Problems of Federalism in the Regulation of Consumer Financial Services Offered by Commercial Banks: Part II

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PROBLEMS OF FEDERALISM IN THE
REGULATION OF CONSUMER
FINANCIAL SERVICES
OFFERED BY
COMMERCIAL BANKS: PART II

Ralph J. Rohner*

The first portion of this article reviewed the array of federal and state consumer protection laws affecting commercial banks and described the many areas of friction created by such multiple lawmaking. This half of the article addresses the question of how these various laws are enforced by the federal and state bank supervisory agencies and concludes with an evaluation of the many options for improving the overall regulatory and enforcement structure for consumer protection.

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This article is based on a report entitled Problems of Federalism in the Regulation of Consumer Financial Services Offered by Commercial Banks, prepared by the author in 1978-79 for the Task Force on State and Federal Regulation of Commercial Banks, Federal Deposit Insurance Corporation, Washington, D.C. Copies of the original report are available from the FDIC.
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I. THE EXERCISE OF CONSUMER ENFORCEMENT RESPONSIBILITIES BY THE BANK SUPERVISORY AGENCIES

A. In General — A Caveat

The enforcement of consumer protection laws is a responsibility of the three federal banking agencies — the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), and the Federal Reserve Board (Board) — either by express provision in the federal consumer protection laws or by implication from the Financial Institutions Supervisory Act (FISA). In addition, the banking departments in the several states have enforcement functions under state laws applicable to banks within their supervisory authority. Yet, in describing and evaluating the activities of these agencies, it is impossible to make precise empirical comparisons.

On the federal level, the scope of enforcement responsibility varies greatly among the agencies. OCC supervises approximately 4,600 national banks, many of which are large institutions. The FDIC is responsible for 9,100 state nonmember commercial and mutual savings banks. In contrast, the Board has direct enforcement duties for approximately only 1,000 state member banks. Thus, the scale of enforcement activity differs among the three federal agencies even though all are enforcing the same body of laws and regulations. Moreover, the resources allocated to consumer protection by these agencies differ, even on a relative basis, since the agencies have other administrative and regulatory functions competing for resource priority.

Among the seven states studied, the differences in enforcement scope are even more pronounced. There are wide variations in the number of banks operating within each state. For example, Texas has 762 while Utah has only 53. Moreover, since Kansas, Texas, Utah, and Virginia are non-branching states, the agency's examination and enforcement burden is increased because of its inability to sample branches of a single bank. Another variable is the resources available to the banking agencies in each of the seven states. Information supplied to the Conference of State Bank Supervisors indicates that four of the seven states would need budget increases of twenty to two hundred percent to maintain adequate supervision.


2. As noted in Part I, this article is based on a study prepared by the author for the Federal Deposit Insurance Corporation (FDIC). The study concentrated on seven representative states: Kansas, Massachusetts, New York, North Carolina, Texas, Utah, and Virginia.
without federal assistance. Additionally, in most of the states the bank supervisor’s responsibilities include not only commercial banks but other financial institutions as well — thrifts, small loan companies, money order companies, perpetual care cemeteries, and the like. These institutions create competition for, and consequently drain, the limited resources of the state agencies.

Perhaps the major differentiating factor among the seven state agencies is the substantive law they are charged to enforce. Unlike the three federal agencies, each of which enforces the same body of federal consumer law, the scope and complexity of applicable state consumer laws differs markedly from state to state. Those states which have enacted the UCCC, such as Kansas and Utah, have a comprehensive range of applicable provisions. Others, such as New York, have a wide range of consumer protection, including incorporation-by-reference of a number of federal laws such as Truth in Lending. Massachusetts has been specifically exempted from the federal TIL law in favor of a substantially identical state version. In contrast, banks in Virginia and North Carolina are subject to state usury laws and virtually nothing more.

Another reason why statistical comparisons among the state and federal agencies cannot be made is the absence of comparable accounting and budgeting systems. Among the three federal agencies, and even within the aggregate budgets for each agency, it is difficult to derive reliable figures for those expenditures attributable to consumer enforcement. Moreover, each agency conducts its consumer enforcement efforts through a variety of functional operations: a consumer affairs office in the central Washington headquarters; examiner training in a separate office; and examinations through regional offices. Even though consumer compliance examinations by the three federal agencies are now conducted separately from the commercial examinations, none of the agencies keep records in a way that allows meaningful expenditure comparisons to be made.

At the state level, the absence of reliable data on enforcement costs is even more evident. The state supervisors, particularly those in states where their responsibilities include nonbank institutions, can only estimate

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3. See generally A PROFILE OF STATE-CHARTERED BANKING (Conf. of State Bank Supervisors 1977 ed.) [hereinafter cited as CSBS REPORT].
4. For a more complete discussion of state consumer laws, see Rohner, supra note 1, at 20-27. For a listing of state statutory provisions, see [1976-1978] 2-4 CONS. CRED. GUIDE (CCH); MONOGRAPH No. 8, A COMPILATION OF FEDERAL AND STATE LAWS REGULATING CONSUMER FINANCIAL SERVICES (Cred. Res. Center, Purdue Univ. 1977).
5. See N.Y. BANKING LAW § 353 (McKinney 1971).
the aggregate percentage of time allocated to commercial bank examinations. Their responses to inquiries about the proportion of time or resources expended on consumer law compliance were pure guesswork. Thus, efforts to evaluate, comparatively or absolutely, the costs and benefits of the consumer enforcement activities of federal and state agencies suffer not only from a dearth of hard data but are at best apples-and-oranges comparisons.

B. The Federal Agencies

1. Background

Active involvement of the OCC, FDIC, and the Board in consumer protection began in 1968 with the enactment of the Consumer Credit Protection Act\(^7\) as each of the agencies was specifically charged to enforce the disclosure provisions of Truth in Lending (TIL). Since then the number of federal laws and regulations has multiplied,\(^8\) and with it the enforcement responsibilities of the agencies. The energy, enthusiasm, and sophistication with which the agencies have tackled consumer compliance, however, has grown slowly but steadily. This expansion is attributable to a number of causes — congressional criticism, lawsuit settlements, and the inevitable refinement of techniques over time.

a. Congressional Oversight

When TIL was enacted in 1968, Congress assumed that the federal regulatory agencies would adequately enforce it. But, according to the report of the National Commission on Consumer Finance (Commission),\(^9\) all the federal agencies did was to adopt, as part of the regular examination procedure, special procedures for TIL compliance. The Commission further noted that, although the vigor of enforcement varied among the individual agencies, all federal enforcement remained rather cursory through 1972.\(^10\)

The need for a more energetic enforcement attitude on the part of the federal agencies was underscored in 1974 when Title II of the Federal Trade Commission Improvements Act mandated the creation of separate


\(^8\) For a compilation of these federal laws, see Rohner, supra note 1, at Appendix A.

\(^9\) See CONSUMER CREDIT IN THE UNITED STATES, REPORT OF THE NAT'L COMM'N ON CONSUMER FINANCE 56 (1972) [hereinafter cited as NCCF REPORT].

\(^10\) Id. at 56-57. The Commission did commend the FTC for its efforts in enforcing TIL, particularly since the FTC has no general and continuing supervisory and examination authority over creditors that come within its TIL jurisdiction. Id. at 57.
Regulation of Consumer Financial Services

offices for consumer affairs in each bank agency. While the Board's annual reports preceding 1974 had regularly announced that TIL was being enforced vigorously and evenhandedly and that "substantial compliance" was being achieved, these conclusions had to be revised upon closer examination. Although the Board maintained, in its 1974 annual report, that there was substantial compliance for written disclosures, it did admit to a "disappointing" compliance rate for oral disclosure.

In 1976, a Senate Banking Committee Oversight Report found the enforcement efforts by all three agencies to be unsatisfactory. Several serious problems were noted. First, although the consumer divisions had been created as required, their staffs were too small to conduct adequate compliance reviews and had no outreach capability. Second, the compliance examinations were conducted as an insignificant adjunct to the regular commercial examinations by examiners with minimal consumer law training. Finally, the committee criticized the reluctance on the part of federal supervisors to enforce state consumer protection laws.

In the same year, the Senate Banking Committee also issued a report on enforcement of the fair lending provisions under the Fair Housing Act. It found that only the Federal Home Loan Bank Board (FHLBB) had issued regulations for fair housing enforcement through regular examinations; the FDIC and the Board merely encouraged voluntary compliance. None of the agencies required banks to keep racial records for monitoring purposes, and no sanctions or affirmative action had ever been employed.

The oversight hearings on TIL enforcement conducted by the House Committee on Government Operations in the fall of 1976 produced many

14. Id. at 6-11. The committee report also expressed concern over the small number of formal enforcement actions, minimal consumer education efforts, and the Board's failure to use its authority to proscribe unfair or deceptive banking practices. None of the agencies had been able to give detailed breakdowns of violations actually detected. Consequently, the report recommended that the agencies establish procedures to record and analyze both examination and complaint violations. Id. at 8.
15. See S. Rep. No. 930, 94th Cong., 2d Sess. 2-3 (1976). In fact, the FDIC had denied the Justice Department access to its records on fair lending. The committee recommended that lenders be required to keep statistics on race and sex and approvals and denials of loans and to furnish them to the federal agencies regularly and also to make them available to the public. It also recommended that the agencies issue regulations delineating prohibited practices and sanctions in addition to increasing affirmative enforcement action. Id. at 3-4.
of the same conclusions found by the Senate. TIL enforcement activity was found to be lacking in substance. The committee specifically recommended revising examination procedures so that the types and numbers of violations would be detailed and that the corrective action taken would be specified. The committee further recommended that, rather than assigning regular examiners to consumer compliance on a short-term basis, the agencies should develop career paths for consumer specialists. The basis for these recommendations was dramatically reinforced by the results of separate compliance exams conducted in Massachusetts by specially trained state examiners who found many more violations than had been reported in FDIC examination reports of the same banks. This lack of focus on individual violations was a major reason for the felt inadequacy of the regular exams conducted by the FDIC.

These congressional critiques have had a pronounced impact on agency policies. Although not all of the oversight recommendations have been followed, the congressional attention forced the agencies to give consumer compliance a higher priority.

b. National Urban League Lawsuit

Congressional pressure for strengthening consumer enforcement by the three federal banking agencies was augmented by a lawsuit brought by the National Urban League and other civil rights groups against these agencies and the FHLBB in 1975, seeking to compel implementation of the Fair Housing Act. The suit was brought because none of the federal banking agencies had issued regulations, instituted racial data notation systems, nor otherwise taken affirmative steps to assure bank compliance.

The Urban League lawsuit culminated in settlements between the plaintiffs and all of the defendant agencies except the Board. The settlement agreements with OCC and FDIC clearly contemplate increased enforce-

17. Id. at 7, 12.
18. Id. at 13-14, 17-18.
19. Although no committee report was ever issued, the Subcommittee on Consumer and Monetary Affairs of the House Government Operations Committee held additional oversight hearings on the agencies' fair lending enforcement programs in the fall of 1978. See Banking Regulatory Agencies' Enforcement of the Equal Credit Opportunity Act and the Fair Housing Act: Hearings Before a Subcomm. of the House Comm. on Gov't Operations, 95th Cong., 2d Sess. (1978) [hereinafter cited as House Oversight Hearings on ECOA and FHA Enforcement]. Members of the subcommittee continued to be critical of the agencies' programs.
21. 42 U.S.C. §§ 3601-3619 (1976). For a discussion of the FHA's requirements and enforcement responsibilities, see Rohner, supra note 1, at 7 n.9, 15 nn.54 & 56.
ment activity in connection with those laws having a civil rights content—Fair Housing, ECOA, and HMDA. Although the thrust of the agreements was toward the development of data systems permitting an identification of patterns of discrimination—either overt or covert through application of the "effects test" analysis—emphasis was also placed on providing examiners with analytical tools for the recognition of discriminatory practices.

The settlements with the FDIC and OCC were signed in May and November of 1977 respectively, and many of the principal points of the agreements have been implemented. Both agencies have appointed civil rights specialists and are developing data analysis systems, though more slowly than contemplated. The FDIC has issued regulations to strengthen its data-gathering for monitoring purposes, and OCC has proposed comparable regulations.

The Board did not join in settlement of the Urban League suit and eventually won a dismissal on grounds of plaintiffs' lack of standing. The

22. The FDIC agreed to establish a data collection and analysis system for determining whether race or sex had been a factor influencing lending decisions, to train examiners especially to focus on racial and sexual factors, to create a position for a full-time civil rights specialist, to amend current processing procedures for complaints of violations, to provide the plaintiffs with an opportunity to comment on the FDIC's enforcement programs, to offer suggestions for improvement and to give written explanations for all suggestions not followed when requested by plaintiffs. See Settlement Agreement Between Plaintiffs, National Urban League, et al. and Defendant, Federal Deposit Insurance Corporation, National Urban League v. OCC, No. 76-0718 (D.D.C. May 13, 1977). The settlement agreement with the OCC was substantially the same. See Settlement Agreement between Plaintiffs, National Urban League, et al. and Defendants, Office of the Comptroller of the Currency and John G. Heimann, Comptroller of the Currency, National Urban League v. OCC, No. 76-0718 (D.D.C. Nov. 30, 1977).

It should be noted that the type of enforcement activity called for in the settlements differs from the traditional "forms review" which constituted TIL compliance activity. Here the emphasis is on examiner training and investigatory techniques to produce a greater capacity to identify violations while TIL enforcement involves primarily an accountant's type review of credit instruments. This difference serves, in some measure, to separate bank compliance activity into two parts: (1) more traditional hard-data reviews, as for TIL, Fair Credit Billing, and even for application-form aspects of ECOA and (2) a newer emphasis on piercing the collected data for hints as to the existence of discriminatory lending policies. This division is reflected in the reorganizations at OCC and FDIC to separate civil rights from other consumer credit operations.

23. See 12 C.F.R. § 202.6(a) n.7 (1979). Under this effects test, a lending practice is prohibited if it has discriminatory consequences even if there had been no intent to discriminate. See Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).


Board, therefore, did not make a comparable commitment to improving fair housing enforcement activities.

In general, the attitude of the Board seems more resistant to the adoption of explicit mortgage underwriting criteria, as the FHLBB has done, or to the full implementation of a data notation and analysis system, as the FDIC has done. While the National Urban League suit was still pending, however, the Board commissioned a consultant to study its fair housing enforcement program. The resulting Dennis Report27 was critical of the Board's lack of clear commitment to vigorous enforcement of the credit discrimination laws and of the training, enforcement, and advisory programs in the civil rights area. All evidence indicates that the Board is taking the report seriously and is making efforts to respond. Training and examiner materials, for example, have been redesigned to incorporate Dennis' suggestions. Thus, in the case of the Board, some impetus toward strengthened enforcement has come indirectly from the Urban League suit.

It is likely that the impetus of these lawsuit settlements, coupled with continued congressional oversight, will produce greater emphasis on the enforcement of antidiscrimination laws in the area of mortgage lending. Since the settlement agreements are limited to home mortgage credit, and do not encompass the full scope of the ECOA, much less any of the more conventional consumer protection laws, their broader impact is speculative. They do indicate, however, that under pressure the agencies can make more than a rhetorical commitment to strengthened enforcement.

2. Compliance Examinations

The primary enforcement instrument for all three of the federal bank supervisory agencies is the compliance examination. In 1968, when the agencies were charged with TIL enforcement, the logical technique was to build a TIL compliance component into the regular bank examination process, a process of periodic unannounced site visits intended to assure the bank's safety and soundness. Thus, the use of regular commercial bank examiners to review for consumer compliance is as much an historical accident as the result of conscious selection of the optimum enforcement mode. It is only within the past three years that each of the agencies has more or less separated the compliance examination procedure from its commercial exam ancestry.

a. Procedure

The basic methodology of consumer compliance exams is similar among the three agencies. Each has assigned a number of its examiners to compliance examination duty: on a six-month rotation at the FDIC and OCC; on an indefinite basis at the Board. At the same time, each of the agencies conducts special examiner training programs in consumer law compliance, and the examiners assigned to compliance duty have usually attended one of these special consumer law training programs.

As of about mid-1977, each of the three agencies separated its compliance exams from the regular commercial exams. Certain examiners would now look exclusively at the bank's consumer operations, and prepare a separate compliance report. Only the FDIC directed that its compliance exams should be done at different times than the commercial exams, thus making the FDIC's compliance examination procedure altogether independent of the safety and soundness exams.

The actual examination process involves one or more compliance examiners who sample the bank's files for various kinds of consumer credit transactions, follow checklists and instructions for determining compliance or noncompliance, complete worksheets noting violations, review bank policies with appropriate bank officers, and complete compliance examination reports which are discussed with bank management. Compliance exam reports are reviewed at the regional office level, and appropriate follow-up steps are taken. These might include further consultations with bank management, another special exam, or the forwarding of recommendations for action to Washington headquarters.

b. The Examiner Corps

The number of examiners assigned to consumer compliance varies among the three federal banking agencies as do the number and size of the banks each agency supervises. The FDIC, with approximately 9,100 insured nonmember banks, employs approximately 2,500 examiners nationwide, of whom approximately 200 are engaged in consumer enforcement at any one time. OCC supervises some 4,600 national banks with a corps of 2,200 examiners; about 135 of these are engaged in consumer compliance. At the FDIC, therefore, approximately eight percent of its examiner manpower is allocated to consumer enforcement; at the OCC, six percent is allocated. At the Federal Reserve, by contrast, 100 of the system's 700

28. Much of the information in the following pages defies conventional citation. It is the product of the author's reviewing numerous formal and informal agency documents and of personal and telephone consultations with staff at each of the federal banking agencies.
examiners are regularly involved with consumer compliance for their 1,000 state member banks. This is an allocation of more than fourteen percent of the Board's manpower to consumer exams.

There are further differences among the agencies. The FDIC plans to examine each bank once every fifteen months, the OCC once every two years, and the Board, at least at the beginning of its experimental special exam program, once a year. The length of time the examiners spend on site also varies. The FDIC indicated its examiners typically spend two to three days at a bank; the OCC said its average consumer exam lasts 8.7 working days; and the Board, with its higher ratio of examiners per bank, indicated that its compliance exams range between five and ten days.

After the initial decision to pull a number of regular examiners "out of the line" to do compliance exams, each agency experienced some uneasiness and reluctance on the part of those examiners. Their concerns seemed to be twofold: first, some of the examiners apparently viewed consumer compliance as a less significant, less important aspect of the agency's responsibility, or at least something other than what they expected to do as bank examiners; second, many of the selected examiners apparently worried that assignment to consumer compliance would take them outside the mainstream of career advancement.

Fortunately, each of the three agencies indicated an awareness of the need to assure themselves of dedicated consumer examiners who did not consider themselves, and were not treated as, second-class personnel. Recently, the three agencies have confirmed their plans to provide consumer examiners guaranteed career advancement, and the FDIC even announced that it was creating a cadre of special higher-level career consumer specialists.29

Eventually, the separation of consumer compliance examinations from commercial soundness and safety examinations may become so complete and the techniques involved so different as to require a corps of special consumer compliance examiners, with special credentials and training. Such a clean separation of compliance functions from safety and soundness is not compelled under the present circumstances, but in the future the agencies should not feel bound by the conventional examiner model.

Basic to successful compliance examinations is the nature of the training the examiners receive. No more than several years ago, according to congressional reports,30 the agencies conducted only minimal training in consumer compliance, each apparently using materials and instructional

30. See notes 13, 16 and accompanying text supra.
techniques of its own design. The current emphasis on separate consumer examinations performed by specially trained examiners has forced each agency to expand its training efforts, and this in turn has drawn the agencies somewhat closer together in their training approaches.

Each agency has been assigning examiners to compliance training programs in greater numbers than are being immediately assigned to compliance duties. That is, they are developing consumer compliance expertise throughout the entire examiner corps, although only a fraction of those people will be doing compliance exams at any given time. OCC and the Board offer two-week consumer law training programs while the FDIC's program was only one week long until 1979. For "trainers," the Board has tended to rely heavily on the lawyers from its Division of Consumer Affairs, and their presentations have been criticized somewhat as being "over the heads" of the examiners or too theoretical for the examiners' more pragmatic needs. OCC, on the other hand, has preferred to use senior or experienced examiners as trainers on the ground that they can communicate better on the examiners' level.

In the area of antidiscrimination laws, the agencies' materials may all be subject, in greater or lesser degree, to criticisms in the Dennis Report directed at the Board materials. The Report noted that discriminatory practices could not be examined adequately by merely reviewing forms and that it was necessary for examiners to know how to analyze credit records for discriminatory factors not apparent on their face for unarticulated bank policies and for possible effects test violations. In fact, all three of the agencies have modified their materials beyond those of the Board which Dennis reviewed. The revised materials now cover important civil rights case law and point out the need to investigate the bank's overall underwriting practices including its relationships with appraisers and realtors. Although these are needed improvements, they ought not to be limited, as they presently are, to mortgage credit since ECOA applies to the whole universe of credit transactions.

c. Compliance Examinations: Scope and Depth

The scope of the compliance examinations — in terms of the body of law for which compliance is reviewed — is essentially the same for all three agencies. They examine for violations of each of the substantive federal laws and regulations discussed in Part I[2] and also for violations of incidental regulations such as those on savings account advertising,

32. See Rohner, supra note 1, at 6-14.
mandatory FDIC decals, and the like. Each of the agencies hedged on the extent to which its examiners regularly reviewed compliance with state usury and other state consumer protection laws. Since national banks are subjected to state usury laws by the National Bank Act, OCC does provide its examiners with some training, instructions, and working papers to test compliance with those laws. But even these materials do not delve into the actual prevailing rates in the various states nor into the many complications in determining how rates are to be computed under differing statutory formulae or court interpretations. Because of its exclusive visitorial powers for national banks, OCC has acknowledged a responsibility to enforce applicable state consumer laws and has begun to accumulate more complete information on those laws. OCC has also begun, on a "piece-meal" basis, the enforcement of state laws in several states in cooperation with state officials. In contrast, the compliance manuals used by FDIC and the Board do not address state laws other than usury.

Other aspects of the agencies' training and instructional materials underscore the limitations in the scope of their compliance examinations. For instance, banks may be exposed to liability for TIL violations in consumer paper they obtain by purchase or discount from dealers. Yet, as of late 1978, the examiners were not given special instructions for determining the dealer's compliance with sales and credit disclosure responsibilities. Additionally, the examiner materials did not acknowledge the indirect applicability of the Federal Trade Commission's Holder Rule.

More serious, perhaps, is the failure of these instructional materials to acknowledge the impact on bank compliance of the many judicial interpretations of laws such as Truth in Lending. Both the instructional

34. See Form letter from John G. Heimann, Comptroller of the Currency, to state bank supervisors (August 2, 1977).
35. See Rohner, supra note 1, at 18.
38. In his report to the Board on credit discrimination enforcement, Warren Dennis makes this point with respect to the body of civil rights case law which undoubtedly will influence court interpretations of ECOA as well. See DENNIS REPORT, supra note 27, at 13, 19-22. Some significant case law is now included in the credit discrimination materials at each agency. The same point can be made as to TIL case law although the problem of synthesizing the hundreds of TIL interpretations into meaningful training instructions or checklists is no doubt very difficult.
materials and the case studies rely on references to or paraphrases of the regulations or on official Board interpretations. Virtually no attention is paid the numerous Board staff letters, nor is there any reflection of the myriad qualifications and shadings added by court opinions. If a partial purpose of compliance exams is to protect banks from exposure to suits, the present procedures do not do the best possible job.

d. Examination Effectiveness

There is a touch of irony in the way effectiveness of consumer compliance exams is currently measured; that is, the more violations discovered the better. Had there been uniform standards and procedures through the years, one would expect the level of noncompliance to decrease as banks became more familiar with the laws' requirements. But there is no doubt that the current compliance exam procedures are more thorough and exacting than in the past and are revealing higher percentages of violations.

In its early annual reports on TIL, the Board, after consultation with the other enforcement agencies, reported inconsequential levels of violations. The FDIC, for example, detected TIL violations in approximately ten percent of its examinations in 1974, which was an increase of only three-and-one-third percent from the preceeding year.\(^3\) The 1975 Board report,\(^4\) however, noted that OCC, FDIC, and Connecticut state examiners had found an increased number of violations attributable to better examination procedures and increased examiner sophistication rather than to a trend toward noncompliance. These reports were noted by the Senate Banking Committee in 1976, in its July oversight hearings.\(^4\) Senator Proxmire expressed amazement that the banking agencies had taken almost no formal actions against banks even though the FDIC reported discovery of violations in twenty-eight percent of its examinations and the Comptroller acknowledged that "the number of violations noted in formal reports of examination since 1969 is substantial and not capable of being itemized."\(^4\)

Against this background, the noncompliance percentages reported more recently by the agencies may be less startling. The chart below contrasts the numbers and percentages of examinations disclosing violations of Reg-

\(^3\) See Letter from Frank Wille, Chairman, FDIC to Jeffrey M. Bucher, Board of Governors, Federal Reserve System (November 12, 1974).


\(^4\) Id. at 2 (opening statement of Sen. Proxmire).
ulations B and Z for 1976, 1977, and 1978:\textsuperscript{43}

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It should be noted that these percentages indicate the numbers of examinations in which any violation is detected; they do not mean that the stated percentages of bank transactions are not in compliance. On the other hand, there is a remarkable disparity between the level of violations found by OCC and Board examiners and by FDIC personnel. The generally smaller size of the FDIC's state nonmember banks, with accompanying lack of in-house lawyers or compliance officers, would seem to leave them as prone to violations as their national or state-member counterparts. The disparity therefore must rest, to some degree, in the relative meticulousness of the examiners' reviews.

Both the agencies and the banks acknowledge that compliance exams often serve an auxiliary educational purpose — informing bank officials of interpretations and nuances of the laws and regulations. In this light, the current examination results may be seen as serving both a corrective and preventative purpose. The Board, in addition, has instituted a formal advisory program in which consumer specialists from the various reserve banks visit member banks for consultation on forms and procedures. Some 770 such visits, averaging about a day in length, were made in 1977.\textsuperscript{44}

In sum, the revised examination procedures implemented in each of the three federal agencies in the past three years have been effective in identifying larger numbers of apparent violations. If one assumes, as the agencies do, that there is not a trend toward outlawry by the banking industry, the high percentages of detected violations must be attributable to sharp-

\textsuperscript{43} These figures, although not amenable to conventional citation, can be verified in reports from the FDIC and OCC to the Board on TIL and ECOA as well as in the annual reports from the Board to Congress on TIL and ECOA.

\textsuperscript{44} See Board of Governors of the Federal Reserve System, Annual Report to Congress on Truth in Lending for the Year 1977 7 (1978) [hereinafter cited as FRB 1977 Annual Report on TIL].
ened examiner skills and techniques. It is perhaps heartening that the agencies themselves characterize many of these violations as "technical" — unintentional failures to execute mechanical requirements in the law. But it may also be the case that the examiners have concentrated on the kinds of violations that can readily be discerned from a careful forms review, leaving untouched more substantive patterns of violations, especially in the civil rights (equal credit opportunity) area.

3. **Complaint Handling Procedures**

As required by the 1975 amendments to the Federal Trade Commission Act, all three federal banking agencies handle individual consumer complaints, both through their regional offices and at their Washington headquarters. When a consumer complaint is received, it is recorded on a standard form, coded, and entered into the agency's computer. Records of complaints received and handled at the regional level are forwarded periodically to the Washington office. All complaints received in Washington are acknowledged from that office.

Field examiners or regional office consumer specialists will then contact the bank and request relevant factual information. Subsequent correspondence with the consumer or the bank disposes of most cases. Direct contact by the examiner with the bank or the consumer is in the examiner's discretion and usually depends on the factual information needed for resolution.

Each of the agencies professes to handle complaints of all kinds, ranging from impolite tellers to substantial violations of law. Complaints involving unlawful practices are not confined to violations of federal laws and regulations and include assertions of various state law violations. Thus, agency enforcement through complaint handling has a broader scope than enforcement via compliance exams which are limited to federal laws.

The Washington offices have only recently issued formal written procedures for their personnel to follow for general consumer complaints. The headquarters offices cannot be certain how closely these are followed; in all three agencies, the regional offices have discretion to modify procedures. Nor do any of the agencies have a standard means of deciding when or what type of investigation should be made in a given case.

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All three agencies keep computer records of complaint resolutions in addition to data about complaints and inquiries received. Agency examiners have access to the complaint correspondence with the bank in preparing for the compliance examination at that bank.

The agencies publicize the existence of the complaint procedures in various ways, for example, by pamphlets with mail-in complaint forms attached. Additionally, the agencies maintain a working referral system among themselves although none of the federal agencies maintain a regular referral system with the state bank supervisors.

In short, while each of the agencies has taken its complaint-handling responsibilities seriously, the overall effectiveness of the programs remains questionable. The data on complaint volume indicates that many customer “complaints” do not allege violations of law, but factual disputes, discourtesies, or similar matters. The Board recently found, for example, that no more than seventy customer complaints out of 3,200 involved apparent violations of legal rules. In addition, the data systems at the three agencies are not fully compatible. This has resulted in difficulties when the agencies have attempted to combine their data for analytical purposes. One of the hopes was that complaint data information would show patterns of bank practices justifying enforcement action or the issuance of deceptive-practices regulations. Thus far, the complaint procedures have not permitted this broader use.

4. Education

Banker education is an important part of the regulatory function; the more the banker knows of consumer laws, the fewer the violations and risks of bank exposure to civil liability. Whenever a law or regulation is enacted or amended, each agency sends its banks an up-date letter explaining the law and how best to comply with it. Each agency will also promptly answer inquiries from banks. Most of the educational services for bankers are performed at the regional level. The agencies send speakers to bankers’ meetings and American Bankers Association seminars and may organize their own bankers’ workshops.

The agencies have also established various programs aimed at educating the bank customer. These programs, while not unsuccessful, are not really

47. See Board of Governors of the Federal Reserve System, Annual Report to Congress on Section 18(f) of the Federal Trade Commission Act for the Year 1978 4-6 (1979) [hereinafter cited as FRB 1978 Annual Report on Section 18(f)].

48. The reference here is to rather informal responses by agency staff to industry inquiries by letter or phone. This “educational” function is to be distinguished from the issuance of official and unofficial opinion letters by the Board’s staff.
hitting the mark. For the most part, they are limited to speaking engagements before consumer groups, the distribution of pamphlets, and the occasional development of educational films. Although the content, range, and volume of distribution appear impressive, there is some question as to how many actually reach the intended audience. Distribution is often through the banks, and banks are not generally anxious to inform their customers they may have rights which can be asserted against the bank. All three agencies are attempting to develop materials for schools and other large groups\textsuperscript{49} in order to reach the public in a meaningful manner. At the present, however, education seems to occupy a lower priority than other enforcement efforts.

5. Remedial Measures

A review of the federal banking agencies' consumer protection activities must take into account the corrective or remedial measures the agencies' have brought to bear on banks.

a. Cease and Desist Orders

Since 1969, the agencies' annual reports indicate that cease and desist orders are occasionally issued by the three bank agencies in response to violations of the various consumer protection laws for which they have enforcement responsibility.\textsuperscript{50} All are "consent" orders rather than the result of litigated complaints. One clear meaning of these figures is that the three banking agencies have not used formal administrative proceedings as an integral part of their enforcement arsenal. Instead, the agencies have relied almost exclusively on examination reports and the resulting consultation with bank officials to bring about informal and prospective correc-


\textsuperscript{50} The FDIC appears to have used cease and desist orders most often. For example, it has issued a total of 10 in the years 1976 and 1977, to enforce Regulation Z. See Letter from Lewis G. Odom, Jr., Deputy to the Chairman, FDIC, to J. Charles Partee, Board of Governors, Federal Reserve System (November 27, 1978); Letter from George A. LeMaistre, Chairman, Office of Bank Consumer Affairs, FDIC, to Philip C. Jackson, Board of Governors, Federal Reserve System (December 7, 1977), and a total of nine in the same two-year period to enforce Regulation B. See Letter from Lewis G. Odom, Jr., Deputy to the Chairman, FDIC, to Nathaniel E. Butler, Associate Director, Board of Governors, Federal Reserve System (December 19, 1978); Letter from George A. LeMaistre, Chairman, Office of Bank Consumer Affairs, FDIC, to Janet Hart, Director, Division of Consumer Affairs, Board of Governors, Federal Reserve System (December 13, 1977).
tions of detected violations. Both the agencies and the banks see a distinct educational function in compliance exams; to the extent the examiners and the agency supervisory personnel consider themselves as compliance instructors, it may be understandable that they have not taken hard-line enforcement postures.

The agencies' rare use of formal sanctions is probably attributable to their reluctance to take a strong adversarial position against banks on consumer protection matters. While formal administrative proceedings are cumbersome, expensive, and understandably regarded as sanctions of last resort, the inertia of conventional attitudes and the slow acceptance of their roles as consumer protectors have been at least subconscious factors in the determination of compliance policies. Yet, these policies are changing. The agencies' arsenal of formal enforcement weapons has also grown by virtue of the amendments to the FISA contained in the recent Financial Institutions Regulatory and Interest Rate Control Act.\(^5\)

b. Publicity: Consumer Notification

Not only have the agencies been reluctant to initiate formal administrative proceedings, but they have been slow to seek any remedial action with respect to past violations. None of the three agencies has been willing to use publicity to bring banks into compliance. The agencies cite the confidential nature of examination reports as barring any disclosure of the names of noncomplying banks or of the nature of the violations. The OCC, for example, has vigorously and successfully resisted a Freedom of Information Act request from Consumer's Union for the identity of banks found to have overcharged consumers under TIL.\(^5\)

Neither have the agencies seriously considered informing the consumers who are affected by violations, a technique proudly employed by several state supervisors\(^5\) and recommended by congressional oversight reports.\(^5\)

While the traditional confidentiality of examiner reports may be understandable in the context of concern for safety and soundness, it is less clear

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\(^5\) 1. Pub. L. No. 95-630, tit. I, 92 Stat. 3641, \textit{reprinted in} [1978] \textit{U.S. Code Cong. & Ad. News} 3641, 3641-72. Title I of this Act amends the FISA in numerous respects, one of which is to authorize the banking agencies to impose fines of $1,000 per day for violations of cease and desist orders. \textit{Id.} at 3641.


why compliance information should be so privileged. Where the applicable law affords consumers a cause of action for actual or statutory damages, it may well be considered a part of the enforcing agency's responsibility to see that those consumers are aware of their rights. Certainly the agencies have no hesitancy in telling the banks about violations so they can protect their rights. Unless the agencies are intended to serve exclusively as protectors of bank assets, it would seem there should be some room for a controlled form of publicity about discovered violations.

At one point, a proposal to amend Truth in Lending to authorize the agencies to publicize violators was criticized as comparable to a bill collector's "shame list" and dropped from the legislative proposal. Publicity in the form of press releases naming offending banks may serve no constructive purpose beyond possibly embarrassing the banks into greater compliance efforts. On the other hand, notification to individual affected consumers, at least in any case where actual damages are possible, is consistent with the notion that the agencies have a fundamental duty to those consumers. Such a notification program need not present undue risk of liability for the bank involved where the applicable consumer law permits a bank to avoid any penalty liability if it takes corrective measures promptly after discovering violations.

The situation is somewhat different in the case of violations uncovered in response to individual consumer complaints. Of necessity, to resolve the matter in the consumer's favor where that is appropriate, the consumer must be advised of the results of any investigation conducted. Apparently this happens regularly, as each agency indicates that substantial numbers — although a relatively small percentage — of complaints are resolved in the consumer's favor. A distinguishing factor here, however, is that the information indicating a violation does not derive from an examination report and that veil of confidentiality is inapposite.

56. The Regulation Z (TIL) Enforcement Guidelines, 44 Fed. Reg. 1222 (1979), in fact do call for customer notification, and the written notice must indicate that the bank's reimbursement is a result of the creditor's failure to make required TIL disclosures. Id. at 1224, § 9. See also Questions and Answers Regarding Joint Notice of Statement of Interagency Enforcement Policy for Truth in Lending 8 (prepared by the staffs of OCC, FDIC, FHLBB, the Board, and NCUA 1979).
57. See 15 U.S.C. § 1640(b) (1976). The creditor can avoid liability if it notifies the affected consumer of the error and makes any necessary adjustments within 15 days after discovering the violation and prior to any action being instituted or any receipt of written notice. Id.
c. Restitution: The TIL Guidelines

The remedial measure that is currently attracting considerable attention is restitution, that is, the ordering of refunds of specific dollar amounts to consumers where TIL disclosures have misstated certain charges. The five financial supervisory agencies collaborated on drafting such enforcement guidelines and promulgated them in early 1979. 58 As discussed below, the reaction has been volcanic.

The present interest in a restitutionary remedy apparently originated in the 1976 and 1977 congressional oversight hearings, in which both House and Senate committees urged the agencies to pursue refunds for overcharged customers. 59 These recommendations cited a pilot study by OCC which found overcharges of $1.6 million among twenty-seven national banks in the New England region. This estimate seems small in light of further investigations by OCC and analyses of some 1,400 compliance examination reports from 1977. Based on possible overcharges discovered by the examiners, OCC estimated conservatively that overcharges in excess of $32 million could have been made by national banks alone. 60 Adjusting that figure, even roughly, to account for state-chartered banks could mean that the amount of customer overcharges among all banks approaches $60 million. 61

A legislative proposal to require restitution of overcharges resulting from understatements by a creditor of an annual percentage rate or finance charge was contained in the Truth in Lending Simplification and Reform Act which passed the Senate in 1978 and 1979. 62 In the meantime, with no action imminent in the House, a joint agency task force drafted the uniform TIL Enforcement Guidelines whose sum and substance are ground rules for restitution. 63

61. This figure is premised on the assumption that national banks hold approximately 50% of all bank-held consumer credit receivables. For the figures upon which this percentage estimate is calculated, see ASSETS AND LIABILITIES, 1976 REPORT OF INCOME COMMERCIAL & MUTUAL SAVINGS BANK (FDIC 1976).
63. According to the statements accompanying publication of the proposed and final guidelines, their express purpose is to set forth the corrective measures to be taken when a violation of TIL results in overcharges to customers. See 44 Fed. Reg. 1222 (1979); 42 Fed. Reg. 55,786 (1977). As the final guidelines indicate, reimbursement is the corrective meas-
Once the guidelines were officially promulgated in 1979, both the OCC and the Board wrote to a number of banks — the total is unknown but reportedly is several thousand — requesting them to make "voluntary" reimbursements of overcharges detected during recent examinations. Immediately, there were signs of trouble. Rumors were rampant in Washington that certain banks would fail if they had to reimburse the specified sums. Reportedly, unexpected technical questions about what Regulation Z required also arose, and, in one case, the Examination Council, which is coordinating application of the guidelines, responded to a state bankers association's plea by "reconsidering" whether insurance cost disclosures could be stated as dollars-per-hundred rather than as a lump-sum total.

In August, 1979, the American Bankers Association filed suit against the bank agencies, asking for a declaration that the guidelines exceed the agencies' authority. Thus, the single instance in which the agencies have taken an aggressive or adventurous approach to their enforcement roles remains under a cloud.

The question of whether the bank agencies should embark on a broad restitution program does not arise in a vacuum if one takes into account enforcement activities outside the banking area. The FTC, for example, has recently been granted statutory authority to seek restitutionary relief in court. Consumer credit administrators in UCCC states and elsewhere often have similar statutory powers, as do many state attorneys general. Thus, the notion of public officials seeking private remedies for aggrieved consumers is not unique even for supervisors such as UCCC administrators, who also have examination powers, although it is noteworthy that most existing statutory restitution provisions require court action rather than a mere administrative proceeding.

More difficult, perhaps, is the proper measurement of any refunds due. If a creditor, for example, imposes finance charges that are permissible to be taken for any overcharge greater than one dollar. See Statement of Enforcement Policy, 44 Fed. Reg. 1222-23 (1979) [hereinafter cited as TIL Enforcement Guidelines].

64. The trade press reported these events. See, e.g., Washington Credit Letter, Aug. 27, 1979, at 3; id., Aug. 13, 1979, at 2.

65. See Complaint for Injunctive Relief and Declaratory Judgment, American Bankers Assoc. v. Board of Governors, No. 79-2066 (D.D.C. 1979). In response to this suit, the Federal Financial Institutions Examination Council (FFIEC) has recommended significant revisions of the TIL Enforcement Guidelines which would liberalize the reimbursement requirements. See Legal Times of Wash., October 8, 1979, at p. 1, col. 4, and p. 6, col. 4.


under state law but miscomputes and understates the annual percentage rate (APR), is the consumer equitably entitled to a refund of the difference between the disclosed rate and the permitted actual rate? If a creditor fails to state any APR, has the consumer been damaged in the full amount of the finance charge imposed? Additionally, should the agency's restitution order reach back to the initiation of these transactions? Perhaps the sharpest debates about the pending guidelines and about the restitution provision in the TIL Simplification bill had to do with the retroactivity of such orders; that is, should the cutoff time be one year (the statute of limitations for individual civil actions), October, 1974 (when TIL was amended to permit recovery of actual damages), or July, 1969 (when TIL first took effect)? The final guidelines apply to transactions consummated since 1974.

Nothing in the provisions cited as authority for agency restitution orders expressly authorizes that remedy. The proposed guidelines rely on the general administrative enforcement provisions of TIL, which are silent as to remedies, and on the FISA cease and desist power, which does say that orders entered after administrative hearings may require the bank "to take affirmative action to correct the conditions resulting from" violations of the law. The apparent rationale for the guidelines is that the "conditions resulting" from TIL misdisclosure include the unfair retention of charges beyond those actually disclosed. It is this rationale which will be tested in the bankers' lawsuit.

d. ECOA Enforcement Guidelines

In addition to the proposed guidelines for TIL enforcement, the federal supervisory agencies, including the FHLBB and NCUA, have jointly pro-

69. The guidelines clearly say the creditor must make reimbursement under these circumstances without regard to the legality of the charges under state usury laws. See TIL Enforcement Guidelines, supra note 63, at 1223, § 4. In a sense, therefore, there is a conclusive presumption of damage to the customer.

70. In this case, the guidelines provide that the omitted APR shall be the actual APR reduced by 1/4% for mortgages, or 1% for other credit. See TIL Enforcement Guidelines, supra note 63, at 1223, § 4(b).

71. Id. at § 3(a).

72. The preamble to the guidelines states:

These Guidelines are adopted pursuant to the enforcement authority contained in

Reserve Board, the Federal Deposit Insurance Corporation, and the Comptroller
of the Currency . . .


73. According to the American Bankers Association, to require creditors to reimburse funds resulting from a bona fide error would be unfair and would create severe hardship. See Complaint, supra note 65, at 6-11.
posed uniform guidelines for the enforcement of Regulation B (ECOA)\textsuperscript{74} and the Fair Housing Act. The thrust of these proposals, however, differs markedly from those for TIL enforcement.

The TIL guidelines define when restitution of overcharges will be ordered. Such a remedy, however, is largely inappropriate in cases of credit discrimination where the violation does not usually result in measurable overcharges. The proposed Regulation B guidelines, therefore, delineate other corrective measures which may be used. For unlawfully discouraging applications from protected classes of individuals, the guidelines call for "affirmative advertising" to be directed at the discouraged class, along with notifications to agents, dealers, community groups, and others that the institution pursues nondiscriminatory elements in evaluating applications.\textsuperscript{75} Additionally, the guidelines would require the creditor to reevaluate all previous applications in accordance with nondiscriminatory standards, to solicit new applications from individuals discriminatorily rejected, and to refund fees and prepayment penalties that may be involved in making the new loan.\textsuperscript{76}

While these Regulation B guidelines constitute novel enforcement mechanisms for the banking agencies, aimed as they are at undoing the effects of past discrimination, consumer and civil rights groups find distinct weaknesses in them. The "affirmative advertising" to be required as a response to past prescreening practices, in their view, gives no assurance of an effective change in the lender's applicant base. Nor does mere notification to real estate brokers, dealers, and the like assure elimination of discriminatory channeling of applicants. Similarly, while the victims of past discrimination will be given a second chance to receive credit from the offending bank, there may be no significant deterrent in that remedy.

The fact that these guidelines and those for Regulation Z (TIL) are offered as "uniform" guidelines also has pluses and minuses from the point of view of overall enforcement policy. If all three agencies — five, including FHLBB and NCUA — apply substantially equivalent criteria and remedies, disparities of treatment among financial institutions would tend to be eliminated. The new Examination Council is in a position to coordinate the agencies' efforts if it has the will.\textsuperscript{77} On the other hand, should

\textsuperscript{74} See 43 Fed. Reg. 29,256 (1978).
\textsuperscript{75} Id. § I.
\textsuperscript{76} Id. § II. Note that this could require lenders to reoffer loans at rates prevailing when the discriminatory act occurred. For example, in a market where mortgage rates are escalating monthly, this could result in a substantial monetary penalty for the bank. Thus, these proposed guidelines do have an element of restitution and deterrence.
\textsuperscript{77} The FFIEC was created by the Financial Institutions Regulatory and Interest Rate
these proposed guidelines be uniform in name only — as could be the case if each agency, despite the Examination Council, goes its own way in interpreting them, training its examiners on their content and importance, and scheduling the pace of their application — all of the existing enforcement inequities will remain.

e. Criminal Referrals

Since criminal penalties attach to serious violations of certain federal consumer laws, the agencies through their examination and complaint handling function are in a position to discover and report to the Justice Department possible criminal noncompliance.

Of the three federal banking agencies, only the FDIC appears to have referred cases of TIL violations to the appropriate United States Attorney, and none of these cases have in fact been successfully prosecuted. This may be understandable. If the agencies are correct that most detected violations are of a "technical" nature, and the result of inadequate understanding of the law, it would be very difficult for the Department of Justice to prove that noncompliance was "willfully and knowingly" done, as required for criminal sanctions.

f. Unfair or Deceptive Practice Rules

A potentially far-reaching enforcement device, not designed to correct individual violations so much as to serve prophylactic purposes, is the issuance of regulations identifying particular acts or practices by banks which are deemed unfair or deceptive. The power to issue such regulations, which are similar to FTC trade regulations rules, was given to the Board in 1975 FTC Act amendments. But, except for the publication of two proposed regulations to parallel pending FTC proposals, this enforcement power has been unused in the five years since enacted.


81. For a discussion of these proposals, as well as discussion of the Board's regulation writing authority under §57a(f), see Rohner, supra note 1, at 10-11.

82. The Board indicated that it has initiated investigations into several possible rulemaking areas. These include disclosures for deposit account customers, describing accounts as free when they are not, closing customer accounts without notice, unnecessarily
The value of such rulemaking is that, once offensive patterns of conduct are identified, carefully drawn proscriptions against those practices provide fair warning to banks to adjust their operations, afford a surer basis for examiner review and complaint handling, and, perhaps above all, provide some certainty as to compliance expectations. In addition, the mere issuance of regulations probably produces substantial and widespread compliance automatically from law-abiding bankers.

6. The Costs and Benefits of Federal Agency Enforcement

There is a dearth of reliable data from which to calculate or project either the real costs of the enforcement programs at the three federal banking agencies or their real benefits to consumers. The inability of the agencies to determine expenditures allocated to their respective consumer compliance functions is in some respects understandable and perhaps even unavoidable. Each of the three agencies has its enforcement operations divided between Washington headquarters and regional offices. Within each agency, consumer compliance activities draw on other agency operations—administrative, overhead, legal, and the like—in amounts difficult to verify. Computations of personnel time spent on consumer compliance are imprecise.

As for consumer benefits attributable to agency enforcement programs, measurement in dollar terms is quite difficult when corrective actions are exclusively prospective and preventive in nature, which is the case with virtually all compliance examinations up to now. How does one assign a monetary value, for example, to the sense of well-being consumers may feel when their complaints are handled satisfactorily; or to consumers' understanding of correct TIL disclosures brought into compliance after an examination report; or to the sense of self-esteem consumers may experience when discriminatory questions are detected and eliminated from credit applications? It is equally difficult to measure the market value to consumers of the information contained in accurate TIL disclosures, proper Fair Credit Billing notices, Fair Credit Reporting Act notifications, or Regulation B statements of reasons for adverse action.83 One may as-

83. To pose these questions is not to suggest that there have been no efforts to evaluate the costs and benefits of consumer protection laws. In fact, there have been numerous exploratory studies, some aimed at the federal consumer credit laws, see, e.g., T. Durkin & G. Elliehausen, 1977 Consumer Credit Survey (FRB 1978); Exercise of Consumer Rights Under the Equal Credit Opportunity and Fair Credit Billing Acts, 64 Fed. Reg. Bull. 363.
sume that some consumers utilize this information to gain some financial advantage—a better APR, a higher savings account yield, or perhaps the use of a credit card when the bank had previously declined to issue one. This inability to quantify is true of any benefits attributed to prospective changes in bank practices made as the result of a compliance examination.

Only when banks are directed to remedy the effects of past violations does it become more feasible to measure benefits in dollar terms. Thus, the clearest instance of measurable consumer benefit may be the reimbursements ordered by OCC to consumers whose TIL disclosures understated applicable charges. Given the number of customer overcharges that occur, substantial potential benefits would inure to consumers if refunds of this nature become commonplace.

None of the agencies have published actual or potential dollar totals for reimbursements under the TIL guidelines. If the proposed Regulation B guidelines were in effect, it would be possible to measure, to some degree, the explicit dollar benefits to individuals who received credit at a lower APR after reconsideration or who were refunded fees and prepayment penalties under the same circumstances. But such data is far from being available.

While amounts of possible reimbursements to customers may be viewed as benefits to the individuals who receive them, they are certainly not so viewed by the banks who pay them. Thus, it is appropriate to ask whether enforcement activities do, or can, produce benefits for the banks themselves. Some benefits certainly may flow to banks in the form of avoided liabilities for civil penalties plus court costs and attorney's fees, liabilities which could accrue if the banks persisted in unlawful practices. This is not to say that careful and thorough compliance examinations will eliminate consumer litigation, but only that banks will be less exposed to suits for obvious violations if a compliance exam uncovers them in advance.

On the other side of the ledger, until very recently there was simply no reliable data on the cost of agency enforcement. The FDIC's expendi-
ture of $2,000,000, however, does include examination costs. Finally, it defies belief that the FDIC’s consumer compliance expenditures are ten times those of both the OCC and the Board. It is unfortunate that this reading of the data was broadcast in the public press.

In 1978, each of the three agencies submitted projections of equal credit enforcement costs for fiscal 1978 and 1979 to the House Government Operations Committee. The calculations submitted permit reasonable calculation of the costs of their overall consumer compliance operations beyond just the Fair Housing and ECOA components.

The chart below summarizes the aggregate expenditures for consumer compliance as the agencies calculated them for fiscal 1978.87

<table>
<thead>
<tr>
<th>July 1977-1978</th>
<th>FDIC</th>
<th>Board</th>
<th>OCC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Cost of Compliance Program</td>
<td>$4,152,50088</td>
<td>$2,443,079</td>
<td>$4,484,854</td>
</tr>
<tr>
<td>Number of Compliance Exams</td>
<td>6,275</td>
<td>688</td>
<td>2,154</td>
</tr>
<tr>
<td>Cost per Exam</td>
<td>$661</td>
<td>$3,550</td>
<td>$2,082</td>
</tr>
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</table>

If one views examination reports as the primary end product of these expenditures, the comparative figures among the agencies is significant. A compliance examination by the Board costs nearly twice as much as one conducted by the OCC, and almost six times one of the FDIC’s. Combined with the fact that the OCC conducts compliance exams only every other year, while the Board examines annually, it is apparent that the Board compliance examination efforts are twice as concentrated as the OCC’s both in time and in expense. At the same time, the small per-examination expense at the FDIC in 1977-78 bears about the same relationship then rose again to $229,000 in 1975, and that the FDIC had estimated annual TIL enforcement costs of $2,000,000, 10 times that of either of the other two agencies. See H.R. REP. No. 280, 95th Cong., 1st Sess. 23 (1977) (table 4.6).

These figures pertained only to TIL enforcement, not to the broader array of laws for which the agencies are now responsible. Furthermore, the data is not only outdated for purposes of making any kind of current projections, but also inherently suspect. For example, the figures for the Board do not account for the costs of TIL compliance examinations, which totaled $344,846 in 1974 and $563,642 in 1975. Id. at 59, Table II.

86. See House Oversight Hearings on ECOA and FHA Enforcement, note 19 supra.
87. Id. at 601-07 (OCC); 1016-17, 1032 (FDIC); 1413 (Board).
88. This figure assumes that fair lending activities constituted 40% of the FDIC consumer protection expenditures. The FDIC did not state this percentage, but both the OCC and the Board did. The assumption, therefore, is that the FDIC’s relative share is the same.
to the OCC's as the average size of the consumer holdings of state non-
member banks compared to national banks.

For fiscal 1979, the OCC estimated expenditures at the same levels as for
1978. The Board said it was impossible to project 1979 figures. The
FDIC, however, indicated that it planned to increase its expenditures for
credit discrimination enforcement by 135%, based on estimated examiner
hours almost three times greater in 1979 than in 1978. It is unclear
whether this projected FDIC increase in one part of its compliance budget
would be new money or would be a re-allocation from other compliance
functions.

The range of 1979 projections from three agencies — utter unpredict-
ability from the Board, no change from the OCC, and a 135% increase
from the FDIC — at least underscores the difficulty of pinning down reliable
cost figures. It also suggests the need for more function-related budget
systems and greater planning and coordination among the agencies. The
new Examination Council may be in a position to develop these aspects.

There is a further dimension to the calculation of enforcement costs —
those related to the burden and expense for banks in responding to agency
enforcement actions. Some direct costs to the bank are involved in receiv-
ing and accommodating the compliance examiners and in affording them
space, materials, and personnel time during the actual examination. Informal
contacts with bankers and their trade associations indicated that,
while these costs are real, no one could put a dollar figure on internal costs
incident to compliance exams. In addition, where violations are found in
the course of the examination or asserted in consumer complaints, the
bank must investigate and perhaps adjust the complaining consumer's ac-
count, or, in the case of systemic violations, reprint forms, manuals, and
similar materials, or retrain personnel. No data is available to document
these costs; yet bankers insisted they are real. They are another ingredient
of the overall cost of compliance.

To summarize, the information available indicates that the three federal
banking agencies — including regional offices and Reserve banks — are
spending upwards of $11 million annually to effectuate compliance pro-
grams. This figure accounts for the direct costs of the actual examinations,
the identifiable costs of Washington operations directly related to compliance,
and an indeterminate sum for the range of incidental and support
services needed for the program. These costs promise to rise dramatically

89. House Oversight Hearings on ECOA and FHA Enforcement, supra note 19, at 603,
1033, 1414.
with the implementation of the Community Reinvestment Act\textsuperscript{90} and the passage of the Electronic Funds Transfer bill in late 1978.\textsuperscript{91}

It is worth noting, finally, the "pass-through" phenomenon that accompanies these agency expenditures. Since the agencies operate with funds provided through bank assessments, those annual costs are ultimately reflected in those assessments and thus in bank overhead and in the pricing of bank services to consumers.\textsuperscript{92}

\section*{C. State-level Enforcement}

\subsection*{1. Overview and Background}

In 1972, the National Commission on Consumer Finance observed that state enforcement agencies were preoccupied with safety and soundness considerations and not with consumer protection:

By conducting examinations directed toward ensuring bank soundness, state examining forces are generally duplicating efforts of the FDIC and the Board with regard to insured nonmember and state member banks, respectively . . . . Overemphasis on soundness leaves other bank supervision functions, such as detection of fraudulent and irregular consumer credit practices, a poor second in the scale of priorities . . . .\textsuperscript{93}

A present evaluation indicates that little has changed\textsuperscript{94} and that, in light of increases in state consumer legislation, the relative level of consumer protection activities in the state bank supervisory agencies may have diminished.

With the exception of Massachusetts and perhaps New York, the state banking agencies in the seven states devote little attention or resources to

\begin{itemize}
  \item \textsuperscript{90} 12 U.S.C. §§ 2901-2905 (Supp. 1 1977). See Rohner, \textit{supra} note 1, at 7 n.11.
  \item \textsuperscript{91} 15 U.S.C.A. §§ 1693-1693r (Supp. 1978). See Rohner, \textit{supra} note 1, at 8 n.16.
  \item \textsuperscript{92} These kinds of costs are related directly to the enforcement functions of the federal and state banking agencies. There is, of course, a broader range of creditor costs involved in complying generally with consumer protection laws, without reference to bank examinations as such. As each new consumer law is passed, creditors need to review their practices, consult counsel, reprint forms, reprogram computers, retrain personnel, establish monitoring systems, and probably increase loss reserves. These costs are undoubtedly substantial, and are upwardly affected by the proliferation of state and federal laws and regulations. Although some efforts have been made to measure these costs in limited circumstances, see, \textit{e.g.}, \textit{Exercise of Consumer Rights Under the Equal Credit Opportunity and Fair Credit Billing Acts}, 64 FED. RES. BULL. 363 (1978), their total is probably incalculable. See generally A. Heggstad, \textit{supra} note 83.
  \item \textsuperscript{93} See NCCF REPORT, \textit{supra} note 9, at 53.
  \item \textsuperscript{94} Much of the material that follows concerning the operations of state banking departments derives from responses to questionnaires supplied to the FDIC or from follow-up telephone discussions between those departments and FDIC staff. Where information is amenable to conventional citation, the specific references will be made.
\end{itemize}
explicit consumer protection activities. The state agencies acknowledged little in the way of examiner expertise in consumer laws — two of the states had no examiners with such expertise while three others had no more than four such individuals. Separate compliance training, compliance handbooks, and special examination visits are virtually unknown at the state level.

In all but Massachusetts, consumer compliance examinations are only incidental parts of the regular commercial examination. In several states it appears the state officials receive and review copies of federal agency examination reports and treat this second-hand review as state-level enforcement even though the federal examiners would have devoted virtually no time to examining state law compliance. Additionally, there is little evidence of formal complaint handling or educational efforts on the part of the state bank supervisors. Even in Massachusetts, which has the most aggressive enforcement program, those efforts are directed almost exclusively at Truth in Lending and credit discrimination compliance.

The context in which state consumer compliance activity occurs deserves restating. Only state-chartered banks are subject to state examination, thus eliminating from consideration the large number of national banks with their dominant proportion of consumer credit holdings. Except where a state has been explicitly exempted from federal law, as in the case of Massachusetts for Truth in Lending, state officials have neither the responsibility nor the authority to examine for compliance with federal laws as such, though some states have adopted federal requirements by reference or parallel enactment.

The state agencies are responsible for state law only. Many states, including several in the selected seven, have a fairly comprehensive body of state laws applicable to consumer transactions. These laws may range from assorted usury limitations to detailed limitations on bank agreements and practices. Thus, even though the compliance efforts of the federal agencies have received considerable attention recently, it does not follow that the protections afforded by state law are insignificant or not deserving of enforcement; it is inappropriate to rationalize less vigorous enforcement activity at the state level on the grounds of the unimportance of state laws.

While two of the seven target states — Virginia and North Carolina —

96. See note 61 and accompanying text supra.
97. See, e.g., N.Y. BANKING LAW § 353 (McKinney 1971).
98. See authorities cited in note 4 supra.
have little in the way of statutory consumer protections applicable to banks beyond traditional usury laws, even those laws are basic and longstanding consumer protections against overcharging. Their complexities may be lost on most individual consumers because of intricate computational rules and because the resulting finance charge is disclosed as a Truth in Lending APR, which may be a quite different number from that expressed in the state usury law. Two of the states whose banking agencies appear least active in consumer compliance — Kansas and Utah — have enacted the UCCC, which contains numerous provisions affecting banks in matters of rates, permissible contract terms, creditor remedies, credit insurance, and the like. Other states — New York, Texas, and Massachusetts — have enacted a variety of consumer protection measures either by law or administrative regulation. In all of these instances, consumers may properly expect equally thorough enforcement from both state and federal officials.

One of the barriers to more ambitious state enforcement against commercial banks is the fact that each of the seven state bank agencies is responsible for supervising not just commercial banks but other institutions as well — thrifts, credit unions, consumer finance and small loan companies, and the like. The number of these nonbank institutions subject to supervision ranges from thirteen money order companies in Kansas, to 692 finance companies in North Carolina, to more than 2,000 nonbank commercial entities in New York.99

A chronic difficulty at the state level is inadequate funding for the banking agency and allocation of available resources. The NCCF Report noted that state-level staffs and budgets are generally inadequate for the task of effective bank examination.100 But the Report then drew attention to a seeming paradox by concluding that, despite the duplicative state and federal efforts to examine for safety and soundness, “it is likely that the state agencies will direct whatever energy and funds they possess toward examining for soundness and ignore other matters such as detection of consumer protection law violations.”101 Thus, the Commission accurately

99. See CSBS REPORT, supra note 3, at 19-22.
100. NCCF REPORT, supra note 9, at 54. According to the Commission, few state banking agencies were doing any state consumer law enforcement whatsoever, their resources not permitting any ambitious efforts. Since the federal agencies were doing an adequate job of examining banks for soundness, it was difficult for state legislatures to justify appropriating significant amounts for a duplicate effort or for auxiliary functions such as consumer protection. Id.
101. Id. Other than commenting on the limited consumer protection role of state banking agencies, the NCCF Report did not suggest solutions nor make specific recommendations for change. As a result, the NCCF Report did not serve as impetus for changing the programs of the state bank supervisors. Moreover, the state banking agencies have not been
predicted that most state agencies would continue to give top priority to safety and soundness at the expense of consumer protection activities.

Unlike the federal agencies, whose enforcement authority is often exclusive with respect to banks within their jurisdiction, the state bank supervisors may share enforcement authority with other state officials. Where the state attorney general, for instance, conducts visible activity in this area, there may be a tendency on the part of the bank supervisors to defer to that office for necessary consumer protection. This same phenomenon may occur where state civil rights commissions are charged with enforcing antidiscrimination laws applicable to banks. Thus, the existence of alternate enforcement agencies may be one factor contributing to the modest level of effort by the bank supervisors. Another is the tradition of bank agency concern for safety and soundness, that is, depositor protections rather than borrower protections.

2. **Specific Aspects of State Enforcement**

State bank supervisors generally acknowledge responsibility to enforce state consumer laws as part of their supervisory function, and all profess to do so primarily through their bank examination procedures. Except for Massachusetts, none of the seven states has established discrete consumer compliance reviews. In fact, in these other six states, examination for consumer law compliance is no more than an incidental part of regular commercial exams.

Massachusetts alone has created a special corps of consumer examiners, separately and specially trained, who conduct separate examinations for compliance with state laws (including particularly the state Truth in Lending law). Special examination formats have been developed for TIL subjected to the same oversight scrutiny in congressional hearings of the past several years as have the federal banking agencies. Perhaps, therefore, the enforcement inertia in the states is attributable to the lack of effective outside pressures for action at the state level.

102. See, e.g., House Oversight Hearings on TIL Enforcement, supra note 53, at 43-45 (statement of Commissioner Greenwald). In Massachusetts, which has a separate corps of consumer examiners, there is more examiner manpower relative to the consumer holdings of commercial banks. Based on the number of compliance examinations conducted at commercial banks in Massachusetts, there was one compliance examiner for each $378 million in state commercial bank holdings of consumer obligations. The ratio of state examiners to bank holdings in Massachusetts, therefore, is comparable to that for federal examiners at FDIC or the Board but again does not account for the many variables arising from the number of banks, size of banks, and complexity of substantive law.

By contrast, officials in the remaining six states acknowledged that the allocation of staff and examiner time to consumer laws was minimal. Until recent experiments in New York with a new, comprehensive consumer compliance checklist, see note 103 and accompanying text infra, "only incidental checks during commercial examinations" occurred. Again, excepting recent innovations in New York, none of the other five states provided examiners
and for the state equal credit laws, and another is being designed for fair credit reporting purposes. These separate consumer compliance exams typically last three or four examiner days. During 1977, the Massachusetts examiners conducted some 282 TIL compliance exams among commercial and mutual savings banks and thirty-eight equal credit exams among those same institutions. The Massachusetts bank commissioner has testified concerning the thoroughness and depth of these examinations in contrast to the levels of noncompliance previously detected by FDIC examiners.

Even so, while Massachusetts examiners are instructed to note violations of other state laws, besides TIL and ECOA, no special examination is scheduled for those laws, and they are apparently reviewed as incidental to the more "visible" disclosure and antidiscrimination laws.

New York is also somewhat unique. Until recently, its examiners had made only incidental checks for consumer compliance during the conduct of regular commercial examinations. The Supervisor's office, however, has developed a manual and set of questionnaires which examiners can use to verify compliance with all state consumer credit laws affecting banks. This package of materials has been used experimentally in several banks, and the agency intends to begin training examiners in its use throughout the state.103

Beyond Massachusetts and New York, there are no apparent plans in the other five states to change or expand their compliance examination procedures.

a. Complaint Handling: Education

The pattern of state activity or inactivity in these areas is similar to that involving compliance examinations. The five least active states, Kansas, North Carolina, Texas, Utah, and Virginia, have no structured complaint handling procedure within the banking agency. Several of those agencies indicated that individual complaints would as likely be addressed to the state attorney general as to them.

Massachusetts and New York again stand apart in their complaint procedures. In each state a separate division within the bank commissioner's office is responsible for complaints, and each is staffed by seven or eight

any special consumer law training, consumer law manuals, checklists, or equivalent materials.

103. The New York forms force examiners to review for compliance with all state laws, including those applicable to dealer paper. Initially, these compliance forms will only be used internally, as a means for examiners to record possible violations for later review by office personnel. Additionally, the banks will not see these forms but will be advised by letter of apparent violations.
complaint handling specialists. In both instances, these offices deal with complaints against all supervised institutions (not just banks). Consequently, the New York complaint personnel may be spread thinner than those in Massachusetts, which has fewer institutions with substantially smaller holdings.

Educational efforts directed either toward banks or the public range from nonexistent to modest among the seven states. In most, the state agencies delegate personnel to speak to industry or consumer groups and to respond to institutional or consumer inquiries. Several mentioned the preparation of pamphlets and similar material. Massachusetts, for example, has prepared a thirty-seven page "Pocket Credit Guide," which has been extensively distributed, and also a monthly guide of prevailing annual percentage rates which is carried in local newspapers. The New York banking department has aided in the preparation of pamphlets concerning the credit discrimination laws.

None of the states, except possibly Massachusetts, seems to have emphasized educational efforts or to have had particular success in generating ongoing educational programs in institutions such as schools.

b. Remedies

Not surprisingly, the only state in which it is possible to describe and evaluate remedies sought by the state bank supervisor for noncompliance with consumer protection laws is Massachusetts. In the others, the only apparent response to any detected violations would be an admonition in the examination report to correct those violations in the future under threat of possible cease and desist orders.

In Massachusetts, when the bank commissioner discovers overcharges in the course of Truth in Lending compliance examinations, the affected customers are notified and asked whether they wish to obtain a refund. Unless the customer waives the refund, the banks are then afforded an opportunity to make the refund voluntarily. Where the creditor refuses to comply or challenges the restitution instruction, the commissioner refers the case to the state attorney general for appropriate action.104

That Massachusetts has pursued remedies other than mere prospective correction of violations is consistent with that state's generally aggressive

104. Using these procedures, the Massachusetts commissioner obtained restitution of $137,600 from commercial, mutual savings, and cooperative banks through mid-1978. Consumers waived their claims to an additional $97,000, and six cases involving $86,000 have been referred to the attorney general. The total amount of detected overcharges by banks and thrifts under the state's Truth in Lending law, therefore, is $320,600, based on the examinations of 380 institutions.
posture on consumer protection. Undoubtedly, the commissioner's office is now viewed by banks more as an adversary than as a friendly and supportive regulator of their safety and soundness. It seems clear that the Massachusetts commissioner has seen that office as having a distinct obligation to protect the consumers of bank services as well as bank depositors. There is little evidence of comparable commitment or action in any of the other six states.

3. Costs and Benefits of State Consumer Protection Activity

This subsection is necessarily brief, because there is both very little activity to measure and even less information about the costs of that activity. And, as in the discussion of costs and benefits of federal agency enforcement activity, it is impossible to quantify consumer benefits beyond amounts of refunds actually obtained.

Several examples demonstrate the futility of attempting precise calculations. In response to a direct question about the departmental expenses attributable to enforcing consumer protection laws, a Texas spokesman replied that they were "practically nil, maybe $15,000 - $20,000 a year." The North Carolina spokesman could provide no figure whatever for consumer compliance costs. Neither Kansas nor Utah ventured a figure for compliance activity after acknowledging that their examiners spend virtually no time on that detail.

Again, only Massachusetts' experience permits any approximation of direct compliance expenditures. That state estimated that about twenty to twenty-five percent of its total staff and examiner time was devoted to the supervision of commercial banks. This translates to $705,000 to $880,000 out of the 1977 budget devoted to overall commercial bank supervision. Assuming that twenty percent of that figure (commensurate with consumer holdings as a percentage of all bank assets) is spent on consumer enforcement, one can extrapolate an estimate of approximately $140,000 to $175,000 as the departmental expenditure on consumer compliance for commercial banks. A substantially smaller but perhaps more accurate figure results if one focuses on the activity of the twenty-five consumer specialists: compliance exams at commercial banks accounted for fourteen percent of the work product of those twenty-five examiners in 1977. Those examiners in turn constituted about 14.5% of the entire Massachusetts examiner corps. Thus, over two percent of the entire department's budget was attributable to commercial bank consumer compliance activity. This
These estimates, however, are subject to considerable qualification and clarification. As of 1978, the state of Massachusetts simply did not maintain records of precisely defined functional activities relating to the subcategory of institutions known as commercial banks. Nonetheless, the projected range of probable expenditures is not meaningless. It suggests that banking department expenditures are substantially balanced by direct returns to consumers in the form of restitutionary refunds. In addition, during fiscal 1978, the Massachusetts Division of Banks recouped an additional $13,000 from commercial banks in fees for compliance exams. Thus, from the perspective of those consumers who received restitution, the agency costs of securing a remedy are probably less than the value of the specific monetary remedy itself. This, of course, does not take into account any valuation which might be placed on the intangible or psychic benefits flowing to consumers from the correction of creditor practices through agency compliance efforts.

From the banks' perspective, however, the costs of responding to agency enforcement loom larger, for they must not only pay the restitution or otherwise correct their violations but must also, through their assessments, pay the expenses of the enforcement agency. These costs to the banks may in turn be offset somewhat by the avoidance of private suit and attendant litigation expenses. But it is not unfair to say that the bank's costs, which must be reflected in their pricing, include the combination of the banks' internal compliance costs, both preventative and corrective, and the expenses of the supervisory agency.

As in the case of the federal agencies, if enforcement programs like that in Massachusetts become widespread, with specific monetary correction of past violations as well as prospective correction of future unlawful practices, the value of those programs to individual consumers will be significant. At the same time, the cost of developing and maintaining the state bank supervisory agencies to police institutional practices will not be insubstantial and will of course be passed on to bank customers generally.

II. CONCLUSIONS, OPTIONS, AND RECOMMENDATIONS

The dominant "problem" in the current system of enforcement of con-

105. These figures are based on handwritten responses to the FDIC questionnaire, and thus, are not amenable to conventional citation.
106. It is worth noting that the 1978 elections in Massachusetts produced a new incumbent in the office of state bank commissioner. It is therefore uncertain whether or to what extent the active programs initiated by the prior commissioner will continue.
Consumer protection laws can be simply stated. It is the duality of the two distinct levels of consumer legislation and enforcement, one federal and one state. Each hemisphere has its own sovereignty — Congress enacts laws and the federal agencies enforce them; state legislatures pass laws and state bank supervisors enforce those laws. Both bodies of law and enforcement authority affect the identical transactions, the same consumers, and, to a great extent, the same creditors.

This statement of the problem, however, largely begs the question. There is no inherent reason why the enforcement of federal and state consumer protection laws cannot be a smoothly meshed operation. At the present time, it is not.

The problem is neither simple nor singular. Rather, there are a number of difficulties, inefficiencies, and inconsistencies which are the products of the side-by-side existence of multiple regulatory authorities. These problems have arisen out of the haphazard and ad hoc growth of consumer protection measures and enforcement structures. This growth pattern is itself attributable in some degree to the rapid expansion of the consumer marketplace over the past generation. Thus, with prosaic hindsight, we can look at a marketplace regulated almost exclusively by the states and local communities, with no felt need for broad protective rules beyond those applicable to commerce generally and certainly with no special reason to make those rules or their enforcement uniform from state to state.

The direct intervention of the federal government in regulating the consumer credit marketplace, traceable only to 1968, has grown to where federal regulation clearly overshadows that of the states, threatening to reduce the state role even further. As new substantive concerns have emerged, for example, credit discrimination, computerized transaction handling, customer privacy and the like, the fundamental protections have been enacted at the federal level, often before state initiatives even begin. Concurrently, the federal government has left significant regulatory aspects of the consumer credit marketplace to the states — rate regulation principally, but also large aspects of permissible contract terms, creditor security and collection practices, and credit insurance.

Even within each of the regulatory spheres, federal and state, there are sources of discordance. Substantive laws affecting banks emanate from Congress, from each of the banking agencies, from the Board in certain cases, and indirectly, from the Federal Trade Commission (FTC). Each of the banking agencies undertakes its own enforcement program, until recently unaffected by the operations at the others, in a setting clouded by
some degree of inherent membership competitiveness.\textsuperscript{107} The states go in fifty directions at once as local conditions, local banking structures, and local politics dictate. Moreover, the effort to forestall a federal takeover of the consumer credit area by enacting uniform state laws has collapsed. Not even the eleven states that have adopted a consumer credit code would profess that there is any real uniformity among themselves.

While it is certainly true that uniformity is not inherently better than diversity, there is presently an unhealthy overdiversification of consumer credit regulation and enforcement. This lack of uniformity causes serious compliance burdens for creditors who must respond to both federal and state mandates on the same matters and special burdens for those creditors who conduct multistate business operations and must, therefore, adjust their otherwise standard practices to local requirements. The present multiplicity of regulatory and enforcement sources is also a cause of confusion for consumers who are given combined state and federal disclosures expressly inconsistent from paragraph to paragraph. By shopping for financial services across state lines or among national and state-chartered institutions, consumers have different rights depending on where they choose to bank. Additionally, consumers have no clear sense of where to lodge their complaints.

Yet, at times both consumers and bankers prefer this diversity. Consumer spokespersons can fight on two battlefronts: at the federal level for minimum protections nationwide and in the state legislatures for responses to local concerns. Bankers, too, opt for dualism where this provides them with options: more "comfortable" enforcement policies at one level; better interest rate or alternative mortgage possibilities at another level.\textsuperscript{108} The problem, therefore, is how best to balance the federal and state rules in consumer protection for optimum fairness, effectiveness, and flexibility.

With this preface, the following suggestions are offered as possible options for improvement.

\textsuperscript{107} There has been much discussion recently of "charter switching"; that is, state banks switching to national charter and vice versa. By switching charters, of course, the bank changes its supervisory agency and controlling laws and regulations. For a more detailed discussion of charter switching and the entire concept of dual banking, see Scott, The Dual Banking System: A Model of Competition in Regulation, 30 Stan. L. Rev. 1 (1977).

The practice of charter switching has resulted in a dwindling number of Federal Reserve member banks, a subject addressed in current legislation. See, e.g., S. 85, 96th Cong., 1st Sess. (1979). These changes do not appear to have been prompted by the federal agencies' consumer protection policies. Nonetheless, the federal agencies do not like to see their constituencies dwindle.

\textsuperscript{108} See generally Scott, supra note 107, at 13-23.
A. Applicability of Substantive Laws

1. Duplicative Laws

Efforts should be made to reduce the proliferation of duplicative, overlapping, and inconsistent federal, state, and agency rules for consumer credit transactions. No one benefits when state and federal laws are inconsistent, when federal statutes cannot readily be integrated with each other, when basic protections differ from state to state, or when federal and state laws are altogether duplicative of each other. These situations generate compliance burdens for creditors, enforcement dilemmas for the supervisory agencies, and delayed or diluted benefits for consumers.

Although the goal of codifying and clarifying the crazy-quilt of existing consumer credit laws may be readily agreed on, the alternative methods of doing so are numerous. There are two extreme options and several intermediate steps that might be taken.

a. Total Federal Preemption

Congress could occupy the entire field by enacting a comprehensive consumer credit code which preempts state consumer credit laws. Politically, this is a most improbable step. By producing strong states'-rights reactions, Congress would be forced to handle the delicate matters of rates and insurance. Such a federal code would necessarily reenact existing federal laws, hopefully in a more integrated form. Further, it would need to contain provisions of the scope contained in the Uniform Consumer Credit Code and the Model Consumer Credit Act. To draw the necessary support, such legislation would need to contain both strong consumer protections to encourage consumerists to forego improving on federal laws in the state legislature and reasonably high rates to compensate creditors for compliance costs.

b. Federal Withdrawal

The opposite extreme would be for the federal government to withdraw from consumer credit regulation altogether in favor of a carefully structured uniform act adopted by all the states. Aside from the unlikelihood of this turnabout by Congress and the states, any such referral of consumer

109. There are a number of examples of these unfortunate by-products of uncoordinated lawmaking: (1) a strong Florida ordinance was largely destroyed on grounds that it was preempted by the Fair Credit Reporting Act (FCRA); (2) the mesh between the FCRA and the ECOA with respect to credit histories is still unsettled; (3) Alden's, Inc. must now operate differently in Illinois than in Pennsylvania with customers in one state paying more than in the other. See Rohner, supra note 1, at 25-26 & nn.102, 103. Finally, in some cases, consumers collect twice because one act by the creditor violates both federal and state law.
credit regulation back to the states would probably require Congress to retain some jurisdiction in areas that have distinct interstate dimensions—EFTS, for example.

c. Nonpreemptive Federal Code

An alternative to either state or federal withdrawal would be the enactment of a comprehensive federal code which would not broadly preempt state law. That is, Congress might legislate minimum consumer protections across the whole range of consumer financial transactions but leave the states free to enact consistent or more protective provisions as they saw fit. Senator Proxmire at one time talked of introducing such legislation, but never did so and has apparently discarded the idea.

This approach would satisfy consumerists who prefer to seek maximum protection at both the federal and state levels. But it would still involve substantial displacement or rewriting of existing state laws and would probably create enormous regulatory burdens in sorting out which and to what extent state laws remained viable. It would also have the effect of increasing the duplication of coverage of federal and state laws.

d. Modified Preemption Rules

A more realistic intermediate step, which assumes that federal laws will predominate but that the states will continue to have some regulatory role, would be to adjust the preemption rules so that federal law more completely displaces state law on the same general subject matter. The discussion above has noted the fluid and uncertain nature of the present preemption rules, which preserve any state law not clearly “inconsistent” with the federal or giving greater protection than federal law to the consumer. The Board’s regulations have grappled with these standards and understandably have taken a cautious approach to preemption of state law.

Criteria presently used to determine “inconsistency” include whether state law requires different terminology and whether compliance with one law constitutes a violation of the other. Mere redundancy of state and federal law is not presently grounds for preemption. State law, however, should be preempted whenever it is substantially duplicative of federal protections. This would avoid the creditors’ dilemma when there are minor differences between federal and state requirements. Additionally, it would obviate the need for the anomalous “inconsistent state law” disclosures now permitted under TIL, preclude possible double liability for a single violation, and eliminate the need for both federal and state agencies to examine for compliance. This adjustment would not entail any loss of
consumer protections. First, states would be free to seek exemptions from the federal law where state provisions are substantially the same or stronger. Second, the reduced role for state enforcement should allow the federal agencies to justify the resources needed to maintain strong enforcement programs of their own.

It may be possible to devise other refinements in the present "inconsistency" standard for state law preemption. For example, one industry-sponsored draft of a preemption rule would have federal law displace any state law unless: "the State or political subdivision requirement (A) provides significantly greater protection to the consumer than do the requirements imposed by [federal law] . . . , (B) is required by compelling local conditions, and (C) does not unduly burden interstate commerce." The draft then suggests that, in determining the burden on interstate commerce, the Board should consider technological feasibility, compliance costs, the likelihood of similar state laws, and the need for a uniform national rule.

This approach adds several new criteria to the preemption test. Not only must the state law give consumers greater protection, but it also must be "significantly" greater protection. The state law must be "required" by local conditions, yet not "unduly" burdensome on interstate commerce. While these notions are philosophically a proper part of the preemption issue, they are so subjectively value-laden as to be almost impossible operating standards. If read literally, they would probably leave no state consumer laws intact. What local circumstances would "require" a state law significantly different from the federal and not emulated elsewhere? Additionally, to the extent a state law gave significantly greater protection, it would likely increase creditor compliance costs and thus burden interstate commerce.

This approach has the additional effect of shifting the burden of proof to the state wishing to keep its own law. Any state law concerning the same acts or practices as a federal law would in fact be preempted, unless and until the state satisfied the Board on the specified criteria. This procedural obstacle might stifle state initiative, especially if the Board took a cautious approach to granting state requests.

Still, suggestions such as these merit further thought. It would be helpful if the Board or a congressional committee, with the cooperation of state officials, tested these criteria, laying them alongside state laws in several

110. See TIL Simplification Hearings, supra note 55, at 642 (Consumer Bankers Association proposed amendments to TIL).
111. Id.
jurisdictions to gauge both the difficulty of their application and their probable preemptive effect.

e. "Limited Deference"

An alternate approach to clarifying the preemption rules is reflected in the proposed Truth in Lending Simplification Act. Its value, however, may be limited to the credit cost disclosure context. The bill would authorize the Board, as now, to determine whether there are inconsistencies in state law, but where such inconsistency is found, the creditor would be barred from making the state disclosure and would be immunized from liability for such omission. In addition, where the Board found that state-required disclosures are "substantially the same in meaning" as TIL disclosures, creditors would be permitted to make disclosures in compliance with state law instead of under TIL.

This provision, a kind of "limited deference" approach, would require the Board to make line-by-line determinations about the status of state disclosure laws and could produce a disclosure statement where every other item is dictated by federal law and the remainder by state law. This is not conducive to a well-structured and meaningful disclosure scheme.

f. Periodic Reviews

Without measurably disturbing the present balance of regulatory authority between the states and the federal government, it would still be desirable for each lawmaking body periodically to review its statutory and regulatory consumer protection rules for clarity, internal consistency, and effectiveness. The suggestion here is primarily for a periodic assessment of the mechanical operation of the laws, but such reviews might well point out substantive problems as well. An instance of this is the current proposal for Truth in Lending Simplification, which originated in response to concerns about the impracticability or ambiguity of certain TIL rules. Along the way, the proposed act has become the vehicle for substantive amendments.

This recommendation is based upon a simple legislative fact of life. In the debate over the enactment of a particular law, its implications for the future are never perfectly understood or expressed, nor is its relationship to other existing laws worked out in great detail. The original TIL, for example, failed to anticipate the furor over class actions or the question of as-

113. For example, the pending bill authorizes the enforcement agencies to seek restitution of overcharges, reduces the number of items to be disclosed, and limits civil penalties to certain specified violations. See id. §§ 8, 11, 15.
signee liability. It is ill-suited for dealing with variable rate mortgages, open-end credit secured by real estate, and sundry other matters which have come to light since 1968. The Federal Consumer Credit Protection Act\(^{114}\) contains further anomalies: Title I (TIL) applies only to consumer credit while Title VII (Equal Credit Opportunity) applies to all forms of credit and the newly enacted Title IX (Electronic Fund Transfer Act) does not apply to credit at all. The Board has regulation writing authority under some titles, but no agency has that authority for several others.

At the state level, consumer protection provisions are often widely scattered through the state codes. In addition, state laws accumulate over time on a more piecemeal basis than federal laws. Historically acceptable provisions may outlive their usefulness or may be found unacceptable on constitutional or other policy grounds. Except for those states which consciously adopt a comprehensive code, Kansas and Utah, for example, the states rarely reexamine their own laws and only occasionally adjust them to changes or new adoptions at the federal level.

It is easier to suggest regular monitoring and periodic evaluations of federal and state laws than to indicate how it can effectively be accomplished. The Truth in Lending simplification experience shows that a reexamination of existing laws can involve an immense investment of time and resources. Yet the expanded consumer affairs and legal offices in the federal banking agencies contain a body of expertise and experience that might be employed for this purpose, especially if there is some consolidation of the enforcement functions of those agencies.

2. State Exemptions

In line with the recommendations concerning preemption rules, the ground rules for states obtaining exemptions from federal laws should be modified to permit exemptions only where they will demonstrably enhance consumer protection. At present, states may qualify for an exemption for “any class of credit transactions” within the state if they satisfy the Board that the state law is “substantially similar” and that there is “adequate” provision for enforcement.\(^{115}\) While only a few states hold exemptions from TIL, others have recently gotten exemptions from the Home Mortgage Disclosure Act,\(^{116}\) and one state’s TIL exemption has just been ex-

\(^{114}\) Pub. L. No. 90-321, 82 Stat. 146 (codified in scattered sections of 12, 15, 18 U.S.C. (1976)). The CCPA has been amended various times since its enactment in 1968. See Rohner, supra note 1, at 9 n.17.


tended to federally chartered credit unions, indicating that the exemption device may be reviving.117

So long as the Board insists that state law be virtually identical to the federal, the net effect of an exemption is merely a shifting of enforcement responsibility to state officials. From the state’s point of view, this is desirable only when the state agency has the resources and the enforcement program to produce greater protection for consumers than if the federal agency retained jurisdiction. For the federal supervisory agency, an exemption for a particular state means only that its examiners can omit a portion of the usual exam format.

a. Abolish Exemptions

One option would be to abolish the exemptions outright, on the theory that federal laws should be applicable nationwide without exception and enforced uniformly by federal agencies. Even if this were done prospectively, it is doubtful that the existing exemptions could be withdrawn without cause.

b. Relax Exemption Rules

Instead of abolishing exemptions, an alternative would be to make them easier to obtain, perhaps even automatic whenever state law is roughly comparable to federal law. At present, the states must petition the Board for exemptions. They bear the burden of demonstrating “substantial similarity” of state law and the adequacy of state enforcement. If, however, the political judgment is made that the states should have greater responsibility for consumer protection, the criteria for exemptions might be relaxed so that any “reasonably similar” state law would substitute for the federal rule. In addition, the Board might review state laws and approve exemptions on its own initiative without the formality of a state application. The federal law and federal agency enforcement would simply become inapplicable in those states.

Under this policy, for example, a state credit disclosure law might qualify for an exemption even though it did not require itemization of the finance charge as under TIL. Similarly, a state credit discrimination law applicable only to “consumer” credit might be exempted despite the fact

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that the federal law has broader coverage. In this latter case, the federal exemption standards might require an affirmative expression by the state legislature of its judgment that antidiscrimination legislation is unnecessary in the nonconsumer area.

On this modified basis, there could be a substantially larger number of state exemptions even without new state legislation. These broader exemptions would eliminate some of the redundancy of federal and state laws and would relieve the federal agencies of significant enforcement duties in those states.

There are significant weaknesses in this approach despite its value in eliminating duplicative coverage. A standard of "reasonable similarity" could operate to exempt state laws which were not as strong or as comprehensive as the federal, thus diminishing the scope of consumer protection laws. In addition, to the extent enforcement became an exclusively state concern, it would not likely be equivalent in vigor or thoroughness to the compliance efforts of the federal agencies. Further, relaxed exemption rules or automatic exemptions for any roughly comparable state law would tend to reintroduce the crazy-quilt pattern of state laws that existed prior to 1968, producing immense compliance burdens for interstate creditors.

c. Provide Exemptions only when Consumer Protection is Enhanced

Preferably, exemptions should be available on a more limited basis than at present; that is, only when they will materially enhance consumer protection in the applicant state. This "enhancement" policy is certainly not reflected in the present ground rules or in their application. At best, exemptions are available on the principle that consumers will be no worse off than under federal jurisdiction. At worst, exemptions once granted are never closely reviewed despite possible changes in the state's enforcement effort — the only withdrawal of an exemption came after a well-publicized court decision declaring the state law unconstitutional.

In addition, exemptions presently are granted without reference to the impact of new enforcement duties on the state agency's enforcement of other state laws. When state officials take on the enforcement of federal laws, they must allocate enforcement resources to that law. These re-

118. Among the seven states, for example, Kansas, New York, Utah, Texas, and Virginia would all qualify for exemptions from TIL because they have enacted parallel laws or have incorporated the federal provisions by reference. See, e.g., N.Y. BANKING LAW § 353 (McKinney 1971). A number of the seven states would qualify for at least partial exemptions from the ECOA; several more from the new Debt Collection Practices Act, and so on.

sources must come either from new funds or from other enforcement activity. Thus, exemptions would be appropriate only if they are not accompanied by a commensurate reduction of other compliance efforts; that is, if they do not unduly “drain” those efforts.

Experience with exemptions under the Home Mortgage Disclosure Act suggests another test for whether the exemption enhances consumer protection. The federal HMDA is a narrow statute requiring only limited institutional recordkeeping on the location of its home mortgage loans. Some states, however, have enacted broader antirelining laws, of which recordkeeping is only a part.¹²⁰ States have sought exemptions so that the whole antirelining structure can operate as an integrated whole under state supervision. It would be appropriate for the Board, in considering exemption applications, to consider expressly whether the state’s desire to supervise that aspect of state law is an important part of a larger consumer protection effort; that is, the state’s need for the exemption to accomplish that larger objective.

d. Partial Exemptions

The present exemption provisions extend to “classes of transactions.” The Board has effectively read these to mean classes of creditors. Until recently, each exemption applied only to state-chartered institutions. No exemption, however, differentiates by aspects of creditor activity. For example, none cover closed-end but not open-end transactions or exempt credit disclosure but not rescission rights. If the purpose of the exemption provisions is to permit states to act where there are local needs and enforcement capabilities, it would be useful to permit exemptions more tailored to local conditions.¹²¹

To encourage states to adopt more protective local rules without having to undertake wholesale enforcement responsibility, as for all of TIL or all of ECOA, the Board could encourage and grant applications for narrow exemptions from specified provisions of federal law. It could also grant exemptions for specified portions of a bank’s consumer portfolio so long as

¹²¹ For example, a state’s strong interest in redlining practices might give its bank examiners special expertise in real estate credit transactions; that expertise along with appropriate state legislation might justify exemptions from ECOA and TIL for mortgage loans, but not for other forms of closed-end or open-end credit. Additionally, a state might wish to examine all automobile paper for compliance with TIL and other state rules. With only the present exemptions as guides, exemptions for specified types of transactions would be unprecedented.
such carving out does not result in duplicative or disruptive examinations and does not undermine the overall effectiveness of the federal law.

e. National Banks and Exemptions

Virtually all of the state exemptions approved by the Board exclude from their coverage national banks and other federally chartered institutions. This limitation is based on the asserted immunity of such institutions from state visitatorial powers. Since state officials are not authorized to examine national banks, the state is unable to demonstrate that there is adequate provision for enforcement, a statutory prerequisite for the exemption.

The result of this differential treatment of state and federally chartered institutions is bifurcated enforcement of a law that is "substantially similar" in its federal and state versions. Bifurcated enforcement can quickly become uneven enforcement, with either the federal or state agency taking a more thorough or aggressive supervisory role. This makes the level of consumer protection in those states depend on whether the customer happens to bank at a national or state-chartered institution.

This article discusses the general question whether state officials ought to have examination or similar supervisory authority for federally chartered institutions and concludes that they should. The point here, however, is narrower: where a state otherwise qualifies for an exemption from federal law, that exemption should extend to all institutions, regardless of charter; the exemption should not be artificially split on the basis of the purported "exclusivity" of the federal agency's examination authority. Thus, there is no reason that an otherwise proper exemption should not carry with it the necessary grant of authority for state officials to supervise compliance by federally chartered institutions. This may require statutory amendment or explicit agreement between the pertinent state and federal supervisory agencies.

3. Preemption and Exemption Rules in Rulemaking

Although the Board has not yet issued any "unfair and deceptive prac-


124. This, for example, has been done between the Massachusetts bank commissioner and the NCUA for federal credit unions. See note 122 supra.
tices" regulations under the authority of section 18(f) of the FTC Act, it is likely that they will do so in the future. In order to avoid the kinds of preemption questions that have arisen under similar FTC trade regulation rules, it would be desirable for any such Board regulations to contain explicit preemption rules similar to those recommended above with respect to federal legislation; that is, the federal rules should displace inconsistent or duplicative state requirements.

Similarly, it would be desirable to have the same possibilities for state exemptions from any section 18(f) regulations as for exemptions from federal statutes. A comparable exemption provision should be applicable to any unfair practices regulations. The grant of authority in section 18(f) is probably broad enough to permit the Board to draft any such regulation with an exemption mechanism built into it.

4. Multiple Rulemaking by Federal Agencies

Although not constituting a direct federal-state issue, a further contributing factor to the lack of synchronization in consumer protection is the multiple sources of substantive lawmaking at the federal level. While Congress enacts the formal legislation, additional rulemaking of great daily importance to banks and consumers occurs in each of the three bank agencies and indirectly through the FTC.

There is no clearer example than the FTC’s Holder Rule, that effectively exposes banks to broad liabilities arising from dealer sales. From the FTC’s point of view, the Holder Rule is a necessary exercise of its statutory duty to regulate dealers, even though it has a "spill-over" effect on banks. The Board, however, objected that banks were affected by a rule that the bank supervisory agencies had no part in drafting.

Similarly, different agencies have different orientations toward the needs and problems of the institutions they supervise. The FTC has suggested interpretations of Regulation B that the primary regulator, the Board, has

127. Under § 18(f), the Board has the authority to “prescribe regulations to carry out the purposes of [§ 18(f)], including regulations defining with specificity such unfair or deceptive acts or practices, and containing requirements prescribed for the purpose of preventing such acts or practices.” 15 U.S.C. § 57a(f)(1) (1976). Since other consumer protection laws permit exemptions, see, e.g., 12 U.S.C § 2805(b) (1976) (HMDA), the Board could argue that the mandate of § 18(f) to protect against unfair and deceptive practices also allows for regulations containing exemption mechanisms.
found groundless. \textsuperscript{129} OCC has felt the need for EFTS guidelines, but the other bank agencies have not. FDIC and OCC issue regulations on racial data notations, but the Board does not. The Board is the primary interpreter and regulation writer for ECOA, yet the Comptroller's Office independently writes advisory letters to national banks. \textsuperscript{130}

The desirability of this multiple agency rulemaking depends on one's perspective. On the positive side is healthy competitiveness, permitting one agency to deal flexibly with the particular problems of the industry segment it regulates. Initiatives or imaginative activity at one agency may spur similar activity at another. Additionally, there is less chance of a centralized rulemaking agency becoming lethargic or an industry captive. On the other side, the multiplicity of federal agency rulemaking causes some problems. Similar transactions are treated differently depending on which agency has jurisdiction over the bank, thus creating an uneven compliance burden and uneven consumer protection. Interagency frictions are generated when one agency "interprets" a law differently from the other, especially if one is assigned primary regulatory authority under that law. At times, the pronouncements or enforcement activities of one agency appear to impose compliance requirements at odds with those adopted by another, creating a real conflict in precedents.

"Functional" regulation, that is, centralized rulemaking by subject matter for all industries, has apparently worked well in some cases (SEC), not so well in others (OSHA or DOE). "Segmented" rulemaking has traditionally been the norm in the banking field but has arguably not worked so well elsewhere. It is not necessary to choose between the two regulatory approaches in the abstract. The problem is simply that there are too many federal agencies involved in consumer credit rulemaking without clear jurisdictional lines between them or coordination of their efforts. \textsuperscript{131} The situation is not one of regulatory flexibility but of positive interagency friction and mistrust plus all the inequities of uneven consumer protection policies.


\textsuperscript{130} See, e.g., [1977] 5 CONS. CRED. GUIDE (CCH) \&\& 42,091-96.

\textsuperscript{131} Even the moderate NCCF REPORT recognized a need for more centralized consumer credit regulation at the federal level. It recommended the creation of either a Bureau of Consumer Credit within an umbrella Consumer Protection Agency, or, failing that, a separate Consumer Credit Agency. Such a bureau or agency was to have full statutory authority to issue rules and regulations and to supervise all examination and enforcement functions under the CCPA. See NCCF REPORT, supra note 9, at 58-59.
a. **Total Centralization**

The most radical form of centralization would be the creation of the kind of agency recommended by the NCCF Report\(^3\) in 1972. Its regulatory powers would run far beyond banks to all institutions engaged in providing consumer financial services. This agency would necessarily displace the present consumer credit regulatory functions of the five agencies supervising depository institutions, the FTC, and presumably the Secretary of Labor (with respect to garnishment), the Secretary of HUD (with respect to RESPA and Fair Housing), and components of sundry other existing agencies.

The primary advantage of such an agency would be the placing of all administrative regulation and rulemaking in the hands of a single authority having a comprehensive view of the entire marketplace of consumer financial services. Its focus would be exclusively on consumer protection without the concurrent responsibilities of regulating in other conflicting areas. Where uniform standards are necessary, this agency could develop and adopt them without the time-consuming sifting and resifting that an interagency task force inevitably requires.

There are, however, disadvantages in placing all regulation of consumer financial services in a single agency. There could be bitter internecine struggles in and among existing agencies to see whose personnel and ideologies would survive and dominate the new organization. A monolithic regulatory structure conceivably might be "captured" by the industry or otherwise fail to maintain a strong consumer protection posture. The task of the agency might prove so vast that what are presently interagency conflicts would revive as intraagency differences. Additionally, there might be cause for new frictions between the agency regulating consumer financial services and the old-line supervisory agencies responsible for safety and soundness.

On balance, it is submitted that the advantages outweigh the disadvantages. Consumer credit and debit transactions have become a significant part of our economy, and any given transaction may involve banks and nonbanks acting in concert.\(^3\) Further, any major consolidation of regulatory powers should be done by constituting a new regulatory body rather than by giving all authority to an existing agency. The new agency would have distinct advantages: a fresh charter unencumbered by any existing agency's narrow perspectives or vested interests; high public expectations

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132. *See* note 131 *supra.*

133. For example, banks buy dealer paper, process merchants' credit card drafts, supply information to, and use credit reporting agencies.
as a prod to action; and the organizational freedom to "write on a clean slate." None of the existing agencies except the Board has much experience in regulating creditors other than the ones it directly supervises, and the Board has regulatory authority over nonbanks only with respect to implementing regulations for certain specific federal statutes. To keep the new agency vital, it might be subject to a "sunset" provision or be required to constitute an advisory board containing representatives of all interested industry and public groups.

b. Centralization of Rulemaking for Depository Institutions

A less ambitious centralization plan might combine the regulatory powers over all depository institutions in the same way the recently created Financial Institutions Examination Council (Council) does for examination powers. Instead of giving that Council merely the power to prescribe standard examination practices, its authority might be broadened to make it the exclusive source of consumer regulations, interpretations, guidelines, and the like for all deposit-making institutions.

The advantages of this approach include the fact that it is a less drastic reorganization. It also could be "phased in" more readily by building onto an existing Council structure. The more homogeneous nature of the deposit-holding institutions should allow this regulatory entity to achieve an easier consensus on regulatory and enforcement needs. The Council would have a healthy dual function: to issue regulations and rules and to supervise the actual enforcement operations of the five agencies. On the other hand, frictions with other agencies, such as the FTC, could reappear or continue.

c. Centralization in an Existing Agency

Another alternative for centralizing all rulemaking authority for depository institutions would be to designate one of the five existing agencies as the exclusive rulemaking and interpretive body while denying the other four agencies any such authority. This would have the effect of preventing conflicting, inconsistent, or more onerous rules from issuing separately from each agency.

The logical agency for this centralization would be the Board since it already bears the major regulatory responsibility under the CCPA and has chafed at what it sees as unwarranted incursions into its regulatory role by the other agencies. But there is reason to doubt the wisdom of resolving present frictions by declaring one of the interested parties the out-and-out victor. The reaction from the other agencies to the enhancement of the Board's authority at the expense of their own could be smoldering resent-
ment or stifled enforcement initiative. In addition, the Board does not enjoy the reputation among consumer groups of having the most vigorous consumer protection policies. Vesting all regulatory authority in the Board's hands could be perceived as a weakening of the federal commitment in that regard.

d. Rulemaking Centralization for Commercial Banks

A fourth and more limited centralization approach would be to combine the consumer protection regulatory functions of the three agencies that deal with commercial banks. Given recent efforts toward cooperative enforcement programs by those agencies, it would be a relatively modest step to consolidate their regulatory roles officially and structurally. Such a consolidation might be achieved by assigning this new function to the Council or by independent legislation. Nevertheless, the responsible body would need greater autonomy and authority than the present Interagency Coordinating Committee. It might also be accomplished by designating the current dominant regulator, the Board, as the exclusive source of consumer rules and regulations for commercial banks, but this alternative has most of the shortcomings discussed above.

5. Applicability of State Law to National Banks

There has been a measure of continuing uncertainty about the applicability of state consumer protection laws to federally chartered institutions, particularly national banks. So long as the states are allotted a role in the regulation of consumer credit, as they are presently, either the Congress or the OCC ought to state explicitly that local laws of the types embodied in the Uniform Consumer Credit Code or in state enactments paralleling federal laws are fully applicable to such institutions.

It was noted above that their federal charter does not immunize national banks from state law provisions regulating financial transactions. There is no inherent conflict between state consumer protection laws and the functioning of national banks as so-called "federal instrumentalities." Although the OCC has usually agreed with this proposition when specific questions of applicability arose, it would be helpful for the OCC to adopt and publicize a policy whereby state consumer protection laws would be presumed applicable to national banks for purposes of compliance and enforcement. This "presumption of applicability" would be overcome only by the clearest evidence that such state law truly interfered with important functions of the bank under its federal charter.

This article has previously discussed the special questions arising under the National Bank Act with respect to the applicable interests rates when
national banks operate across state lines. Marquette National Bank v. First of Omaha Service Corp. openly invites Congress to consider the need for specific modifications in the "most favored lender" doctrine that has provided national banks with significant advantages over state-chartered creditors. The 115-year-old National Bank Act provisions were written without contemplation of the kinds of interstate activity in which banks now engage; it is therefore unwise to construe that Act in such a way as to encourage interstate warfare between national banks and all other credit grantors. It may be that a congressional overhaul of the statutory provisions on permissible rates for national banks is in order. The options to be considered in such a process would include: codifying the apparent holdings of Marquette National Bank and other cases that national banks can charge the highest rate permitted either in their home states or in the state of the customer's residence; limiting national banks to rates permitted state institutions in the jurisdiction where the customer lives; or enacting a preemptive federal usury law for national banks. None of these are unqualifiedly good alternatives. The first promotes predatory practices by large national banks, the second undercuts the traditional notion of national banks as "most favored lenders," and the third overturns the National Bank Act's own policy of deferring generally to state usury laws. The third, however, may be the most attractive choice, assuming it is politically possible to agree on a structured set of rates for the various kinds of credit transactions ranging from credit card plans to home mortgages.

B. Allocation of Enforcement Duties

At the present time, with substantive consumer protection laws emanating from both federal and state governments, there is a distinct separation of enforcement responsibilities between supervisory agencies at the two

134. See Rohner, supra note 1, at 35-38.
137. In fact, such a preemptive general usury law for national banks already exists though it has a limited operational effect. Section 85 of the National Bank Act, 12 U.S.C. § 85 (1975), permits national banks to charge

at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located . . .

id., if higher than the otherwise applicable state rates. This provision was invoked by national banks in New York during a recent mortgage money crunch.
levels. Essentially, federal agencies enforce federal law, state agencies state law. While it is theoretically possible that either the federal government or the states might withdraw altogether from the regulation of consumer financial services, such a possibility is remote. Even with explicit recognition of the predominant lawmaking role of Congress and the federal agencies and even with the adoption of the preemption and exemption rules recommended above, the states will properly want and demand some share in the enactment and enforcement of consumer protection laws. Thus, there is a basic assumption that, for the foreseeable future, any reordering of enforcement duties will have to permit both the federal and state governments a policing role. Beyond this premise, however, are a number of possible adjustments to make overall consumer enforcement more efficient and more evenhanded.

I. Consolidation of Federal Agency Enforcement Programs

No matter what is done to delineate more clearly the respective roles of federal and state bank supervisory agencies, definite benefits could accrue from some consolidation of, or greater coordination between, the federal enforcement agencies themselves. Enforcement authority under most of the federal consumer protection laws is scattered among eight or nine agencies.\[138\] The three bank supervisory agencies each have an independent enforcement function, and each of those agencies has separately created and maintained the full complement of enforcement resources — training, materials, regional office consumer specialists, examiners, complaint-handling procedures, and the like. Unsynchronized federal-level enforcement simply exacerbates the unevenness of the combined federal and state efforts.

Some measure of increased coordination of enforcement will result from the recent creation of the Financial Institutions Examination Council, whose authority encompasses the FHLBB and NCUA as well as the three banking agencies.\[139\] The powers of this Council are modest, however, and do not contemplate the physical or organizational consolidation of the staffs and programs of the existing agencies. Moreover, the Council does not have jurisdiction over other federal agencies having substantial enforcement duties for nondepository institutions, such as the FTC.

a. Single Federal Enforcement Agency

As discussed in connection with centralizing federal agency rulemaking

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138. See Rohner, supra note 1, at 14-16, Appendix A.
139. See note 77 and accompanying text supra.
authority, it would be possible to locate all federal consumer protection enforcement responsibility in a single new agency. The broadest form of centralization would consolidate into one agency both the rulemaking and enforcement functions of all the federal agencies currently sharing in the supervision of institutions offering consumer financial services.140

Aside from its political unacceptability, this “ultimate centralization” option has other drawbacks. The relocation and restaffing involved in creating a new enforcement agency would undoubtedly be expensive, time-consuming, and disruptive of enforcement continuity. Perhaps more importantly, in the case of the bank supervisory agencies, it would place in separate agencies the responsibilities for supervising consumer compliance and safety and soundness. Banks would be subject to examination by personnel of the new agency and also by regular examiners from the banking agency. Potential frictions would abound, and the reservoir of bank agency knowledge and expertise arising from its concern for safety and soundness could not directly influence the new consumer agency’s enforcement policies. One can doubt both the practicability and the wisdom of this approach.

b. “Bureau of Consumer Credit”

The complete centralization of federal agency enforcement suggested above is more drastic than that contemplated by the National Commission on Consumer Finance in 1972. Its recommendation was for a new agency that would oversee, but not replace, the enforcement activities of existing agencies.141 This “Bureau of Consumer Credit” would essentially supervise the supervisors. It would also have centralized rulemaking authority and extensive investigatory powers. It would be autonomous in its lawmaking function but dependent on existing agencies to carry out its enforcement directions.

An organizational structure along the lines suggested by the NCCF has as much to recommend it today as it had seven years ago. Its desirability has in a sense been confirmed by the creation of the Financial Institutions Examination Council. There is no compelling reason, however, why a coordinating body for the enforcement of consumer credit laws should be limited to depository institutions. Indeed, there is no reason why a body

140. For example, personnel from existing agencies would be relocated into a new agency, or new personnel would be hired to staff the new agency, and all existing agencies would be discharged from any further authority or duty in the consumer protection area. Both the rulemaking and compliance examination functions of the three bank agencies would be transferred to the new agency.

141. See note 131 supra.
like the NCCF's "Bureau of Consumer Credit" could not coexist with the
new Council — the latter as a coordinating body for all examination func-
tions respecting depository institutions while the former would supervise
the overall enforcement of laws affecting the whole area of customer
financial services. More than anything else, this Bureau would provide the
measure of "quality control" presently lacking among both the federal and
state enforcement efforts.

The NCCF identified other important functions beyond coordination of
federal agency enforcement programs this "Bureau" would perform. One
would be to monitor the adequacy of state enforcement for which the Bu-
reau would require some authority to investigate or require reports from
state officials. A second function, whose importance is further developed
below, would be to serve as a clearing house for, and a provider of, techni-
cal assistance to states to enhance the quality of their enforcement pro-
grms.142

c. Combined Enforcement for Depository Institutions

Another form of consolidation among the federal enforcement agencies
would be to combine the enforcement programs either of all five deposi-
tory-institution supervisory agencies or at least of the three commercial
bank agencies. This envisions the creation, out of the existing personnel
and programs of the several agencies, of a single pool of consumer compli-
ance examiners with a single support and training structure. Since all of
these agencies enforce virtually the same body of consumer protection
laws and since consumer compliance will rarely impact on safety and
soundness, the only rationale for maintaining five or three separate police
forces is the historically separate responsibility of each agency for its seg-
ment of the credit-granting industry.143

This consumer compliance pool could operate under the aegis of the
Financial Institutions Examination Council. Each of the five or three
agencies would assign a number of its examiners to work either regularly
or for some specified period of time as "Federal Consumer Compliance
Officers" under the direction of the Council. The Council would provide
the training programs, examination materials, and report forms and would
coordinate the scheduling of compliance examination through the regional
offices of the respective agencies. The Council, or its compliance arm,

142. See NCCF REPORT, supra note 9, at 59.
143. Senator Proxmire has championed the idea of a single bank regulatory agency. See,
e.g., S. 332, 96th Cong., 1st Sess. (1979). Thus far, he has been unsuccessful. The proposal
here is merely to combine the consumer protection functions of the OCC, the FDIC, and the
Board.
should also have responsibility to review and evaluate compliance exam reports, recommend any necessary follow-up administrative action to the agency involved, and maintain a centralized data bank on exam results, patterns and types of violations, and similar matters — data that would be useful both in monitoring examination effectiveness and in identifying unfair or deceptive practices appropriate for treatment by regulation.

This centralized compliance force might also handle consumer complaints regarding any bank or depository institution. In theory, this three-legged or five-legged unit might also be delegated the authority to initiate cease and desist or similar administrative proceedings against violators on behalf of whichever agency was the primary supervisor.

This kind of unified enforcement program would not necessarily produce dramatic reductions in the total manpower needed for consumer compliance. Indeed, every examiner currently doing consumer compliance would probably be assured of a continuing job. Rather, the economies would lie in the training and support services, where only a single set of materials, manuals, report forms, and a single training curriculum would be needed. There would likely be other intangible benefits as well. With all bank consumer compliance under one roof, for example, it should be easier to share among all examiners lessons learned by experience, special skills developed by certain examiners, or special investigative techniques without loss of such information by filtration through the hierarchies of three or five separate compliance shops.

The creation of a combined examiner force for banks or for all depository institutions is not inconsistent with the creation of the recommended Bureau of Consumer Credit. The Bureau would supervise enforcement as to all categories of credit grantors — banks and others — but execution of enforcement programs themselves would be through existing line agencies.

d. Role of the Financial Institutions Examination Council

Even if nothing else is done in the way of consolidating federal agency enforcement efforts, the authority of the Financial Institutions Examination Council clearly includes the establishment of uniform examination standards among the five agencies supervising depository institutions. In addition, the Council is charged to “make recommendations for uniformity in other supervisory matters,” which could encompass complaint handling, educational programs, and other supervisory techniques that do not rely on formal bank examinations. An obvious recommendation is that the Council lend its weight and authority to development of effective, uniform consumer compliance programs.

The act creating the Council is silent on the Council's duty or authority
to consult regularly with federal agencies other than the five agencies supervising financial institutions. Because there has been some measurable friction between the banking agencies (especially the Board) and the FTC on enforcement policies, the Council ought to maintain an open, regular liaison with the FTC with respect to the enforcement of consumer protection laws. Similar relationships might be maintained with other agencies — Justice, for example, with respect to ECOA enforcement — as the need warrants. Those agencies need not be given a formal voice in Council decisions, but their mutual and concurrent enforcement responsibilities should be openly recognized.

2. A Federal-State Contract Structure

The federal and state agency consumer compliance programs, now operating virtually independently, should be brought together in an integrated, cooperative joint venture for optimum efficiency and maximum consumer protection. In this connection, the authority of the federal banking agencies to supervise compliance with state consumer protection laws should be confirmed, and the agencies should adopt affirmative policies and programs to assure that banks under their jurisdiction are complying with state laws. At the same time, Congress should consider giving state officials the authority to enforce federal consumer laws, not in a way that would be duplicative of federal agency efforts but rather in a way that would permit the federal and state agency consciously to agree on a fair division of enforcement duties between them. The federal agencies should then be authorized and encouraged to enter into agreements with the state bank supervisors allocating the responsibility for consumer enforcement between them. The framework for these federal-state agreements should take into account the comparative resources of the state and federal agencies, the relative complexity of state law, the willingness of state officials to accept or purchase technical assistance from the federal agency, the possible loan or exchange of examiners or other compliance personnel, and, in general, the ability and desire of the agencies at each level to handle adequately the enforcement duties for both state and federal laws.

a. Federal Agencies Enforcing State Law

Part I of this article describes the broad grant of authority in the Finan-

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145. The suggestions just made involve a somewhat complex mesh of component judgments and recommendations. The ultimate objective, however, is to change the aloofness that presently characterizes the federal and state roles in consumer protection into a positive program of cooperation and mutual support.
Regulation of Consumer Financial Services

cial Institutions Supervisory Act (FISA) for each of the federal banking agencies to commence cease and desist proceedings for the violation of "any" law or regulation.\textsuperscript{146} While arising out of concern for the institution's safety and soundness, the FISA was also intended to permit the agencies to protect the good name, the "image," of banking generally. There is ample room within the statutory mandate for the agencies to police compliance with many types of state laws.

It would be helpful if amendments to the FISA would make more explicit the authority of the federal agencies to enforce state consumer laws. Moreover, the NCCF Report concludes that, as the FISA is currently written, the authority exists.\textsuperscript{147} The federal agencies, however, have only very grudgingly acknowledged any responsibility to examine for state law compliance; what they do review does not extend beyond usury violations.

The federal banking agencies should consider adopting and publicizing a policy that all applicable state consumer laws fall within the purview of the agencies' enforcement program. This policy would be essentially an affirmation of the agency's authority; it would not necessarily or immediately mean a doubling or tripling of the agency's enforcement efforts. The purpose of this recommended expression of policy is to provide a basis for more cooperative efforts with state officials along the lines developed below.

\textit{b. State Agencies Enforcing Federal Law}

At present, state officials lack explicit authority to police compliance with federal consumer laws even if they have the resources and the desire to do so. In theory, state bank supervisors might examine for compliance with federal laws because such compliance measurably affects safety and soundness, but there does not appear to be any instance in which state supervisors have done this. The only way state officials can effect an enforcement role for themselves with respect to federal laws is if the state adopts the federal provisions as state law either by reference\textsuperscript{148} or by parallel legislation. Or, if the state adopts a law "substantially similar" to federal law, it may obtain an exemption from the federal provisions and take over enforcement responsibility from the federal agencies.\textsuperscript{149} Otherwise, state enforcement of federal rules incorporated by reference into state law duplicates federal agency enforcement.

The notion of delegating to state agencies the authority to enforce duties

\textsuperscript{146} See Rohner \textit{supra} note 1, at 16-19.
\textsuperscript{147} See NCCF \textit{Report}, \textit{supra} note 9, at 53.
\textsuperscript{148} See note 5 and accompanying text \textit{supra}.
\textsuperscript{149} 12 C.F.R. § 226.55 (1979) (state exemptions to TIL).
arising under federal laws is not unprecedented, and Congress might well consider enacting a limited form of such a "parens patriae" delegation in the consumer protection area. That is, the appropriate state officials having jurisdiction over the various classes of credit-granting institutions in the state would be authorized to use existing state enforcement machinery, such as examinations and cease and desist proceedings, to seek compliance with applicable federal statutory requirements. This authority would lie unless state law expressly denied it to state officials.

As in the case of the recommendation in (a) above, the purpose of this delegation would not be to shunt to state officials the enforcement burden now borne by the federal agencies. In no way should the federal agencies relax or remit their efforts. The purpose of this delegation, instead, would be to create parity between federal and state officials in the scope of their enforcement powers. Both federal and state agencies would have the legal capacity to enforce the full package of laws applicable to consumer transactions within those states. This equilibrium would then permit a deliberate and open assessment by the agencies involved of how this shared authority should in fact be divided in any given state.

c. Federal-State Enforcement Contracts

If, as recommended, both the federal and state agencies are authorized to enforce all applicable consumer protection laws, a system is needed to produce an efficient and fair allocation of those duties between agencies at both levels of government. The system should have as its dominant goals: (1) the avoidance of duplication or gaps in the overall enforcement of consumer laws; (2) the assurance of even and vigorous consumer protection; (3) maximum use of the body of consumer law expertise developed by the federal agencies; and (4) due recognition of the enforcement roles of the state. The following specific ingredients might be included in such a system:

(1) "Consumer Enforcement Resource Center"

There should be established at the federal level a strong resource capacity to provide the state agencies with technical assistance in the form of training, materials, data systems, and personnel such as examiner trainers or supervisors and complaint specialists. This resource office would supplement the support staff needed for federal enforcement alone and would

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150. For example, the environmental protection laws often contain mechanisms for a negotiated "delegation" of federal enforcement to states. See, e.g., 42 U.S.C. § 1857c-6(c)(1) (1976).
certainly require new sources of funds. The "Consumer Enforcement Resource Center," to give it a name, would be an arm of whatever centralized federal enforcement authority created under earlier recommendations, or, failing any such new agency, the resource center could be developed as part of the newly created Financial Institutions Examination Council.

The purpose of the resource center, as suggested, would be to enhance the capacity of state agencies to take a more effective role in consumer protection. It would need to offer a much more comprehensive package of "federal aid" than is now available to the states from the federal banking agencies. As much of the technical assistance as possible should be supplied to state banking agencies on request, but to the extent feasible, the states might be expected to contribute toward the value of those services.

(2) Allocation of Enforcement by Contract

In the second and most critical part of this design, the federal supervisory authorities, the existing bank agencies, or any of the possible consolidated supervisory entities would adopt the policy, with congressional authorization if necessary, of contracting with the individual states regarding their respective shares of their now-mutual enforcement responsibilities.

The guidelines for the negotiation of these contracts should stress their purpose of assuring evenhanded and thorough enforcement of all consumer laws in all states while recognizing the shared nature of that enforcement responsibility. States able and willing to handle a larger portion of the enforcement load could bargain for it by demonstrating their capacity to do so. For example, the "resource center" discussed above is intended to provide an inducement and an opportunity for states to develop their enforcement programs. To the extent states took on a larger share of the enforcement load, federal enforcement resources would be freed up for allocation elsewhere in other states or to maintain other aspects of the federal enforcement program.

The possible variations in these state-federal agreements are numerous. One state might wish to take on virtually all enforcement duties within its boundaries and do so effectively through technical assistance or payments from the federal resource center. Another state might find its resources spread so thin, or its state laws so minimal, that it would effectively withdraw from consumer enforcement in favor of plenary enforcement by federal authorities. Other states could strike other balances. For example, a state might elect to enforce all laws relating to credit costs (usury) and disclosure (TIL), leaving the enforcement of laws on credit discrimination and community responsibility to the federal agency. Yet another contract
might contain an allocation of duties by size of bank or by geographic
genre within the state. Still another state might prefer to pool its person-
nel with federal agents and have a joint enforcement program.

The burden of this recommendation is that it is possible to visualize a
genuinely cooperative venture in consumer protection by federal and state
agencies. This venture would be immensely flexible, to allow and en-
courage state initiative, but would always have the reserve authority of the
federal agencies to conduct their own comprehensive enforcement activi-
ties. The standards and criteria by which these state-federal agreements
would be negotiated and approved need much refinement as do the spe-
cific inducements that can be proffered to state agencies to take more ac-
tive roles. This approach, however, offers the prospect that open
recognition of shared responsibilities by federal and state authorities will
produce better consumer protection than the current system in which each
level of government operates virtually blind to the needs, capabilities, or
concerns of the other.

(3) Monitoring

A third ingredient in this “enforcement contract” package would be
monitoring. Either the federal resource center or its parent agency would
need to observe carefully the actual implementation of the various en-
forcement contracts, periodically evaluate them for effectiveness and effi-
ciency, and call for changes or adjustments when necessary. The
evaluation process might involve reviewing regular reports and critiques
from both the federal and state officials involved, monitoring complaint
data, and consulting with interested parties in the community, including
industry and consumers. The centralized nature of this monitoring and
data gathering function should permit a more reliable aggregate assess-
ment of the consumer financial-services marketplace and enable the super-
visory agency to suggest necessary substantive law changes as well as
needed enforcement modifications. Incidentally, it might also emphasize
to congressional oversight committees the complex problems of federalism
in the regulation of the consumer marketplace.

3. Enforcement Contract Alternatives

There are alternatives to the full-blown “enforcement contract” plan de-
scribed above, that would bring state bank supervisors more actively into
the enforcement picture. Each of the following alternatives, however, is
either only a piecemeal approach or of questionable feasibility.

First, federal enforcement agencies could exercise their authority to ex-
amine fully for compliance with state law without reference to what the
state agencies are doing in that regard. This assumes that state enforcement is negligible and will so continue. It would also require immense additional expenditures by the federal agencies to create an examiner corps conversant with the laws of the fifty states. In theory, the federal agencies might justify these expenditures for consumer enforcement by giving the state bank supervisors a larger role in examining for safety and soundness, but it is doubtful whether either the agencies or the Congress would want to diminish the traditional supervisory functions of the federal agencies.

Second, state officials could be delegated the authority to enforce federal laws without particularly coordinating that authority with federal agency activity. The risk here is more uneven or duplicative enforcement.

Third, federal resources could be poured into state bank supervisors’ programs through grants, technical assistance, details of federal personnel, and similar aid. There would be, however, no insistence on any quid pro quo in the way of demonstrably strengthened enforcement.

Finally, the federal agencies could require, or strongly request, periodic reports from the various state bank supervisors on the nature, extent, and results of consumer enforcement activities in the states. This could be a legitimate function of the new Federal Examination Council under its mandate to create a state liaison committee to “encourage the application of uniform examination principles and standards by state and federal supervisory agencies.” While regular reporting of state agency activity might produce increased awareness of the level of state enforcement, it would seem an empty gesture without some mechanism for acting on that information.

4. State Examination of National Banks

Regardless of any other alterations that may be made in the structure of federal and state enforcement programs, Congress should take action to assure that state officials have an appropriate measure of visitorial access to federally chartered institutions for the purpose of assuring compliance with applicable state consumer laws. This was the recommendation of the National Commission on Consumer Finance six years ago; it has been the continuing plea of several state bank supervisors in more recent years.

The notions of national banks as protected “federal instrumentalities”

152. See NCCF Report, supra note 9, at 60.
153. See Senate Oversight Hearings on Consumer Protection Activities, supra note 41, at 3, 22, 46 (testimony of Commissioner Greenwald of Massachusetts, Commissioner Connell of
subject to the "exclusive visitorial powers" of OCC are historical relics exaggerated by constant repetition. On closer analysis, in the setting of the consumer marketplace of the 1980's, it is difficult to see how privately owned and locally situated national banks perform any unique "federal" function in dispensing consumer credit and other services. It is equally doubtful that the integrity of their federal charters is jeopardized by allowing state personnel to evaluate a narrow aspect of their operations, for example, consumer compliance, especially when the record shows a dearth of effort by OCC to ensure compliance with state laws.

This is not to suggest that state officials be licensed to pillage the records of national banks but rather that state officials who are responsible for consumer enforcement be given the limited access to bank files and personnel necessary to accomplish that purpose. It may only be necessary for Congress to specify that the Comptroller is authorized to grant such access; good faith and personal integrity could do the rest.

This recommendation is particularly important if the "enforcement contract" model is implemented, for a fully open and cooperative federal and state approach to consumer protection would be undermined by continued insulation of certain instructions behind an anachronistic screen of federal instrumentality.

C. Execution of Enforcement Duties

The preceding suggestions concerning the reallocation of enforcement duties among and between federal and state authorities have as their theme the creation of a regulatory and enforcement structure that is effective, balanced, and comprehensive. Any such structure, including retention of the status quo, should also be as efficient and productive as possible. There are a number of ways in which the enforcement process might be improved.

1. Interchange of Information on Enforcement Methodology

The enforcement techniques among the federal agencies are in a state of evolution from an incidental feature of regular commercial exams to separate, specially constructed programs involving compliance exams, special exams, complaint processing, and educational functions. The states, at least six of the seven examined, do not seem to have stressed or prioritized consumer compliance as have the federal agencies. But if there is to be an open and cooperative enforcement structure such as suggested above, it

Connecticut, and Deputy Administrator McCaffrey of Oklahoma). For additional discussion of state access to national banks, see Rohner, supra note 1, at 38-42.
would be desirable for the state and federal agencies to operate at equivalent levels of sophistication. Thus, one of the functions of any federal-level "resource center" ought to be an ongoing interchange of information between the federal and state agencies concerning the methodology of their respective enforcement efforts. The maintenance of this interchange might be an activity of the Council, or it could be done by the suggested "Bureau" or other centralized federal consumer enforcement authority.

2. Separation of Consumer and Commercial Examinations

The three federal banking agencies have separated the consumer compliance examination from the regular commercial exam of which it was originally a part. There are several reasons for this shift, including: expediency; the need to respond to congressional pressure for improved consumer compliance; and the need to develop and apply a body of expertise quite different from that used in commercial exams. In the process, the federal agencies have demonstrated that the exercise of their consumer enforcement responsibilities are more effectively accomplished outside the confines of traditional bank examinations. The implications of this conclusion merit further exploration.

a. Enforcement Without On-Site Visitations

In theory, consumer compliance programs could be devised which do not rely wholly on regular on-site bank visitations. There is nothing in the federal consumer laws themselves, nor in the FISA, which compels the agencies to "examine" for consumer compliance in the conventional way. The agencies might, therefore, utilize completely alternative techniques, such as reliance on consumer complaints to identify possible violations or creation of investigation teams to pursue possible violations. Such an abrupt and dramatic shift away from routine on-premises compliance checks would, however, be unwise both as a matter of public and congressional relations and as a matter of substantive consumer protection. The overriding value of some form of institutional examination is its deterrent and preventive effect; that is, its capacity to bring bank practices into compliance rather than merely to penalize violators after the fact. This value is perceived as clearly by the banks as by the consumer, for the banks look to the examinations in part as protection against consumer complaints or

154. The FTC, for example, does not have regular examination powers with respect to nondepositary institutions and utilizes various investigative techniques to identify violators. These techniques include monitoring media advertising, analyzing and investigating consumer complaints, utilizing field investigations and subpoena power, and so on.
lawsuits. Thus, any suggestions that the bank agencies redesign their enforcement programs after the fashion of other agencies which have neither the tradition nor the authority for regular periodic examinations should be rejected.

b. Desirability of Separate Consumer Examinations

The separation of consumer compliance examinations from safety and soundness ought to be viewed as more than a temporary or tentative expedient. The nature and volume of the body of consumer law to be enforced justifies distinctive rather than ancillary treatment. As a class, bank customers — the intended beneficiaries of the consumer protection laws — have expectations and needs separate and distinct from the bank's depositors and investors. Moreover, except in egregious cases where the banks may be threatened by a devastating class action, it is unlikely that consumer law violations affect institutional safety and soundness. All of these considerations support the emphasis given to compliance exams by separating them from commercial exams.

In addition, it is likely that the divergence of consumer compliance from safety and soundness will increase as the volume and range of consumer laws increase. Within the past several years, banks have been subjected to the "civil rights" provisions of the Equal Credit Opportunity Act and to the "community responsibility" rules of the Home Mortgage Disclosure and Community Reinvestment Acts. The momentum of legal protections for bank customers has already spilled over into the noncredit area and may eventually deal with other depositor services such as checking and savings accounts.

The separation of compliance exams from safety and soundness exams was probably not only inevitable but a necessity for the future. The enforcement agencies, state as well as federal, should develop compliance programs in that light without being inhibited by any felt necessity to hold to a commercial exam model. At the same time, it is probably unrealistic to expect all states to initiate separate compliance examination programs overnight. For the time being, state officials should at least plan their enforcement efforts cognizant of the experience in the federal agencies and cognizant of the demonstrated need for distinctive treatment of consumer compliance.

155. For a more detailed discussion of these emerging areas of legal protections, see Rohner, supra note 1, at 42-49.
c. Specialist Examiners

It is probably time to acknowledge that the day of the "generalist" bank examiner has passed. While regular examiners have been assigned to consumer compliance duty by the federal bank agencies, they have been reluctant to enter that new and somewhat alien field. The examiners worried about job security and career advancement. Moreover, they were expected to be experts in such diverse areas as interest rate miscalculations and effects-test discrimination after only two weeks of training.

Though there is no basis for saying that the current consumer examiners are incapable of doing adequate consumer exams, they are at least distracted by their prior experience in the commercial area and by their imminent return to that area. The temporary nature of their assignment to consumer compliance is simply not conducive to developing an in-depth expertise or sensitivity to the burgeoning body of consumer law. Even within the consumer compliance area, it may be difficult for a given examiner to be equally adept in all aspects.

The federal agencies are constantly reviewing the status of their consumer examiner programs. They are committed to the assurance of career paths for examiners who take on consumer compliance duty; the agencies ought to formalize those arrangements as soon as possible. Beyond this, it is premature to assume that some wholly new category of bank examiner must be created, persons with different educational or professional backgrounds than commercial examiners, for example, or persons with some special interest or aptitude for consumer compliance work. But the agencies ought to be evaluating their programs with an eye to such factors. If compliance has become a distinctive aspect of agency activity, there is clearly no advantage in continuing to insist that each examiner can perform equally well on both sides. The recognition of a new examiner classification with its own entering credentials and its own career path, and possibly with subclasses for field personnel, complaint specialists, resource persons, education specialists, and the like, may eventually be necessary.  

3. Adjustments in Examination Techniques

Once it is established that consumer compliance need not utilize the same format as commercial examinations, a number of adjustments in the compliance exam may be possible that could result in more efficient utili-

156. Some of this is already beginning to occur. See textual discussion at 323, The Examiner Corps, supra.
zation of agency resources. The suggestions below are offered to provoke further thought, not to guarantee improvements.

a. Off-Site Examinations

It would seem unnecessary to have an examiner physically visit each and every banking institution in order to verify compliance with requirements respecting the form of bank documents. This seems true at least of the required disclosure format under TIL, the permissible inquiries under the ECOA, or the collected data under the HMDA. Such largely mechanical "forms reviews" might be done more efficiently by teams of "form" specialists in the regional offices, or even in Washington. With respect to the preprinted portions of bank forms, the bank might simply be required to submit copies of its documents for annual review. Even for information which the bank or customer must insert in individual transactions — annual percentage rates or finance charge computations — the requisite sample of completed forms might be reviewed at the regional or Washington office level rather than by the examiner in the field.

Relieving the on-site examiner of some portion of these mechanical chores would leave the examiner free to devote more time to an evaluation of bank policies, operating procedures, and internal monitoring or audit systems. It might also free more compliance personnel to serve as educational outreach persons for banks wanting that assistance.

b. Specialized Examinations

It may be fruitful to divide what is presently an across-the-board compliance exam into several more focused, specialized exams. Obvious candidates over the next few years would be special exams for compliance with "community responsibility" laws or for civil rights compliance. Furthermore, a given bank's level of compliance in one area might be so high that only occasional spot checks would be needed for that area while other aspects would demand more constant attention.

The state of Massachusetts has used this system of specialized exams to the apparent satisfaction of the bank commissioner.157 Some closer analysis of the Massachusetts experience might indicate its wider adaptability.

c. Alternative Investigatory Techniques

There may be effective alternate ways of generating information about possible violations other than on-site examinations. One technique is "testing," which involves having enforcement personnel deal with banks

157. See House Oversight Hearings on TIL Enforcement, supra note 53, at 43 (testimony of Commissioner Greenwald).
by phone or in person as if they were real customers. This device may be particularly useful in determining whether the institution is engaging in illegal prescreening or redlining practices. Regular consultation with community and consumer groups may also shed light on bank practices which would not appear in an on-site examination. Interviews with prior bank customers or applicants may be useful in verifying bank practices and customer satisfaction.

Some of these techniques may, in fact, be inefficient or time-consuming, or simply unproductive. The suggestion here is only that the agencies ought not hesitate to experiment with them and with other investigatory methods.

d. Advanced Scheduling of Examinations

Since the primary focus of commercial exams is to determine the safety of the bank's condition, it has traditionally been thought necessary to schedule those exams on an unannounced basis. Surprise visitations seem less necessary in the compliance area unless one cynically assumes the banks will falsify documents and retroactively amend their operating policies. Compliance exams are, in fact, often scheduled by the federal agencies on an advance-notice basis, and this seems wise and largely riskless. It should permit the bank personnel to prepare material in advance of the examiner's arrival with resulting time savings. It might even be suggested that banks always be given the maximum possible advance notice of compliance exams on the theory that forewarning will prompt careful internal audits. The goal, after all, is compliance, not after-the-fact correction.

e. Focus on Bank's Internal Procedures

At least one of the federal agencies instructs its examiners to give attention to evaluating the strengths and weaknesses of the bank's own internal auditing and monitoring systems as well as to a file-by-file check for violations. This would seem to be efficient use of examiner time, especially in very large banks where the effort needed even to sample, much less evaluate, files from dozens of branches could be excessive in light of its results.

There is something of a David-and-Goliath aspect to the thought of an examiner trainee or assistant examiner challenging the correctness of, or providing useful suggestions about, forms and practices carefully reviewed and approved by expert bank counsel. Some of this flavor emerged in conversations with bankers; for example, a disposition to pickiness by the ex-

158. For a discussion of this technique and its effects, see House Oversight Hearings on ECOA and FHA Enforcement, supra note 19, at 35-36 (testimony of Commissioner Greenwald).
aminers and a reluctance by large banks to acknowledge any educational value in the examiner’s visit. This suggests the desirability of matching the examiner’s level of expertise to the level of sophistication of the bank; for very large banks this might mean that the most effective and efficient examination would consist of some spot checks of transaction files but considerable assessment of the thoroughness and correctness of the bank compliance officer’s programs.

f. Frequency of Examinations

Another apparent carry-over from the safety and soundness tradition is the sense that compliance exams ought to be conducted frequently, as close to annually as possible. Presently, the Board examines annually, the FDIC conducts examinations every fifteen months, while the OCC intends to do compliance exams every two years. There would seem to be no particular magic to annual exams. The choice may be put: is it better to have shallower exams more frequently or in-depth exams less often? With the federal agencies now planning to order corrective remedies in the form of restitution and refunds, banks gain little by delaying their own compliance efforts, and a reasonable case can be made for less frequent but more comprehensive examinations.

4. Complaint Handling; Education

The complaint handling and educational aspects of bank agency enforcement need considerable rethinking and original thinking, respectively. Without impugning the industriousness or good faith of the agency personnel, the complaint procedures appear to be largely unproductive except as band-aid responses to some consumer grievances. The agencies have been anxious to respond to congressional criticism and so have inundated the banks with brochures and complaint forms for distribution to the public, drawing anger and sometimes ridicule from the very bankers whose cooperation may be essential in seeking amicable settlements of customer complaints. Additionally, the complaint recordkeeping systems of the agencies are incompatible with each other and both individually and collectively are of little use in identifying types and patterns of serious violations. The agency complaint handling procedures have only been operating, in a formal way, since 1974 or 1975, and the staff persons involved acknowledge that they are still in a preliminary stage.

Each of the agencies is making efforts to improve both the efficiency of the procedures and the usefulness of the complaint data. Those efforts certainly should continue. The value of extensive complaint handling mechanisms, however, lies not only in the responses they provide for individual
customers but also in the aggregate picture customer complaints can create of bank practices. Especially in the area of civil rights and community responsibility, the complaint intake may be an invaluable source of leads as to the existence of discriminatory and redlining practices.

In order to derive these larger benefits, it is important that the agencies use standardized procedures so that similar cases are handled similarly no matter which agency is involved. Secondly, information about complaints and their disposition needs to be retrievable in a standardized format to permit meaningful analysis and comparison for all three agencies. In addition, that data needs to be recorded in a form which permits thorough and qualitative analysis of the types of complaints and the types and severity of violations detected. Finally, the agencies ought to allocate the necessary resources to permit on-site field investigations of complaints that cannot be satisfactorily resolved through exchanges of correspondence.

It is of course true that standardization can become stultification if each agency must imitate the other without opportunities for experimentation or innovation. The current complaint handling process, however, may not be able to achieve some of its basic goals without data and analyses which are comparable and combinable. Agency individuality, at the present time, is counterproductive.

The educational programs of the federal banking agencies consist primarily of the preparation of fliers, booklets, and the like and the distribution of copies of pertinent laws and regulations. Some contracts have been given to outside firms for the production of educational films on specific topics. None of the agencies has made an inroad into school curricula, obviously the most fertile area for developing an informed consuming public. The problem with regulatory agency educational programs may lie in the simple fact that the personnel conducting those programs are out of their field; they are lawyers, bank examiners, or economists, but they are not professional educators or professionals in the communications media. To mount effective educational programs, the agencies must be prepared to commit the substantial funds necessary to retain a complement of professional communicators and educators to work with agency staff on translating substantive rights, remedies, obligations, and procedures into meaningful messages for the public.

It is also clearly counterproductive and inefficient for each federal agency, and conceivably each of the fifty state agencies, to conduct independent, and therefore duplicative, educational programs. One primary

159. The FDIC, however, has made some initial efforts in this area. See note 49 and accompanying text supra.
function of the "Consumer Enforcement Resource Center" suggested above would therefore be the coordination and steering of a nationwide consumer education effort.

5. **Agency Enforcement Sanctions**

A final area in which the banking agencies, primarily the federal agencies, have developed momentum is remedies for violations as well as prospective compliance. The development of real clout on the part of the agencies, however, is long overdue for several reasons. Unless the enforcement agencies are prepared to take prompt and strong steps to see that the injurious effects of past violations are undone, their "go and sin no more" admonitions for the future are mere verbal slaps on the wrist. Prospective-only corrective orders do nothing for past victims and serve little deterrent value for future conduct. The past lack of aggressiveness of agency enforcement has undoubtedly contributed to the felt need to develop strong private remedies which at times appear to have led to eruptions of expensive, inefficient, and even harassing litigation.

Perhaps the most insidious effect of bland agency enforcement policies is the attitude engendered among banks that the maximum extent of their compliance responsibility is to respond dutifully to examination reports. Where banks are induced to measure their compliance responsibility by the results of an examiner's report, there is less motivation for them, their counsel, and their trade associations to develop strong compliance programs on their own. The very casualness of the agency enforcement program results in a shifting of a greater portion of the compliance burden to those agencies.

This suggests that enforcement techniques such as restitution of overcharges, including notification to customers of their rights and corrective steps such as proposed in the Regulation B guidelines, are healthy steps to a better balanced enforcement environment. These innovations are understandably painful to banks, as much for their novelty as for their economic implications. In the future, however, judicious agency insistence on strong remedies ought to produce greater incentive for industry self-policing, greater customer satisfaction with the operation of the marketplace, and less exposure by institutions to the uncertain liabilities of private litigation.

160. For a detailed discussion of remedial measures, see notes 50-82 and accompanying text supra.
III. Conclusion

The dominant role in the regulation and enforcement of consumer protections for bank customers is shifting more and more from state legislatures and state agencies to Congress and the federal bank supervisors. The shift in roles has produced some new and unexpected frictions attributable to dual regulatory structures. The reduction of those frictions and the improvement of the overall system of consumer protection probably cannot be achieved, and certainly is not likely to be achieved, by radical surgery on the federal and state regulatory mechanisms. Rather, those goals can realistically be pursued only by thoughtful and careful accommodation of the legitimate interests and capabilities of both levels of government. This task ought to be high on governmental agendas through the 1980's.