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Financial Regulatory Reform: Dodd-Frank and Beyond

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Ability to Pay

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The landmark Dodd-Frank Act of 2010 transforms the landscape of consumer credit in the United States. Many of the changes have been high-profile and accordingly attracted considerable media and scholarly attention, most notably the establishment of the Consumer Financial Protection Agency/Bureau. Even specific consumer proposals, such as the "Plain Vanilla," drew hot debate and lobbying firepower. But when the dust settled, one profoundly transformative innovation that did not garner the same outrage as Plain Vanilla and CFPA did get into the law: imposing upon lenders a duty to assure borrowers' ability to repay. As will be discussed below, assuring a borrower's ability to repay is not an unprecedented legal concept, even though its wholesale embrace by Dodd-Frank represents a sea change in U.S. consumer credit market regulation. This article does three things. First, it tracks the multifaceted pedigree of this duty to assess "ability to pay," looking at fledgling strands in consumer law as well as other arenas such as securities law; it compares too its more robust embrace in foreign systems. Second, it offers conjecture regarding just how this broadly stated principle might be put into practice by the federal regulators. Finally, it provides a brief normative comment, siding with the supporters of this new obligation on lenders.