1976

The Equal Credit Opportunity Act Amendments of 1976: A Meaningful Step Toward the Elimination of Credit Discrimination

Barbara J. Klein

Follow this and additional works at: https://scholarship.law.edu/lawreview

Recommended Citation
Although there is no constitutional right to receive credit, the use of credit has in recent years become a virtually indispensable commodity.\(^1\) Recognizing its importance, Congress enacted the Equal Credit Opportunity Act of 1974\(^2\) to insure that credit is not denied arbitrarily or capriciously on the basis of sex or marital status. While the enactment of legislation prohibiting discrimination in the granting of credit is certainly a praiseworthy objective, the Equal Credit Opportunity Act of 1974 has been criticized by many for its failure to cover a number of areas of known discrimination and to act as a significant deterrent to continuing discrimination.

In enacting legislation regarding credit discrimination, Congress was faced with the formidable task of balancing a number of competing interests. The needs of the consumer were to be of paramount concern.\(^3\) The lending institution, however, has a property right at stake in that it owns the money which the consumer seeks to borrow. A balance must be struck between the creditor's need for protection from financial loss and the borrower's need for credit.\(^4\) It is essential that creditors be allowed to consider information about the credit applicant that is relevant to the formation of financially sound decisions. To prohibit the consideration of such criteria would be a disservice to consumers, since the cost and availability of credit will vary proportionately to the risk of loss that creditors are forced to undertake.\(^5\)

---

1. See Hearings on S. 483, S. 1927 & H.R. 6516 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess. 1 (1975) [hereinafter cited as 1975 Hearings]. Senator Biden noted that “virtually all home purchases, probably two-thirds of all automobile sales and more than half of major department store sales are on credit . . . .” See also 122 CONG. REC. 1018 (daily ed. Feb. 2, 1976) (remarks of Senator Biden). Outstanding consumer credit is growing at a phenomenal rate. It now stands at almost $200 billion, excluding family mortgage credit which would add more than $400 billion to that total. \(Id.\)


5. It is not in the borrower's best interest to be given credit if he is unable to repay the debt. The purpose of screening applicants is to determine who will be likely to have financial problems if given credit. Financial difficulties may lead to destroyed
The 1976 amendments to the Equal Credit Opportunity Act are an attempt to balance these competing needs and to establish a clear national policy that no one shall be denied the credit he wants or needs on the basis of criteria having nothing to do with credit-worthiness. The purpose of this article is to interpret and evaluate these amendments through an examination of their legislative history and to discuss their probable impact on the credit industry.

I. THE EQUAL CREDIT OPPORTUNITY ACT OF 1974

Although the use of credit has been an integral part of the American marketplace for many years, the Equal Credit Opportunity Act of 1974 was the first comprehensive legislative attempt to prevent credit discrimination. Congress had previously passed consumer credit legislation in the Truth in Lending Act and the Fair Credit Billing Act, but the area of credit discrimination had never been dealt with directly. The Equal Credit Opportunity Act of 1974 prohibits discrimination by a creditor "against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction." By enacting such legislation, Congress intended to insure that those engaged in the extension of credit would make credit available with fairness and impartiality. It was also believed that economic stabilization and competition would be strengthened by the absence of discrimination on the basis of sex and marital status.

The Act authorizes the Federal Reserve Board to prescribe such regulations as are necessary to effectuate the purposes of the legislation. Pursuant to this authority, the Board issued a series of regulations collectively known as Regulation B. These regulations deal primarily with two areas:

---

11. 121 Cong. Rec. 4789 (1975) (remarks of Congresswoman Sullivan). Ms. Sullivan stated that when the House began its hearings in 1972, to her knowledge there was not a single law in any state or a single bill in Congress to prohibit credit discrimination by sex or marital status.
13. Id. § 1691.
14. Id. § 1691b. The Board is given similar rulemaking powers under the Truth in Lending Act. Id. § 1604 (1970).
criteria which may not be considered by creditors in extending credit, and the furnishing of credit information to consumer reporting agencies.

To facilitate the bill's intent to eliminate discrimination on the basis of sex or marital status, Regulation B prohibits the consideration of certain factors by creditors in making their decision to extend credit. Lending institutions may not make inquiries regarding an applicant's marital status or childbearing intentions, nor may they discount the income of an applicant or the applicant's spouse or refuse to issue separate accounts on the basis of sex or marital status. Additionally, sex and marital status may not be used as variables in a credit scoring system.

One of the greatest obstacles that women encounter in attempting to obtain credit is the lack of a credit history. This is due to the fact that credit information regarding married couples is traditionally reported only in the husband's name. Regulation B attempts to alleviate this problem by requiring creditors to determine whether the account is one for which both spouses will be contractually liable and if so to designate the account to reflect the participation of both spouses. Creditors are also required to notify applicants of any action taken on their application and, if requested, to provide reasons for such action.

Overall administrative authority for the Act and the regulations rests with the Federal Trade Commission, with parallel authority granted to various other federal agencies. In the case of noncompliance by a creditor, an ag-

---

16. Id. § 202.4(c)(1). A creditor may, however, make inquiries about marital status for the purpose of ascertaining his rights and remedies regarding the particular extension of credit. 15 U.S.C. § 1691(b) (Supp. V, 1975). For example, in some cases property cannot be mortgaged without the consent of both the husband and wife. However, if the creditor asks the applicant's marital status, only the terms "married," "unmarried," or "separated" may be used. Fed. Res. Bd. Reg. B, 12 C.F.R. § 202.4(c)(2) (1976).


18. Id. § 202.5(e).

19. Id. § 202.4(b).

20. Id. § 202.5(f). Credit scoring is a method of determining credit-worthiness by assigning numerical values to the various factors presented by each applicant and making the decision to grant credit on the basis of the total score. Cremer Testimony, 1975 Hearings, supra note 1, at 441. In contrast, granting credit merely on the basis of the creditor's judgment is an art rather than a science. When this method is used, it is virtually impossible to show the existence of prejudice or to verify the truth of any reason given for rejection. Id. at 445-46.


22. Id. §§ 202.5(m)(1)(2).


24. Id. §§ 1691c(a)(1)-(9). Administrative enforcement of the Act with respect to
The applicant may institute civil proceedings for preventive relief in the form of an injunction or a restraining order. Additionally, the applicant may institute proceedings to recover actual and punitive damages in an individual capacity or as the representative of a class.

Although the Equal Credit Opportunity Act of 1974 was a significant initial breakthrough in the area of credit discrimination, it was far too limited in scope and it left many areas of discrimination untouched. Evidence was presented in 1974, at hearings before the House Subcommittee on Consumer Affairs, regarding the need for legislation dealing with credit discrimination on the basis of race, color, religion, national origin, and age. Nevertheless, before the full committee was able to act upon these recommendations, a weak antidiscrimination bill was agreed upon by the House and Senate conferees.

The most vigorous criticisms of the Act have been directed at its enforcement provisions. Consumer groups maintain that these provisions are inadequate to insure compliance by creditors. Because overall enforcement powers are delegated to the Federal Trade Commission, any violation of the Equal Credit Opportunity Act is subject to the same disciplinary action as a violation of the Federal Trade Commission Act, and the Commission may delegate parallel authority to these institutions because the FTC does not have jurisdiction over banking institutions.

---

25. Id. § 1691e(d).
26. Id. §§ 1691e(a)-(c). The applicant may pursue the remedies provided by the Act in lieu of, but not in addition to, any remedies provided by state law. Id. § 1691d(e).
28. 121 CONG. REC. 4789 (1975) (remarks of Congresswoman Sullivan). The House conferees of another subcommittee went to conference with the Senate on a bank deposit insurance bill to which the Senate had attached its consumer credit bill. The House conferees agreed to the Senate riders and the conference report came before the House under a rule waiving points of order against nongermane Senate amendments. It was therefore impossible to obtain separate votes on the individual provisions of the Senate amendments. The House was forced to decide whether to pass, defeat or recommit the entire conference report which included provisions that were desperately needed by the home building industry.
use the powers delegated to it under that Act to deal with the violation.\textsuperscript{81} At the hearings before the Senate Subcommittee on Consumer Affairs, however, a representative from the Commission pointed out that it lacks the resources to achieve effective compliance.\textsuperscript{82} Pursuant to the Federal Trade Commission Act, the Commission is only empowered to issue cease and desist orders in the case of noncompliance by a creditor.\textsuperscript{83} Consequently, aggrieved applicants must rely on individual or class action suits to assert their rights and to recover any damages they may have suffered. Consumer advocates maintained that the original ceiling of recovery for punitive damages discouraged the institution of suits and was an inadequate deterrent for creditors.\textsuperscript{84}

The original Equal Credit Opportunity Act has also come under heavy criticism from creditors. Although the general purposes of the Act were easy to state, the problems involved in its day-to-day operation were great. Regulation B has been attacked by creditors as unclear, overly complicated, and burdensome.\textsuperscript{85} The Act itself simply prohibits discrimination on the basis of sex or marital status, but creditors claim that the numerous regulations implementing the Act increase the complexity of the legislation and enhance the possibility of litigation.\textsuperscript{86}

II. THE 1976 AMENDMENTS

The amendments to the Equal Credit Opportunity Act\textsuperscript{87} must be viewed

\begin{footnotes}
\item[31.] Id. § 1691c(c) (Supp. V, 1975).
\item[32.] Testimony of Sheldon Feldman, Assistant Director for Special Statutes, Federal Trade Commission [hereinafter cited as Feldman Testimony], 1975 Hearings, supra note 1, at 218.
\item[33.] 15 U.S.C. § 45(b) (1970). In the case of noncompliance with an order of the Commission, violators are subject to a civil penalty of not more than $5,000. Id. § 45(1). Other agencies entrusted with administrative enforcement powers have the same problem. See, e.g., 12 U.S.C. § 1818(b) (1970). In the case of national banks, member banks of the Federal Reserve System, and banks insured by the Federal Deposit Insurance Corporation, the Board of Directors of the FDIC can issue cease and desist orders.
\item[34.] Under the original Equal Credit Opportunity Act, the ceiling of recovery for punitive damages was $10,000 in an individual action and the lesser of $100,000 or one per centum of the creditor's net worth in a class action. 15 U.S.C. §§ 1691b(e)-(c) (Supp. V, 1975). To date, no reported cases have been brought under the provisions of the Equal Credit Opportunity Act.
\item[35.] Letter from the International Consumer Credit Association, 1975 Hearings, supra note 1, at 587. The Association maintained that Regulation B is "so unreasonable, uncertain, contradictory and indefinite that it is not only unconstitutional but also impossible in compliance for almost any creditor." Id.
\item[36.] Letter from Dawson, Riddell, Taylor, Davis, & Holroyd, 1975 Hearings, supra note 1, at 575-76.
\end{footnotes}
both as a natural extension of the original Act and as an attempt to correct its deficiencies. The amendments expand the scope of prohibited discrimination to include race, color, religion, national origin, and age.\textsuperscript{38} They prohibit a refusal to extend credit solely because the applicant receives public assistance\textsuperscript{39} or has exercised his rights under the Consumer Credit Protection Act.\textsuperscript{40} The enforcement provisions of the Act have also been extended. The ceiling of potential recovery of punitive damages in a class action was raised to the "lesser of $500,000 or one per centum of the net worth of the creditor";\textsuperscript{41} the Attorney General of the United States is authorized to commence a civil action in "pattern and practice" cases;\textsuperscript{42} and a Consumer Advisory Council is to be established to render advice concerning the Act and other consumer related matters.\textsuperscript{43} As a further deterrent, and to aid in the enforcement of the Act, a written statement of reasons for denial of credit must be furnished to an applicant upon request.\textsuperscript{44}

\textbf{A. Expansion of the Scope of Prohibited Discrimination}

Prior to the enactment of most antidiscrimination legislation, an initial determination that the alleged discrimination does in fact exist has to be made. Adding unnecessary categories of prohibited discrimination could have the effect of weakening a bill by overburdening the courts and diffusing the enforcement efforts of the regulatory agencies.\textsuperscript{45} In drafting the amendments to the Equal Credit Opportunity Act, however, because race, color, religion,
and national origin are standard classifications in civil rights legislation, it was felt that reasons should be presented for excluding those categories from coverage rather than requiring justification for their inclusion.  

This reasoning does not apply to the inclusion of the categories of age and receipt of public assistance. In these areas, evidence of discrimination was considered necessary. At the hearings before the Subcommittee on Consumer Affairs, the American Association of Retired Persons presented substantial evidence that age discrimination in the granting of credit does in fact exist. Statistics were cited showing that persons between the ages of 55 and 64 are actually the most credit-worthy. Furthermore, the greatest bulk of savings accounts were stated to be held by persons over the age of 60. Ironically, in the absence of legislative protection, the elderly were providing funds for loans to younger persons and yet were denied an adequate opportunity to obtain credit themselves.

While the prohibitions regarding race, color, religion, and national origin are absolute, the amendments permit a creditor to inquire about the age of the applicant to determine whether he has the capacity to contract and to determine the probable continuance of his level of income. Creditors may also make use of a statistically sound credit scoring system that considers age as long as elderly applicants are not assigned a negative value.

While no statistical evidence was presented regarding discrimination against recipients of public assistance, Congress felt it was intolerable that

46. See Pottinger Testimony, 1975 Hearings, supra note 1, at 318. It was argued that discrimination in these areas is repugnant to the basic values of a democratic society. Id. at 331.
47. 1975 Hearings, supra note 1, at 76-92. A substantial number of letters from elderly persons who had been denied credit or had had their credit revoked upon reaching a particular age were submitted as evidence by the American Association of Retired Persons. See also 1975 Hearings, supra note 1, at 12 (statement of Senator Brock). Congress was especially concerned about the elderly since they are becoming more common victims of crime, making the possession of credit cards and checking accounts a necessary safety precaution.
48. 1975 Hearings, supra note 1, at 5.
51. Id. § 1691(b)(2). See, e.g., 1975 Hearings, supra note 1, at 8 (remarks of Senator Brock). If the applicant is 60 years of age and if the mandatory retirement age is 65, the creditor may take this factor into account. An example frequently cited at the hearings was the case of an 85-year old man applying for a 30-year mortgage. In such a case, age is admittedly a valid factor to consider.
such recipients should be disadvantaged solely because of the source of their income. Creditors criticized the attempt to eliminate this factor in credit determinations on several grounds: first, there was no demonstrated need for statutory protection; second, creditors must be able to distinguish between stable and unstable sources of income; and third, such applicants would rarely qualify for bank card credit in any case. The provision would seem to overcome these objections since it simply prohibits consideration of the nature of the applicant's income, while allowing creditors to make inquiries regarding the amount and frequency of payments.

The amendments also provide for the continuance of special programs for economically disadvantaged persons, credit assistance programs offered by nonprofit organizations for the benefit of their members, and programs designed to accommodate "special social needs." The last category was added to allow profit-making organizations to establish special programs designed to increase access to the credit market by persons previously foreclosed.

B. More Effective Enforcement Provisions

One of the most controversial additions to the Equal Credit Opportunity Act is the requirement that a written explanation of reasons for adverse action be given to an applicant upon request. This provision serves to dis-
courage discrimination,\textsuperscript{62} to point out to the applicant the manner in which his credit status is deficient,\textsuperscript{63} and to facilitate the administration of the enforcement provisions of the Act.\textsuperscript{64} In drafting the amendments, much debate focused on the issue of whether written reasons for adverse action should be furnished automatically, upon request, or not at all. The criticism most frequently directed at the "automatic" provision was that it would be unduly burdensome and costly.\textsuperscript{65} Consumer representatives, however, felt that such a provision was necessary to assure compliance. A compromise was reached by requiring a written explanation only upon request of the applicant.\textsuperscript{66}

A second issue of great concern to creditors was the content necessary to constitute a sufficient statement of reasons for denying credit. Under the regulations prescribed by the Federal Reserve Board pursuant to the original Equal Credit Opportunity Act, this had proven to be a very troublesome issue.\textsuperscript{67} As a result of the Senate hearings, it was agreed that a "check-list" letter in which the creditor merely checks off the reason for denial would be sufficient for purposes of the Act.

Among the changes in the civil liability provisions of the Act, the provision raising the ceiling of possible recovery in class action suits aroused a great deal of dispute. The proposed Senate amendment recommended that the ceiling be raised to "the greater of $50,000 or one per centum of the net worth of the creditor."\textsuperscript{68} The purpose behind setting any ceiling is to limit

\begin{itemize}
  \item \textsuperscript{62} Creditors rarely furnish rejected applicants with even a cursory explanation for their action. Their apparent rationale is that since they have no legal obligation to do so, they will not venture the effort or risk potential embarrassment. \textit{S. REP. NO. 589, 94TH CONG., 2D Sess. 641 (1976).}
  \item \textsuperscript{63} It was thought that knowledge of the reasons for adverse action would ultimately have a "beneficial educational effect on the credit-consuming public and a beneficial competitive effect on the credit marketplace." \textit{Id.}
  \item \textsuperscript{64} Since discrimination is "inherently insidious, almost presumptively intentional, yet often difficult to detect and ferret out . . . ." strong enforcement is essential. \textit{Id. at 647.}
  \item \textsuperscript{65} Testimony of Forrest D. Jones, on behalf of the American Bankers Association, 1975 \textit{Hearings, supra note} 1, at 264-65. \textit{See also id. at 285.} In 1973, it cost $3.31 to dictate, type, mail, and file a business letter.
  \item \textsuperscript{66} 15 U.S.C.A. § 1691(d)(2)(B) (Supp. 2, 1976). \textit{See also id. § 1691(d)(5). This latter provision was added to protect small businesses. A verbal statement of reasons is sufficient in the case of "any creditor who did not act on more than one hundred and fifty applications during the calendar year preceding the calendar year in which the adverse action is taken . . . ."}
  \item \textsuperscript{67} Creditors claimed that a number of factors are considered in making a credit decision, no one of which is controlling. It is therefore difficult to articulate the specific reasons for denial in a clear and meaningful fashion. \textit{Statement of Interbank Card Association on S. 1927, 1975 \textit{Hearings, supra note} 1, at 585.}
  \item \textsuperscript{68} S. 1927, 94TH CONG., 1ST Sess. § 706(b) (1975).}
\end{itemize}
the exposure of creditors to vast judgments the size of which would depend on the number of members in the plaintiff's class. At the same time, there was concern that if the ceiling were too low, potential plaintiffs would be dissuaded from bringing a class action.

Creditors argued that the present ceiling on recoveries was an adequate deterrent, since most creditors would comply with the Act to avoid the potential damage to their reputation from involvement in litigation. It was also felt that the higher ceiling could bankrupt smaller businesses and would allow excessive recovery in the case of large corporations. A third concern was that a higher ceiling would encourage vexatious litigation. Consumer advocates argued that an increased ceiling was necessary to ensure compliance. Evidence was presented to show that judges generally refrain from granting the maximum allowable recovery. Furthermore, the higher ceiling would tend to encourage more private enforcement, thereby decreasing the need for governmental enforcement and reducing government costs. To reconcile creditor and consumer interests, a compromise provision was adopted, which set the ceiling at "the lesser of $500,000 or 1 per centum of the creditor's net worth."

Because strong enforcement is essential in civil rights legislation, it was felt that alternative remedies should be available to aggrieved applicants.

70. Under the original Equal Credit Opportunity Act, if there were more than 10 members in the class, the class' recovery was less than the recovery in equivalent individual suits. 122 Cong. Rec. 1019 (daily ed. Feb. 2, 1976) (remarks of Senator Biden).
71. 1975 Hearings, supra note 1, at 307.
72. Id. at 303 (remarks of Senator Garn).
73. Pottinger Testimony id. at 334. See also Letter from M.M. Whitmore, Manager, Credit Policy & Control Division, Standard Oil Company, 1975 Hearings, supra note 1, at 635. The Standard Oil Company recommended that a provision be added under which the court could, in its discretion, award reasonable attorney's fees to defendants, if it was found that the suit had been brought either on frivolous grounds or out of ill will by the plaintiff.
74. See Testimony of Benny Kass, Attorney, Washington, D.C., 1975 Hearings, supra note 1, at 301. Mr. Kass argued that "the $100,000 maximum, may be a very cheap price to pay when extra charges to the consumer in effect have benefitted to the coffers of that individual creditor much more than $100,000."
75. The courts have clearly demonstrated that they have no intention of permitting mammoth class action judgments in cases based on purely technical violations. See Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412 (S.D.N.Y. 1972). The size of a class action judgment should depend on "the amount of actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional." 1975 Hearings, supra note 1, at 17 (remarks of Congresswoman Sullivan).
76. 1975 Hearings, supra note 1, at 210 (remarks of Senator Proxmire).
quently, a new provision was added to the civil liability section of the Act which authorizes the Attorney General of the United States to institute proceedings either on referral from the administrative agencies responsible for enforcement\(^{78}\) or on his own initiative in the case of "pattern and practice" suits.\(^{79}\) This provision is based on the assumption that the Justice Department's experience in civil rights legislation can be utilized to achieve maximum compliance under the Act.\(^{80}\) Furthermore, while the other federal agencies are empowered only to issue cease and desist orders, the Attorney General is authorized to commence a civil action for injunctive or such other relief as may be appropriate.\(^{81}\) Additionally, both the Attorney General and the Federal Reserve Board are required to issue annual reports to Congress on the performance of their respective functions under the Act.\(^{82}\)

A provision was also added authorizing the establishment of a Consumer Advisory Council,\(^{83}\) which would absorb the already existing Truth in Lending Advisory Committee.\(^{84}\) Members of this council are to be chosen so as to achieve a fair representation of the interests of both creditors and consumers.\(^{85}\) The chief functions of the Council are to advise and consult with the Federal Reserve Board regarding the Board's responsibilities under the Act and to facilitate a uniform and coordinated approach to consumer legislation.\(^{86}\)

III. THE AMENDMENTS' POTENTIAL IMPACT ON THE CREDIT INDUSTRY

A. Written Explanations

While passage of the amendments to the Equal Credit Opportunity Act

\(^{78}\) *Id.* § 1691e(g).

\(^{79}\) *Id.* § 1691e(h).

\(^{80}\) S. REP. No. 589, 94th Cong., 2d Sess. 647 (1976). "Pattern and practice" suits by the Attorney General have been effective in achieving compliance with other civil rights statutes. 1975 *Hearings, supra* note 1, at 26 (supplemental statement of Congresswoman Sullivan).


\(^{82}\) *Id.* § 1691f.

\(^{83}\) *Id.* § 1691b(b).

\(^{84}\) Early drafts of the bill called for a separate advisory committee on the Equal Credit Opportunity Act similar to the advisory committee established under the Truth in Lending Act. However, the Federal Reserve Board urged the subcommittee to create an advisory council with broader responsibility to render advice concerning the entire Consumer Protection Act. *S. REP. No. 589, 94th Cong., 2d Sess. 645 (1976).* This provision has the additional advantage of requiring no additional cost to the government for the establishment of a new council. *Id.* at 649.


is a significant step toward assuring equal access to credit, opponents of the bill have criticized the requirement of a written explanation for denial of credit as being counterproductive, since any increase in costs to creditors will ultimately be passed on to consumers. In all likelihood, this fear should prove to be unwarranted. At the hearings before the Subcommittee on Consumer Affairs, Werner H. Kamarsky, the Commissioner of the Human Rights Division for New York, testified that a written denial requirement in the New York Human Rights Act had not proven to be unduly burdensome.

A countervailing concern of consumer advocates is that without written statements, the filing of legitimate complaints will be discouraged. Because of the many factors involved in the decision to grant credit, it is difficult for applicants to determine whether or not they are really being discriminated against. Without written explanations, it would be almost impossible for an applicant to prove that discrimination had occurred.

The real problem with written explanations is assuring that creditors give the true reasons for the denial. Certainly no creditor will openly admit that he has discriminated against an applicant. This problem might be alleviated by requiring creditors to retain records. If a rejected applicant believes either that the reason for denial in itself is discriminatory or that it is merely a pretext for a discriminatory purpose, he could examine the records of those applicants similarly situated to determine if he has actually been treated differently. While the original Equal Credit Opportunity Act made no provision regarding written explanations, Regulation B requires creditors to retain records for each applicant for a period of 15 months after action has been

87. Id. at 653. Congress has been accused of engaging in legislative overkill because the provisions of the original Equal Credit Opportunity Act had not yet gone into effect when the amendments were being made. See also 1975 Hearings, supra note 1, at 7 (remarks of Senator Brock).
88. N.Y. EXEC. LAW § 296-a (McKinney 1974).
89. See Testimony of Werner H. Kamarsky, Commissioner, Division of Human Rights, State of New York, 1975 Hearings, supra note 1, at 42.
90. 1975 Hearings, supra note 1, at 209 (remarks of Senator Biden). However, the American Retail Federation pointed out that it would be foolhardy to leave such a task to a clerk or secretary when a technical violation could result in potential liability. Testimony of Jim Godfrey, representing the American Retail Federation, id. at 406.
taken. It is imperative that this provision be retained, for without it the utility of written explanations could be lost.

One of the major concerns of creditors regarding the use of written explanations has been the danger that their determination of what constitutes a sufficient statement could later be held by a court to be inadequate. The amendments require that the statements contain the "specific reasons for adverse action." This standard does not provide creditors with clear guidelines, since it is susceptible to varying interpretations. To protect creditors from such technical violations, an "immunity" provision has been added to the Act. This provision protects creditors from liability for any act done in "good faith in conformity with any official rule, regulation, or interpretation thereof by the [Federal Reserve] Board." Pursuant to this provision, creditors may submit questions to the Board and rely on its answers as a "good faith" defense in case of subsequent prosecution. The courts are not bound by these interpretations, but a judicial determination contrary to an opinion issued by the Board would not have an adverse retroactive impact on a creditor who had relied on the interpretation.

B. Regulation B

The issuance of regulations to implement the Equal Credit Opportunity Act amendments has proven to be the most difficult task with which the Federal Reserve Board was charged. The present regulations have been subjected to a great deal of criticism for their failure to provide creditors with clear and meaningful guidelines. Following the passage of the 1976 amendments, proposed regulations were issued and subjected to comment at public hearings. In contrast to the existing regulations, the new regulations reflect clear and concise draftsmanship and can be expected to alleviate many of the problems that creditors face under the present regulations.

At the hearings held before the issuance of the new regulations, consumer groups were especially concerned about credit scoring and urged that creditors be required to use systems that are based on their own business ex-

94. The amended regulation not only retains this provision, but also increases the period of retention to 25 months to comply with the extension of the statute of limitations by two years under the amendments. 42 Fed. Reg. 1261 (1977) (to be codified at 12 C.F.R. § 202.12(b)).
96. Id. § 1691e(e).
97. Id.
experiences, as opposed to one general system which all would be required to follow. This proposal is based on the fact that characteristics of credit-worthiness vary from one area of the country to another. If a uniform system were required, creditors would be forced to use averages, thereby increasing their risk of loss in some areas of the country and decreasing the availability of credit to credit-worthy applicants in other areas. The new or amended regulations recognize these concerns and require creditors to base their scoring systems on their own experience or that of a similarly situated creditor if the creditor does not have sufficient experience of his own.

The 1976 amendments allow creditors to use age in a statistically sound credit scoring system as long as elderly applicants are not assigned a negative value. Pursuant to this provision, the regulations require that elderly applicants be given a score which reflects the creditor's experience with that age group, but which is not less than the score for the age group receiving the highest value in the creditor's scoring system. While the proposed regulations did not provide a numerical definition for "elderly," following sharp criticism by creditors, the final regulations have provided that an applicant will be considered "elderly" once he or she has reached the age of 62. Although such a definition is admittedly arbitrary, some guideline is essential for the protection of creditors and the Board is to be commended for its recognition of this problem.

Although the Act does not so require, the Board has decided that credi-

100. Cremer Testimony, 1975 Hearings, supra note 1, at 435.
101. 42 Fed. Reg. 1253 (1977) (to be codified at 12 C.F.R. § 202.2(p)). The regulations also require the scoring system to be one that uses a numerical score to predict the applicant's probable willingness and financial ability to repay the loan. Id. at 1243.
103. 42 Fed. Reg. 1253 (1977) (to be codified at 12 C.F.R. § 202.2(v)). For example, if the highest value is assigned to the 60-69 age group, then a 70-year old applicant could not receive a lesser value. Fed. Res. Bd. Press Release (Jul. 15, 1976) at 11. Creditors have criticized this provision claiming that "blackballing" against the elderly will be prevented if they are given the same value as the age group receiving the lowest score. Statement of H.R. Lively, Director of Public Affairs, Sears, Roebuck & Co., Hearings on the 1976 Amendments to the Equal Credit Opportunity Act Before the Federal Reserve Board 16-17 (Aug. 12, 1976) [hereinafter cited as FRB Hearings] (on file at the Federal Reserve Board). In fact, the language of the bill seems to support the Board's proposed regulation since any value other than the highest score given for age would be a negative factor when compared to an age group receiving a higher score.
105. Nevertheless, the Act does authorize the Board to prescribe such regulations
tors will be required to keep records on credit applicants reflecting sex, race, age, and other factors which are prohibited bases of discrimination.106 Such a provision will greatly aid the various enforcement agencies by providing a regular means for monitoring the creditors' performance under the Act. The agencies will be able to examine the records to determine whether a disproportionate number of applicants from a particular category are being denied credit. This regulation, however, only requires creditors to record these factors in those cases where an applicant seeks credit for the purchase of residential property.107 This limitation is grounded in the concern that a notation requirement would be too costly and burdensome if required in all forms of credit extension.108 Additionally, creditors have testified that asking such questions could prove to be a public relations problem and that some applicants might refuse to answer them.109

A better provision would limit the characteristics which must be recorded to those that are visible to the creditor,110 but would apply the requirement to all forms of credit.111 Such a provision would have the advantage of providing a means of surveillance for most forms of credit and yet reducing the burden placed upon creditors. In addition, by limiting the characteristics to be recorded to those that are visible, creditors will not be faced with the problem of borrowers who are offended by such questions.

Although information on characteristics such as marital status, age, and religion would also be helpful to the enforcement agencies, requiring creditors to ask applicants these questions could have the anomalous effect of increas-

---

106. 42 Fed. Reg. 1261 (1977) (to be codified at 12 C.F.R. § 202.13(a)). Under this provision, creditors will be required to record the applicant's sex, marital status, race, national origin, and age. Id.

107. Id.


110. Under this system, only race, sex, and national origin would be recorded. The category of national origin could encompass broad categories obvious to the creditor such as Asian, Indian, and Spanish. See Fed. Res. Bd. Press Release (Jul. 15, 1976) at 38-40.

111. Statement of J: Stanley Pottinger, Assistant Attorney General, Civil Rights Division, Department of Justice, FRB Hearings, supra note 103, at 116-17. This would necessarily be limited to personal interviews and would not cover applications for credit cards made by mail or by telephone. However, Mr. Pottinger pointed out that the Department has other means of checking on such accounts. For example, they could check to see if an inordinate number of denials involved persons living in predominantly Black areas or persons with Spanish or Jewish surnames. Id. at 117.
ing the possibility of discrimination in these areas. Such a provision would require creditors to ask about the prohibited characteristics, yet prohibit creditors from considering them in the final decision. Additionally, the potential of litigation would be increased, since an applicant might incorrectly perceive that he had been discriminated against simply because the creditor asked about his marital status or religion.\footnote{112}

IV. THE NEED FOR EFFECTIVE ENFORCEMENT AND EDUCATION

Because discrimination is so difficult to detect and prevent, it is imperative that the Equal Credit Opportunity Act be stringently enforced. For this reason, the most important provision in the amendments may prove to be that which authorizes the Attorney General of the United States to institute civil proceedings.\footnote{113} As previously noted, the Federal Trade Commission and many of the other federal agencies to whom enforcement is entrusted do not have adequate enforcement powers. Furthermore, testimony received by the Senate Subcommittee on Consumer Affairs showed that federal bank regulatory agencies are generally reluctant to take public action against institutions under their jurisdiction for fear of jeopardizing public confidence in the offending institution.\footnote{114} Additionally, such agencies are faced with a built-in conflict of interest, in that they are charged with protecting the rights of consumers as well as with protecting the banks from the financial loss which would result from a large recovery in a class action suit.\footnote{115} The authority of the Attorney General to proceed on his own initiative should act as an incentive to the other regulatory agencies to enforce compliance by offending creditors promptly.\footnote{116} Additionally, the Justice Department has the benefit of experience with other civil rights statutes, experience which other regulatory agencies lack.

\footnote{112} Id. at 128.
\footnote{114} 1975 Hearings, supra note 1, at 26 (supplemental statement of Congresswoman Sullivan). Ms. Sullivan noted that in at least one case, a bank official who repeatedly violated the Truth in Lending Act was not persuaded to comply until the regulatory agency stressed the danger of a potentially large class action. See also News Release of Senator Proxmire, 1975 Hearings, supra note 1, at 480. A survey done by the Comptroller of the Currency showed the administration's failure to enforce the 1968 Fair Housing Act. Four agencies, the Comptroller of the Currency, the Federal Home Loan Bank Board, the Board of Governors of the Federal Reserve System and the Federal Depository Insurance Corporation, regulate the financial institutions which provide the majority of funds for home financing. Under Title 8 of the Act, discrimination in mortgage lending is illegal, but since the passage of the Act the administration has failed to bring a single suit.
\footnote{115} See 1975 Hearings, supra note 1, at 26 (supplemental statement of Congresswoman Sullivan).
\footnote{116} See id. at 27.
Although the enforcement powers of the Attorney General have the potential for achieving effective compliance, this objective will not be realized unless the Justice Department fulfills its intended role. The requirement of annual reports to Congress from the Board of Governors of the Federal Reserve and the Attorney General should operate to prevent administrative inaction by providing a regular vehicle for congressional oversight.\footnote{117. Testimony of Steven M. Rohde, Center for National Policy Review, 1975 Hearings, supra note 1, at 464.} The provision requires the Attorney General and the Board to make reports concerning the administration of their functions under the Act and also requires the Board to evaluate the extent to which compliance with the requirements of the Act is being achieved and to submit a summary of the enforcement actions taken by each of the regulatory agencies.\footnote{118. 15 U.S.C.A. § 1691f (Supp. 2, 1976).}

While the enforcement powers entrusted to the Attorney General should prove to be effective, private litigation will continue to play an important role. For this reason, it is important that the civil liability provisions of the Act be designed so that aggrieved consumers are not discouraged from instituting private suits. In cases of this nature, the consumer rarely suffers any measurable damages\footnote{119. Feldman Testimony, 1975 Hearings, supra note 1, at 218. In most cases, actual damages would be limited to the cost incurred in locating a second creditor. \textit{Id.}} and while the Act does provide for punitive damages, courts generally refrain from granting the maximum amount. Furthermore, although the Act provides for the award of reasonable attorney's fees\footnote{120. 15 U.S.C.A. § 1691e(d) (Supp. 2, 1976).} lawyers may be reluctant to take a case which promises such a small recovery.\footnote{121. Feldman Testimony, 1975 Hearings, supra note 1, at 218.} Because of these considerations, a provision should be added guaranteeing a minimum recovery upon proof of a violation in an individual suit. The Truth in Lending Act has such a provision\footnote{122. 15 U.S.C. § 1640(a)(1) (1970). Pursuant to this provision, the plaintiff receives a $100 minimum recovery in the event of any violation that is proven. \textit{Id.}} and, in the view of the Federal Trade Commission, this provision has been very successful in making private actions a significant deterrent.\footnote{123. 1975 Hearings, supra note 1, at 218. \textit{But, cf.} Statement of Commissioner Nye, \textit{id.} at 224, in which the dissenting Commissioner argued that such a provision would allow a plaintiff who had established a technical violation which resulted in no provable damages to nonetheless receive $100 as a "tip" for a "good try."}

In addition to a guaranteed minimum recovery, it is essential that potential plaintiffs be informed of the rights and remedies available to them under the Equal Credit Opportunity Act. The present regulations of the Board require creditors to inform all credit applicants that the federal Equal Credit Oppor-
tunity Act prohibits discrimination on the basis of sex or marital status. The new regulations implementing the 1976 amendments will expand this notice to include race, color, religion, national origin, age, and receipt of public assistance, but only require that the notice be given in cases where adverse action is taken. To facilitate public understanding of the provisions of the Act, the Board also requires that the statement of action taken, the Equal Credit Opportunity Notice, and the statement of specific reasons for adverse action be given together.

These notices will serve the dual purpose of informing consumers of their rights and aiding them in determining whether or not they have been discriminated against. Nevertheless, because some consumers inevitably will be unable to understand the notice, or reluctant to ask for a written statement, consumer protection groups should assume the responsibility of educating and arousing the interest of the public in the importance and potential of the Act.

V. CONCLUSION

Through the enactment of the 1976 amendments to the Equal Credit Opportunity Act, Congress has done a commendable job of balancing the needs of consumers and creditors. Recognizing the growing importance of credit in modern society, the amendments insure that consumers will not be denied credit on the basis of characteristics having nothing to do with credit-worthiness. On the other hand, the amendments also recognize the creditors' need for protection from financial loss by allowing them to consider factors which are relevant to an applicant's credit-worthiness.

Significantly, the enforcement provisions of the Act reflect this concern for balancing the needs of consumers and creditors. Creditors are protected from liability for violations resulting from good faith reliance on the interpretations of the Federal Reserve Board and consumers are offered a number of different remedies in the case of noncompliance by a lending institution. The requirement of a written denial will be of some aid to consumers in ascertaining whether they have been discriminated against, without causing an

125. 42 Fed. Reg. 1257 (1977) (to be codified at 12 C.F.R. § 202.9(9)). The amended regulation requires that the notification be in writing and that it contain a statement of the action taken, the provisions of section 1691(a) of the Act, the name and address of the federal agency which supervises the creditor, and either a statement of the specific reasons for the action taken or a disclosure of the applicant's right to receive such a statement. This notification must be given to the applicant within 30 days after the creditor has received a completed application or taken an adverse action. Id. at § 202.9(9)(2).
undue burden on creditors. The administrative enforcement provisions of the Act provide a promising vehicle for insuring maximum compliance and, if stringently enforced, will act as an effective means of preventing discrimination in the granting of credit.

Barbara J. Klein