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forced to speak and risk incriminating himself both at the disciplinary hearing and possibly in future criminal proceedings⁹⁶ or to keep silent and accept the burden of giving up his defense while presenting an admission of his guilt to the disciplinary board.⁹⁷ The combined effect of the two decisions is to place the prisoner in a procedural vise from which there is no foreseeable release.

ELLEN KABCENELL WAYNE

Equal Credit Opportunity Act Amendments of 1976—An Overview of the New Law

As the American consumer credit industry has grown, lawmakers repeatedly have turned to legislation and regulation in an effort to control abuse and discourage the development of unfair credit policies.¹ Part of this effort is represented by the Equal Credit Opportunity Act Amendments of 1976,² passed in March, 1976, only five months after the original legislation became effective.³ The most ambitious and controversial amendments expand the existing ban on discriminatory credit-granting procedures, impose new disclosure requirements on lending institutions and increase the statutory limits on creditor liability. Creditors insist that these amendments and the corresponding regu-

96. In light of the Court's view that *Miranda* is completely inapplicable to this situation, it is unclear whether the absence of protection for the fifth amendment privilege would cause self-incriminatory testimony given at a disciplinary procedure to be excluded from a later criminal trial.

97. 328 F. Supp. at 778.

1. Legislation in this area includes the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §§ 1730f, 1831b, 2601-2617 (Supp. V 1975), and the Consumer Credit Protection Act, 15 U.S.C.A. §§ 1601-1691f (West 1974, Cum. Supp. 1976, Supp. Pamphlet No. 1 1976, & Supp. Pamphlet No. 2, pt. 1 1976). The latter encompasses the Truth in Lending Act, 15 U.S.C.A. §§ 1601-1667e (West 1974, Cum. Supp. 1976, Supp. Pamphlet No. 1 1976, & Supp. Pamphlet No. 2, pt. 1 1976), the Fair Credit Billing Act, 15 U.S.C.A. §§ 1666-1666j (West Cum. Supp. 1976 & Supp. Pamphlet No. 2, pt. 1 1976), and the Equal Credit Opportunity Act, 15 U.S.C.A. 1691-1691f (West Cum. Supp. 1976 & Supp. Pamphlet No. 2, pt. 1 1976).

2. Pub. L. No. 94-239, 90 Stat. 251 (codified at 15 U.S.C.A. §§ 1691-1691f (West Supp. Pamphlet No. 2, pt. 1 1976)) (amending Equal Credit Opportunity Act of 1974, 15 U.S.C. §§ 1691-1691e (Supp. V 1975)) [hereinafter cited as amendments].

3. The original Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691e (Supp. V 1975), became effective Oct. 28, 1975. Pub. L. No. 90-321, § 707, 88 Stat. 1525 (1974).

lations will create a new maze of paperwork and increase the threat of capricious lawsuits, thus making credit more expensive and less available to those in need, while driving the smaller creditor from the market. Consumer advocates see the legislation as a way to extend credit to worthy persons struggling in an economic system that makes credit a necessity of life. It is too early to determine the precise impact of the amendments on either consumers or the credit industry as a whole. It is possible, however, to outline those key provisions that are most likely to bring about change in current credit-granting procedures. An evaluation of those provisions must consider not only the policy issues behind congressional action but also any potentially counterproductive results of the new law.

Despite the massive and complex credit legislation Congress has passed since 1968 there has been little protection for the consumer who is denied credit on grounds not logically related to the evaluation of a good credit risk. Testimony at congressional hearings in 1973 revealed unsurprising patterns of inherently discriminatory credit-granting procedures, particularly with regard to women and the elderly.⁴ Some of the criticized procedures were clearly offensive;⁵ others, though neutral in motive, were discriminatory in effect.⁶ Congress responded to the hearings, and to extensive lobbying pressure from women's groups, by passing the Equal Credit Opportunity Act of 1974 (the Act).⁷ The Act barred discrimination on the basis of sex or marital status but omitted several significant protection and enforcement provisions considered crucial by consumer advocates.⁸

4. *Hearings on the Economic Problems of Women Before the Joint Economic Comm.*, 93d Cong., 1st Sess. (1973) [hereinafter cited as *Joint Comm. Hearings*]; *Hearings on H.R. 14856 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 93d Cong., 2d Sess. (1973).

5. There have been reports that when a married couple applied for a home loan, some loan officials discounted the wife's income unless the wife had had a hysterectomy. *Joint Comm. Hearings, supra* note 4, at 192 (setting forth the practice of Veterans Administration loan officials as an example).

6. It was also common practice to discount a mortgage applicant's part-time income as unreliable; this has had an adverse effect on women who make up a great percentage of the part-time work force. Comment, *Equal Credit: Promise or Reality?*, 11 HARV. C.R.-C.L. L. REV. 186, 196-97 (1976).

7. 15 U.S.C. §§ 1691-1691e (Supp. V 1975). An overview of the law is provided in Note, *Consumer Protection: The Equal Credit Opportunity Act*, 28 OKLA. L. REV. 577 (1975). The impact of the 1974 Act and accompanying regulations on lenders is discussed in Mortimer, *A Creditor's Preliminary Look at Regulation B*, 93 BANKING L.J. 417 (1976). The impact of the Act on low-income persons is discussed in Baker & Taubman, *The Equal Credit Opportunity Act: The Effect of the Regulations on the Poor*, 9 CLEARINGHOUSE REV. 543 (1975).

8. For instance, in noting the Federal Reserve Board's failure to include a re-

The ensuing attempt by the Federal Reserve Board (the Board) to promulgate regulations implementing the 1974 Act produced hard-fought debate of the kind that might well have preceded the drafting of the bill itself.⁹ The regulations as finally promulgated were a disappointment to many consumer advocates who had hoped the Board might take the broadest possible view of the legislation by requiring more affirmative activity on the part of creditors. In addition to their displeasure with the regulations, some congressmen and consumer groups were still committed to expanding the legislation's coverage to protect other groups historically denied credit for irrelevant reasons.¹⁰ To incorporate these needs into the existing legislative framework, Congress in 1975 instituted a new round of hearings,¹¹ which culminated in the passage of the Equal Credit Opportunity Act Amendments of 1976.

Once again, the Federal Reserve Board must implement this legislation; proposed rules are currently in print¹² and hearings are being held to solicit public and industry reaction.¹³ The expanded scope of the Act along with new procedural and enforcement devices provided by the amendments unfortunately has created new ambiguities. In an effort to address these ambiguities the Board has proposed detailed rules that may create traps even for the creditor who in good faith attempts to comply with the law.¹⁴ Such a maze of complex rules also

quirement for explanation of denial of credit by the creditor, Representative Patterson said, "These regulations . . . almost make it impossible for the system designed by the Congress to be used at all." 121 CONG. REC. E5351 (daily ed. Oct. 8, 1975).

9. Proposed rules were published in April, 40 Fed. Reg. 18,183 (1975), but were not satisfactory to creditors so a revised version was published a few months later, 40 Fed. Reg. 42,030 (1975). Women's groups and consumer advocates found these rules too weak and urged that further changes be made. The final regulations, 40 Fed. Reg. 49,298 (1975)—published one week before the deadline set by the legislation—represent an attempt at compromise.

10. A bill introduced by Senator Biden also would have prohibited discrimination on the basis of "political affiliation," and would have given the Board authority to establish "such other classifications" as were found appropriate. S. 1927, 94th Cong., 1st Sess. § 701, reprinted in *Equal Credit Opportunity Act Amendments and Consumer Leasing Act—1975: Hearings on S. 483, S. 1900, S. 1927, S. 1961 and H.R. 5616 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *1975 Hearings*].

11. *1975 Hearings*, supra note 10.

12. 41 Fed. Reg. 29,877 (1976).

13. *Id.* at 29,870.

14. For instance, in an effort to protect married women from being unfairly penalized in a credit scoring scheme because they do not have phone listings, the proposed rules stipulate that a creditor "shall not take into account the existence of a telephone listing in the name of the applicant" but may consider "the existence of a telephone

makes it difficult to identify consumer rights and remedies under the law. In order to construe the amendments and the rules in the face of this potential confusion it is important to identify the policy considerations underlying the legislation. Therefore, a review of the amendments' most significant provisions must focus upon their intended impact and attempt to identify potential pitfalls facing consumers and creditors.

THE "STATEMENT OF REASONS" CLAUSE

Potentially the most significant provision of the 1976 amendments is the "statement of reasons" clause.¹⁵ As approved, this provision states that creditors are obligated to provide any rejected credit applicant who so requests with "specific reasons" explaining the denial. In contrast, the original Senate bill, which received the support of many consumer advocates, would have required that such reasons be given automatically to the rejected applicant at the time he or she was informed of the adverse action.¹⁶

Although resigned to some degree of additional regulation, creditors fought at least to limit the proposed legislative provisions; the modified "statement of reasons" clause represents one of their victories. However, examination of the motives behind the opposition to this section indicate that the "victory" may be less important than it seemed.

Creditors have cited increased cost as the main reason for their objections to the clause,¹⁷ but in light of other legislative requirements

in the residence of an applicant" 41 Fed. Reg. 29,881 (1976) (proposed rule § 202.6(b)(3)).

15. (2) Each applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor. A creditor satisfies this obligation by—

(A) providing statements of reasons in writing as a matter of course to applicants against whom adverse action is taken; or

(B) giving written notification of adverse action which discloses (i) the applicant's right to a statement of reasons

(3) A statement of reasons meets the requirements of this section only if it contains the specific reasons for the adverse action taken.

15 U.S.C.A. § 1691(d)(2), (3) (West Supp. Pamphlet No. 2, pt. 1 1976).

16. "A creditor shall promptly furnish each applicant who has applied for credit and to whom credit is denied or terminated a clear and meaningful statement in writing of the reasons for the denial or termination." S. 1927, 94th Cong., 1st Sess. § 701(d), reprinted in 1975 Hearings, *supra* note 10, at 148.

17. Sears, Roebuck and Co. prepared data indicating that each letter of rejection could cost over \$5.00 to prepare, and that multiplied by the new account rejections in 1974, the cost of sending such letters would be over \$8 million. 1975 Hearings, *supra* note 10, at 402. This assumes that each letter would be individually drafted and typed.

this reason may not be valid. For example, creditors are required to inform rejected applicants in writing of adverse action taken on any applications.¹⁸ Thus, if an applicant requests an explanation of the credit denial the lender is required to write a second time, providing the statement of reasons. This statement may take the form of a prepared checklist¹⁹ on which the creditor would check appropriate explanatory phrases. By automatically including this statement with the first letter, the lender saves the time, effort and expense of preparing a second response.

The advantages of such a checklist may convince creditors to go beyond the minimal response required by the legislation; indeed some creditors already are employing this system.²⁰ Direct and honest communication with a potential customer is likely to produce public good will, which is particularly important to a service industry whose community reputation is a critical business consideration.²¹ An individual applicant may respond favorably to a clear explanation of his or her failure to qualify for credit and may be encouraged to reapply after meeting the appropriate requirements.

The automatic statement also decreases the likelihood that an applicant will deny having received a response to his or her request for a written explanation of the adverse action. Thus it seems possible that from a business standpoint, creditors may be convinced to go beyond the requirements of the law, despite their prior vigorous opposition to the "statement of reasons" section. The advantages of incurring the additional expense involved may be more convincing if substantial judgments are awarded against lenders who violate this provision of the law.

18. A creditor must give the applicant a written statement of the reasons for the rejection or notify the applicant in writing of his or her right to have such a statement. 15 U.S.C.A. § 1691(d)(2), (3) (West Supp. Pamphlet No. 2, pt. 1 1976), quoted in note 15 *supra*.

19. The Board's proposed rules include a sample checklist which, if properly completed by the creditor, establishes compliance with the "specific reasons" requirement. 41 Fed. Reg. 29,882 (1976) (proposed rule § 202.9(b)(2)).

20. Representatives of National BankAmericard testified at congressional hearings that in the interest of public relations, member banks are encouraged to employ alternative form letters and inform the rejected applicant of why he or she was not awarded credit. 1975 *Hearings, supra* note 10, at 367. Informal inquiry by the author reveals that North Carolina Wachovia banks offering MasterCharge are instructed to include a checklist explanation when informing a customer that his or her MasterCharge application is not being accepted.

21. "[F]or the most part there is no national market for consumer credit. Consumers seldom shop for credit outside their town or city . . ." NATIONAL COMMISSION ON CONSUMER FINANCE, CONSUMER CREDIT IN THE UNITED STATES 11 (1972) [hereinafter cited as NCCF REPORT].

Although it is difficult to predict, it seems unlikely that large numbers of credit applicants will request the written explanation to which they are entitled.²² In light of this fact, it would seem that the goal of establishing a more critical and informed class of consumers would have been better achieved by requiring automatic disclosure of the reasons for rejection. Nevertheless, the "specific reasons" clause establishes the principle that a credit applicant is entitled to know why a lending institution did not find him to be an acceptable credit risk. Recognition of this principle is, in itself, an important development, even if the legislation's precise language does not go far enough toward encouraging the growth of an informed class of credit consumers.²³

CLASSIFICATION OF BORROWERS

Less concrete protection for the credit consumer is found in the statute's specification of particular categories of people against whom creditors cannot discriminate.²⁴ Although the categories of race,²⁵ color, religion and national origin are potentially important, the inclusion of a prohibition on age discrimination has proved to be the most controversial. Here again, industry representatives achieved their objectives by convincing legislators that if the category of age were added as a protected classification, it should not be barred from use as a factor

22. While not definitive, an informal questionnaire mailed to selected member banks by National BankAmericard indicated that 10-15% of rejected applicants contact the bank for further information when invited to do so; for those banks that did not invite inquiry only 1% inquired. *1975 Hearings, supra* note 10, at 375-82.

23. By including the "statement of reasons" provision Congress also expressed a desire to provide a victim of credit discrimination with potential courtroom evidence. Although a creditor is not going to explain the applicant's rejection in terms of discriminatory motives, a rejection statement based on clearly inappropriate reasons will make better legal ammunition than no statement at all. See SENATE REP. NO. 94-589, 94th Cong., 2d Sess. 8, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 635, 642.

24. 15 U.S.C.A. § 1691(a) (West Supp. Pamphlet No. 2, pt. 1 1976) reads as follows:

(a) It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—

(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);

(2) because all or part of the applicant's income derives from any public assistance program; or

(3) because the applicant has in good faith exercised any right under this chapter.

25. A 1975 pilot survey confirmed the existence of racial discrimination by showing that black applicants for mortgage loans are turned down almost twice as frequently as white applicants of similar economic circumstances. COMPTROLLER OF THE CURRENCY, ADMINISTRATOR OF NATIONAL BANKS FAIR HOUSING PRACTICE PILOT PROJECT, 1975, reprinted in *1975 Hearings, supra* note 10, at 481-526.

in credit scoring schemes. In effect, the amendments ban only the arbitrary use of age when making credit decisions.²⁶ For instance, the young person having difficulty obtaining a loan because he or she lacks a credit rating may find this legislation of little help; creditors still will be able to deny credit on that ground.²⁷ The new law would appear to prohibit some of the discriminatory practices cited in the legislative record,²⁸ though creditors can inquire about age in relation to other "valid" credit factors such as credit history and employment record. If the amendments do result in credit extension to some elderly persons presently denied credit in an arbitrary manner, creditors should not foresee economic loss. Studies suggest²⁹ and common sense reinforces the notion that persons over sixty-five often are better able to assess their ability to repay loans, have better credit histories and are in general more conservative about assuming debts.

The prohibition of age discrimination was particularly intended to protect the elderly; however, the effects of expanding the law's coverage to additional groups (the terms "race," "color," "religion," "national origin" and "age" are new) may well go beyond protection of each individual classification. Because the persons now protected from discriminatory credit-granting practices include those Americans historically denied equal opportunity in many social and economic spheres, the language suggests that Congress would favor broad and inclusive judicial construction of the equal credit opportunity legislation.³⁰

26. The amendments prohibit discrimination on the basis of age but provide that the creditor may make inquiries concerning age to determine "probable continuance of income levels [or] credit history." 15 U.S.C.A. § 1691(b)(2) (West Supp. Pamphlet No. 2, pt. 1 1976). Age may be considered in an "empirically derived credit system" if such a system does not operate so that the age of an elderly applicant is given a "negative factor or value." *Id.* §§ 1691(b)(2), (3). These quoted terms are defined by the Board in the proposed rules at 41 Fed. Reg. 29,872 (1976) (proposed rules § 202.2(o) & (u)). At least one commentator has suggested that the legislation will "preclude age as a meaningful component of a credit scoring system" because whenever one age bracket is given favorable treatment the result is to "discriminate" against other age groups. Comment, *The 1976 Amendments to the Equal Credit Opportunity Act*, 28 BAYLOR L. REV. 633, 641 (1976).

27. If a rejected applicant could establish that basing credit denials on lack of credit rating results in disproportionate rejection of persons under age 26, it seems likely that a creditor would be able to justify his position by showing that lack of credit rating has a "manifest relationship to creditworthiness," as this phrase is used in the Board's proposed rules. 41 Fed. Reg. 29,879, 29,880 n.7 (1976) (proposed rule § 202.1(x), .6(a)). For another proposed rule on this issue, see note 42 *infra*.

28. Apparently many creditors, particularly banks offering credit checking accounts, automatically terminate credit extension when the customer reaches age 65. 1975 Hearings, *supra* note 10, at 78-92.

29. 1975 Hearings, *supra* note 10, at 438.

30. On the other hand, a specific test as opposed to a more general prohibition of "discrimination based on immaterial grounds" leaves unprotected specific groups of

CIVIL LIABILITY

Broad construction and successful consumer litigation will not alone deter those creditors who are determined to continue violating the letter and the spirit of the law. In those cases, it seems that only severe financial penalties will provide an effective deterrent; the amendments' liability provisions represent an effort to create such a deterrent. In addition to actual damages, costs and attorneys' fees, an individual may recover up to \$10,000 in punitive damages; for class actions, punitive damages are limited to \$500,000 or one percent of the creditor's net worth, whichever is less.³¹ It should be noted that these terms represent a considerable concession to the industry. The originally proposed limits—\$50,000 or one percent of net worth, whichever was greater³²—were rejected, presumably because committee members did not favor multi-million dollar recoveries of punitive damages.³³

persons such as the physically handicapped. The committee rejected a provision in the Senate bill that would have allowed the Board to add new classifications, presumably on the ground that such a grant of authority would permit an executive body to exercise powers reserved to the legislature. S. 1927, 94th Cong., 1st Sess. § 701(a)(b) (1975), *reprinted in 1975 Hearings, supra* note 10, at 147.

31. 15 U.S.C.A. § 1691e (West Supp. Pamphlet No. 2, pt. 1 1976) reads in part as follows:

(a) Any creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant in an amount equal to the sum of any actual damages sustained by such applicant acting either in an individual capacity or as a representative of a class. . . .

(b) Any creditor . . . who fails to comply . . . shall be liable to the aggrieved applicant for punitive damages in an amount not greater than \$10,000 . . . except that in the case of a class action the total recovery under this subsection shall not exceed the lesser of \$500,000 or 1 per centum of the net worth of the creditor. . . .

(d) In the case of any successful action . . . the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded. . . .

32. S. 1927, 94th Cong., 1st Sess. § 706(b) (1975), *reprinted in 1975 Hearings, supra* note 10, at 150.

33. The proposed and adopted provisions produce vastly different results, as an example will illustrate. Assume a successful class action is brought against Sears, Roebuck Acceptance Corporation (net worth approximately \$707,000,000). Under the provisions as proposed, liability could be as high as \$7,070,000. As adopted, the legislation would limit liability to \$500,000. Actual damages, costs and fees must be added to these figures.

The results are also significantly different in relation to a small creditor, whose net worth is, for instance, \$50,000. Under the section as proposed, he could lose his entire business in a successful class action suit. As the law now stands, liability for punitive damages could not exceed \$500 in his case. These larger awards could be limited if the class did not include enough members, since no individual can recover more than \$10,000. (Sears Roebuck Acceptance Corporation net worth figures for 1974 appear in *1975 Hearings, supra* note 10, at 281.)

The compromise \$500,000 figure (increased from \$100,000 in the Equal Credit Opportunity Act³⁴) was designed to provide incentive for class actions while discouraging the frivolous litigation some feared would occur if recovery were limited only by the one percent ceiling. While this may discourage class actions when the class includes more than fifty persons,³⁵ commentators have pointed out that class actions may not be the appropriate remedy for so personal and subjective an act as discrimination.³⁶

Only a class action, however, can result in the tremendous financial sanctions that would deter a creditor from repeatedly violating the law. Individual actions, which are limited to a \$10,000 recovery,³⁷ provide a remedy for the applicant but at small relative cost to the creditor. It is the threat of larger losses that, in theory, creates the motivation to comply. This motivation is inevitably weakened by limiting the scope of the class action. The conflict over the liability provisions reflects a broader controversy surrounding the class action device itself.³⁸ While imperfect, and vulnerable to attorney abuse, the class action remains the most significant private tool available for challenging a discriminatory credit practice that violates numerous persons' rights under the law but does not result in actual damages.³⁹

However, creditors were quick—and correct—to point out that the amendments do not limit recovery of punitive damages to situations of intentional or knowing violation of the law.⁴⁰ The committee report

34. 15 U.S.C. § 1691e(c) (Supp. V 1975) (amended 1976).

35. In theory, this is because an individual could not recover the maximum individual award of \$10,000 if the maximum class action award had to be split into more than 50 shares.

36. See 1975 Hearings, *supra* note 10, at 627; Note, *Consumer Protection: The Equal Credit Opportunity Act*, 28 OKLA. L. REV. 577 (1975). On the other hand, the class action would seem the perfect way to attack a policy that arbitrarily puts a blanket end to credit checking accounts when customers reach the age of 65. See note 28 *supra*.

37. See note 31 *supra*.

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

39. In addition to private civil actions, the amendments authorize the Attorney General to bring civil suits "whenever he has reason to believe that one or more creditors are engaged in a pattern or practice in violation [of the law]." 15 U.S.C.A. § 1691e(h) (West Supp. Pamphlet No. 2, pt. 1 1976).

40. 15 U.S.C.A. § 1691e(b) (West Supp. Pamphlet No. 2, pt. 1 1976) provides that

[i]n determining the amount of [punitive] damages in any action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the cred-

suggests that liability should be determined by applying the now famous "effects test," which grew out of employment discrimination cases.⁴¹ This would shift to the creditor-defendant the burden of proving that credit practices that result in rejection of disproportionate numbers of persons in protected classes are material to making sound credit decisions. Translating these courtroom burdens of proof into business procedures designed to avoid litigation suggests the employment of a scheme of affirmative review by creditors. Such a scheme would require a review of application procedures to determine if disproportionate numbers of persons in protected classifications were being rejected as poor credit risks.⁴² If this were occurring, the creditor would have to determine if the application qualifications responsible for this result were necessary to assess credit risks validly. Even if such qualifications were materially related to assessing credit risks, a broad application of the "effects test" would seem to require that the creditor make some effort to devise other qualifications that would further the desired evaluation process without producing the accompanying discriminatory effect.

Whether creditors seek to avoid litigation by instituting such an affirmative review system will depend on how aggressively consumers pursue their rights (particularly in the form of class actions) and also on how broadly courts apply the "effects test" as outlined in race discrimination and employment cases. By suggesting that the courts examine impact in addition to intent, it would seem that Congress has expressed support for procedural devices that will spread the costs of

itor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

The proposed rules indicate that an "inadvertent error" is not a violation of the "statement of reasons" requirement, 41 Fed. Reg. 29,883 (1976) (proposed rule § 202.9(e), but "inadvertent error" is narrowly defined. 41 Fed. Reg. 29,883 (1976) (proposed rule § 202.10(c)).

41. In determining the existence of [unlawful] discrimination . . . courts or agencies are free to look at the effects of a creditor's motives or conduct in individual transactions. Thus judicial constructions of anti-discrimination legislation in the employment field in cases such as *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) are intended to serve as guides in the application of this act

SENATE REP. NO. 94-589, 94th Cong., 2d Sess. 4-5, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 635, 638.

42. The proposed rule specifically proscribes in several instances . . . the use of insufficiently refined general information which is accordingly not causally related to a determination of creditworthiness where the effect of using such information would be to discriminate against an applicant on a prohibited basis, even though the creditor may have no intent to discriminate.

41 Fed. Reg. 29,880 n.7 (1976) (proposed rule § 202.6(b)).

correcting social problems among businesses and industries that have profited from the advantages of the American market.

POTENTIAL PROBLEMS

The "effects test," however, has been developed and expanded on a case by case basis over time.⁴³ It is the prospect of having to employ legal counsel to interpret the test's requirements that prompts creditors to complain of overregulation and unwarranted government intrusion. Even if actual costs of disclosure and application-form revision are kept to a minimum, there is still an expressed fear that the additional regulation and its accompanying legal complexities could force the small lender out of the credit business.⁴⁴ In an effort to address this concern Congress included a provision exempting the very small creditor from the "statement of reasons" requirement.⁴⁵ Nonetheless, many creditors have seemed overwhelmed by the complexity of the new law, the increasing need for legal advice in order to comply with its provisions and the potential for litigation.⁴⁶ Even the most clearly worded regulations may not dispel this fear, given the complex nature of the credit industry.⁴⁷ At worst this development could mean a reduction in the number of middle-level creditors as they relinquish their share of the market to the giants of the industry. For instance, a businessman who extends credit as part of a small retail operation may opt for a major credit card arrangement to avoid potential litigation.

A reduction in the number of small creditors would work against consumer interests, if only because there would be fewer alternative

43. See *Boston Chapter NAACP v. Beecher*, 504 F.2d 1017, 1019 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975), in which the court found that particular employment requirements were not sufficiently job-related to justify their discriminatory effects. But see *Parrish v. Board of Comm'rs*, 533 F.2d 942, 949 (5th Cir. 1976), in which the court ruled that although the state bar examination resulted in disproportionate rejection of black applicants, the test as administered was a legitimate evaluation of job-related skills.

44. See note 46 *infra*.

45. 15 U.S.C.A. § 1691(d)(5) (West Supp. Pamphlet No. 2, pt. 1 1976) exempts from the "statement of reasons" requirement those creditors "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."

46. This concern was expressed by a small retailer from Massachusetts; that state has enacted credit legislation similar to the federal law. MASS. ANN. LAWS ch. 151B, § 4(3B), (4), (10), (12), (14), (15) (Michie/Law. Co-op 1976). The retailer said that in his town in one month alone "11 independent retailers went from their own charge into bank charges because they felt they couldn't comply with the Massachusetts regulations." 1975 Hearings, *supra* note 10, at 387.

47. NCCF REPORT, *supra* note 21, at 207.

lending schemes available. It seems likely that a nationwide credit and finance company would establish less flexible policies than a local merchant familiar with his market and more willing to extend credit to a local resident. With fewer existing systems of assessing credit charges, the consumer is less able to fit payment plans to his or her individual needs.⁴⁷ And fewer creditors means, at least in theory, less competition to keep down the price of money.⁴⁸

Whether a reduction in the number of small creditors will be an inevitable result of increased industry regulation is difficult to predict, because it depends on small lenders' perception of the law as much as on the law itself. However, this legislation is only a small part of the overall problems faced by small businesses today. It is unlikely that repeal of the amendments would help a small businessman as much as would clear regulations setting forth for the well-intentioned creditor a plan or policy that would establish compliance with the law.⁴⁹ Ultimately, some degree of complexity will be inevitable and must be accepted as part of an increasingly interdependent and technologically sophisticated society. Although the legislators were made aware of the small businessman's problems, the committee report accompanying the amendments leads to the conclusion that Congress' overwhelming priority was to halt the policies that have made it virtually impossible for some American credit consumers to participate in the existing American economic framework.⁵⁰

In order to predict how successful the amendments will be in achieving this congressional goal it is important to recognize the limitations of the legislation. The amendments represent an attempt to re-

48. Less competition would mean the possibility of collective price setting, less service for high-risk customers and prevention of entry into the market by potential competitors. *Id.* at 209-11.

49. For instance, use of the Board's proposed checklist of credit criteria constitutes compliance with the "statement of reasons" requirement. *See* note 19 *supra*. If extended too far, however, this device could be used to shift the risk of noncompliance to the Board; it is therefore important that the Board make clear, as it has in its proposed rules, that Board members will not have "authority to approve particular creditors' forms in any manner." 41 Fed. Reg. 29,878 (1976) (proposed rule § 202.1 (c)(5)).

50. Senator Jesse Helms did not share the view that federal legislation is the best way to achieve the stated goals:

These amendments are just one more nail in the coffin of the right of the individual to have local matters determined by the State legislatures. . . .

Not only has the Congress been encroaching on [the] right[s] of the States . . . it has also usurped much of the vital decisionmaking power formally exercised by business and consumers in a free market.

122 CONG. REC. S1021 (daily ed. Feb. 2, 1976).

dress grievances that are inextricably wound with much larger social, political and economic problems. While outlawing certain discriminatory credit-granting practices, the amendments do not challenge the catch-22 of the underlying economic system. Credit is often denied because the applicant does not have a credit history; for many this vicious circle cannot be broken. Persons with low incomes are often unable to obtain loans though they may be perfectly capable of slowly repaying a small loan. And because credit has become so integral a part of the American economic system⁵¹ the individual defined as a "bad" credit risk all too frequently turns to the thriving underworld of loan sharks and extortionists.

And yet if credit is going to remain an important tool for improving the standard of living, as well as for aiding the individual through temporary periods of financial difficulty, it is imperative that such a tool be universally available. If the amendments result in efforts on the part of lending institutions to reassess established credit scoring schemes, as well as in greater consumer understanding of creditors' lending criteria, they should be called a success.⁵²

DONNA HELEN TRIPTOW

Federal Jurisdiction—Environmental Law—Do Private Citizens Have a Right To Bring Action To Abate Water Pollution Under Federal Common Law?

The Federal Water Pollution Control Act Amendments of 1972¹ set a goal of ending all pollutant discharges into navigable waters by 1985.² This lofty goal will be difficult to obtain³ even with congress-

51. "Between . . . 1950 and 1971 consumer credit outstanding rose from \$21.5 billion to \$137.2 billion, an increase of over five times . . ." NCCF REPORT, *supra* note 21, at 5.

52. The legislation, however, does not address the problems created by an ever-increasing national, corporate and individual debt. This increased debt is one manifestation of the "rising expectations" politicians have taught us to fear, but we are continually urged to "relax" and "charge it."

1. 33 U.S.C. §§ 1251-1376 (Supp. V 1975).

2. *Id.* § 1251(a)(1).

3. McThenia, *An Examination of the Federal Water Pollution Control Act Amendments of 1972*, 30 WASH. & LEE L. REV. 195, 208 (1973).