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The Equal Credit Opportunity Act: A Functional Failure

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The Equal Credit Opportunity Act was enacted in 1974 as (1) a consumer protection statute designed to provide accurate information to and about consumers involved in credit transactions, and (2) an antidiscrimination statute designed to shield protected classes of consumers from discrimination in the granting of credit. The Federal Reserve Board promulgated regulations to further these statutory goals. Congress intended that the Act would be enforced through both private litigation and public compliance programs. Few private lawsuits have been brought under the Act, however, and public enforcement efforts have neither checked credit discrimination nor halted perpetuation of prior discrimination.

Professor Matheson believes that courts, government enforcement agencies, and consumers should focus on substantive (rather than procedural) violations of the Act and its implementing regulations. The Act should be amended to allow for a minimum damage recovery for successful plaintiffs. The definition of "adverse action" in the regulations should be amended to acknowledge that credit granted on different terms than those requested by an applicant may indicate illegal discrimination. Detailed statistical information must be kept by credit-granting institutions and made available to private litigants and government enforcement agencies to assist them in identifying and eliminating credit discrimination. Professor Matheson believes that these changes will help create a statutory and regulatory framework that will promote better compliance by creditors with the Act's provisions and enhance enforcement efforts by both private parties and public agencies.

In 1974, Congress passed the Equal Credit Opportunity Act (hereinafter ECOA or the Act) to ensure that "financial institutions and other firms engaged in the extension of credit make that credit equally available to all creditworthy customers without regard to sex or marital status." Two years later, Congress expanded the ECOA to prohibit credit discrimination based on race, color, national origin, age, receipt of public assistance income, or the exercise in good faith of the rights guaranteed under the Consumer Credit Protection Act. The ECOA was

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instantly hailed as a watershed in the battle to provide knowledge about and accessibility to credit.4

The Equal Credit Opportunity Act serves two purposes.5 First, like other credit legislation such as the Truth in Lending Act6 and the Fair Credit Reporting Act,7 the ECOA is a consumer protection statute designed to provide accurate information to or about consumers involved in credit transactions. Second, the ECOA is an antidiscrimination statute like the Equal Employment Opportunity Act.8 The ECOA assumes that consumer credit is a positive and necessary aspect of our economy to which all qualified applicants should have equal access;9 compliance with the procedural directives of ECOA does not always guarantee freedom from liability, unlike compliance with the provisions of the Truth in Lending Act.10

This Article demonstrates how the Equal Credit Opportunity Act, through a combination of its explicit provisions and unperceived flaws, has been a functional failure in combating credit discrimination. Part I presents a brief overview of the statute and its implementing regulation. Part II examines the Act’s dual enforcement mechanism of public compliance programs and pri-

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9 Credit has ceased to be a luxury item, either for consumers or for business entrepreneurs. Consumer credit outstanding continues to grow at a phenomenal pace and now stands slightly below $200 billion, not even counting 1–4 family mortgage credit which would add more than $400 billion to that total. Virtually all home purchases are made on credit. About two-thirds of consumer automobile purchases are on an installment basis. Large department stores report that 50% or more of their sales are on revolving or closed-end credit plans. Upwards of 15% of all consumer disposable income is devoted to credit obligations other than home mortgages.

In this circumstance the Committee believes it must be established as clear national policy that no credit applicant shall be denied the credit he or she needs and wants on the basis of characteristics that have nothing to do with his or her creditworthiness. The Committee readily acknowledges that irrational discrimination is not in the creditor’s own best interests because it means he is losing a potentially valuable and creditworthy customer. But, despite this logical truth, the hearing record is replete with examples of refusals to extend or to continue credit arrangements for applicants falling within one or more of the categories addressed by this bill.

vate litigation. The dearth of private lawsuits brought under the Act and reasons for their absence is examined in Part III. Part IV describes how public enforcement efforts under the Act have neither acted as an independent check on discrimination nor provided the impetus to halt perpetuation of prior discrimination. Part V considers several fundamental policy issues affected by the ECOA that to date have escaped judicial consideration. Finally, Part VI suggests several amendments needed to institute effective enforcement of the Act.

I. OVERVIEW OF THE ACT AND REGULATION B

Credit has become a functional substitute for cash in our economy, and consequently credit decisions can greatly influence an individual's economic choices. The Equal Credit Opportunity Act was adopted after a study revealed that creditors, including banks, credit card issuers, credit unions, and small businesses, were unjustly denying credit to members of certain groups, such as racial minorities and women. The ECOA attempts to lessen some of the private sector’s control over individual purchasing power by seeking to correct the inaccurate use of stereotypes and to promote wider availability of credit by prohibiting use of those stereotypes in credit decisions.

The statute and its implementing Regulation B cover all phases of a credit transaction. Regulation B identifies and

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12 The general rule and fundamental proscription of the ECOA’s implementing regulation is that “[a] creditor shall not discriminate against an applicant on a prohibited basis regarding any aspect of a credit transaction.” 12 C.F.R. § 202.4 (1983). The critical terms are defined in the Act or in the regulations, including “discriminate,” which is defined as “to treat an applicant less favorably than other applicants.” Id. § 202.2(n).
13 12 C.F.R. § 202.2(m) (1983). The transaction, however, must involve “credit,” which is defined as “the right granted by a creditor . . . to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment therefor.” 12 C.F.R. § 202.2(j) (1983). “Creditor” is defined in Regulation B as

A person who, in the ordinary course of business, regularly participates in the decision of whether or not to extend credit. The term includes a creditor’s assignee, transferee, or subrogee who so participates. For purposes of §§ 202.4 and 202.5(a), the term also includes a person who, in the ordinary course of business, regularly refers applicants or prospective applicants to creditors, or selects or offers to select creditors to whom requests for credit may be made. A person is not a creditor regarding any violation of the Act or this part committed by another creditor unless the person knew or had reasonable notice of the act, policy, or practice that constituted the violation before its involvement with the credit transaction. The term does not include a person whose only participation in a credit transaction involves honoring a credit card.

addresses in detail various phases of the credit-granting procedure, with particular focus on the application process, the evaluation process, and the reporting of reasons for adverse action. Regulation B prohibits a creditor from requesting any information with respect to certain applicant characteristics. By limiting several classes of transactions are exempted from many of Regulation B's procedural and technical restrictions on the credit process. Section 202.3 lists these exemptions, which include credit relating to public utilities, securities transactions, incidental consumer credit, extensions of credit primarily for business or commercial purposes, and governmental credit. 12 C.F.R. § 202.3(a)-(f) (1983). Though these areas remain susceptible to the general ban on discrimination in § 202.4, § 202.3 effectively provides that unsuccessful credit applicants can bring suit for technical violations of the Act only in cases involving individual consumer credit.

14 Several classes of transactions are exempted from many of Regulation B's procedural and technical restrictions on the credit process. Section 202.3 lists these exemptions, which include credit relating to public utilities, securities transactions, incidental consumer credit, extensions of credit primarily for business or commercial purposes, and governmental credit. 12 C.F.R. § 202.3(a)-(f) (1983). Though these areas remain susceptible to the general ban on discrimination in § 202.4, § 202.3 effectively provides that unsuccessful credit applicants can bring suit for technical violations of the Act only in cases involving individual consumer credit. 15 12 C.F.R. § 202.5(d) (1983). Problems arise when the regulations allow the same information to be used for one purpose, yet attempt to restrict its use for another purpose. It is relatively easy to preclude use of race in a credit determination when the creditor has no information about an applicant's race. It is much more difficult to control the use of that information once it has been obtained. Regulation B somewhat wishfully provides that a creditor may consider in evaluating an application any information that the creditor obtains as long as that information is not used to discriminate against an applicant on a prohibited basis. For example, a creditor is prohibited from asking an applicant's race for purposes of credit evaluation, id. § 202.5(d)(5), but is required to obtain information concerning race in certain transactions for purposes of monitoring the Act's effectiveness. Id. §§ 202.5(b)(2), 202.13(a). Although a credit-evaluation inquiry into race is prohibited, id. § 202.5(d)(5), that same provision allows inquiry into the applicant's immigration status. Most strikingly, although the Act declares that age discrimination is unlawful, it permits a creditor to consider the age of an elderly applicant, if the applicant's age is used by the creditor in the applicant's favor. Id. § 202.6(b)(2)(iv).

A creditor may not inquire into an applicant's sex, id. § 202.5(d)(3); it may, however, indirectly obtain information regarding an applicant's sex from the applicant's first name or the applicant's use of an optional title such as Ms. or Mrs. Information about birth control practices or intent to bear children may not be elicited, but a creditor may request the number of an applicant's dependents. Id. § 202.5(d)(4). A creditor may request an applicant's marital status only if the application is for other than individual unsecured credit. Id. § 202.5(d)(1). A creditor may not inquire into whether an applicant's income is derived from alimony, child support or separate maintenance, unless the applicant is informed that such income need not be revealed and the applicant wants it to be considered in determining creditworthiness. Id. § 202.5(d)(2). As a practical matter, a woman who receives sporadic alimony or child support payments may be caught between conflicting implications of the Act. If she asks the creditor to consider this income, she may be denied credit because of another's history of irregular payment or poor credit rating rather than because of her own character and capacity to repay. Yet, if she chooses to withhold information regarding these payments from the creditor, she risks being denied credit because of insufficient income.

Sometimes the specific rules in the regulations concerning use of information establish subtle distinctions between permissible and impermissible uses of the same information. For example, a creditor cannot take into account the existence of a telephone listing in the applicant's name, but can consider whether there is a telephone in the applicant's home. Id. § 202.6(b)(4). Part-time income and support payments cannot be disregarded, but the creditor may subjectively determine the likelihood that such income will continue. Id. § 202.6(b)(5). These distinctions isolate and ban creditor practices that, in the instances cited above, tend to discriminate against women whose phone is listed in their husband's name, who can only work part-time because of family obligations, or who have little control over the regularity with which they receive support payments. Such subtlety, however, may work against Regulation B's objective of clarifying what is acceptable creditor behavior in application evaluation.
iting the collection of this information, Regulation B aims to prevent creditors from basing credit decisions on improper assumptions.

Regulation B is also designed to assist applicants in identifying and enforcing their rights. A creditor has an affirmative duty to inform an unsuccessful applicant of her right to request a statement of the reasons she was denied credit, and to furnish those reasons to the applicant upon her request. The creditor must also provide the applicant with a statement of the ECOA’s purpose and the name of the governmental agency that enforces the Act in that particular transaction.

II. THE DUAL ENFORCEMENT MODEL

The ECOA employs a dual enforcement model in seeking to achieve its goal of ensuring the widest possible access to credit. Compliance with the ECOA is enforced both by government agencies and through private litigation. The Act authorizes the Federal Reserve Board to prescribe regulations to clarify and amplify specific statutory provisions in light of its legislative purpose, although overall administrative enforcement of the Act rests with the Federal Trade Commission, with limited authority delegated to eleven other federal agencies.

16 12 C.F.R. § 202.9 (1983). See generally Taylor, Meeting the Equal Credit Opportunity Act’s Specificity Requirement: Judgmental and Statistical Scoring Systems, 29 BUFFALO L. REV. 73, 81-90 (1980). Regulation B provides a creditor with the option of formulating its own statement of reasons for adverse action on an application. Section 202.9(b)(2) of Regulation B also contains a form prepared by the Federal Reserve Board as a sample statement of reasons for adverse action as a model for creditors to follow. Where a credit scoring system is used, no particular method is required in selecting the reasons provided for rejection, and no particular number of reasons must be disclosed. The Federal Reserve Board has stated, however, that disclosure of more than four reasons is not likely to be helpful to the applicant. 12 C.F.R. § 202.901(d) (1983).

17 12 C.F.R. § 202.9(b) (1983).


19 The enforcement agencies and the creditors for which they are responsible are the following: 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, 12 U.S.C. § 1464(d) (1982), § 407 of the National Housing Act, 12 U.S.C. 1730 (1982), and §§ 6(i) and 17 of the Federal Home Loan Bank Act, 12 U.S.C. §§ 1426(i), 1437 (1982); 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, 7 U.S.C. §§ 181-229 (1982)); Farm Credit Administration (federal land banks, land bank associations, federal intermediate credit banks and production credit associations); Small Business
Critics claimed that the enforcement provisions of the 1974 Act were inadequate.\textsuperscript{20} Enforcement by the Federal Trade Commission was limited to the issuance of cease and desist orders against noncomplying creditors,\textsuperscript{21} while damage actions were left to private litigation. Furthermore, punitive damages of up to $10,000 in an individual action and the lesser of $100,000 or one percent of the creditor's net worth in a class action\textsuperscript{22} were believed to be insufficient.

In response to these criticisms, the 1976 amendments, while retaining the dual enforcement framework, significantly strengthened the compliance provisions of the Act. A new section was added authorizing the United States Attorney General to institute civil proceedings in two circumstances. First, any of the twelve administrative agencies responsible for enforcement of the Act could refer matters to the Attorney General for litigation. Second, the Attorney General could independently commence civil proceedings when deemed necessary to prohibit or remedy a pattern of pervasive discrimination.\textsuperscript{23} Private enforcement was bolstered by raising the ceiling of potential recovery of punitive damages in class actions to the lesser of $500,000 or one percent of the creditor's net worth.\textsuperscript{24} Addition-
ally, a Consumer Advisory Council was established to render advice to the Federal Reserve Board concerning the Act and other related matters.25

As amended, the Equal Credit Opportunity Act appeared to be an imposing piece of antidiscrimination legislation. Commentators anticipated a substantial increase in administrative activity and litigation, as toughened public and private enforcement mechanisms combined to promote compliance with the Act.26 The intervening years, however, have produced only a few public enforcement actions and a trickle of litigation.

III. UNDERSTANDING THE PAUCITY OF PRIVATE LITIGATION

Congress intended that private actions would provide the bulwark of enforcement for violations of the ECOA.27 The ECOA has spawned surprisingly little litigation, however, for a statute promising to revolutionize the credit industry. Fewer than fifty cases have been reported under the statute in the decade since its enactment,28 less than the number brought under the Truth in Lending Act in an average month,29 and far less than the number of employment cases filed in an average week under Title VII.30 In spite of this dearth of private actions, the Federal

28 A LEXIS search for ECOA cases (GEN FED and STATES libraries) identified 77 decisions citing the ECOA. Of these, only 48 involve actual cases based in whole or part on the Act. See also 1981 ATT’Y GEN. REP. TO CONGRESS PERSUANT TO THE EQUAL CREDIT OPPORTUNITY ACT AMENDMENTS OF 1976, at 4 (“Although the Equal Credit Opportunity Act [Amendments] have now been in effect for more than five years, we know of only 29 private cases being brought under it.”); M. GREENFIELD, CONSUMER TRANSACTIONS 214 (1983) (“From 1975 through 1980 consumers filed fewer than thirty cases to enforce their rights under the ECOA.”).
29 Cf. F. MILLER & B. CLARK, CASES AND MATERIALS ON CONSUMER PROTECTION 199 (1980) (“There have been to date some 14,000 lawsuits” under TILA, enacted in 1968).
30 Over 8,000 discrimination suits were filed in federal courts in 1983, a weekly average of over 150. 115 LAB. REP. (BNA) 116 (1984) Over 47,000 charges were filed with the EEOC in 1973, and the Commission in 1972 took informal action in 2,800 cases and closed 970 cases after a formal decision. MARSHALL, KNAPP, LEGGETT & GLOVER, EMPLOYMENT DISCRIMINATION: THE IMPACT OF LEGAL AND ADMINISTRATIVE REM-
Reserve Board discovered over 17,000 violations of the Act during routine bank examinations over one eighteen-month period.\textsuperscript{31}

The paucity of private litigation under the ECOA may discourage potential plaintiffs from bringing credit discrimination suits because they believe they only have a slim chance of prevailing. Furthermore, the small number of cases brought may cause legislators or administrators to overestimate the statute’s effectiveness as a regulatory device. Although startling, the lack of litigation under the Act is readily explainable as a result of certain provisions of the Act and Regulation B, combined with the nature of the credit market.

A. The Strictures of the Statute and Regulation B

It is easy to see why the Act and its implementing regulations have chilled private enforcement. First, there is no minimum statutory recovery under the Equal Credit Opportunity Act.\textsuperscript{32} Existence of a statutory minimum is especially important in discrimination cases, because actual damages are often speculative.\textsuperscript{33} Congress recognized this in the Truth in Lending Act, under which a creditor is liable for a minimum of $100 in addition to court costs, legal fees and actual damages.\textsuperscript{34}

Second, the Act’s provisions regarding notice of adverse action\textsuperscript{35} do little to encourage private enforcement. In amending the Act, Congress had to decide whether written notification of


\textsuperscript{33} Several courts have held that mental distress, humiliation, and embarrassment are cognizable “actual damages” under the Act even though no out-of-pocket loss resulted. See Anderson v. United Finance Co., 666 F.2d 1274, 1277 (9th Cir. 1982); Sayers v. General Motors Acceptance Corp., 522 F.Supp. 835, 841 (W.D. Mo. 1981); Owens v. Magee Finance Service, Inc., 476 F. Supp. 758, 770 (E.D. La. 1979); Shuman v. Standard Oil Co. of California, 453 F.Supp. 1150, 1153 (N.D. Cal. 1978). An award of punitive damages under the Act, while not dependent on a showing of actual injury, has been construed as requiring a minimum finding of reckless disregard of the requirements of the law. See Anderson v. United Finance Co., 666 F.2d at 1278 and cases cited therein.


the reasons for adverse action should be automatically furnished to an applicant, furnished only upon an applicant’s request, or not furnished at all. The original Senate Bill embodying the 1976 amendments required automatic notification. While some argued that this requirement would discourage credit discrimination, educate consumers, and assist administrative enforcement, creditors complained of its expense and burden. In the end, Congress compromised and required creditors to furnish a written explanation of reasons for adverse action only upon the applicant’s request. The amendments also provided, however, that creditors must notify applicants of their right to request disclosure of these reasons. Theoretically, the difficulty of bringing credit discrimination suits without knowing the reasons for denial has been eliminated, but as a practical matter few consumers take the time to request a written explanation of the creditor’s denial.

Additionally, the promulgation of Regulation B itself may have deterred private actions. At hearings on the initial adoption of the ECOA in 1974, the Federal Reserve Board argued that the Act would be better enforced without specific rules, allowing the courts to mold the Act’s broad proscription against discrimination in light of individual cases. Nonetheless, Congress

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36 The original Act did not require any form of notice to applicants. The Federal Reserve Board, despite lack of explicit authorization, promulgated regulations requiring notice. 12 C.F.R. § 202.5(m)(1–2) (1976).
37 S. 1927, 94th Cong., 1st Sess. § 701(d), reprinted in 1975 Hearings, supra note 20, at 148–149.
39 See, e.g., 1975 Hearings, supra note 20, at 264–65 (testimony of Forrest D. Jones on behalf of the American Bankers Association). See also id. at 285 (response to questions directed to Forrest D. Jones). Sears, Roebuck & Co. prepared data indicating that each letter of rejection could cost over five dollars to prepare, and that the cost of sending such letters to rejected applicants in 1974 would be over $8 million. Id. at 402.
42 See 1975 Hearings, supra note 20, at 375–82 (statement of John A. Dillon on behalf of National Bankamerind, Inc.). The content of the letter stating the reasons for the adverse action is a complex matter in itself, particularly when statistical methods of credit determination are employed. See generally, Taylor, Meeting the Equal Credit Opportunity Act’s Specificity Requirement: Judgmental and Statistical Scoring Systems, 29 BUFFALO L. REV. 73 (1980).
ordered the Board to promulgate regulations to enforce the Act.\textsuperscript{44} In response, the Board spelled out in great detail the kinds of information that could, and could not, be asked of applicants or used to evaluate applicants,\textsuperscript{45} and also published model application forms.\textsuperscript{46}

Contrary to expectations,\textsuperscript{47} the complexity of Regulation B, combined with creditors’ generally greater familiarity with the Act’s requirements, actually may have discouraged successful private litigation. A creditor’s good faith reliance on or conformity with promulgated rules and forms immunizes it from liability; therefore ambiguities in the Act or Regulation B are effectively resolved against an applicant.\textsuperscript{48} Furthermore, an applicant must prove \textit{actual} damages for any violations of the Act that are not so protected.\textsuperscript{49}

The realities of the credit market enhance the problems posed by the Act and Regulation B for private enforcement. Individuals who are denied credit by large creditors may not assert their rights because of institutional formidability and obvious bargaining inequalities. Conversely, unsuccessful applicants for credit from small, local credit-granting businesses may not assert their rights because they fear reprisal or do not wish to alienate the creditor. Additionally, the availability of credit alternatives further discourages prosecution of possible ECOA violations. Most credit applicants realize that alternative sources of credit exist.\textsuperscript{50} Except for the most uncreditworthy, effort is


\textsuperscript{49} See supra note 33. See also Markham v. Colonial Mortgage Service Co., 605 F.2d 566, 571 (D.C. Cir. 1979) (no interim attorneys’ fee award).

usually better spent seeking credit alternatives than challenging a questionable credit denial.

Moreover, much discrimination occurs not when credit is completely denied, but when credit is granted on different terms from those sought by the applicant. For example, a person seeking an unsecured loan may be required to provide collateral, or a loan application for ninety-five percent financing might be countered by an offer to finance only eighty percent. Neither of these situations necessarily involves ECOA-prohibited discrimination, but they both raise the question whether they are sufficient “adverse action” to require notification to the consumer of her ECOA rights and a statement of reasons for the denial of credit on the requested terms. In order to be effective, the notice of adverse action should be required within the broadest sphere of situations which may constitute credit discrimination.

The Act defines adverse action 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,” a definition which is broad enough to include all significant discrimination in credit terms. In Regulation B, however, the Federal Reserve Board limited the Act’s definition of adverse action so that no notice of adverse action is required when a counteroffer is accepted by the consumer, even when the terms of the credit are substantially different from those sought by the consumer. Given the fact that the consumer’s primary goal is simply to obtain credit on some terms, the Board’s definition provides a large loophole for creditors who are able to adjust their terms (often institutions making installment or home mortgage loans). A consumer who accepts credit on terms different from those requested has no right to receive notice of adverse action. Because the notice is designed to increase consumer awareness of possible discrim-

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52 12 C.F.R. § 202.2(c)(1) (1983). In contrast, the Fair Credit Reporting Act requires that an adverse action notice be given whenever credit “is denied or the charge for such credit or insurance is increased . . . .” 15 U.S.C. § 1681m(a) (1982).
53 See, e.g., Nat’l Comm’n on Consumer Finance, Consumer Credit in the United States 11 (1972) (“[c]onsumers seldom shop for credit outside their own city.”)
54 Variation in charges on a case-by-case basis is much less likely with respect to credit or charge cards, and in those situations consumer shopping can easily occur between companies competing for card business.
55 See Dorsey v. Citizens & Southern Financial Corp., 678 F.2d 137, 139 (11th Cir. 1982).
ation,\textsuperscript{56} dispensing with the notice in these circumstances decreases the likelihood that a discrimination claim will be brought.

\section*{B. Proof Problems in Private ECOA Suits}

1. \textit{Approaches to Proving Discrimination}. Congress clearly envisioned that large-scale private litigation alleging substantive discrimination would be brought under the Act. The statute provides for generous class action recoveries and attorneys' fee awards.\textsuperscript{57} A class action can result in substantial financial sanctions that would deter a creditor from repeatedly violating the law.\textsuperscript{58}

Despite these expectations, most suits have been based on purely technical violations of the Act's information bars or notification provisions. A handful of substantive discrimination claims have been prosecuted, all based on isolated instances of discrimination.\textsuperscript{59} No class actions have been successfully prosecuted.\textsuperscript{60}

To understand this lack of far-reaching substantive litigation under the Act, it is important to focus on the methods of proof of substantive discrimination that were initially developed in employment discrimination cases. Absent clear proof of discrim-


\textsuperscript{57} 15 U.S.C. \S 1691e (1982).

\textsuperscript{58} Discussion of the class action as a consumer enforcement mechanism is found in \textit{Fetterly, The Application of the Class Action to Consumer Litigation, 24 FED'N INS. COUNSEL Q. 4 (1973); Landers, Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma, 47 S. CAL. L. REV. 842 (1974).}

\textsuperscript{59} See, e.g., \textit{Brothers v. First Leasing, 724 F.2d 789 (9th Cir. 1984) (ECOA prohibitions against discrimination on the basis of sex and marital status apply to consumer leases); Miller v. American Express Co., 688 F.2d 1235 (9th Cir. 1982) (cancellation of wife's supplementary account upon spouse's death); Markham v. Colonial Mortgage Service Co., 605 F.2d 566 (D.C. Cir. 1979) (refusal of lender to aggregate incomes of unmarried couple applying for mortgage loan). See also United States v. American Future Systems, Inc., 571 F.Supp. 551 (E.D. Pa. 1983) (special purpose credit program which discriminated in favor of white, single women).}

inatory intent, a consumer has two ways to prove discrimination: disparate treatment or disparate impact. Disparate treatment occurs when some people are treated less favorably than others because of an identifiable characteristic such as race, sex or national origin. Discriminatory intent is proved by evidence that the creditor’s stated reason for refusing credit to the plaintiff was not applied by the creditor to others situated similarly to the plaintiff. In essence, proof of disparate treatment is an attempt to show discriminatory intent by means of circumstantial evidence.

Beginning with McDonnell Douglas Corp. v. Green, Title VII employment discrimination cases have set forth the process of proving disparate treatment by allocating the burden of production between the plaintiff employee and the defendant employer. A plaintiff can establish a prima facie case of discrimination in an employment discrimination suit by showing that she: (1) is a member of a protected class; (2) applied and was qualified for the job for which applicants were sought; (3) was rejected despite her qualifications; and (4) after her rejection the position remained open and persons of her qualifications continued to be sought. Similarly, in an ECOA suit, a rejected credit applicant might prove disparate treatment by showing that: (1) she belonged to a protected class; (2) she applied for credit and was financially able and willing to repay; (3) she was nevertheless refused credit; and (4) the creditor continues to seek to extend credit to other applicants with similar willingness and ability to repay.

Such evidence is understandably rare. One of the closest approximations of an intentionally discriminatory statement appears in Morgan v. First National Bank of Springdale, Civ. No. 77-5055 (W.D. Ark. Jan. 16, 1979). In Morgan, a black applicant was told that the “bank had lent out all its available money” and was asked whether he was a customer of the bank but he was not told that the bank’s policy was to lend only to customers.

The disparate treatment/disparate impact dichotomy is deceptive for two reasons. First there may be no clear line between the two types of claims in any given case. Second, this two-category grouping hides a greater variety of distinctions among types of discrimination. See generally Miller v. American Express Co., 688 F.2d 1235 (9th Cir. 1982); Lamber, Reskin & Dworkin, The Relevance of Statistics to Prove Discrimination: A Typology, 34 HASTINGS L.J. 553 (1983).


Once the plaintiff has proved a prima facie case of discrimination, the creditor must "articulate some legitimate non-discriminatory reason" for the applicant's rejection. As the Court explained the shifting burden of proof in *Furnco Construction Co. v. Waters*, a "prima facie case under *McDonnell Douglas* raises an inference of discrimination only because [the court] presume[s] these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." The creditor's burden to rebut this inference can be met by articulation of a reason for the action that is not based on a prohibited classification. The burden of production then shifts back to the plaintiff to prove that the creditor's stated reason is merely a pretext for discrimination.

Alternatively, a plaintiff may show that the apparently neutral application of the defendant's credit criteria results in a systematic exclusion of one of the classes protected by the Act, resulting in a disparate impact on that group. Disparate impact differs from disparate treatment in that in the former case the plaintiff need not prove that the creditor intentionally discriminated against the applicant.

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69 Id. at 577.
70 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804–05 (1973). In practical terms, the burden on the plaintiff is weighty compared with that of the defendant. Proof of pretext, in addition to developing a prima facie case, often involves complex use of statistics which are neither easy to interpret nor readily available to the plaintiff. In addition, a recent Supreme Court decision, *Texas Dept. of Affairs v. Burdine*, 450 U.S. 248 (1981), has interpreted the employer/creditor's burden to be "only the burden of explaining clearly the non-discriminatory reasons for its actions," not the burden of actually proving the legitimacy of that reason. After *Burdine*, it appears that in the employment context, and probably in the credit area as well, the burden of production in proving discriminatory intent has been shifted more heavily onto the shoulders of the party charging discrimination.

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

> We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.
A three-step disparate impact test, also known as the "effects test," was first enunciated by the Supreme Court in two employment discrimination cases, *Griggs v. Duke Power Company* and *Albemarle Paper Co. v. Moody.* This test operates as a disparate treatment test in shifting the burden of proof between the parties. In essence, a disparate impact test requires a plaintiff to show that the creditor's facially neutral standard in fact selects applicants in a significantly discriminatory pattern. If the creditor's practices are shown to have a disparate impact on a certain group, the creditor must show that the challenged policy is predictive of performance or that business necessity mandates the use of the allegedly discriminatory practice. Under Title VII, the practice must be job-related; under the ECOA the practice must relate to creditworthiness. In order to prevail, the plaintiff must present a less discriminatory alternative that equally serves the legitimate business purposes of the creditor.

2. **Credit Discrimination Proof Problems.** As a practical matter, an unsuccessful credit applicant faces difficult obstacles in proving allegations of discrimination. In order to prove either disparate treatment or disparate impact, the applicant must develop data on other applicants. To prove disparate treatment, the applicant must show that the only difference between herself and others granted credit was her sex, race or other protected classification. The need for statistical data is even greater to prove disparate impact. The applicant must show that the creditor rejected statistically significant disproportionate numbers of persons in protected classes. This assumes that applicants can be separated by statutory classification.

Under the ECOA and Regulation B, the development of such applicant pool data is virtually impossible. The Act does not prohibit a creditor from requesting information regarding protected characteristics, but merely prohibits discrimination based

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74 422 U.S. 405 (1975).


on those characteristics. Regulation B goes beyond the statute, however, by absolutely prohibiting creditors from requesting information relating to certain protected characteristics.

The prohibition in Regulation B on information requests relating to certain characteristics may have been based on the theory that prevention of the recording of information would prevent discrimination. For the great bulk of credit requests, however, these information bars only impede effective private enforcement. If creditors cannot collect the data, applicants cannot learn it from creditors through discovery, and cannot prove that other unsuccessful applicants share the protected characteristic. An applicant therefore cannot establish a prima facie case of discrimination.

The effect of this information void is magnified because discrimination is inherent in the credit-granting process among applicants deemed good business risks, or "creditworthy," and those deemed to present unacceptably high risks. Creditors use two general types of application evaluation systems: judgmental and statistical. Traditionally, creditors have judged creditworthiness subjectively. A credit officer examines an applicant's personal characteristics and other related information (such as home ownership, income, length of employment and credit references) in evaluating an applicant's ability and willingness to pay. The credit officer bases her decision on both her prior

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80 Information generally falls into one of three categories: capacity, character, and collateral. "Capacity" refers to an applicant's ability to repay the loan. "Character" concerns whether she will repay, and "collateral" concerns whether the creditor will be protected if she does not repay. The primary purpose of the ECOA is to assure that every stage of the credit decisionmaking process is fair and does not rely upon factors unrelated to any applicant's ability or desire to be a safe credit risk. See Churchill, Nevin & Watson, The Role of Credit Scoring in the Loan Decision, THE CREDIT WORLD, March 1977, at 6.
experience as a credit risk evaluator and institutional guidelines.81

The other method of evaluating creditworthiness, statistical analysis or "credit scoring," uses a numerical formula to predict creditworthiness. The Federal Reserve Board sanctions the use of a credit scoring system if it is "empirically derived" and "demonstrably and statistically sound."82 Each factor in the applicant's credit profile is given a numerical score based on a preset schedule, and the applicant's total score is determined by adding the individual attribute scores. The creditor's action is objectively determined by the score's position on an established scale. Credit is granted, denied, or the application is held pending acquisition of further information, such as a credit report. No subjective factors need enter into the credit decision.83

The information bars of Regulation B do not prevent illegal discrimination by most judgmental creditors. Many judgmental creditors, such as banks and other financial institutions, employ loan officers who meet with prospective loan customers face to face. The applicant's race, sex, and age are clearly visible to the person making the initial credit decision. The very fact that the system is judgmental and allows the credit officer wide discretion means that factors such as an applicant's race, sex, marital status and age may receive consideration in the determination of whether to grant credit. Under these circumstances, the Regulation's prohibitions merely eliminate the possibility of

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81 The judgmental system of credit analysis suffers from several flaws. First, the system is based on the imperfect recollection of the credit officer, that is both limited and distorted by prior experiences. Second, either because of the strength of the credit officer's recollection or because of informal institutional guidelines, the judgmental system reacts slowly to changes in creditworthiness of the applicant pool. For example, reliance on the maxim of the three "P's" (never lend to preachers, plumbers or prostitutes) or the three "B's" (never lend to beauticians, bartenders or barbers) may have some intuitive appeal but little or no empirical verification. See Main, A New Way to Score with Lenders, MONE\y, Feb. 1977, at 73.

82 12 C.F.R. § 202.2(p)(2) (1983). A scoring system is considered to be empirically derived if it evaluates creditworthiness primarily by allocating points to key attributes, with the points derived from empirical comparison of the creditor's past creditworthy and noncreditworthy applicants. 12 C.F.R. § 202.2 (p)(1) (1983). A scoring system is demonstratively and statistically sound if it is "developed for the purpose of predicting the creditworthiness of applicants with respect to legitimate business interests of the creditor utilizing the system, including, but not limited to, minimizing bad debt losses and operating expenses in accordance with the creditor's business judgment." 12 C.F.R. § 202.2(p)(2)(ii) (1983).

demonstrating the factors in the credit decision for purposes of proving disparate treatment.84

The converse situation applies to creditors using credit scoring systems, such as large department store chains (e.g., Sears or Penneys), credit card companies (e.g., Visa and Mastercard), and very large finance companies.85 Barring questions relating to protected characteristics certainly prevents their consideration in a scoring system, but if no bar existed, creditor reliance on such characteristics in a purely mechanical scoring system would be relatively easy to detect.86

A more subtle problem is also presented by the information bars in the credit scoring context. Although discrimination cannot take place by direct consideration of protected-class characteristics, a creditor may substitute significantly correlated proxies for those prohibited pieces of information. For example, zip codes might be substituted for race,87 or home ownership might be used in place of race or sex.88 Use of these proxies could be challenged on grounds of disparate impact as having the effect of rejecting members of a protected class in disproportionate numbers.89

84 As part of the hearings on the 1976 amendments to the ECOA, a regulatory provision was suggested which would have limited the recording of protected-class characteristics to those visible to the creditor. See HEARINGS ON THE 1976 AMENDMENTS TO THE EQUAL CREDIT OPPORTUNITY ACT BEFORE THE FEDERAL RESERVE BOARD, 16–17 (August 12, 1976) (on file at the Federal Reserve Board) (statement of J. Stanley Pottenger, Assistant Att’y Gen., Civil Rights Division, Dept. of Justice); Fed. Res. Bd. Press Release (July 15, 1976) at 38–40.


86 If applications are computer scored, the computer program would show that suspect class factors were considered as part of the program’s total score determination. If applications are scored by humans, the “program” is the scale presented to the person figuring the score. Any phantom points given for prohibited characteristics would be detected because the given total score would be greater than the predicted score based on the scale’s points for consideration of proper factors.

87 This was the basis of the claim in Cherry v. Amoco Oil Co., 490 F.Supp. 1026 (N.D. Ga. 1980). The substitution of zip codes for race is so widely accepted that at least one full-scale attempt was made to prohibit place-of-residence discrimination. See Credit Card Redlining: Hearings on S. 15 Before the Subcomm. on Consumer Affairs of the Comm. on Banking, Housing, and Urban Affairs, 96th Cong., 1st Sess. 5 (1979) [hereinafter cited as 1979 Hearings].

88 See, e.g., Nevin and Churchill, The Equal Credit Opportunity Act: An Evaluation, 43 J. MARKETING, Spring 1979, at 95, 100–02. The question is not whether the information has no relation to risk, for nearly any factor a creditor could choose may have some correlation to wealth and therefore to traditional standards of creditworthiness. Rather the question is one of sufficient relation to risk. The regulations purport to act as a mechanical check on the types of information acquired. By prohibiting the acquisition of information that is highly prejudicial or of little predictive value, it is assumed the misuse of that information can also be controlled.

To prove an effects test case, an applicant must be able to statistically compare the proportion of members of the relevant protected class who are within the applicant pool with the proportion in the group granted credit. The cost of collecting and presenting this information when statistical data is available is extremely high, but if the creditor is barred from collecting information altogether on protected characteristics, comparative proportions cannot even be determined. Thus, the Regulation B information bars originally designed to protect disadvantaged consumers prevent those same consumers from proving systemic discrimination under the effects test.

Even assuming that a consumer could clear the initial data discrimination case); Cherry v. Amoco Oil Co., 490 F.Supp. 1026 (N.D. Ga. 1980) (ECOA). In the employment area, it is often relatively easy to identify a discriminatory employer practice and its effect on employees singly or in a group. In contrast, a creditor's use of complex statistical systems may consider numerous factors, some of which may relate to creditworthiness only in conjunction with other factors. The plaintiff may choose either to attack the system as a whole or to attempt to isolate elements which appear to adversely affect a protected class. The use and interpretation of statistics itself requires an expertise which may be outside the experience of most plaintiffs and counsel. There is always the danger that the plaintiff may through inexperience with the use of statistics produce exhaustive quantitative data that ends up proving the wrong point. Finally, as a matter of cold reality, few rejected credit applicants are likely to have the financial resources to finance both the discovery and use of experts necessary to build a strong statistical case.


92 Much has been written about the application of the effects test to ECOA cases on the mistaken presumption that it would be a significant part of private ECOA enforcement. See, e.g., Baer, The Equal Credit Opportunity Act and the "Effects Test", 95 Banking L.J. 241 (1978); Note, Credit Scoring and the ECOA: Applying the Effects Test, 88 Yale L.J. 1450 (1979). Regulation B itself negates some of the potential impact of the effects test in one other way. The regulations allow a creditor to use factors such as minimum income and past credit history to evaluate creditworthiness. Use of any factor that correlates with wealth or past economic advantage, however, will inevitably disproportionately disfavor minorities and women. One possible way for consumers to use the disparate impact test to their advantage would be to attack the creditor's scoring system as a whole, claiming that it rejects protected class members in a disproportionate manner, and shifting to the creditor the burden of showing that such disproportionate impact is justified. See Miller v. American Express Co., 688 F.2d 1235, 1242 n. 3 (9th Cir. 1982) (Poole, J., dissenting).
availability and cost hurdles a credit scoring system poses to establishing a prima facie case, an applicant pursuing a disparate impact claim faces other obstacles. Under the three-part disparate impact test, the creditor would then have to prove that the criterion attacked has a manifest relationship to creditworthiness. The Federal Reserve Board has lifted this burden from creditors’ shoulders by proclaiming that, in an “empirically derived” and “statistically sound” credit scoring system, all factors employed by the creditor inherently have a manifest relationship to creditworthiness. The consumer must then show that the legitimate needs of the creditor can be as readily served by substitution of some other factor. By hypothesis, however, the scoring system uses the most predictive pieces of information available. It just may be that the category used is as discriminatory as it is predictive.

It appears that the only situation where the information bars might help an applicant is in a judgmental system where the person evaluating the loan application does not ever see the applicant. Such systems are used by some large financial institutions in major metropolitan areas. There ground level personnel take credit applications, but credit decisions are made upstairs. Usually in such larger institutions loans are made and applications are assessed according to a written policy. In this situation the regulation’s information bars would prevent the creditor from taking into account protected characteristics in assessing creditworthiness. As in the credit-scoring situation, however, factors which the institution’s formal credit policy identifies as significant may in effect be proxies for protected categories. Once again, however, proof of the disproportionate impact of these proxies is all but impossible because Regulation

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95 See Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).


98 This appears to be the system of credit decisionmaking that provided the basis for the regulations. For an example of this system in operation, see Fischl v. General Motors Acceptance Corp., 708 F.2d 143, 145 (5th Cir. 1983).

B prohibits the creditor from requesting the information necessary to identify members of the protected class.

IV. ANEMIC PUBLIC ENFORCEMENT

Although public enforcement of the Equal Credit Opportunity Act is divided among several government agencies, three are of primary importance. The Federal Reserve Board’s authority to prescribe and amend Regulation B, together with its authority to enforce compliance by state-chartered member banks, makes it the primary proponent of public enforcement. The Federal Trade Commission is responsible for credit card issuers and all creditors not specifically responsible to other agencies. Finally, the ability of the Attorney General to bring civil proceedings for ECOA violations, added as part of the 1976 amendments, creates a significant opportunity for effective and visible public enforcement.

A. Federal Reserve Board

The task of the Federal Reserve Board (Board) in securing compliance with the Equal Credit Opportunity Act has not been easy. The Board’s difficulties in promulgating regulations to carry out the Act derive from the inherently discriminatory nature of the credit-granting process. A creditor must fully consider an applicant’s characteristics in order to make a rational and profitable judgment as to creditworthiness. Congress, however, has condemned the denial of credit to certain individuals or groups on the basis of certain characteristics that it considers unrelated to creditworthiness. If Congress could not adequately resolve these competing tensions in enacting the statute, it may be unrealistic to believe that the Board would fare better.

100 See supra notes 18–19, 23 and accompanying text.
Most of the commentary on the Act criticizes the lines drawn by the Board in promulgating Regulation B.\textsuperscript{105} The Board performs a dual administrative role, overseeing the regulation of ECOA (and a dozen other consumer credit protection laws for which Congress has assigned the Board special responsibility),\textsuperscript{106} while also supervising and regulating commercial banks.\textsuperscript{107} Early on, the Board candidly recognized the conflict inherent in its dual role: "There is always the risk that Federal regulations might—without intending to do so, and without even accomplishing positive benefits—so hobble the credit-granting process as to significantly increase credit losses."\textsuperscript{108} These concerns underlay the Board’s initial views that no regulations should be adopted\textsuperscript{109} and that the 1976 amendments broadening the Act were premature.\textsuperscript{110}

The Board has followed its Congressional mandate in adopting regulations and has taken substantial steps to enforce compliance with the Act. The Board has attempted to educate consumers and creditors regarding the requirements of the Act and Regulation B.\textsuperscript{111} The Board receives, reviews and investigates or refers to other agencies approximately 700 consumer equal credit opportunity complaints each year.\textsuperscript{112} In 1981 the Board adopted an Interagency Policy Statement defining the parameters of regulatory enforcement strategy in an effort to coordinate the ECOA enforcement policies of the Federal Deposit Insur-


\textsuperscript{109} See supra note 43 and accompanying text.


Since the enactment of the ECOA, the Board has adopted an affirmative program of special compliance examinations of state member banks. These examinations show a steady improvement in bank compliance. The Board also has undertaken studies of the cost of compliance by creditors and the use by consumers of the protective provisions of the Act and regulations.

The Board has focused its enforcement programs on compliance with the procedural requirements of the Act and Regulation B, such as application forms, notifications of reasons for credit denials, data notation requirements, and record keeping. This has been instrumental in eliminating technical violations of the ECOA and Regulation B, educating creditors about the Act's requirements, and providing consumers with the knowledge and data needed to understand the Act and enforce their rights.

Despite this active program, however, there appears to be a lack of broad scale attacks by the Board on possible deep-seated discrimination problems. The Board has chosen to approach enforcement in a low-key manner, opting for the present not to "publicly name institutions that repeatedly fail to correct discriminatory practices." The Board has released strong policy statements on such basic substantive matters as discouraging applicants on a prohibited basis and using credit criteria in a discriminatory manner in evaluating applications.

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115 In 1982 the Board found that more than two-thirds of the examined banks were in full compliance with Regulation B, up from 51 percent in 1981, 40 percent in 1980 and 23 percent in 1979. Only 20 percent of the noncomplying institutions in 1981 had violated five or more of Regulation B's more than 170 provisions. Other agencies have reported a similar improvement in compliance. 1982 FED. RES. BD. ANN. REP. 155; 1981 FED. RES. BD. ANN. REP. 154–55; 1980 FED. RES. BD. ANN. REP. 177–78.
118 The Board in the past three years has taken formal action against only a handful of institutions. 1982 FED. RES. BD. ANN. REP. 156; 1981 FED. RES. BD. ANN. REP. 154; 1980 FED. RES. BD. ANN. REP. 177.
tion is whether the Board can and will effectively enforce its asserted policies.

To some extent the Board (like other public enforcement agencies) faces the same problems of proof which beset private litigants. Proof of widespread illegal discrimination requires access to applicant pool data.\textsuperscript{121} For monitoring purposes, Regulation B requires a creditor to request an applicant's sex, race (or national origin), marital status, and age only in connection with a written mortgage loan application for the purchase of residential real estate and only if the applicant consents to give such information.\textsuperscript{122} The limited scope and quality of this monitoring data prevents the Board from effectively using it to identify patterns of discrimination as part of its compliance procedures.\textsuperscript{123}

Despite the lack of available information, the Board has identified and prohibited a narrow group of practices likely to have a disparate impact on protected groups, such as the use of statistics relating to the likelihood of bearing or rearing children,\textsuperscript{124} the consideration of the existence of a telephone listing in the name of an applicant,\textsuperscript{125} and the discounting or exclusion from consideration of an applicant's income because such income is derived from part-time employment, an annuity, a pension, or other retirement benefits.\textsuperscript{126} Beyond these isolated prohibitions lie a host of questionable criteria used by creditors\textsuperscript{127} that the Board, as primary public proponent of the Act, should challenge on the basis of disparate impact. Because of the gen-

\textsuperscript{121} See supra notes 76–99 and accompanying text. Such access however, will not provide ammunition against some practices, such as subtle prescreening through advertisements. See also Hsia, \textit{Credit Scoring and the Equal Credit Opportunity Act}, 30 Hastings L.J. 371, 438–42 (1978) (prescreening in credit scoring context may be discriminatory).


\textsuperscript{123} The Board has indicated that at present it does not plan to expand the detail or scope of the Regulation B monitoring information. Statements to Congress, 64 Fed. Res. Bull. 742, 743 (1978); Statements to Congress, 66 Fed. Res. Bull. 20, 26–27 (1980).

\textsuperscript{124} 12 C.F.R. § 202.6(b)(3) (1983). See also Anderson v. United Finance Corp., 666 F.2d 1274, 1277 (9th Cir. 1982) (spousal signature).

\textsuperscript{125} 12 C.F.R. § 202.6(b)(4) (1983).

\textsuperscript{126} 12 C.F.R. § 202.6(b)(5) (1983). This provision allows a creditor to consider the probable continuance of such income. See also Geary, \textit{Annual Survey of Consumer Financial Services Law Developments, Equal Credit Opportunity}, 38 Bus. Law. 1287 (1983).

\textsuperscript{127} See supra notes 87–89 and accompanying text.
eral unavailability of data and the significant costs of obtaining it, the Board has decided that "in the credit arena . . . the effects test will remain largely a matter for the courts to apply."128

B. Federal Trade Commission

The Equal Credit Opportunity Act delegates overall enforcement authority to the Federal Trade Commission (FTC), except where other agencies are specifically required by the Act to oversee certain groups of creditors.129 This residual authority includes the major credit card companies, department stores, some credit unions and sales finance companies. The FTC has the opportunity to be a major factor in ECOA enforcement.

That promise remains unfulfilled. Since the Act’s enactment, the FTC has proclaimed that its limited resources have prevented it from effectively policing creditor actions.130 Unlike the Federal Reserve Board, the FTC has no program for the periodic examination of individual creditors, and cannot have such a program without extensive restructuring.131 Investigation of consumer complaints and sporadic special industry investigations form the bulwark of the limited FTC program.132

FTC enforcement activities have been minimal. In 1977 the FTC announced “an industrywide investigation of compliance with the Equal Credit Opportunity Act by mortgage lending and credit card companies.”133 Over the next three years a total of only seven consent orders or judgments were entered.134 In 1981 and 1982, FTC enforcement of ECOA was virtually nonexistent, resulting in criticism from one of its own members and a promise by its chairman of increased enforcement activity.135 No significant increase, however, has occurred to date.136

133 1977 FTC ANN. REP. 19.
136 See 1982 FED. RES. BD. ANN. REP. 136.
C. United States Attorney General

The Attorney General’s role in ECOA enforcement is twofold. First, civil actions can be commenced based on referrals made by the other agencies responsible for compliance.137 Second, the Attorney General can initiate proceedings based on a belief that a creditor is engaged in a pattern or practice of discrimination.138 Not surprisingly, given the lethargic enforcement activities of other agencies and their emphasis on voluntary compliance, there has been only one referral to date to the Attorney General by another federal agency.139 Self-initiated actions, therefore, have been the sole focus of Justice Department enforcement.

The Attorney General receives slightly over a hundred consumer complaints annually, each of which is investigated.140 Each year several actions have been instituted alleging widespread discrimination by creditors, but it was not until the spring of 1982 that one of these actions was tried on the merits.141

Any expectation that the Department of Justice might assume a broader role in ECOA enforcement has been quashed by two developments, one self imposed and one judicially imposed. In his 1980 Annual Report, the Attorney General recognized the sharp contrast between the small number of private suits and the findings of numerous ECOA violations during routine examinations by the various federal administrative enforcement agencies.142 The following year the Attorney General attempted to develop new procedures, relying on statistical studies, to trigger investigations and identify creditor practices that had a broad impact on consumers.143 The experiment was unsuccessful, however, and the 1982 Report stated that the “Civil Rights Division does not plan to devote significant resources to this

140 ATT’y GEN. REP. 1982, supra note 139, at 1. (115 Complaints received).
142 1980 ATT’y GEN. REP. TO CONGRESS PURSUANT TO THE EQUAL CREDIT OPPORTUNITY ACT AMENDMENTS OF 1976 at 3.
143 1981 ATT’y GEN. REP. TO CONGRESS PURSUANT TO THE EQUAL CREDIT OPPORTUNITY ACT’S AMENDMENTS OF 1976 at 3.
approach in the future." The hope that public resources could be used to develop creditor applicant pool data and to overcome Regulation B's built-in inhibitions of private disparate impact suits thus died.

Equally important was the Third Circuit's summary affirma-
tance of the district court decision in United States v. Beneficial Corp. At issue was the Act's mandate to the Attorney General to pursue civil litigation "for such relief as may be appropriate, including injunctive relief." The Attorney General argued that this phrase should be construed to allow for money damages for private individuals injured by the creditor's actions. Despite the District Court's recognition that it may be "unlikely because of the size of the claims involved and the difficulty in proving same that there will be such actions by individual claimants or class actions representing such plaintiffs," summary judgment for defendants was granted on this issue. In the absence of specific congressional authorization, the Attorney General could not use government resources to enforce ECOA to recover monetary relief for injured individuals. The summary action of the Third Circuit seems to have put the final hope for effective public enforcement and relief to rest.

V. Facing the Fundamental Issues in the Second Decade

Credit discrimination against individuals on the basis of age, race, sex, religion and other factors did not gain widespread attention until the early 1970's. In 1972 the National Commission on Consumer Finance issued a report that concluded that "widespread instances of unwarranted discrimination in the granting of credit to women" existed. Despite substantial evidence of pervasive discrimination, the Commission did not recommend

144 ATT'Y GEN. REP. 1982, supra note 139, at 3.
148 NATIONAL COMMISSION ON CONSUMER FINANCE, CONSUMER CREDIT IN THE UNITED STATES 160 (1972).
149 For example, the Commission heard testimony that revealed problems in the following areas: (1) Single women have more trouble than single men in obtaining credit; (2) Creditors generally require a woman upon marriage to reapply for credit, usually in
legislation to prohibit credit discrimination because it preferred private competition to public regulation.\textsuperscript{150}

Nonetheless, two congressional committees investigated the area; one report identified thirteen specific discriminatory practices used against women alone.\textsuperscript{151} These investigations prompted enactment of the Equal Credit Opportunity Act. Suits brought under the ECOA, however, have focused on procedural rather than substantive violations of the Act. This focus has hidden several fundamental questions that the courts have yet to address under the ECOA.

Putting aside the issue of intentional credit discrimination,\textsuperscript{152} the nature of the creditor's past experiences determines an ap-

\begin{itemize}
  \item Single women have more trouble than single men in obtaining credit.
  \item Creditors generally require a woman upon marriage to reapply for credit, usually in her husband's name.
  \item Creditors are unwilling to extend credit to a married woman in her own name.
  \item Creditors are often unwilling to consider the wife's income when a married couple applies for credit.
  \item Women who are separated have a particularly difficult time, since the accounts may still be in the husband's name.
  \item Creditors arbitrarily refuse to consider alimony and child support as a valid source of income when such source is subject to validation.
  \item Creditors apply stricter standards to married applicants where the wife rather than husband is the primary supporter for the family.
  \item Creditors request or use information concerning birth control practices in evaluating a credit application.
  \item Creditors request or use information concerning the creditworthiness of a spouse where an otherwise creditworthy married person applies for credit as an individual.
  \item Creditors refuse to issue separate accounts to married persons where each would be creditworthy if unmarried.
  \item Creditors consider as "dependents" spouses who are employed and not actually dependent on the applicant.
  \item Creditors use credit scoring systems that apply different values depending on sex or marital status.
  \item Creditors alter an individual's credit rating on the basis of the credit rating of the spouse.
\end{itemize}

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applicant’s likelihood of getting credit.\textsuperscript{153} The first problem with this system is inertia. Reaction by creditors to changes in the composition and creditworthiness of the pool of credit applicants occurs slowly.\textsuperscript{154} A presumption exists against certain classifications that is not easily overcome.\textsuperscript{155} While factors such as occupation, home ownership, or length of time on the job may be related to creditworthiness, reliance by creditors on such data may have a disproportionate impact on consumers who perform certain jobs, who have not owned homes, or who have been unable to secure long-term employment. The question remains whether it is discriminatory for creditors to use these secondary characteristics to deny credit to otherwise qualified applicants.

For example, Regulation B prohibits consideration of the existence of a telephone listing in the applicant’s name,\textsuperscript{156} but does not prohibit consideration of home ownership. Both factors are probative of creditworthiness and both are significantly correlated to sex,\textsuperscript{157} but one is much easier for applicants to change than the other. The easily modified characteristic, however, is the one prohibited from consideration. The reverse correlation between the predictive ability of factual information used in credit analysis and the ability or inability of an applicant to alter that information magnifies the effect of historical data on an applicant’s ability to obtain credit.

Neither the ECOA nor the courts have provided clear standards for halting perpetuation of past discrimination.\textsuperscript{158} Any attempt to totally eradicate the effects of past discriminatory


\textsuperscript{155} This problem is minimized with respect to credit scoring systems because Regulation B requires periodic revalidation of credit scoring systems. 12 C.F.R. § 202.2(p)(2)(iv) (1983). See generally Long, Credit Scoring System Selection, 11 J. FINANCIAL & QUANTITATIVE ANALYSIS 363 (1976).

\textsuperscript{156} 12 C.F.R. § 202.6(b)(4) (1983).

\textsuperscript{157} See supra note 15; see also Nevin & Churchill, The Equal Credit Opportunity Act, An Evaluation, 43 J. Marketing, Spring, 1979, at 95, 100 (finding significant correlation between home ownership and age and marital status).

practices would clearly place a substantial financial burden on the credit industry.\textsuperscript{159} The lack of any requirement, however, to affirmatively modify traditional credit decisionmaking processes merely perpetuates discrimination. As in other areas, the permissible extent of affirmative action programs and their precise relationship to past discrimination remains unclear.\textsuperscript{160}

Furthermore, the data on which current evaluation systems and practices are built may be inherently discriminatory. For example, women and minorities have been underrepresented in the credit process, and creditors’ evaluation systems are therefore heavily based on a sample of white, male credit recipients. Minority and female applicants may be penalized for not possessing characteristics traditionally identified with white males.\textsuperscript{161}

Such a built-in bias not only penalizes applicants who do not possess such characteristics, but also fails to consider special characteristics of the members of protected classes that may make them superior credit risks. Patterns of geographic distribution, economic life styles, and financial practices among some protected groups may differ from traditional models.\textsuperscript{162} These findings could fundamentally affect our view of equality in credit determinations.

\textsuperscript{159} Preventing creditors from considering variables which have a high correlation to actual creditworthiness, but which have a disproportionate impact on groups of applicants, will increase creditor costs and to some extent decrease fund availability. See, e.g., Benston, Risk on Consumer Finance Company Personal Loans, 32 J. OF FINANCE 593 (1977); Murphy, Economics of Scale in the Cost of Compliance with the Consumer Protection Laws: The Case of Implementation of the Equal Credit Opportunity Act of 1974, 10 J. OF BANK RESEARCH 248 (1980); Smith, The Equal Credit Opportunity Act of 1974: A Cost/Benefit Analysis, 32 J. OF FINANCE 609 (1977).

\textsuperscript{160} See generally Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (state statute that excludes males from enrolling in state-supported nursing schools violates the Equal Protection Clause); United Steelworkers of America v. Weber, 443 U.S. 193 (1979) (Title VII does not prohibit all race conscious affirmative action plans); Univ. of California v. Bakke, 438 U.S. 265 (1978) (race can be taken into account in admissions decisions but strict numerical quotas are not allowed). See also Grove City College v. Bell, 104 S. Ct. 1211 (1984) (Title IX prohibition on educational discrimination applies only to individual programs receiving federal aid).


A study of the accounts of a large metropolitan bank which issues credit cards based on a credit scoring system is illustrative. Twenty applicant characteristics, ranging from occupation and income to length of time at current address, were used in several different credit scoring models. The study showed that the ability of traditional historical information to predict creditworthiness varied markedly between males and females. The study found that ECOA's prohibition on distinguishing data on the basis of sex can in fact hurt women because it creates a presumption that the relationship between risk indicators and credit performance is identical for men and women. For example, with regard to credit references:

If men typically handle financial matters, only one or two bank references may be an indicator of risk, while for women, the establishment of even one such relationship may be indicative of good credit performance. If women have on average only two while men have four, but credit references carry the same weight in determining creditworthiness, the model will understate the creditworthiness of women in a pooled regression.

Controlling for such variations, the study found that from 18 to 63 percent more females would be accepted at various identified levels of acceptable risk. Put simply, the "arguments in favor of separate credit models [for men and women in order to eliminate discrimination in credit granting based on sex] are compelling."

Because the ECOA requires that all equally qualified applicants be treated equally, it is essential to define what "equally qualified" means. Most credit evaluation systems consider factors based on a historical data pool that is dominated by white

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164 Id. at 3, 6.

165 Id. at 9–11.

166 Id. at 8–9. Other results show that "[h]aving a 'retail sales job' is quite common among female labor force participants and carries relatively little weight, but is apparently highly correlated with unsatisfactory performance for males. Banking relationships and home ownership also carry relatively higher weights for women than for men. The presence of these characteristics in the female pool is less frequent than among males, but they are apparently indicative of good credit performance." Id. at 10.

167 Id. at 15.

168 Id. at 17. The Chandler-Ewert study focused solely on the disparate predictive effect of traditional variables. Different economic and financial practices may dictate consideration of totally separate structural models for credit prediction among various groups. See supra note 162 and accompanying text.
males. Given this bias, "equality" in the credit context may not mean refusing to consider protected characteristics, but may mean affirmatively recognizing that applicants with certain characteristics may form a select sub-group. Even if not used as a basis for finding creditor treatment discriminatory, the identification of such credit sub-groups can lead to a statutorily sanctioned special purpose credit program of affirmative action.\textsuperscript{169}

The courts have yet to resolve these difficult issues under the Equal Credit Opportunity Act. The questions are not necessarily insoluble; they simply have not been raised in the credit context. Absent access by private parties and public agencies to a data pool presently unavailable under Regulation B, however, such issues will only be addressed in law reviews.

**VI. REFINEMENT OF THE ENFORCEMENT FRAMEWORK**

It is clear from the evidence that the substantive effects of the Equal Credit Opportunity Act over the past ten years have differed from original expectations. Consideration of the extent of society's desire to identify and eliminate credit discrimination should spur amendment of the Act, Regulation B, or both, and tougher administrative enforcement.

Initially, Congress should amend the Act to provide for a statutory minimum damage recovery. Experience with the Truth in Lending Act's minimum $100 recovery\textsuperscript{170} illustrates the desirability of a parallel provision under ECOA, where actual damages are equally difficult to prove.\textsuperscript{171} Moreover, since a minimum statutory recovery would promote technical accuracy by creditors in complying with the Act, enforcement of technical violations could be substantially shifted from administrative agencies to private parties.\textsuperscript{172}

Revisions of Regulation B could also improve the effectiveness of the ECOA. The definition of "adverse action" should be changed to reflect the fact that variation in the terms on which

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\textsuperscript{169} 15 U.S.C. § 1691(c)(3) (1982). Development of special purpose credit programs presumes the ability to analyze the data necessary for special program design. Under the present regulation, however, such data is unavailable. See supra notes 76–99 and accompanying text. See also United States v. American Future Systems, Inc., 571 F. Supp. 551 (E.D. Pa. 1983) (special purpose credit program which made distinctions based upon race, marital status, and other prohibited bases violated ECOA).


\textsuperscript{171} See, e.g., Mars v. Spartanburg Chrysler Plymouth, Inc., 713 F.2d 65 (4th Cir. 1983) (plaintiff entitled to damages under Truth in Lending Act even though no actual injuries were sustained).

\textsuperscript{172} See supra notes 114–117 and accompanying text.
credit is granted may be an indication of illegal discrimination.\textsuperscript{173} This would make applicants and creditors more conscious of the possibility of this form of illegal discrimination.

Regulation B must also be revised to require creditors to collect data relating to applicant characteristics which identify applicants as members of protected classes. The tension here is clear. Prohibition of the collection of data relating to these characteristics furthers the appearance of neutrality and avoids false issues of discrimination.\textsuperscript{174} As discussed earlier, however, this prohibited information often is available to creditors either directly or through highly-correlated proxy variables.\textsuperscript{175} The availability of data concerning protected applicants is essential to challenge credit discrimination in many of these situations.\textsuperscript{176} Collection of this data is needed both for adequate effects test enforcement and for special purpose affirmative action programs to benefit groups who have been historically discriminated against or who may be better credit risks than the white male credit majority.

Implementing these changes alone will not lead to the elimination of credit discrimination. These amendments, however, would create a statutory and regulatory framework that would promote better compliance by creditors and enhance enforcement efforts by both public agencies and private parties. An accompanying shift in focus from procedural compliance to substantive violation would emphasize the ECOA’s unique role among consumer protection legislation as an antidiscrimination statute and raise issues of substantive discrimination previously unaddressed by the courts.

\textsuperscript{173} See \textit{supra} notes 35–42 and accompanying text.

\textsuperscript{174} An applicant who is requested to supply information relating to protected characteristics may feel discriminated against by the very request for such information. Some lessening of this reaction may be accomplished by prefacing such requests with the statement that “recording of the following information is required pursuant to the Equal Credit Opportunity Act and Regulation B.”

\textsuperscript{175} See \textit{supra} notes 84–89 and accompanying text.

\textsuperscript{176} The Board recognized the practical difficulties in proving discrimination but maintained the information bars despite consumer requests that they be eliminated:

When the earlier version of Regulation B was being drafted, feminist groups fought hard for a provision banning questions about an applicant’s sex or marital status on application forms. They believed that keeping this information from creditors would reduce discrimination against women. Such a ban also was viewed as a way of re-educating those who still thought that these factors were crucial to the credit decision. But a year later these same groups were supporting civil rights groups in calling for a provision in Regulation B requiring creditors to ask the sex and race of applicants for credit. This change was based on the realization that these data constituted an important enforcement tool.
