approach to the continuously evolving area of applying the FTCA to financial institutions.[13] To illustrate, in the event that Congress amended the FTCA, or other statute governing the application of the FTCA to financial institutions, or in the more likely event that a court struck down, restrained, or conditioned the enforcement of the FTCA against financial institutions, the

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(continued...)

should not apply a standard retroactively where those subject to the action could not have possibly anticipated the rule. Further, no less an authority than Thomas Jefferson, shortly after leaving office nearly 200 years ago, embraced this principle that retroactive application of laws is unjust: "The sentiment that ex post facto laws are against natural right is so strong in the United States, that few, if any, of the State constitutions have failed to proscribe them. The federal constitution indeed interdicts them in criminal cases only; <u>but they are equally unjust in civil as in criminal cases</u>, and the omission of a caution which would have been right, does not justify the doing what is wrong." Letter from Thomas Jefferson to Issac McPherson, August 13, 1813 (emphasis added).

12 74 Fed. Reg. 5498, 5548 (Jan. 29, 2009).

13 While we acknowledge that the Board's UDAP analysis is in the preamble to the rule and not in the rule itself, given the tendency of practitioners and the courts to consider the preambles of regulations in deciphering an agency's intent, such a lengthy legal analysis contained in a preamble is tantamount to codification.

continued validity of the Board's rule, or at least the accuracy of the Board's interpretation, would be brought into question.

Moreover, the inclusion of a detailed FTCA analysis of overlimit fees would also draw enhanced scrutiny of the Board's rulemaking, and specifically the Board's own interpretation of the FTCA. Specifically, while Congress has delegated rulemaking authority to the Board, because the FTCA is a law of general application, the Board would not be entitled to the deference required to shield the Board's interpretation from heightened judicial scrutiny.[14]

Limitations on Fees

Proposal

The Proposal implements the CARD Act provision that limits certain fees from being charged during the first year after an account is opened.[15] This limitation provides that the "covered" fees charged may not exceed 25 percent of the credit limit in effect when the account is opened for the first year after the account is opened. The following fees are explicitly exempted from the proposed limitations: late payment fees, overlimit fees, and fees that the consumer is not <u>required</u> to incur as a condition of establishing the account.[16]

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[14] Courts have also refused to extend deference to agency interpretations of statutes that apply to many agencies, and therefore no single agency is charged to administer. Such statutes include, for example, the Administrative Procedure Act, 5 U.S.C. §§551-706, as well as the Freedom of Information Act, *Id.* §552 the Federal Advisory Committee Act, *Id.* App. 2, and the Natural Environmental Policy Act. 42 U.S.C. §§4321-4347. Courts have consistently and explicitly declined to show *Chevron* deference toward agency interpretations of regulatory statutes of general applicability. *See, e.g., Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n. 9 (1997) (Administrative Procedures Act); *DeBois v. USA*, 102 F.3d 1273, 1285 n.15 (1st Cir. 1996) (National Environmental Policy Act); *Reporters Comm. for Freedom of the Press v. U.S. Department of Justice*, 816 F.2d 730, 734 (D.C. Cir. 1987) (Freedom of Information Act); *Alaska Center for the Env't v. West*, 31 F.Supp. 2d 714, 721 (D. Alaska 1998) (National Environmental Policy Act).

[15] Proposed 12 C.F.R. § 226.52; 74 Fed. Reg. at 54226.

[16] Proposed 12 C.F.R. § 226.52(a)(2). According to the proposed FRB Official Staff Interpretations, other fees that are not subject to this restriction include fees for making an expedited payment, fees for optional services (e.g., travel insurance), fees for reissuing a lost or stolen card, or statement reproduction fees. *See* Proposed FRB Official Staff Interpretations, 74 Fed. Reg. 54314.

Comment

We believe that greater clarification is required as to the types of fees that are excluded from the limitations of proposed § 226.52. The Proposal attempts to delineate among the types of fees that would and would not be included in the limitation on fees. For example, late payment fees, over-the-limit fees, and returned-payment fees,[17] as well as fees for optional services (e.g., travel insurance), are not included within the limitations.[18] While we appreciate that the proposed rule attempts to provide a bright-line rule on excluded fees,[19] the examples that the Board has provided in the Proposal do not provide the Institutions with adequate guidance as to the analysis that they should apply to determine whether a given fee is covered. For example, while the proposed Staff Interpretation states that a cash advance fee is a covered fee for purposes of the proposed fee limitations,[20] the Institutions take the view that a cash advance is use of a credit card which the consumer elects as a matter of personal convenience and therefore the fee charged for using a credit card to obtain a cash advance is more akin to a convenience fee charged for using an ATM machine that is not owned by the cardholder's bank, than to the types of required fees envisioned by the Board. We believe that the Board should clarify in its Staff Interpretations that fees related to card services that are within the control of the consumer should be excluded from the limitations imposed by § 226.52. Some examples of fees that are entirely within the consumer's control are provided in the proposed Staff Interpretation. However, additional examples should include: cash advance fees, convenience check fees, balance transfer fees, and credit (unemployment) protection fees.

Annual Fees

Proposal

The Proposal implements the CARD Act's prohibition on increasing any annual percentage rate, fee or finance charge applicable to any outstanding balance on a credit card

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17 Proposed 12 C.F.R. § 226.52(a)(2).

18 74 Fed. Reg. at 54314.

19 Proposed 12 C.F.R. § 226.52(a)(2)(ii) ("Fees that the consumer is not required to pay with respect to the account.").

20 74 Fed. Reg. at 54314.

account under an open-end consumer credit plan. Because the prohibition applies to increased fees and charges to outstanding balances rather than to new transactions or to the account as a whole, the Board believes that it is appropriate to apply the prohibition only to fees and charges that could be applied to an outstanding balance.[21] Notwithstanding the prohibition on increasing an annual fee applicable to an outstanding balance, the Proposal would permit such a fee to be added or increased with respect to new transactions pursuant to the advance notice exception, except during the first year after the account is opened. To assist card issuers in applying this provision to annual fees, the proposed Staff Interpretations would provide as follows:

> Once an account has been open for more than one year, § 226.55(b)(3) permits a card issuer to increase a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) after complying with the applicable notice requirements in § 226.9(b) or (c), provided that the increased fee or charge is not applied to a protected balance. A card issuer is not prohibited from increasing a fee or charge that applies to the account as a whole or to balances other than the protected balance. For example, after the first year following account opening, a card issuer may add a new annual or a monthly maintenance fee to an account or increase such a fee *so long as the fee is not based solely on the protected balance.*[22]

Comment

The above quoted provision does not indicate how the Proposal would apply to a credit card account which has a balance that contains solely a protected balance and no other amounts, and on which an annual fee was imposed after the balance was created. In the Institutions' view, in such circumstances a card issuer would be able to impose a new or increased annual fee after the first year after the opening of the account, provided that the new or increased annual fee was not imposed on the account because of the existence of the protected balance. The Board should allow as evidence of the annual fee not being imposed on the account solely because of the protected balance, the fact that a credit card agreement indicates that the fee

[21] 74 Fed. Reg. at 54169.

[22] 74 Fed. Reg. at 54324.

applies to the account generally, and other accounts that have protected balances as well as new balances are subject to the annual fee. The Institutions request that the Board reflect this example in its Staff Interpretations.

Marketing to College Students

Proposal

The proposed rule implements the provisions of the CARD Act by requiring institutions of higher education to publicly disclose agreements with credit card issuers regarding the marketing of credit cards.[23] The proposal would state that an institution may comply with this requirement by, for example, posting the agreement on its website or by making the agreement available upon request.[24] The proposal would also prohibit certain inducements where the student is offered tangible items on or near campus or at a college sponsored event.[25]

The proposed Staff Interpretation provides guidance to assist creditors in complying with the CARD Act limitations on a creditor's ability to offer a student at an institution of higher education any "tangible item" to induce the student to apply for, or open, an open-end consumer credit plan offered by the creditor. The proposed commentary clarifies that "tangible item" means a physical item (such as a gift card, t-shirt, or magazine subscription) and does not include non-physical items (such as discounts, rewards points, or promotional credit terms).[26] The proposed Staff Interpretation also clarifies that a location that is within 1,000 feet of the border of the campus of an institution of higher education (as defined by the institution) is considered near the campus of that institution.[27]

The proposed Staff Interpretation further states that an event is related to an institution of higher education if the marketing of such event uses words, pictures, or symbols

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23 Proposed 12 C.F.R. § 226.57(b); 74 Fed. Reg. at 54228.

24 Proposed FRB Official Staff Interpretations, 74 Fed. Reg. at 54328.

25 Proposed 12 C.F.R. § 226.57(c); 74 Fed. Reg. at 54228.

26 Proposed FRB Official Staff Interpretations, 74 Fed. Reg. at 54328.

27 *Id.*

identified with the institution in a way that implies that the institution endorses or otherwise sponsors the event.[28]

Comment

The promotion of credit card products to college students occurs not only at on-campus events, or at off-campus school-sponsored events, but also through direct mail solicitations delivered to the students' on-campus mail boxes. To the extent that the card issuer offers a "tangible item" as covered by the Proposal, the Institutions urge the Board to include additional guidance in the Staff Interpretations confirming that sending a credit card solicitation or related marketing materials to a student's on-campus mail box does not constitute an inducement "on the campus of an institution of higher education,"[29] for purposes of the proposed rule. The Institutions believe that this approach would properly reflect the practicalities of direct mail marketing to students, while not offending the goals the CARD Act or the Proposal. For example, direct mail marketing campaigns to students at a given school may be sent to both on-campus and off-campus/commuting students. Making distinctions as to the application of Regulation Z based on the student's preference for, or ability to afford, on-campus housing would not further the goals of the Proposal. In addition, requiring the Institutions to determine the physical location and proximity of a student's mailbox to an institution of higher learning would make it exceedingly difficult if not impossible for the Institutions to comply with the prohibitions since all an Institution would know is the post office box or address of the prospective applicant, not, in many cases, where that physical location is located relative to the institution of higher learning.

Further, the Institutions request that the Board similarly clarify that an e-mail credit card solicitation would not be deemed an "on-campus" inducement merely because it is delivered to a student's university-sponsored email address (i.e. ".edu").

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28 *Id.*

29 Proposed § 226.57(c)(1).

Phased-in Compliance

Comment

The current effective date of several of the CARD Act provisions is February 22, 2010. However, there is a bill pending in Congress that would accelerate the effective date to December 1, 2009. Given the complexities of the Proposal, the Institutions are concerned that even with the current effective date, the industry will not have enough time to review and update their compliance policies, processes, and systems to adjust to the new law. We therefore ask that the Board specify that it will adopt a phased-in approach to examining for compliance with the CARD Act and the revised Regulation Z. Such a restrained compliance approach would not be unique for a federal agency. In fact, the Department of Housing and Urban Development ("HUD") has very recently issued a press release indicating that is has "instructed its staff to exercise such restraint in considering an action against FHA-approved lenders who have demonstrated that they are making a good faith effort to comply with RESPA's new requirements."[30] Further, it is our understanding that at least one federal agency is taking a similar restrained approach for supervising for compliance under the soon to be effective Regulation GG. Specifically, we suggest that the Board adopt a phased-in compliance examination approach, and delay expectation of full compliance with the regulation until at least 12 months after the February 22, 2010 effective date.

Conclusion

As discussed above, while the Institutions share the Board's goal of promoting greater accountability and responsibility in open-end consumer lending, there are certain points in the Proposal where additional clarification of the regulation's provisions and the Board's expectations is warranted.

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[30] HUD Press Release No. 09-215 (Nov. 13, 2009) (available at: http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories/2009/HUDNo.09-215).

Should you have any questions regarding the discussion above, please do not hesitate to contact me at (202) 220-1210, or my colleague, Travis P. Nelson, at (215) 981-4187.

Sincerely,

Timothy R. McTaggart

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CONSULTING GROUP
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The CARD Act of 2009

Implications & Analysis by
Auriemma Consulting Group, Inc.

November 18, 2009

Contents

Executive Summary

The Credit Card Accountability, Responsibility, and Disclosure (CARD) Act of 2009 is intended to curb credit card issuer practices construed as harmful to consumers.

In this report, the Auriemma Consulting Group (ACG) examines the CARD Act and discusses the provisions likely to have the greatest impact on card issuers and consumers. The report summarizes six key changes to industry practices required by the pending regulation and the likely consequences. The observations and conclusions in this report are based on our direct interaction with credit card industry participants including issuers, processors, servicers, network providers, regulators, and attorneys.

Substantially, all card industry participants predict that the new regulations will result in a significant reduction in available credit, an increase in cost to consumers, and a decrease in the margin earned by issuers. Indeed, many describe the CARD Act as a "transformation" of the industry. The legislation requires a disproportionate level of sweeping change in marked contrast to the preceding decades of gradual evolution. The industry has long depended on sophisticated tools to manage open-ended, unsecured, lines of credit extended to a broad range of consumers. These dynamic risk management techniques developed over many years will have to be replaced on short notice and at great cost. In particular, credit card issuers have depended on the ability to adjust interest rates as a primary means for controlling risk exposure. The loss of the means to adjust for changes in risk will require a transformation in how the product is underwritten and priced.

The CARD Act legislation intends to provide cardholders with more stable and predictable pricing.

Historically, card issuers have offered their product broadly and for an open-ended term. In any given period, the issuer expects a few cardholders to lose their job, sustain an injury, commit a crime, or otherwise experience a change in their risk profile, often quickly and unpredictably. Underwriting models have been developed to accommodate more customers at origination with the understanding that the few that develop into credit problems may be re-priced.

Substantially all issuers object to the constraints placed on the ability to change pricing in the CARD Act. The Act seems to require 'perfect' underwriting and pricing decisions. That is, although many cardholders are very likely to undergo some change in risk level over the course of their life, after the CARD Act, issuers will need to anticipate the worst case level of deterioration that a customer *may* go to. Issuers will need to raise prices to a higher level that allows for potential negative changes in customer risk profile and behavior.

A corollary outcome, issuers expect many new customers that would have qualified under prior underwriting criteria, will be denied credit cards because of the limits on ability to reprice in the CARD Act. CARD Act provisions restricting risk based pricing include:

Protected outstanding balances	No changes to APR in first year
45 day advance notice requirement	"Fixed" means fixed for specified term
Promo rates must be at least six month.	

Interest Rate Reductions

The CARD Act requires issuers to subsequently reduce interest rates that had been previously raised due to a change in economic conditions or credit profile. An issuer who increases the APR on a card account is required to re-examine the account every six months and assess whether the risk associated with criteria for the increase still exist. If the issuer's risk exposure has diminished, the APR must be reduced.

Again, industry participants expect this provision to decrease revenue and increase costs.

The costs associated with the periodic reviews are substantial. Issuers would be required to document and track each customer communication providing reasons for rate increases. This same evaluation criteria must then be used to determine if a subsequent reduction is warranted. Substantial systems upgrades, infrastructure investment, and incremental process would be required.

Many suspect this provision will not provide the intended benefit to cardholders. In order to offset higher costs and recoup losses in revenue, issuers would likely increase penalty pricing. We have seen new default pricing models taking effect in advance of the legislation effective date and anticipate it will continue afterwards.

Most industry participants are confused and concerned by the provision in the CARD Act that mandates consideration of a cardholders ability to repay.

The assessment of the ability to repay prior to an account opening or credit line increase has always been a threshold issue for credit underwriting. Industry participants hope the legislation will allow issuers to rely on information provided by the consumer or in credit reports, as is common practice, and not require a lot of re-engineering of existing processes and procedures.

The supplementary information states that the issuer must review information about a consumer's income, assets, or current obligations to comply with Section 109. This would appear to impose a higher burden than the information provided by the consumer or credit reports without verifying such information prior to opening an account or increasing a credit line. This higher burden would impede an issuers ability to render 'instant decisions' to open new accounts, especially at a retail or bank point of sale. A change in current practice to require more diligent verification of income will increase the time to process an application and the cost of the incremental verification steps.

In order to obtain accurate income information, issuers may need to contact consumers directly. We have heard from many in the industry that the only consumers likely to respond would be those who need credit, generally a riskier group. This contrasts with a more across-the-board credit line increase approach used today which is generally based on credit bureau and other scores. The latter results in a more representative group of cardholders getting a line increase and thus more good balance growth to offset some of the riskier balance growth.

Many issuers are concerned about the need to build a significant amount of new infrastructure and process to go further in verifying ability to repay. This would slow the underwriting process considerably and increase costs. Higher processing and servicing costs may initially be reflected in higher initial APRs.

Industry participants expect the CARD Act provisions for the "protection of young consumers" to result in restricted credit and less availability for consumers under 21 years of age.

Issuers raised a number of questions regarding the provisions for the protection of young customers in the regulatory notice of proposed rulemaking (NPR) including:

- How do they reconcile the requirement that applications be "written" when student and co-signer are often in different physical locations?

- Is the independent means of repayment test the same as the ability to repay test for all consumers? Can a credit card issuer use a young consumer's credit bureau score or internally generated score to determine whether they have the independent means of repayment at the time of application or when being considered for a credit line increase?

- Will issuers be required to verify "ability to repay" for both the student and co-signer?

- Will issuers be required to get consent from both parties for line increases?

Depending on the answer to these questions, the account origination and credit line increase process could be significantly prolonged. This could present a problem in the case of an emergency line increase request.

This protraction would increase costs and restrict access to credit for young consumers. Again, existing procedures seem to largely satisfy the spirit of the legislation and new requirements would seem to create a large burden with limited incremental benefit.

The 'enhanced disclosure' mandated in the CARD Act is another area of concern for industry participants. In particular, compliance with these provisions will require issuers and servicers to quickly remediate systems and change the language on their existing collateral materials including:

Solicitations	Periodic statements
Applications	Account opening disclosures
Change of terms notices	

Implementation of these changes will generate substantial costs for issuers. The cost will include new collateral materials, the destruction of old materials, sales associate training, and the development of new systems applications to deliver the required information. Many issuers generate additional revenue from advertising on statement 'white space' that will be sacrificed for the additional disclosure.

Servicers were especially sensitive to the cost of systems changes. In this regard, the calculation of an amortization schedule on every statement will be complex. Additionally, the interactions between the 21 day advance statement requirement, the necessity for payment due dates to be on the same date each month, and the restriction of due dates falling on holidays or Sundays, will also pose difficulty for systems to calculate in an automated manner.

Despite the appearance of simplicity in this ruling, implementation of enhanced disclosures pose significant underlying challenges and material expense for issuers.

About Auriemma Consulting

Since 1984, ACG has offered comprehensive management consulting, consumer research, industry roundtable, and benchmarking services to the financial services industry. ACG clients include credit card issuers, commercial banks, auto and mortgage lenders, merchants, networks, and industry vendors. Areas of expertise include Collections, Operational Effectiveness, Customer Service, Risk Management, Alliance Development, Marketing, Knowledge Management, Strategic Planning, Financial Strategies, Benchmarking, and Litigation Support. With offices in New York and London, ACG offers actionable solutions to help clients make important business decisions to maximize their efficiencies and revenues.