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COMMENTS

EQUAL CREDIT OPPORTUNITY ACT AMENDMENTS OF 1976

HISTORY

It would be difficult to exaggerate the role of credit in today's society.[1] But for the availability of credit, it would be impossible for most Americans to obtain an education, purchase a car, own a home, or start a business.[2] Because of the increasing popularity of credit cards, credit is relied on daily in consumer transactions. Yet a number of persons have been unable to obtain credit, not because of an inability to repay, but because of their membership in a particular class.[3]

Women, especially, have been victims of credit discrimination.[4] The National Commission on Consumer Finance[5] explored obstacles faced by women in obtaining credit in hearings conducted in May, 1972. The Commission's final report indicated the following problem areas. Single women have more trouble obtaining credit, especially mortgage credit, than single men. Creditors generally require a woman upon marriage to reapply for credit, usually in her husband's name. Such reapplication is not required of men when they marry. Creditors often refuse to extend credit to a married woman in her own name or to count the wife's income when a married couple makes application for credit; and women who are divorced or widowed have difficulty establishing credit.[6] In addition, a report of the Senate

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1. As of January 1, 1977, total household borrowing stood at $875 billion. FEDERAL RESERVE BOARD, MONTHLY CHART BOOK 53 (Mar. 1977). Virtually all home purchases are made on credit. About two-thirds of all automobile purchases are paid for on an installment basis. The larger department stores report that at least one-half of their sales are on revolving or closed-end credit plans. More than 15% of all consumer disposable income goes to meet credit obligations other than home mortgages. S. REP. No. 589, 94th Cong., 2d Sess. 3 (1976) [hereinafter cited as S. REP. No. 589].

2. R. COLE, CONSUMER AND COMMERCIAL CREDIT MANAGEMENT 3 (1968).

3. 120 CONG. REC. 15,230 (1974) (remarks of Representative Sullivan).

4. Eugene Adams, then President of the American Banking Association, in a speech reprinted in THE AM. BANKER, June 25, 1973, at 22, col. 3, admitted that "banks, along with the rest of the credit industry, do in fact discriminate against women when it comes to granting credit."

5. The National Commission on Consumer Finance was created by Title IV of the Consumer Credit Protection Act of 1968 to investigate and report on the entire field of consumer credit in the United States.

6. NATIONAL COMMISSION ON CONSUMER FINANCE, CONSUMER CREDIT IN THE UNITED STATES 152-53 (1972).

Committee on Banking, Housing and Urban Affairs lists thirteen specific practices that discriminate on the basis of sex and/or marital status.[7]

In response to this problem, Congress enacted the Equal Credit Opportunity Act[8] in October, 1974. The Act prohibits discrimination on the basis of sex or marital status in any aspect of a credit transaction.[9] Congress delegated authority to the Board of Governors of the Federal Reserve

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7. The following are examples of practices constituting discrimination which were cited by the Senate report:

a. Holding women and men to different standards in determining creditworthiness, *e.g.*, minimum salary level (without regard to individual obligations), length of employment, length of residence, etc.

b. Requiring a newly married woman whose creditworthiness has otherwise remained the same to reapply for credit as a new applicant.

c. Refusing to extend credit to a married woman in her own name, even though she would be deemed creditworthy if unmarried.

d. Refusing to count a wife's income when a married couple applies for credit, including jointly held credit cards or accounts, secured or unsecured loans, and mortgage loans. This practice includes but is not limited to arbitrary discounting of a wife's income.

e. Refusing to extend credit to a newly separated or divorced woman solely because of her change in marital status.

f. Arbitrary refusal to consider alimony and child support as a valid source of income where such source is subject to verification.

g. Applying stricter standards in the case of married applicants where the wife rather than the husband is the primary family supporter.

h. Requesting or using information about birth control practices in evaluating any credit applicant.

i. Requesting or using information concerning the creditworthiness of a spouse where an otherwise creditworthy married person applies for credit as an individual.

j. Refusing to issue separate accounts to married persons where each would be creditworthy if unmarried.

k. Considering as "dependents" spouses who are employed and not actually dependent upon the applicant.

l. Use of credit scoring systems that apply different values depending on sex or marital status.

m. Altering an individual's credit rating on the basis of the credit rating of the spouse.

S. REP. No. 278, 93d Cong., 1st Sess. 16-17 (1973). For a general discussion of the problems encountered by women in obtaining credit, *see* Gates, *Credit Discrimination Against Women: Causes and Solutions*, 27 VAND. L. REV. 409 (1974) and *The Discredited American Woman: Sex Discrimination in Consumer Credit*, 6 CAL. D. L. REV. 61 (1973).

8. Act of October 28, 1974, Pub. L. No. 93-495, tit. V § 503, 88 Stat. 1521 (codified at 15 U.S.C. § 1691 (Supp. V 1975)).

9. 15 U.S.C. § 1691(a) (Supp. V 1975). "Credit transaction" is defined to include: "information requirements; investigation procedures; standards of creditworthiness; terms of credit; furnishing of credit information; revocation, alteration, or termination of credit; and collection procedures," as well as any other aspect of an applicant's dealing with a creditor. 42 Fed. Reg. 1242, 1252-53 (1977) (to be codified in 12 C.F.R. § 202.2(m)).

System to prescribe regulations to implement the Act,[10] and in accordance, the Board has promulgated Regulation B.[11]

The Act went into effect on October 28, 1975. Only five months later Congress amended it to include other categories of discriminatory practices. The Equal Credit Opportunity Act Amendments[12] expand the scope of prohibited discrimination to include discrimination on the basis of race, color, religion, national origin, age (provided the applicant has the capacity to contract), receipt of public assistance benefits, and the good faith exercise of any right under the Consumer Credit Protection Act.[13] This legislation is a natural extension of the original Act.[14] Testimony given in congressional hearings indicated that credit discrimination existed on grounds other than sex and marital status. Pilot studies conducted by the Comptroller of the Currency and the Federal Home Loan Bank Board indicated a strong probability of race discrimination in mortgage lending.[15] In its testimony the Department of Justice also noted emerging problems of credit discrimination brought about by the Arab oil boycott and urged the inclusion of race, color, religion and national origin to parallel other civil rights legislation.[16] The most frequently cited abuse in the hearing record was discrimination against the elderly.[17]

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10. 15 U.S.C. § 1691(b) (Supp. V 1975).

11. 12 C.F.R. § 202 (1976).

12. 15 U.S.C.A. § 1691 (Supp. 1977). This section expanding the scope of prohibited discrimination became effective March 23, 1977. Those sections of the Amendments dealing with enforcement became effective as of the date of enactment, March 23, 1976.

13. *Id.* § 1691(a). The exercise of rights under the Consumer Credit Protection Act, 15 U.S.C. § 1601 *et seq.* (1970), includes the exercise of rights granted under the Equal Credit Opportunity Act, the Fair Credit Reporting Act, and the various chapters on truth-in-lending.

14. *See* S. REP. No. 589, *supra* note 1, at 2. In May of 1974 Rep. Leonor K. Sullivan introduced a bill, H. R. 14856, which would have prohibited discrimination in the granting of credit on the basis of race, color, religion, national origin, age, sex and marital status. The Equal Credit Opportunity Act was enacted as a non-germane Senate rider on a House bill dealing with bank deposit insurance and was limited to discrimination based on sex and marital status. The legislative action came close to the end of the congressional year and in order to get any legislation on credit discrimination passed in the 93d Congress it was necessary to accept the limited Senate version. *Equal Credit Opportunity Act Amendments of 1976, Hearings on H.R. 3386 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Currency and Housing,* 94th Cong., 1st Sess. 9, 14 (Apr. 22 and 23, 1975).

15. *See Oversight Hearings on Equal Opportunity in Lending Enforcement Before the Senate Comm. on Banking, Housing, and Urban Affairs,* 94th Cong., 2d Sess. (Mar. 11 and 12, 1976).

16. *See* S. REP. No. 589, *supra* note 1, at 3.

17. *Id.*

EXPANDED PROTECTION FOR CREDIT APPLICANTS

The Equal Credit Opportunity Act prohibits discrimination in any type of credit transaction. This protection extends to business[18] as well as consumer credit. The amended Act provides that the Federal Reserve Board may exempt any class of transactions "not primarily for personal, family or household purposes" from one or more provisions of the Act.[19] In order to make such an exemption, the Board must expressly find that the application of such a provision would not contribute substantially to carrying out the purposes of the Act.[20] In accordance with this power the Board has exempted five categories of credit—business, incidental,[21] securities, public utilities, and governmental—from certain procedural requirements of Regulation B. Each of these types of credit is still subject to the general rule prohibiting discrimination and to most of the substantive requirements of the Regulation.[22]

Except for "affirmative action" credit programs,[23] the ban against discrimination on the basis of race, color, religion, national origin and sex is absolute. A creditor may not consider these characteristics at all in evaluating an application. However, inquiries into an applicant's marital status,

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18. President Ford, in signing the Equal Credit Opportunity Act Amendments into law on Mar. 23, 1976, stated: "This bill carries out my recommendations. It applies to business credit as well as consumer credit transactions and, thus, reaches discrimination against Americans in the extension of credit which might arise from foreign boycott practices." 12 WEEKLY COMP. OF PRES. Doc. 478 (Mar. 29, 1976).

19. 15 U.S.C.A. § 1691b(a) (Supp. 1977).

20. *Id.*

21. "Incidental credit" is defined as credit that possesses three characteristics: the credit is not made pursuant to a credit card account; no finance charge or other fee is or may be imposed; and there is no agreement by which the credit may be made payable in more than four installments. 42 Fed. Reg. 1242, 1254 (1977) (to be codified in 12 C.F.R. § 202.3(a)(3)). Incidental credit includes, for example, services provided by a dentist or lawyer before billing the client.

22. *See* 42 Fed. Reg. 1242, 1253-54 (1977) (to be codified in 12 C.F.R. § 202.3).

23. 15 U.S.C.A. § 1691(c) (Supp. 1977) states that it is not a violation of the Act for a creditor to refuse to extend credit offered pursuant to:

> (1) any credit assistance program expressly authorized by law for an economically disadvantaged class of persons;
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> (2) any credit assistance program administered by a non-profit organization for its members or an economically disadvantaged class of persons; or
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> (3) any special purpose credit program offered by a profit-making organization to meet special social needs which meets standards prescribed in regulations by the Board;
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> if such refusal is required by or made pursuant to such program.

For the standards prescribed by the Federal Reserve Board for special purpose credit programs see 42 Fed. Reg. 1242, 1256-57 (1977) (to be codified in 12 C.F.R. § 202.8).

age, and public assistance benefits, if any, are permissible for limited purposes. A creditor may request marital status in order to determine his rights and remedies[24] where an application is for other than individual unsecured credit.[25] Inquiries concerning age and receipt of public assistance may be made in order to evaluate credit history, the probable amount and continuance of income, or other pertinent elements of creditworthiness.[26] While Congress wanted to ensure that an applicant would not automatically be rejected on the basis of age or receipt of public assistance benefits, it recognized that these two factors do bear on creditworthiness and should not be summarily excluded from the credit-granting

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24. 15 U.S.C.A. § 1691(b)(1) (Supp. 1977).

25. 42 Fed. Reg. 1242, 1254 (1977) (to be codified in 12 C.F.R. § 202.5(d)(1)). For an individual, unsecured account, a creditor may request the applicant's marital status if the applicant resides in a community property state or if property upon which the applicant is relying as a basis of repayment is located in a community property state. *Id.*

26. 15 U.S.C.A. § 1691(b)(2) (Supp. 1977). The Federal Reserve Board has defined "pertinent element of creditworthiness" in a judgmental system of evaluating applicants as: "any information about applicants that a creditor obtains and considers and that has a demonstrable relationship to a determination of credit-worthiness." 42 Fed. Reg. 1242, 1253 (1977) (to be codified in 12 C.F.R. § 202.2 (y)).

Age may be used as a variable in any "empirically derived credit system" which is "demonstrably and statistically sound," so long as the age of an elderly applicant is not assigned "a negative factor or value." 15 U.S.C.A. § 1691(b)(3) (Supp. 1977). For definitions of "empirically derived credit system," "demonstrably and statistically sound," and "negative factor or value" see 42 Fed. Reg. 1242, 1253 (1977) (to be codified in 12 C.F.R. § 202.2).

The age of an elderly applicant may always be used in favor of extending him credit. 15 U.S.C.A. § 1691(b)(4) (Supp. 1977). In any case, where age is used as a variable in a credit-scoring system, an elderly applicant may not receive fewer points for age than are assigned to the class of applicants most favored on the basis of age. 42 Fed. Reg. 1242, 1253 (1977) (to be codified in 12 C.F.R. § 202.2(v)). *See id.* at 1243 (explanatory material accompanying Reg. B, Section 202.2(v)).

Many creditors, especially large creditors, use a credit scoring system to evaluate applications. Such a system generally consists of "an allocation of points to characteristics of the applicant, the total number of points depending on how that applicant compares to a statistical sampling of previous applicants with similar credentials." S. REP. No. 589, *supra* note 1, at 6. Creditor witnesses testifying at congressional hearings vigorously supported the credit scoring concept and urged Congress to permit the use of age in such a system. *See, e.g., Equal Credit Opportunity Act Amendments of 1976, Hearings on H.R. 3386 Before Subcomm. on Consumer Affairs of House Comm. on Banking, Currency and Housing*, 94th Cong., 1st Sess. 85-95 (Apr. 22 & 23, 1975) (testimony of Richard Cremer, Assistant Corporate Credit Manager, Montgomery Ward). According to Mr. Cremer, Montgomery Ward gives higher scores to older applicants because "our statistical analysis demonstrates there is close correlation between the older age levels and good credit risks." He further stated that elimination of the age factor from Ward's credit scoring system would substantially increase their bad debt losses, "adding to the cost of providing consumer credit." *Id.* at 94.

process. For example, an elderly applicant[27] who is close to retirement might not qualify for a loan if his future income will not justify the extension of credit.[28] Likewise a recipient of public assistance might not qualify for a loan where his income is low or marginal. If, however, public assistance income, either alone or in conjunction with other income, meets the creditor's usual standards, credit may not be denied because of the source of the income.[29]

The Federal Reserve Board has interpreted the Amendments to prohibit discrimination against applicants because of the race, color, religion, national origin, sex, marital status or age of persons with whom the applicant associates.[30] Thus, not only is it impermissible for a creditor to consider the applicant's race, it is also impermissible for him to consider the race of partners or officers of the applicant, that of individuals who may be associated with the applicant in connection with the purpose of the extension of credit (for example, the prospective tenants in an apartment complex to be constructed with the loan proceeds), or the race of individuals residing in the neighborhood in which the collateral is located.[31]

Effects Test

In addition to proscribing intentional discrimination, the amended Act may be interpreted as prohibiting actions that have the *effect* of discriminating against applicants of any protected class. The legislative history indicates that Congress intends for cases interpreting equal employment legislation, specifically *Griggs v. Duke Power Company*[32] and *Albemarle Paper Company v. Moody*,[33] to serve as guides in the application of the Equal Credit Opportunity Act—especially with respect to the allocation of

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27. The amended regulation defines "elderly" as 62 years of age or older. 42 Fed. Reg. 1242, 1253 (1977) (to be codified in 12 C.F.R. § 202.2(o)).

28. S. Rep. No. 589, *supra* note 1, at 5.

29. *Id.* For a further discussion of how age and receipt of public assistance benefits may affect the credit decision see 42 Fed. Reg. 1242, 1255 (1977) (to be codified in 12 C.F.R. § 202.6, n. 9).

30. 42 Fed. Reg. 1242, 1253 (1977) (to be codified in 12 C.F.R. § 202.2, n. 3). This interpretation is contained in a footnote to Regulation B, but the Regulation states that footnotes are to have the same legal effect as the text of the Regulation. *Id.* at 1253 (to be codified in 12 C.F.R. § 202.2(dd)).

31. *Id.* at 1253 (to be codified in 12 C.F.R. § 202.2 n. 3). This interpretation closely parallels the actual language used in the section of the Fair Housing Act which deals with housing credit. *See* 42 U.S.C. § 3605 (Supp. V 1975). Congress has specified that a person discriminated against in the area of housing credit may elect to recover under either the Equal Credit Opportunity Act or the Fair Housing Act. *See* 15 U.S.C.A. § 1691e(i) (Supp. 1977).

32. 401 U.S. 424 (1971).

33. 422 U.S. 405 (1975).

burden of proof.[34] In *Griggs* the Supreme Court enunciated what has come to be known as the "effects test." In that case the Court was deciding whether an employer's requirement of a high school diploma and a satisfactory score on two aptitude tests violated Title VII of the Civil Rights Act of 1964 since it operated to disqualify black job applicants at a substantially higher rate than white applicants. The Court held that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[35] Thus a violation may occur even when there is no intent to discriminate.[36] Once a requirement for employment or promotion is shown to be discriminatory in effect, the burden shifts to the employer to show that such requirement has a "manifest relationship" to the job in question.[37] If the effects test is applied to the credit industry, any procedure or standard used by a creditor which results in the denial of credit to a class of persons protected under the Act at a substantially higher rate than persons not of that class may be a violation of the Act, unless the creditor can establish that such procedure or standard has a manifest relationship to creditworthiness. If *Albemarle,* another employment case, is applied to the credit area, the burden of proof shifts to the applicant to show that the creditor could have as effectively used a less discriminatory standard to evaluate creditworthiness. Where such showing is made and is not rebutted by the creditor, a violation of the Equal Credit Opportunity Act may be found to exist.[38]

The Board of Governors of the Federal Reserve System applied the effects test in its promulgation of section 202.6(b)(4) of Regulation B.[39] This provision prohibits creditors from considering the existence of a telephone listing in the applicant's own name as a factor in the credit judgment. Because married couples customarily have their telephone listed in the husband's name only, the Board found that the practice of "[a]ssigning a value to the existence of a telephone listing in the applicant's own name was . . . fair in form but discriminatory in operation."[40] The Federal Reserve Board has refrained, however, from including in the Regulation detailed guidelines on the effects test or a list of prohibited practices, since

34. S. REP. No. 589, *supra* note 1, at 4-5; H.R. REP. No. 210, 94th Cong., 1st Sess. 5 (1976).

35. 401 U.S. at 431.

36. "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Id.* at 432.

37. *Id.*

38. 422 U.S. at 425.

39. 42 Fed. Reg. 1242, 1255 (1977) (to be codified in 12 C.F.R. § 202.6(b)(4)).

40. Geary, *Equal Credit Opportunity—An Analysis of Regulation B,* 31 BUS. LAW. 1641, 1652 (1976).

the test is a judicial doctrine and as such is subject to re-interpretation or modification by the courts.[41]

When a violation of the Act is traced to the *effect* of a credit practice rather than to an actual intent to discriminate, the courts must decide whether punitive damages will be awarded. Here again, the employment cases are instructive. The issue in those cases is whether back pay will be awarded when discrimination is found to exist. Title VII authorizes an award of back pay "[i]f the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice."[42] By and large the courts have interpreted "intentional" as meaning a practice undertaken by an employer deliberately rather than accidentally[43] and have not considered the employer's motive. In doing so they have emphasized the compensatory aspect of back pay rather than the punitive aspect. In *Albemarle* the Supreme Court established a standard for denial of back pay based on its interpretation of congressional purpose in enacting Title VII.[44] The Court held that the denial of back pay to a plaintiff who successfully proves the existence of discrimination is proper only if such denial would not frustrate Title VII's dual objectives of eliminating discrimination in employment and compensating victims for economic losses suffered.[45] Under the Equal Credit Opportunity Act, only the goal of eliminating discrimination by forcing creditors to scrutinize carefully the fairness of their standards is served by the punitive damages provision. Compensation for any economic loss suffered is authorized under a separate provision for actual damages. The Act specifies five factors that should be considered by a court in determining the amount of punitive damages to be awarded.[46] One is the degree to which the creditor's violation was intentional. This section implies that a finding of intent may not be necessary in order to assess punitive damages. The issue of intent with respect to punitive damages will no doubt be a source of litigation, and its determination will affect the number of suits ultimately brought under the Act.

41. 63 FED. RES. BULL. 101, 107 (Feb. 1977).

42. 42 U.S.C. § 2000e-5(g) (Supp. V 1975).

43. *See* Note, *A Back Pay Award Standard: Albemarle Paper Company v. Moody*, 54 U.N.C. L. REV. 196, 200 (1976).

44. 422 U.S. at 421.

45. *Id.*

46. 15 U.S.C.A. § 1691e(b) (Supp. 1977) provides:

> In determining the amount of such punitive damages in any action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

Statement of Reasons

In one of the most important provisions, the Amendments establish for the first time in federal legislation the right of a rejected credit applicant to obtain a statement of reasons for the action taken against him.[47] A creditor may satisfy this requirement (1) by automatically providing statements of reasons in writing to applicants against whom adverse action is taken; or (2) by giving written notification of adverse action which discloses the applicant's right to a statement of reasons and the identity of the person or office from which such statement may be obtained.[48] The statement of reasons must identify specific grounds for the adverse decision.[49]

The requirement that creditors give a statement of reasons for adverse action is expected to serve a number of important functions. First, if a creditor knows he must explain his reason for denying credit, he may be less likely to discriminate. Second, the statement of reasons may serve to reduce misunderstanding and allay suspicion on the part of applicants. Third, the rejected applicant will be educated as to how his credit status is deficient. Fourth, in those cases where the creditor's decision was based on misinformation from a credit reporting bureau or on inadequate information in the credit application, the applicant will have a chance to rectify

47. *Id.* § 1691(d)(2) (Supp. 1977). The "adverse action" which triggers the obligation of providing a statement of reasons is defined as "a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested." *Id.* § 1691(d)(6). For a more detailed explanation of "adverse action" see 42 Fed. Reg. 1242, 1252 (1977) (to be codified in 12 C.F.R. § 202.2(c)).

48. 15 U.S.C.A. § 1691(d)(2)(A) and (B) (Supp. 1977); 42 Fed. Reg. 1242, 1257 (1977) (to be codified in 12 C.F.R. § 202.9(a)(2)). There was much debate on the issue of whether to require a written statement of reasons in every case of adverse action. Testimony from creditors indicated that significant costs would be involved in complying with such a blanket requirement, but this testimony was questioned by consumer representatives as being an overstatement of the costs. S. Rep. No. 589, *supra* note 1, at 8. In order to protect the small-volume creditor from being driven out of business by the costs of complying with this requirement, Congress provided that a creditor dealing in 150 or less applications a year may satisfy the obligation by giving a verbal statement or notification. 15 U.S.C.A. § 1691(d)(5) (Supp. 1977).

49. 15 U.S.C.A. § 1691(d)(3) (Supp. 1977). Section 202.9(b)(2) of Regulation B states:

> Statements that the adverse action was based on the creditor's internal standards or policies or that the applicant failed to achieve the qualifying score on the creditor's credit scoring system are insufficient.

42 Fed. Reg. 1242, 1257 (1977) (to be codified in 12 C.F.R. § 202). The Federal Reserve Board has provided a sample form for notification of adverse action with accompanying statement of reasons. *Id.*

such misinformation. And finally, the statement of reasons should aid in the enforcement of the Act by applicants and enforcement agencies.[50]

Enforcement Provisions

In addition to enlarging the substantive rights of credit applicants, the 1976 Amendments substantially strengthen the enforcement mechanism of the Act. Responsibility for enforcing the Act is divided among twelve federal agencies.[51] This administrative enforcement of the Act is augmented by a provision for private enforcement, both on an individual and a class action basis.[52] In order to educate the members of the public as to the existence of the Act and their rights under it, Regulation B requires creditors to provide each credit applicant with a statement explaining the Act's prohibition against discrimination and identifying the appropriate enforcement agency.[53] An aggrieved applicant may bring an action under the Equal Credit Opportunity Act in federal district court without regard to the amount in controversy or in any other court of competent jurisdiction.[54] If he is successful in enforcing liability, the applicant will receive the costs of the action and reasonable attorney's fees in addition to any damages awarded.[55]

The amended Act authorizes the Attorney General to institute actions upon referral from any of the agencies having enforcement responsibility or on his own initiative when he finds a "pattern or practice" of violations.[56] Further, both the Federal Reserve Board and the Attorney General are required to make annual reports to Congress concerning the adminis-

50. *See* 122 CONG. REC. S3067, H1709, H1710 (daily ed. Mar. 9, 1976) (remarks of Sen. Biden, Rep. Sullivan, and Rep. Abzug).

51. 15 U.S.C. § 1691c (Supp. V 1975). The enforcement agencies and the creditors for which they are responsible are: Comptroller of the Currency, national banks; Federal Reserve Board, state-chartered member banks; Federal Deposit Insurance Corporation, non-member insured banks; Federal Home Loan Bank Board, institutions subject to § 5(d) of the Home Owners' Loan Act of 1933, § 407 of the National Housing Act, and §§ 6(i) and 17 of the Federal Home Loan Bank Act; Securities and Exchange Commission, brokers and dealers; National Credit Union Administration, federal credit unions; Interstate Commerce Commission, common carriers; Civil Aeronautics Board, air carriers; Secretary of Agriculture, activities subject to the Packers and Stockyards Act; Farm Credit Administration, federal land banks, land bank associations, federal intermediate credit banks and production credit associations; Small Business Administration, small business investment companies; Federal Trade Commission, all other creditors.

52. 15 U.S.C.A. § 1691e(a) (Supp. 1977).

53. *See* 42 Fed. Reg. 1242, 1257 (1977) (to be codified in 12 C.F.R. § 202.9(a)(2) and (b)(1)).

54. 15 U.S.C.A. § 1691e(f) (Supp. 1977).

55. *Id.* § 1691e(d).

56. *Id.* § 1691e(h).

tration of their functions under the Act and to make such recommendations as they deem necessary. The Board must also assess the extent to which compliance is being achieved and summarize the actions taken by each of the enforcement agencies.[57]

The Amendments extend the statute of limitations for bringing an action from one to two years. Moreover, any applicant who has been a victim of discrimination which is the subject of a proceeding brought within the statutory period by the Attorney General or an enforcement agency may bring an action up to one year after commencement of the government action.[58] This provision allows sufficient time for individual applicants to bring a private action when, through publicity surrounding the government's action, they learn of a potential violation affecting them.

A creditor who fails to comply with any requirement under the Act is liable to the aggrieved party for any actual damages sustained and for punitive damages up to $10,000.[59] Congress provided punitive damages as an incentive for bringing suit since experience with truth-in-lending litigation has shown that actual damages sustained in credit transactions are difficult to prove.[60] The Amendments raise the ceiling for a class action recovery from the original formula of the lesser of $100,000 or 1% of the creditor's net worth to the lesser of $500,000 or 1% of the creditor's net worth.[61]

Under the original Act, an aggrieved credit applicant was forced to elect between pursuing his federal remedies and any remedies that might be available to him under state law. The amended Act requires an election of remedies only with respect to the recovery of money damages. An aggrieved applicant may sue for damages under state or federal law, but not both.[62] At the same time he is free to pursue administrative, injunctive or declaratory relief under federal or state law. The narrower provision substituted by the Amendments appears to be a much better approach. Clearly

57. *Id.* § 1691f.

58. *Id.* § 1691e(f).

59. *Id.* § 1691e(b).

60. Geary, *supra* note 40, at 1643.

61. 15 U.S.C.A. § 1691e(b). The class action ceiling was probably the most controversial issue before Congress. The Federal Reserve had originally proposed a ceiling formula of $50,000 or 1 per cent of a creditor's net worth, whichever was *greater*. This formula was rejected by the Senate in 1974 and by the House Committee in 1975. It was pointed out by some congressmen that a $50,000 liability would destroy many small businesses while a 1 per cent limit for a large firm might be no limitation at all. *E.g.*, "For example 1 per cent of Exxon's net worth is $137,176,900.00. Bank of America's 1 per cent is $18,000,000.00 . . . ." S. REP. No. 589, *supra* note 1, (additional views of Sen. Garn) at 23.

62. 15 U.S.C.A. § 1691d(e) (Supp. 1977).

an aggrieved person should not be able to collect damages twice for the same conduct. On the other hand, the use of such state procedures as mediation of disputes[63] between consumers and creditors is encouraged by not foreclosing the consumer's federal remedies.

REGULATION B

An amended version of Regulation B has been formulated by the Federal Reserve Board to implement the Amendments as well as the original Act.[64] There is no doubt that Regulation B has had a pervasive effect on the credit-granting process.[65] There has been a great deal of cost involved in bringing credit procedures into compliance.[66] Creditors have had to revise their application forms to comply with technical requirements of the Regulation.[67] They have had to educate their personnel as to what inquiries may no longer be made and what information may no longer be considered in evaluating an application.[68] Regulation B also has affected recordkeeping[69]

63. *See Equal Credit Opportunity Act Amendments of 1976, Hearings on H.R. 3386 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Currency and Housing*, 94th Cong., 1st Sess. 29 (1975).

64. 42 Fed. Reg. 1251 *et seq.* (1977) (to be codified in 12 C.F.R. § 202). The amended version of Regulation B became effective on Mar. 23, 1977.

65. *See* Geary, *supra* note 40. For a criticism of Regulation B from the creditor's viewpoint see Mortimer, *A Creditor's Preliminary Look at Regulation B*, 93 BANKING L.J. 417 (1976).

66. According to a Paperwork Survey compiled by the Consumer Bankers Association in August, 1976, the average institution has had to spend $2,750 in attorney's fees to revise its forms to comply with Regulation B. One of the institutions surveyed, Wells Fargo Bank, San Francisco, Calif., had to destroy 1,300,000 forms at a cost of $45,000. The survey showed that the cost of bringing procedures into compliance with Regulation B is $6.75 per application accepted, $9.68 per application rejected. Telephone conversation with Drew Tidwell, Legislative Counsel, Consumer Bankers Association (October 19, 1976).

The amended Regulation provides that creditors may continue to use any application form that complies with the requirements of the October 28, 1975, version of Regulation B until its present stock of those forms is exhausted or until March 23, 1978, whichever occurs first. 42 Fed. Reg. 1242, 1255 (1977) (to be codified in 12 C.F.R. § 202, n. 6).

67. *See, e.g.*, 42 Fed. Reg. 1242, 1255 (1977) (to be codified in 12 C.F.R. §§ 202.5(d)(1) and (3)). All references to sex must now be eliminated; it must be conspicuously indicated that any designation of a courtesy title (such as Mr., Mrs., Ms., or Miss) is optional; only the terms "married," "unmarried," or "separated" may be used to describe marital status.

68. *See, e.g.*, *Id.* at 1255 (to be codified in 12 C.F.R. §§ 202.5(d)(4) and 202.6(b)(5)). Inquiries into birth control practices and childbearing intentions and capability may no longer be made; and income may no longer be discounted on the basis of sex or marital status. A 1971 survey of the lending policies of savings and loan associations conducted by the Federal Home Loan Bank Board revealed that only 22% of the banks would allow full credit for a working wife's income if she was age 25, had 2 school-age children, and worked full-time as a secretary; 25% reported that they would count none of her income; 63% said they would count 50% or less of her income. *Hearings Before the National Commission on Consumer Finance* at 3 (1972) (testimony of J. McElhone).

69. 42 Fed. Reg. 1242, 1261 (1977) (to be codified in 12 C.F.R. § 202.12).

and credit reporting[70] procedures employed by creditors.

The Effect of State Property Laws in Virginia

One provision of Regulation B of particular concern to creditors is section 202.7(d), which provides when the signature of an applicant's spouse may be required. The importance of this section stems from the existence of a number of state property laws which affect the availability of a married person's property to satisfy his or her debts in the event of default. Two examples of such laws which exist in Virginia are (1) the ownership of property by husband and wife as tenants by the entirety[71] and (2) a wife's dower interest in property owned by her husband.[72]

Unless joint application is made, a creditor may not require the signature of an applicant's spouse, or of any other person, if the applicant meets

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A cost/benefit study of the Equal Credit Opportunity Act estimates the initial start-up cost for complying with the Act to be $165.8 million, with an annual recurring cost of $127.5 million. Telephone conversation with James F. Smith, formerly Senior Economist, Management and Consumer Finance Section, Federal Reserve Board (April 27, 1977). For a more detailed discussion see Smith, *The Equal Credit Opportunity Act of 1974: A Cost/Benefit Analysis*, 32 J. FIN. 609 (May 1977).

According to Mr. Smith the additional costs of complying with the 1976 Amendments will be generated primarily by § 202.9 of Regulation B dealing with notification and § 202.12 dealing with record retention. § 202.9 will add an estimated $9 million of compliance cost simply in notifying rejected credit applicants of the adverse action taken. This figure is based on the cost of a 13¢ stamp and a 2-1/2¢ form times 57.25 million rejected credit applicants per year. If 10% of these rejected applicants should request a statement of reasons (assuming the statement did not accompany the notification), this would increase the notification cost by approximately $12 million. This figure is based on a $2 payroll cost, plus a 13¢ stamp and a 2-1/2¢ form. § 202.12 which increases the mandatory period for retention of records from 15 months to 25 months will add approximately $7.6 million to the cost of complying with Regulation B for storage of rejected applications. Address by James F. Smith, *Equal Credit Opportunity Act: Revisited*, Columbia University Alumnae Consumer Credit Management Conference at Arden House, Harriman, N.Y. (Jan. 26, 1977).

70. 42 Fed. Reg. 1242, 1260 (1977) (to be codified in 12 C.F.R. § 202.10).

71. Tenancy by the entirety is a form of concurrent ownership of property which may only exist between husband and wife. Like a joint tenancy, it may be created only where the four unities of time, title, interest, and possession are present. In other words, the tenants must have one and the same interest accruing from one and the same instrument, beginninng at one and the same time, and held by one and the same undivided possession. When one tenant by the entirety dies, his or her interest passes by operation of law to the survivor. 2 MINOR ON REAL PROPERTY §§ 839, 853, and 953 (2d ed. 1928). To ensure that an estate by the entirety is created in Virginia it is essential that the deed or will mention survivorship. Allen v. Parkey, 154 Va. 739, 149 S.E. 615 (1929), *aff'd*, 154 Va. 749, 154 S.E. 919 (1930); VA. CODE ANN. § 55-21 (Repl. Vol. 1974).

72. A surviving wife is entitled to a dower interest which equals a fee simple estate in one-third of all the real estate of which her husband was beneficially seised during coverture of an estate of inheritance. VA. CODE ANN. § 64.1-19 (Cum. Supp. 1977).

the creditor's standards of creditworthiness for the amount and terms of credit requested.[73] A creditor may, however, require the spouse's signature on any instrument necessary, or reasonably believed to be necessary,[74] under state law to make available in the event of default either property relied upon to establish creditworthiness for an unsecured debt or property offered as security.[75] The question then becomes: what instruments are necessary in Virginia to insure access by a creditor to property of a married person which is held by the entirety or which is subject to a dower interest?

A wife's right to dower in the property of her husband is superior to debts contracted by him during the marriage.[76] Thus, land owned by the husband cannot be sold at judicial sale to satisfy a judgment lien free of the wife's dower interest.[77] This dower interest, whether inchoate or consummate, represents an encumbrance upon the property, making title to it unmarketable.[78] In order to insure access to such property, a creditor who relies on the property in extending unsecured credit should require that the wife join in the note. In the event of default, a judgment lien creditor could then institute a creditor's suit to have the land sold at judicial sale and have title conveyed by a special commissioner.[79] If both the husband and wife are made parties to the creditor's suit as joint debtors, the commissioner is authorized to convey title in both of their names, thereby extinguishing the wife's dower interest.[80]

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73. 42 Fed. Reg. 1242, 1256 (1977) (to be codified in 12 C.F.R. § 202.7(d)(1)).

74. The Federal Reserve Board has used the language "reasonably believed by the creditor to be necessary" in recognition of the difficulty of determining what instruments are legally required in some states to enable a creditor to reach property. *Id.* at 1247 (explanatory material accompanying Regulation B).

75. *Id.* at 1256 (to be codified in 12 C.F.R. § 202.7 (d)(2) and (4)).

76. 1 MINOR ON REAL PROPERTY § 319 (2d ed. 1928).

77. VA. CODE ANN. § 64.1-27 (Repl. Vol. 1973).

78. Ficklin's Adm'r v. Rixey, 89 Va. 832, 17 S.E. 325 (1893).

79. The conveyance after a judicial sale is usually made by a master or special commissioner appointed by the court for this purpose. LILE'S EQUITY PLEADING AND PRACTICE § 292 (3d ed. 1952).

80. A court of equity in a suit wherein it is proper to decree or order the execution of any deed or writing, may appoint a commissioner to execute the same; and the execution thereof shall be as valid to pass, release, or extinguish the right, title and interest of the party on whose behalf it is executed as if such party had been at the time capable in law of executing the same, and had executed it.

VA. CODE ANN. § 8-670 (Repl. Vol. 1957).

A husband and wife may join in a deed conveying real estate and such deed will operate as a release of the wife's dower rights therein. *Id.* § 55-41 (Repl. Vol. 1974). Where a commissioner executes a deed on their behalf, therefore, the same result should be accomplished.

The Federal Reserve Board has suggested the use of a *waiver* of dower rights wherever such an instrument would satisfy the requirements of state law.[81] It appears, however, that a bare waiver is not an acceptable method of releasing dower rights in Virginia. By statute[82] a married woman may dispose of her contingent right of dower by her sole act only where her husband has previously disposed of his interest in the real estate. The Virginia Supreme Court construing this statute in *Powell v. Tilson*,[83] quoted from Burks' Address on the Code of 1919[84] as follows:

> The extent of the power of a married woman over her contingent right of dower is somewhat doubtful under the law now in force. . . . The revision seeks to remove all doubt on this subject, and makes it clear that the wife cannot convey her contingent right of dower to any person whomsoever (which, of course, includes the husband) while the husband owns the real estate in question.[85]

Although the case was not decided on this point, it certainly supports the belief that a bare waiver is not sufficient to bar a married woman's dower rights in Virginia.

Where a married applicant seeks secured credit, however, and offers as security property in which his wife is entitled to dower, it is not necessary for the creditor to require the wife to sign the note itself. His interests are sufficiently protected by requiring the spouse to sign the mortgage or deed of trust securing the property.[86] Except in the case of a purchase money transaction,[87] if the husband alone were to execute a mortgage or deed of

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In the event that the husband should die prior to a judicial sale, causing the wife's dower interest to become consummate, such dower interest may be subjected to sale to satisfy a valid lien against the wife. *Id.* § 64.1-42 (Repl. Vol. 1973).

81. *See, e.g.*, 42 Fed. Reg. 1242, 1247 (1977) (explanatory material accompanying Regulation B); *Excerpt from FRB Letter of February 10, 1976, No. 47*, 5 CONS. CRED. GUIDE (CCH) ¶ 42,047.

82. VA. CODE ANN. § 55-40 (Repl. Vol. 1974).

There is no counterpart to this statute for curtesy, the interest a surviving husband takes in realty of which his wife was beneficially seised during coverture. *See id.* § 64.1-19 (Cum. Supp. 1977). Since the legislature has not limited the methods by which a husband may dispose of an inchoate curtesy right, presumably he may release this right in favor of his wife's creditor by written waiver.

83. 161 Va. 318, 170 S.E. 750 (1933).

84. 5 VA. L. REG. (n.s.) 97 (1919).

85. 161 Va. at 328-29, 170 S.E. at 754 (quoting from 5 VA. L. REG. (n.s.) 97, 109).

86. Hoy v. Varner, 100 Va. 600, 42 S.E. 690 (1902); VA. CODE ANN. § 64.1-28 (Repl. Vol. 1973).

87. *See* Gilliam v. Moore, 31 Va. (4 Leigh) 32 (1832). Where a vendor passes title to a purchaser and as part of the same transaction receives back a mortgage or deed of trust to secure the purchase price, the wife of the purchaser will take dower in the property subject

trust, the wife's dower rights would remain paramount to the rights of the mortgagee or trustee and anyone claiming under him.[88]

Where one spouse seeks unsecured credit relying on property held by the entirety, the creditor must require the signatures of both spouses on the debt instrument in order to make the property available in the event of default. The leading Virginia case[89] holds that the entirety is liable for the joint debts of both spouses, "[b]ut where a tenancy by the entirety in the fee simple is once created the property is completely immune from the claims of creditors against either husband or wife alone."[90] This evidently is true not only for real property but also for personal property,[91] such as stocks and bonds, held in the form of tenancy by the entirety.

This rule immunizing entirety property from the individual creditors of either husband or wife follows from the general principle that a creditor cannot subject to the payment of debts property which the debtor himself cannot voluntarily convey. Once an estate by the entirety has been created, neither spouse can sever it by his or her sole act or otherwise transfer any interest therein.[92]

Where one spouse applies for credit and offers as security property held by the entirety, the creditor's interest in the property is sufficiently protected by requiring the signature of the non-applicant spouse on the deed of trust[93] or security instrument[94] with a stipulation that recourse against the non-applicant spouse is limited to the security conveyed. It is not necessary to require that both husband and wife become personally liable

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to the trust or mortgage even if she has not joined in the instrument, since her husband is deemed to have only transitory seisin.

88. 1 MINOR ON REAL PROPERTY § 293 (2d ed. 1928).

89. Vasilion v. Vasilion, 192 Va. 735, 66 S.E.2d 599 (1951).

90. *Id.* at 740, 66 S.E.2d at 602.

91. *See* Moore v. Glotzbach, 188 F. Supp. 267 (E.D. Va. 1960) and Oliver v. Givens, 204 Va. 123, 129 S.E.2d 661 (1963). The courts in both of these cases held that proceeds from realty held by the entireties preserve their character as entirety property and therefore cannot be reached by the individual creditors of one spouse. Although the case dealt only with a derivative of realty, the court in *Oliver* stated "we . . . hold that in this State personal property as well as realty may be held by a husband and wife as tenants by the entireties." *Id.* at 126, 129 S.E.2d at 663.

For a discussion of tenancy by the entirety in personal property see Spies, *Property, Annual Survey of Virginia Law*, 49 VA. L. REV. 1651 (1963).

92. Vasilion v. Vasilion, 192 Va. 735, 740, 66 S.E.2d 599, 602 (1951).

93. *See* Hurst v. Williams, 157 Va. 124, 160 S.E. 24 (1931), which supports the proposition that a wife may put her own property up as security for the debts of her husband.

94. *See* VA. CODE ANN. §§ 8.9-105(1)(d), -112 (Repl. Vol. 1965) for the proposition that someone other than the debtor may own collateral securing a debt and that such person is not liable for the debt or for any deficiency after resale.

on the note in order for the creditor to reach the property on default. Unlike the situation discussed above with respect to an unsecured debt, the creditor who looks to security pledged by a husband and wife to satisfy a debt upon default is not using judicial process to reach property that cannot be voluntarily conveyed. A husband and wife certainly have a legal right to convey their joint interest in the entirety.[95]

The amended version of Regulation B clarifies when a creditor may require the signature of a spouse. Under the original Regulation the "necessary or reasonably believed to be necessary" standard for requiring the spouse's signature was applied only in the case of secured credit.[96] By extending this standard to unsecured credit granted in reliance on property and to unsecured credit in community property states as well as to secured credit,[97] the amended Regulation enables creditors to consider the effects of state property law on their rights and remedies as permitted by the Act.[98] Thus creditors are better able to protect themselves in the event of default. While allowing creditors to obtain the signature of an applicant's spouse may be criticized as eroding one of the goals of the Equal Credit Opportunity Act, *i.e.*, the availability of separate credit for married persons, such procedure is compelled by state laws which treat the property of married persons differently from that of unmarried persons. This is not to say that a creditor may always require the signature of a spouse where the applicant owns entirety property or property to which a dower interest may attach. The Regulation permits the creditor to require the spouse's signature only where reliance on such property is necessary to establish creditworthiness.[99] If the applicant's other assets justify granting the amount and terms of the requested credit and such credit would be granted to an unmarried applicant, then a creditor is not allowed to further insure his credit risk by requiring the signature of the spouse on any instrument. Furthermore, a creditor may not insist that a spouse sign any credit instrument to establish an applicant's creditworthiness where the applicant is willing and able to obtain the signature of a third party as co-signer or guarantor on the obligation.[100]

CONCLUSION

The Equal Credit Opportunity Act does not create a legal right to credit;

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95. Vasilion v. Vasilion, 192 Va. 735, 740, 66 S.E.2d 599, 602 (1951).
96. *See* 12 C.F.R. § 202.7 (1976).
97. *See* 42 Fed. Reg.1242, 1256 (1977) (to be codified in 12 C.F.R. § 202.7(d)).
98. 15 U.S.C.A. § 1691(b)(1) (Supp. 1977).
99. 42 Fed. Reg. 1242, 1256 (1977) (to be codified in 12 C.F.R. § 202.7(d)).
100. *Id.* (to be codified in 12 C.F.R. § 202.7(d)(5)).

it does, however, create a legal right of equal access to credit. The amended Act forces credit-granting institutions to apply the same standards to all classes of persons. By striking out at credit discrimination, this legislation protects the rights of individuals in an area that has been the subject of much abuse. One possible danger, however, lies in over-regulation. Creditors must be given the right to ascertain information which bears directly on creditworthiness. They must also be able to insure access to assets in the event of default. These are legitimate business purposes. If implementing regulations are overly restrictive, the credit-granting process may be so hobbled as to increase credit losses significantly. Such a result would necessitate either increased cost to all credit consumers or higher credit standards. This might exclude marginal credit risks, typically the disadvantaged, who previously could have obtained credit.[101] If creditors cannot obtain the information they need to evaluate applicants properly or if they are unable to facilitate access to assets to protect themselves in the event of default, they might turn away from the credit field and invest their funds elsewhere. Thus, it is incumbent upon the Federal Reserve staff in formulating regulations and issuing staff opinions and upon the courts in interpreting the Act and Regulation B to consider carefully the problems facing both creditors and credit applicants. It would indeed be unfortunate if an Act whose purpose was to promote the availability of credit were to result in making credit less available.

Judith B. Henry

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101. *Equal Credit Opportunity Act Amendments of 1976, Hearings on H.R. 3386 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Currency and Housing*, 94th Cong., 1st Sess. 23 (1975).