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“For Lack of a National Policy on Consumer Credit . . .”; Preliminary Thoughts on the Need for Unified Federal Agency Rulemaking

By RALPH J. ROHNER*

The federal regulatory framework affecting the consumer credit marketplace is a peculiar one. No less than nine separate agencies¹ have been given enforcement responsibilities over particular segments of the consumer credit industry. Each of these agencies has some measure of rulemaking authority, at least with respect to administrative enforcement procedures and often with respect to substantive matters as well. Two of the agencies, the Federal Reserve Board and the Federal Trade Commission, have special substantive rulemaking authority for the banking and non-banking communities respectively.² And the Federal Reserve Board has ostensibly plenary regulation-writing authority under a number of specific consumer protection statutes.³

That this regulatory framework has produced frictions, tensions and uncertainties as to compliance requirements, and claims of anticonsumerism from some quarters, is hardly surprising given its history. That these problems should continue and increase through the 1970s and into the 1980s is regrettable. Whether they are avoidable or solvable is quite another matter, however.

Increasing awareness of what seem to be conflicting regulatory policies from the various federal agencies led the Section's Committee on the Regulation of Consumer Credit to create a special Subcommittee on Unified

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This article is a synthesis of remarks made at a program sponsored by the Subcommittee on Unified Rulemaking in Williamsburg, Virginia, on April 8, 1979. The program participants included Roland E. Brandel, San Francisco; Ralph J. Rohner, Washington, D.C.; Milton W. Schober, Washington, D.C.; William J. O'Connor, Jr., Buffalo; and Mark Silbergeld, Washington, D.C. This article does not represent views of participants, nor of the Committee; rather it illuminates the issues from various perspectives and should assist in approaching this problem more knowledgeably.

1. *I.e.*, the Comptroller of the Currency; the Federal Deposit Insurance Corporation; the Federal Reserve Board; the Federal Home Loan Bank Board; the National Credit Union Administration; the Civil Aeronautics Board; the Secretary of Agriculture; the Farm Credit Administration; and the Federal Trade Commission.

2. Under § 18 of the Federal Trade Commission Act (15 U.S.C. 557a) both agencies are authorized to issue rules or regulations which identify specific acts or practices which are "unfair or deceptive acts or practices."

3. There are explicit directives to the Board to issue regulations under the Truth in Lending (including its Fair Credit Billing and Consumer Leasing chapters), Equal Credit Opportunity, Home Mortgage Disclosure, and Electronic Fund Transfer Acts.

Rulemaking to examine the extent of problems attributable to multiple agency roles and to recommend possible improvements. This effort is part of a larger government and ABA effort. There is a pervading atmosphere of regulatory reform throughout the federal government. The administration has initiated steps toward deregulation in several industries. The President has issued an executive order on "improving government regulations,"⁴ and in March 1979 announced a broad package of regulatory reform proposals.⁵ Independently, the American Bar Association's Commission on Law and the Economy has issued its exposure draft entitled "Federal Regulation: Roads to Reform," and the Administrative Conference of the United States has released its study of the rulemaking procedures at the Federal Trade Commission. The ABA's Section on Corporation, Banking & Business Law has itself created an Ad Hoc Committee on Regulatory Reform.⁶ Regulatory reform proposals are pending in Congress.⁷

Thus, while an examination of federal agency regulatory activity in the consumer credit area is novel, it is but a piece of a larger inquiry into the wisdom, effectiveness and fairness of federal regulatory programs.

Origins of the Present Structure

Congress' first entry into the consumer credit field was the Consumer Credit Protection Act (principally the Truth in Lending Act)⁸ in 1968. This was actually a modest intervention, imposing standardized disclosure requirements on transactions whose substantive terms were controlled almost exclusively by state law. Indeed Congress' intent not to preempt state laws is stated very clearly in the Truth in Lending Act itself.⁹ Congress dutifully assigned enforcement responsibilities to a number of agencies according to their existing constituencies—to the banking agencies for the several classes of banks, to the Home Loan Bank Board, the Civil Aeronautics Board, the Interstate Commerce Commission, the Farm Credit Administration, and so on—with the bulk of the enforcement chore given to the Federal Trade Commission. The Act obviously required consistent regulatory elaboration, and so regulation writing authority needed to be vested in one agency. The reluctant choice was the Federal Reserve Board—partly because it was within the jurisdictional sphere of the Congressional banking committees from which the Truth in Lending Act originated, and partly because the other likely

4. Exec. Order 12044, 43 Fed. Reg. 12661 (1978).

5. 15 Weekly Comp. of Pres. Docs. 491 (March 26, 1979). These have since been introduced in the 96th Congress as S.755 and H.R. 3263 ("The Regulation Reform Act of 1979").

6. Chairman's Message, *Regulatory Reform and the Corporate Bar*, 34 Bus. Law 1637 (1979).

7. See, e.g., S. 1291, 96th Cong., 1st Sess. (1979), the Administrative Practice and Regulatory Control Act of 1979 introduced by Senators Kennedy, Metzebaum and Ribicoff on June 6, 1979; S. 262, 96th Cong., 1st Sess. (1979), the Reform of Federal Regulation Act, introduced on January 31, 1979 with more than 30 cosponsors.

8. 15 U.S.C.A. § 1601 *et seq.*

9. Truth in Lending Act § 111, 15 U.S.C.A. § 1610.

choice (the Federal Trade Commission) was then being criticized for ineffectiveness.

Since 1968 Congress has added one consumer credit protection law after another.¹⁰ Under some, the allocation of regulation writing duties is vested exclusively in the Federal Reserve Board, as under Truth in Lending; under others, no agency can write interpretive regulations; and under a recent community-responsibility statute¹¹ each of the financial institutions agencies was instructed to issue its own regulations. Where the Federal Reserve Board was powerless to regulate, the FTC stepped in with unofficial interpretations and guidelines. In the meantime the Trade Commission's own authority to deal broadly with "unfair or deceptive acts or practices in or affecting commerce" was affirmed and strengthened and used.¹² Under the pressure of a lawsuit by consumer groups, several of the agencies have issued regulations expanding creditors' non-discrimination compliance duties beyond those imposed by the Federal Reserve.¹³ Among the many agencies, all of which had the potential for setting divergent policy goals and creating friction, the largest source of friction, not surprisingly, has been between the Federal Reserve Board and the Federal Trade Commission, instances of which are noted below.

Congress also fostered multiple lawmaking from sources outside the federal government. Throughout the decade since 1968, Congress has never significantly changed its posture on the relationship between federal and state laws dealing with consumer credit. That posture is one of very limited preemption, with the result that the state legislatures and agencies add an overlay of consumer protections and compliance responsibilities that are rarely coordinated with the requirements of federal laws and regulations.

Lack of a National Policy on Consumer Credit

Sharply differing perceptions arise as to the nature and kinds of problems multiple agency rulemaking has caused, and what shape any regulatory

10. In 1970, the Fair Credit Reporting Act, and Truth in Lending Amendments; in 1974, the Fair Credit Billing Act, the Equal Credit Opportunity Act, the Real Estate Settlement Procedures Act Amendments, and the Magnuson-Moss Warranty Federal Trade Commission Improvements Act; in 1976, Equal Credit Opportunity Act Amendments, the Consumer Leasing Act and the discount-surcharge amendment to Truth in Lending; in 1977, the Fair Debt Collection Practices Act, and the Community Reinvestment Act; in 1978, the Electronic Fund Transfer Act, and the Right to Financial Privacy Act.

11. The Community Reinvestment Act, Pub. L. No. 95-128 title VIII (1977).

12. The Commission's inherent authority to issue trade regulation rules was upheld in judicial decisions, and its jurisdiction was extended by legislation to transactions either "in" or "affecting" commerce. In 1975, in Pub. L. No. 93-637 title II, the Commission was given express statutory authority to issue trade regulation rules, to seek restitution from violators, and to impose fines of \$10,000 per day.

13. Both the FDIC and the FHLBB have issued special regulations concerning discrimination in residential mortgage transactions. 12 C.F.R. pts. 338, 528. Those regulations were in part a response to a suit brought against the agencies by the National Urban League and other groups alleging nonenforcement of the Fair Housing Act.

reform ought to take. While unified rulemaking offers certain advantages, embracing the notion of a single federal regulatory body for consumer credit may be unattractive without a clearer picture of what philosophy of consumer protection that body would implement.

The lack of a uniform national policy for consumer credit transactions is not a new topic of concern. As long ago as 1972, the National Commission on Consumer Finance, created under title IV of the Consumer Credit Protection Act, examined the existing consumer credit supervisory and regulatory mechanisms. Its review dwelt more upon enforcement of consumer credit laws and regulations than it did on their formulation.

The Commission examined the three dimensional matrix of consumer regulation—a matrix whose vertical dimensions are the federal scale, the horizontal dimensions are the state enforcement scale, and the third (or depth) dimension is creditor classification. Based on this rather unique model, the Commission reached a number of conclusions, among which were the following:

1. Consumer credit protection laws were intended to protect equally all the citizens of a state or of the United States.
2. The degree of this protection should not depend on whether the consumer deals with a federal or a state chartered institution.
3. All agencies . . . should conduct examinations designed to insure compliance.¹⁴

Thus, the Commission concluded that protection is protection is protection, and that consumers were entitled to it, regardless of the type of creditor or the agency enforcing compliance. What the Commission did not come right out and say, but what may be inferred from the entirety of chapter 4 of the NCCF report, is that creditors should be able to expect the same evenhanded treatment.

Based upon those general premises, the Commission recommended that:

Congress create . . . a unit to be known as the Bureau of Consumer Credit (BCC) with full statutory authority to *issue rules* and regulations and *supervise all examination* and enforcement functions under the Consumer Credit Protection Act, including TIL (emphasis added).¹⁵

Note that this new Bureau would be a central source for the *issuance* of rules, but would merely “supervise” enforcement by existing agencies.

Implementation of that approach has not occurred, however, and faces an immense hurdle which it is doubtful Congress is ready to jump, *i.e.*, adoption of a national policy with respect to consumer credit.

14. National Commission on Consumer Finance, *Consumer Credit in the United States* 53 (1972).

15. *Id.* at 58.

It is difficult to argue that we have such a policy now. Witness the state of affairs under just one act; the Consumer Credit Protection Act. Under titles I (Truth in Lending), VII (Equal Credit Opportunity), and IX (Electronic Fund Transfers), the Federal Reserve Board is given authority to promulgate implementing regulations. Enforcement, however, is parceled out to eight or more other federal agencies which are given specific authority to make their own rules respecting enforcement procedures.

Titles VI (Fair Credit Reporting) and VIII (Debt Collection), on the other hand, are under the primary enforcement authority of the Federal Trade Commission. Although the Commission does not have rulemaking authority under these titles, it has taken upon itself to issue "Interpretations" under Fair Credit Reporting and reportedly has issued several hundred staff interpretations under the Debt Collection title.

And yet, common sense would tell us that one central agency should have supreme authority to prescribe the necessary rules and regulations for the interrelated aspects of consumer credit, whether it be disclosure of the terms of the transaction, selection of customers to whom credit is extended, collecting the debt that results from the transaction, or reporting information to credit bureaus and other creditors about the transaction. There is certainly sufficient commonality among these various aspects of a consumer credit transaction to justify delegation to one agency of the authority to interpret the various acts uniformly and to assure uniform enforcement.

That we do not have that uniformity today is clear. For example, under the Equal Credit Opportunity Act, Congress provided that each applicant against whom adverse action was taken in connection with a credit application is entitled to a statement of the "specific reasons"¹⁶ for that action. The Federal Reserve Board, with primary regulatory authority, has interpreted this requirement by requiring that the "principal reason(s)"¹⁷ be available. Thus, the Board recognized that, in some cases, there is only a single principal reason. The Federal Trade Commission, on the other hand, has recently brought complaints and obtained consent agreements¹⁸ requiring at least four reasons under certain circumstances. The result is that some creditors must furnish four reasons for adverse action, while creditors subject to another agency's jurisdiction need furnish only one or more "principal" reasons. For another example, The Federal Reserve Board in Regulation B provided that a creditor may request any information about the applicant's spouse that may be requested about the applicant if the applicant was relying on the spouse's income as a basis for repayment.¹⁹ The Federal Trade Commission in March

16. ECOA § 701(d)(3), 15 U.S.C.A. § 1691.

17. Reg. B 12 C.F.R. § 202.9(b)(2) (1975).

18. Alden's Inc., FTC Consent Order, Cons. Cred. Guide (CCH) ¶ 98.065 (1978); United States v. Federated Dep't Stores, ___ F. Supp. ___ (S.D. Ohio 1978); United States v. Montgomery Ward & Co., Inc., Cons. Cred. Guide (CCH) ¶ 97,732 (D.D.C. 1979).

19. Reg. B (12 C.F.R.) § 202.5(c)(2).

1978 issued an interpretation holding that reliance on income from the nonapplicant spouse was not a permissible basis for obtaining a credit report on the nonapplicant spouse. The Commission later modified this rule somewhat,²⁰ but it still contains several caveats not imposed by the Board.

The lack of a national policy regarding consumer credit is made manifest in statutes other than the Consumer Credit Protection Act. For example, within a year after the Magnuson-Moss/FTC Improvements Act became law, the Commission promulgated its Holder in Due Course²¹ Rule applicable to sellers. This rule, as finally promulgated, applied not only to sale credit but also to "purchase money loans." Although then-Federal Reserve Board Chairman Burns wrote to then-FTC Chairman Collier requesting a postponement of the effective date, the Commission declined to do so.

Technically, the rule does not apply to banks; however, the Commission published with the final rule a proposed amendment which would extend its coverage to "creditors." Under the unique "triggering" mechanism in the FTC Act²² the Federal Reserve Board will have to issue a similar rule within 60 days after the amendment becomes effective, unless the Board finds that the failure by banks to preserve consumers' claims and defenses is not an unfair or deceptive act or practice or that adoption of such a rule for banks would seriously conflict with essential monetary and payments systems policies of the Board.

Thus, in a regulatory environment in which Congress has repeatedly selected the Federal Reserve Board to exercise specific, exclusive rulemaking power with regard to consumer credit, the FTC has been issued a general grant of rulemaking power to articulate a rather major shift in substantive consumer credit law. Further, the trade regulation rule authority of the Federal Trade Commission permits an agency with neither rulemaking nor enforcement powers over financial institutions, in effect, to bind a banking agency to issue similar regulations without a requirement that the Commission consult with the Board before issuing the regulation.

Another aspect of uniformity bears comment—and that is the matter of enforcement sanctions. Most (if not all) of the enforcement agencies have cease and desist powers.²³ However, one agency—The Federal Trade Commission—has the authority to bring a civil action to recover penalties of up to \$10,000 per day per violation for violation of its trade regulation rules.²⁴ Thus, if and when the FTC and the FRB adopt similar deceptive practices rules, the FTC can seek civil penalties of \$10,000 per violation per day against sales finance companies subject to its jurisdiction, while the Comptroller of the

20. 44 Fed. Reg. 3259 (1979), 16 C.F.R. § 600.8.

21. FTC Trade Regulation Rule, "Preservation of Consumers' Claims and Defenses," 16 C.F.R. pt. 433 (1975).

22. Federal Trade Commission Act § 18(f).

23. See, for the banking agencies, 12 U.S.C.A. § 1818(b).

24. 15 U.S.C.A. § 45(m)(1)(A).

Currency would have only cease and desist powers. Moreover, both the Equal Credit Opportunity Act and the Fair Debt Collection Practices Act permit the Commission to enforce those acts with respect to creditors subject to its jurisdiction as though they were trade regulation rules.

With respect to its enforcement function under Truth in Lending and Fair Credit Reporting, if the Commission prevails in a litigated cease and desist order, it may serve copies of that order on other entities subject to its jurisdiction and, if any of those entities should violate the order, the Commission may then proceed with the \$10,000 a day civil penalty action.²⁵ This is not only a unique enforcement tool, but it partakes of substantive lawmaking as well. Notably, nonparties are exposed to liability for conduct whose illegality was established through an advisory process in which they were not involved, rather than a legislative process.

Thus, one agency has very substantial enforcement sanctions as its disposal which the other agencies do not have. This has a potential for disrupting any attempt to achieve even-handed enforcement, and presents a very formidable potential burden to creditors subject to FTC enforcement authority.

The Federal Reserve Board Versus the Federal Trade Commission Versus the States.

Many of the problems arising from multiple agency rulemaking are attributable to a “tripartite” Congressional approach to the regulation of consumer credit. The three parts are: (1) specific federal laws, for which regulations are issued by the Federal Reserve; (2) a broad mandate to the Federal Trade Commission to police “unfair or deceptive practices” in the consumer marketplace; and (3) the Congressional invitation to states to continue to legislate in the consumer credit area themselves.

On the latter of these approaches, when Congress first got into this business in the late sixties—in the drafting of the Truth in Lending Act—it made a conscious decision not to preempt or displace those state laws. Truth in Lending was to be a simple disclosure statute superimposed on the existing body of state law. Congress refused to add a federal usury law to Truth in Lending although that was seriously proposed!

Congressional restraint was evidenced in another fashion. As it added federal laws to deal with new problems not generally covered in state statutes—*e.g.*, credit card billing practices, discrimination, and the like—again it consciously deferred to the states by providing that if any state wanted to enact a similar law, it would not be preempted unless it were inconsistent with the federal act, nor would it be deemed inconsistent if it provided greater consumer protection.

The result has been a deluge of state statutes dealing with credit billing practices, the disposition of credit balances, discrimination, debt collection

25. 15 U.S.C.A. § 45(m)(1)(B).

and the like. The desire of state legislators to do things a little better than their federal counterparts—or at least a little differently—has led to compliance and interpretative difficulties at least as significant as those caused by federal law and regulations.

The problems posed by duplicative state statutes have been exacerbated by the Congressional decision as to rulemaking at the federal level. In most cases, Congress has given rule *writing* authority to the Federal Reserve Board and then divided enforcement power among a number of other agencies. The rationale is that the agency which has general jurisdiction over an organization should oversee its consumer credit activities. The FTC is given enforcement authority with respect to everyone who does not fit into any one of the other neat regulatory pigeonholes.

The principal problem with such fragmented enforcement power is, of course, that each agency, by the exercise of its authority, generates separate and sometimes conflicting rules of conduct for those subject to its jurisdiction. More importantly, the decisions made in the enforcement proceedings of one agency can create precedents affecting the obligations of creditors not subject to that agency.

The Comptroller of the Currency's staff, for instance, has written some published interpretative letters.²⁶ In addition, a few years ago that office decided that it was misleading for banks subject to its jurisdiction to emphasize on their monthly credit card statements the minimum permissible payment (as contrasted with the full unpaid balance). When a responsible government agency takes that type of position, all creditors issuing similar billing statements are affected. Given the course of Truth in Lending litigation, it would be folly for creditors not to follow the strictest possible interpretations of the statutes and Regulation Z.

Divided enforcement authority also permits an agency which is dissatisfied with a Fed Regulation or Fed staff's interpretations of that Regulation to, in effect, amend those provisions by the position it takes in enforcement proceedings.

It can be fairly said with respect to specific federal consumer credit legislation that, aside from the FTC, no agency has had major *public* differences with the rules and interpretations written by the Federal Reserve Board. Agencies such as the C.A.B., the I.C.C. and the Farm Credit Administration have a very specialized constituency and limited involvement in the mainstream of consumer credit. Therefore, one would not expect them to be innovators.

That is not entirely true of the other financial regulatory agencies, however. Those agencies have recently coordinated rulemaking with the FRB in the development of common examination procedures and Enforcement Guide-

26. See, e.g., Cons. Cred. Guide (CCH) ¶ 42-091-42, 096.

lines for Truth in Lending and ECOA.²⁷ It is clear that there were significant differences among those agencies with respect to the content of the Guidelines and the sanctions to be imposed for violations, but those differences were debated privately and largely compromised in order to develop compatible standards.

Looking to the future, one can expect that the establishment under title X of the Financial Institutions Regulatory and Interest Rate Control Act²⁸ of the Federal Financial Institutions Examination Council will result in the expansion of those efforts to develop common enforcement practices and procedures among the bank and thrift regulatory agencies. From an agency point of view, that is one way to blunt the current proposals (of which pending S.332 is one) to create a single bank regulatory agency.

Although there will continue to be differences in the particulars of those agencies' enforcement practices and creditors will continue to be troubled by what they consider to be aberrations in the decisions of particular regulators, the problems will not, in this context be major.

This sanguine view, however, does not include the Federal Trade Commission. First, an obvious point: the FTC does not have the general examination powers or procedures of the financial regulatory agencies. It was, therefore, not to be expected that it would participate in the development of the Uniform Enforcement Guidelines. Moreover, while those Guidelines may work successfully for the bank regulatory agencies which divide the regulation of about 15,000 banks and examine them regularly, the FTC, which has hundreds of thousands of creditors subject to its jurisdiction, has entirely different enforcement problems.

The second point is even more important and is, in fact, the reason why the major conflicts have involved the FRB and the FTC. It derives from the nature of the Trade Commission Act itself and the type of agency that has resulted.

During the late 1960s, the Trade Commission was being widely criticized for being too timid, too bureaucratic, and generally ineffective. The agency had been formed in 1914 to prevent unfair competition and since 1938 had had more general authority to prevent unfair and deceptive practices in commerce. Stung, or perhaps reinvigorated by that criticism and with new leadership, the FTC began, as we reached the 1970s, to exercise much more actively what it perceived to be its new mandate, reinforced now by the Magnuson-Moss/FTC Improvements Act.

It is sufficient to say that the FTC has, during this period, made full use of an almost unparalleled grant of authority to review and regulate an enormously wide spectrum of commercial activity and to impose in that arena its

27. Final Enforcement Guidelines for Truth in Lending have been adopted and promulgated. 44 Fed. Reg. 1222 (1979). Proposed guidelines for Equal Credit Opportunity Act enforcement are still pending, at this writing. 43 Fed. Reg. 29256 (1978).

28. The Financial Institutions Regulatory and Interest Rate Control Act, Pub. L. No. 95-630 (1978).

views as to what is unfair or deceptive. This started about the same time as the Congress was delegating to the Federal Reserve Board much more circumscribed rulemaking authority under some rather specific and technical consumer credit statutes, while telling the FTC that it was to be one of nine agencies charged with enforcing the FRB's administrative decisions.

There is a paradox here. On the one hand, Congress encouraged, or at least acquiesced in, broad-ranging and essentially unrestrained rulemaking by the FTC on nearly any subject, including consumer credit. On the other hand, Congress moved, in its specific consumer credit enactments, in a much more tentative manner, limiting rulemaking authority, carefully preserving basic state control of the field, and even encouraging additional state activity.

Congress also apparently expected that an agency like the FTC, granted such heady freedom under its own statute, would find it acceptable to be confined to an essentially passive role as an enforcer of another agency's regulations under consumer credit statutes such as the Truth in Lending Act and the Equal Credit Opportunity Act.

From almost any point of view, it simply hasn't worked. The Trade Commission, under its own act, has been far less concerned with administrative restraint or the sensibilities of state legislatures than the Congress. For instance, 40 states had some sort of legislation dealing with the preservation of consumers' claims and defenses in dealer-generated consumer obligations. The Trade Commission Rule²⁹ on this subject preempted nearly all of them. Several states had Door-to-Door Sales Acts superseded by the FTC's rule³⁰ on that subject. As now proposed, the Commission's Credit Practices Rule³¹ would displace or modify a host of local laws. The question is not whether the Trade Regulation Rules are good or bad. It is, rather, what is Congressional policy with respect to the extent of federal intervention in the regulation of consumer credit?

The Trade Commission's activities as an enforcer of specific consumer credit statutes also highlight the difficulties inherent in the question, how does Congress want the statutes now on the books to be administered? While it granted the Fed basic rulewriting and interpretative authority, as well as enforcement power, it has permitted the FTC to challenge that grant at nearly every level of administrative activity.

For example, in 1978 the Trade Commission objected strenuously and publicly to the Board's amendment of Regulation Z to limit the right of rescission in open end credit. Also in 1978, its staff submitted to the Fed staff

29. See n. 19, *supra*.

30. FTC Trade Regulation Rule, "Cooling Off Period for Door-to-Door Sales," 16 C.F.R. pt. 429.

31. FTC Trade Regulation Rule, "Credit Practices" (Proposed 16 C.F.R. pt. 444), 40 Fed. Reg. 16347 (1975).

16 proposed revisions to ECOA's Regulation B. When apparently rebuffed, it came back with four, one of which the Board eventually adopted.³²

The FTC staff has, over the past year or more, regularly objected to Official Staff Interpretations of both Regulations B and Z. When they filed objections to that monumental interpretation permitting the use of two sides of a sheet for revolving credit disclosures,³³ it seemed that perhaps the process of objecting to the Fed's actions had attained a life of its own.

The FTC has also moved strongly at the enforcement level in support of its views as to how federal consumer credit law should be interpreted and administered. The FTC staff has, for instance, made it plain that it has grave doubts as to whether group credit life or disability insurance is ever "voluntarily" purchased in finance transactions so that it can be excluded from the calculation of the finance charge to be disclosed. In proceedings against Commercial Credit, and more recently in the *US Life* case,³⁴ the Commission imposed stringent form and disclosure requirements nowhere to be found in either the statute, regulation, or FRB Interpretations.

A similar series of Equal Credit Opportunity proceedings culminated in the action initiated by the FTC and brought by the Justice Department against Federated Stores.³⁵ The complaint in that action challenged Federated's procedure for giving adverse action notices to customers denied credit. In the process, the Commission took the position that a number of standard reasons used by Federated to explain its adverse action—reasons derived almost verbatim from the list of sample reasons in the Fed's Regulation B—were inadequate and in violation of the law. This has now led to a petition by Sears to the FRB to take action on what it perceives to be distortions by the FTC in interpreting the Equal Credit Opportunity Act.³⁶ The FRB has put the Sears inquiries out for public comment, and the response will undoubtedly bring the FTC-FRB skirmish into sharp focus.

Without intending to criticize either agency, these examples demonstrate the need for Congressional decisions as to: (1) the extent to which the federal government will regulate consumer credit, and (2) the manner in which that is to be done and the federal instrumentalities which should implement those Congressional decisions. These are, in large part, political and not legal questions, but ones which must be answered before attempting to draft a specific proposal to unify the agency rulemaking function.

32. 44 Fed. Reg. 23813 (1979), amending Reg. B § 202.2(1) ("Creditor").

33. The staff interpretation is FC-0149 (1978).

34. *US Life Credit Corp.*, FTC Final Order, Cons. Cred. Guide (CCH) 97,938 & 97,871 (1978). The case has been reversed, however, *US Life Credit Corp. v. FTC*, 599 F.2d 1387 (5th Cir. 1979).

35. *United States v. Federated Dept Stores*, *supra* n. 18.

36. Proposed rulemaking on Equal Credit Opportunity application to Credit Scoring, 44 Fed. Reg. 23865 (1979).

Weighing Advantages and Disadvantages of Regulatory Unification

A pragmatic assessment of the claimed advantages and possible disadvantages of rulemaking consolidation is also in order. While there could be benefits in the form of more uniform and consistent application of the laws and rules, other benefits, such as cost savings to the agencies and to creditors, may be marginal at best. In addition, the banking agencies are subject to criticism for being neither enforcement-effective nor properly oriented toward consumer protection.³⁷ In fact, it can be argued they are caught in an inherent conflict of interest by being responsible both for institutional safety and soundness and for enforcement of consumer laws.

More uniform application of the laws would almost certainly result from consolidating federal agency consumer credit rulemaking in a single place. But the advantage may be only a limited one, for consumer transactions are not a fungible mass. Complexities arise from the transactions themselves, from the various ways in which credit is offered, and from the differences among types of creditors. Further, much of the complexity and some of the inconsistency in the present state of the regulation interpretations and guidelines, is due to the insistence by creditors on getting the most precise and detailed guidance from their regulators on what is adequate compliance. Some 1,500 FRB letters—virtually all to creditors, and the recent amendment of TIL and ECOA to permit “blessed” staff interpretations,³⁸ support this observation. Thus, even if all rulemaking were brought together in one place, the process of hair-splitting interpretations would continue.

Unified rulemaking might have the benefit of opening up to public scrutiny the process by which some of the rulemaking occurs. This lack of “sunshine” has been particularly troublesome for consumer groups in connection with the Interagency Task Force’s work on the TIL and ECOA Enforcement Guidelines. But assertions that unified rulemaking will produce significant cost savings for creditors are dubious. The Congressional hearings are replete with exaggerated estimates of the costs of creditor compliance, at least when measured against after-the-fact calculations of actual compliance costs. A classic example is Sears’ estimate of \$5 each for adverse action notices which eventually turned out to cost 50¢.³⁹

One distinct advantage of unified enforcement, however, would likely be faster decisions on matters of regulatory interpretation and enforcement

37. See, e.g., S. Rep. No. 94-1388, 94th Cong., 2d Sess. (1976).

38. By virtue of 1976 amendments to TILA § 130(f) and ECOA § 706(e), a creditor cannot be held liable for acts done “in good faith in conformity with” any interpretation issued by designated staff members at the Federal Reserve.

39. Compare testimony of Nat’l Retail Merchants Ass’n in Hearings on S. 483 *et al.* by Subcommittee on Consumer Affairs, U. S. Senate Committee on Banking, Housing and Urban Affairs 399 (1975), with Board of Governors of the Federal Reserve System, *Exercise of Consumer Rights Under the Equal Credit Opportunity and Fair Credit Billing Acts*, 64 Fed. Res. Bull. 363, 365 (1978).

policy—faster than at present through the use of Interagency Task Forces and the Interagency Coordinating Committee.

But there are substantial weights on the “disadvantage” side. One of these could be the beginning of an inexorable process toward eliminating the sources of marketplace competition. If consumer protection rulemaking were centralized in one agency, would the existing agencies retain the clout and the individuality to authorize share drafts, interest bearing checking accounts, and other innovative customer services?

From an exclusively consumerist perspective, the great potential disadvantage of regulatory unification would be the probable elimination of the Federal Trade Commission’s role. Or to put the matter in another way, unification of rulemaking authority would sit well with consumer groups only if the FTC became the exclusive rulemaker. The reason for this judgment is that only the FTC has the track record and the independent perspective to be the repository of consumer credit rulemaking authority.

Only as recently as 1976 and 1977 did the banking agencies begin to acknowledge that there were substantial numbers of violations committed by banks under their supervision, and so they began to redesign their enforcement programs. Among consumer groups, many of the promulgated and proposed rules—especially those affecting EFT and ECOA—are viewed as inadequate or even improper implementations of the law.⁴⁰ Further, the FRB in particular has had a penchant for hard-nosed resistance to consumer group requests and proposals.⁴¹

The dominant consumer objection to vesting unified rulemaking in the FRB, however, is the conflict of interest between its role as protector of bank solvency, and its role as protector of the bank’s credit customers. Vigorous rulemaking and enforcement, with the resulting exposure of the bank to agency restitution orders or private civil penalties, could impinge on the agency’s traditional concern for safety and soundness. Even if the agency were objective-minded enough to give equally vigorous effect to both missions, the inculcation of that dual mission in the examiners and other old-line personnel would be no easy task.

Ultimately, the question of whether federal agency rulemaking should be unified comes down to the question of *who*—with what philosophy and attitude—would control that unified process. Even this conclusory restatement of the basic question is a repetition of history, for the Senate Banking

40. A recent example: when the Federal Reserve Board amended Regulation Z with respect to the customer’s right to rescind certain open-end credit transactions, Consumers Union sued the Board on grounds the regulatory amendment violated the statute. *Consumers Union v. Miller*, Civ. No. 78-2188 (D.D.C. 1978). The suit is still pending at this writing.

41. When the National Urban League sued the major financial regulatory agencies for failure to enforce the Fair Housing Act, each of the agencies negotiated a settlement with the plaintiffs, except the Federal Reserve Board which challenged the plaintiffs’ standing and eventually won a dismissal on that ground. *Nat’l Urban League v. Comptroller of the Currency*, 78 F.R.D. 543 (D.D.C. 1978).

Committee engaged in precisely this same debate in 1973 when it was proposed to give the FTC authority to proscribe deceptive practices by banks.⁴² The result was the compromise reflected in section 18(f) of the FTC Act in which FTC rulemaking for non-banks triggers a duty on the part of the FRB to issue similar rules for banks unless the Board can justify. Even as this article is written, the Congress has passed legislation⁴³ removing savings and loan associations from the reach of FTC deceptive practices rulemaking and according that lawmaking authority to the Home Loan Bank Board; this division of authority was born out of concern over FTC meddling in the Bank Board's affairs—and it has the potential for creating the same tensions between the Bank Board and the FTC as between the Federal Reserve and the FTC.

At the same time, the Senate has under consideration an amendment to the pending FTC funding bill, offered by Senator Jepsen of Iowa, which would essentially require the FTC to get the Federal Reserve's permission before prosecuting violations of Federal Reserve regulations under Truth in Lending, Equal Credit Opportunity and similar laws. This would clearly reinforce the Board's position as primary regulator under those acts, but would not resolve broader questions of multiple agency rulemaking.

The Next Step

By way of summary, the Subcommittee on Unified Rulemaking has identified problems with the present regulatory structure, asking deeper questions about the lack of, and need for, explicit national policy on consumer credit, pointing out the primary administrative agency friction point as that due to differing policies between the FRB and the FTC. The creation of a national consumer credit policy is clearly a task for the Congress, through clearer delineation of the preemptive effect of federal laws and regulations on state enactments, and through explicit identification of which regulatory approach shall prevail—*i.e.*, the FTC's roving commission to deal with unfair or deceptive practices, or the FRB's narrower authority to implement specific statutes by regulation.

Questions of possible unification alternatives will occupy the Subcommittee over the ensuing months: *e.g.*, whether consumer credit rulemaking should be assigned exclusively to an existing agency (and if so which one), or to a new entity; whether rulemaking "quality control" needs Congressional action or can be imposed through the Executive branch; and whether any improvements can be made in a way that neither sacrifices consumer protection nor overburdens the credit industry.

42. See S. Rep. No. 93-280, 93d Cong., 1st Sess. (1973), including "Additional Views of Mr. Proxmire."

43. Pub. L. No. 96-37 (1979).