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AN EMPIRICAL ANALYSIS OF THE EQUAL CREDIT OPPORTUNITY ACT

The Equal Credit Opportunity Act1 (ECOA) was enacted in 19742 to prohibit discrimination based on sex or marital status by creditors against credit applicants.3 In 1976, the ECOA was amended to expand the list of prohibited discriminatory criteria4 and to strengthen the enforcement provisions of the original Act.5 Pursuant to one of the amendments, the Federal Reserve Board promulgated regulations to implement the provisions of the Act, known collectively as Regulation B.6

It is vital that innovative legislation of this type be periodically reexamined to discover whether the purposes for which it was enacted are being fulfilled.7 This article will first examine the legislative history of the ECOA to discover (1) the impetus for its enactment; (2) the views of proponents and opponents of the legislation concerning the presence of credit discrimination, its proper cure, and the proposed provisions of the bills introduced to deal with the problem; and (3) the congressional intent as to the use of various credit-granting factors described by the Act.8

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3 Section 502 of Pub. L. No. 93-495 provides:

The Congress finds that there is a need to insure that the various financial institutions and other firms engaged in the extensions of credit exercise their responsibility to make credit available with fairness, impartiality, and without discrimination on the basis of sex or marital status. Economic stabilization would be enhanced and competition among the various financial institutions and other firms engaged in the extension of credit would be strengthened by an absence of discrimination on the basis of sex or marital status, as well as the informed use of credit which Congress has heretofore sought to promote. It is the purpose of this Act to require that financial institutions and other firms engaged in the extension of credit make that credit available to all creditworthy customers without regard to sex or marital status.

4 The amendments added race, color, religion, national origin, age, receipt of income from public assistance programs, and the good faith exercise of legal rights under the Consumer Credit Protection Act as applicant characteristics that creditors could not use to discriminate in the granting of credit. 15 U.S.C. § 1691 (1976).
5 See notes 33-41 and accompanying text infra.
8 See Part I infra.
Regulation B will then be similarly examined to find out how the broad mandates of the ECOA have been made concrete for the use of creditors. Finally, the article will focus on a nationwide survey of consumers conducted by the Survey Research Center of the University of Michigan, concentrating on questions which probe credit refusals and the perceived reasons for such refusals. The article will fully describe the survey as well as the model and statistical techniques used to interpret the survey results. Those results will be utilized to suggest changes in the ECOA and Regulation B so that they better reflect the public policy dictated by Congress.

I. AN EXAMINATION OF THE EQUAL CREDIT OPPORTUNITY ACT

A. History of the Act: ECOA of 1974

The problems of sex discrimination in consumer credit transactions first gained widespread public attention in 1972 with publication of the National Commission on Consumer Finance report which concluded that there were "widespread instances of unwarranted discrimination in the granting of credit to women." A series of law review articles built upon the Commission's findings and proposed various remedies, including federal legislation. The problem was brought directly to congressional attention in two hearings, leading to a Senate report which cited no fewer

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* See note 6 and accompanying text supra.

† See Part II infra.

‡ See Part IV infra.

§ See Part VI infra.

13 NATIONAL COMMISSION ON CONSUMER FINANCE, REPORT (1972) [hereinafter cited as NCCF REPORT], at 160. The Commission heard testimony which revealed particular problems in the following areas:

(1) Single women have more trouble than single men in obtaining credit.
(2) Creditors generally require a woman upon marriage to reapply for credit, usually in her husband's name.
(3) Creditors are unwilling to extend credit to a married woman in her own name.
(4) Creditors are often unwilling to consider the wife's income when a married couple applied for credit.
(5) Women who are divorced or widowed have trouble reestablishing credit. Women who are separated have a particularly difficult time, since the accounts may still be in her husband's name.

Id. at 152-53.


15 Hearings on the Economic Problems of Women Before the Joint Economic
than thirteen common types of credit discrimination based on sex and marital status. In light of such evidence, Congress passed the Equal Credit Opportunity Act of 1974.

The ECOA in 1974 prohibited discrimination by creditors "against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction," though inquiries into an applicant's marital status were allowed under certain conditions. The Federal Reserve Board was empowered to promulgate appropriate regulations. Further provisions assigned administrative enforcement duties to several agencies, depending on the type of creditor involved, with overall enforcement authority given to the Federal Trade Commission. Creditors were made

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16 S. Rep. No. 278, 93d Cong., 2d Sess. (1973). The thirteen types of discrimination included the five cited by the NCCF Report, see note 13 supra, as well as the following:

1. Arbitrary refusal to consider alimony and child support as a valid source of income when such source is subject to validation.
2. Applying stricter standards to married applicants where the wife rather than the husband is the primary supporter for the family.
3. Requesting or using information concerning birth control practices in evaluating any credit application.
4. Requesting or using information concerning the creditworthiness of a spouse where an otherwise creditworthy married person applies for credit as an individual.
5. Refusing to issue separate accounts to married persons where each would be creditworthy if unmarried.
6. Considering as "dependents" spouses who are employed and not actually dependent on the applicant.
7. Use of a credit scoring system that applies different values depending on sex or marital status.
8. Altering an individual's credit rating on the basis of the credit rating of the spouse.

Id. at 17.

19 Such inquiries were allowed "if . . . for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit, and not to discriminate in a determination of creditworthiness." Id. § 701(b).
20 Id. § 703, 88 Stat. 1522.
21 The agencies and persons responsible for enforcing the Act and the type of credit institutions each was to oversee were as follows: the Comptroller of the Currency (national banks); the Federal Reserve Board (member banks of the Federal Reserve System other than national banks); the Federal Deposit Insurance Corporation (nonmember banks insured by the FDIC); the Federal Home Loan Bank Board, acting directly or through the Federal Savings and Loan Insurance Corporation (institutions subject to § 5(d) the Home Owners' Loan Act of 1933, 12 U.S.C. § 1464 (1976), § 407 of the National Housing Act, 12 U.S.C. § 1730 (1976), and §§ 6(i) & 17 of the Federal Home Loan Bank Act, 12 U.S.C. §§ 1426, 1437 (1976)); the Administrator of the National Credit Union Administration (fed-
civilly liable to an aggrieved applicant for any actual damages sustained either by an individual acting alone or as a representative of a class as well as for punitive damages, which are limited to $10,000 in the case of an individual and to the lesser of $100,000 or one percent of the creditor's net worth in a class action. Plain­
tiff applicants were also permitted to plead for injunctive relief and actions could be brought in any appropriate federal district court within one year of the date of the occurrence of the viola­tion, without regard to the amount in controversy.

B. History of the Act: ECOA Amendments of 1976

The convoluted means by which the 1974 Act was passed caused many of the original provisions of legislation introduced in the House of Representatives to be omitted. Widespread dis­
eral credit unions); the Interstate Commerce Commission (any common carrier subject to "the Acts to regulate commerce"); the Civil Aeronautics Board (any air carrier subject to the Federal Aviation Act of 1958, 49 U.S.C. § 1301 (1976)); the Secretary of Agriculture (any creditor subject to the Packers and Stockyards Act of 1921, 7 U.S.C. § 181 (1976)); the Farm Credit Administration (any federal land bank, federal land bank association, or production credit association); the Securities and Exchange Commission (brokers and dealers); the Small Business Administration (small business investment companies); and the Federal Trade Commission (enforcement not specifically committed by the ECOA to some other government agency, regardless of whether the violator "is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act," 15 U.S.C. §§ 41-58 (1976)). Id. § 704, 88 Stat. 1522. This division of enforcement authority remained largely the same in the 1976 Act, with the FTC being given the power to enforce Federal Reserve Board regulations promulgated under the ECOA as if they were FTC regulations. 15 U.S.C. § 1691c.

28 Id. § 706(b), (c).
29 Id. § 706(d).
30 Id. § 706(g).

On July 23, 1973, the Senate passed S. 2101, which included amendments to the Truth in Lending Act to prohibit discrimination in the granting of credit based on the sex or marital status of the applicant. See S. Rep. No. 278, 93d Cong., 1st Sess. (1973). Because the House Committee on Banking and Currency had taken no action on that bill nearly a year later, Senator Brock offered a nearly identical provision as an amendment to H.R. 11121, the Depository Institutions Amendments of 1974. 120 Cong. Rec. 19209 (1974). Approved by the Senate, the bill was sent to conference where it was reported out favorably. H.R. Rep. No. 1429, 93d Cong., 2d Sess. (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6148. A rule forbidding House members from objecting to Senate amendments to H.R. 11121 was passed by the House over the strenuous objections of Representative Sullivan, the principal sponsor of the original House equal credit bill, H.R. 14856, who argued that the credit discrimination provisions of H.R. 11121 inserted by the Senate were too weak. 120 Cong. Rec. 34759-60 (1974). The conference report, however, was accepted by the House and Senate and the bill was signed into law by President Ford on October 28, 1974. Act of Oct. 28, 1974, Pub. L. No. 93-495, §§ 501-503, 88 Stat. 1521 (1974).

31 H.R. 14856 had included race, color, religion, national origin, and age together with sex and marital status as prohibited bases of discrimination. 1974 Credit Discrimination Hearings, supra note 15, at 3.
satisfaction with the limited nature of the 1974 Act led to the introduction of numerous bills in the House and Senate to expand coverage of the antidiscrimination provisions of the ECOA. Evidence of discrimination against the elderly and nonwhites caused Congress to accept the recommendations of its Conference Committee and pass the Equal Credit Opportunity Act Amendments of 1976.

Substantive changes included the addition of age, race, color, national origin, religion, receipt of public assistance benefits, and the exercise of legal rights under the Consumer Credit Protection Act as prohibited criteria in the credit-granting process. The new law requires creditors to notify “each applicant against whom adverse action is taken” of the reasons for such adverse action. The administrative enforcement provisions were substan-

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28 At hearings held in 1975, Representative Frank Annunzio claimed that the 1974 Act had been accepted merely to get some form of equal credit legislation on the books, but that “this time . . . [he was] not willing to settle for legislation that will allow for discrimination in any way, shape, or form.” Hearings on H.R. 3386 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Currency and Housing, 94th Cong., 1st Sess. 10 (1975) [hereinafter cited as 1975 House Hearings].

29 These bills included H.R. 3386, introduced by Representative Sullivan to cover age, race, and sex discrimination (later changed to H.R. 5616); S. 483, introduced by Senator Brock to deal with age discrimination; and S. 1927, introduced by Senator Biden to prevent discrimination based on race, color, religion, age, national origin, political affiliation, receipt of public assistance benefits, or the exercise of rights under the law. Hearings 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 Senate Hearings].

30 The legislative consultant to the National Retired Teachers Association and the American Association of Retired Persons presented evidence, consisting largely of letters of complaint received by these organizations, tending to reveal what the consultant called “a clear pattern of discrimination against older persons by certain national credit card companies, department stores, gasoline companies, banks, and other credit-granting institutions.” 1975 Senate Hearings, supra note 29, at 73.

31 The Chairman of the United States Civil Rights Commission presented evidence revealing discrimination against minorities in the granting of mortgage and other credit. 1974 Credit Discrimination Hearings, supra note 15, at 131-37, 293-99. But see NCCF REPORT, supra note 13, at 160: “The Commission did not find sufficient evidence to prove the hypothesis that there is racial discrimination in the granting of consumer credit.”


35 15 U.S.C. § 1691(d)(2) (1976). A creditor may satisfy this obligation either by notifying every applicant of the reasons involved in taking the adverse action or by informing every applicant that he or she may request (within sixty days) a statement of reasons from the creditor. ld. “Adverse action” is defined by the statute as “a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested.” Not included in the term is “a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.” 15 U.S.C. § 1691(d)(6) (1976).
tially expanded and the FTC was given the power to enforce Federal Reserve Board regulations promulgated under the ECOA "in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule." Potential civil liability against a creditor in a class action was expanded so that punitive damages could not exceed the lesser of $500,000 or one percent of the creditor's net worth. Furthermore, the amendments substituted a two-year limitation for a one-year limitation for bringing of an action under the ECOA.

The Attorney General was made a potential enforcer of the ECOA by the amendments. If agencies which are responsible for administrative enforcement are unable to obtain compliance by their own actions, they are authorized to refer the matter to the Attorney General "with a recommendation that an appropriate civil action be instituted." The Attorney General may also act on his own if "he has reason to believe that one or more creditors are engaged in a pattern or practice" in violation of the Act. In either case, he may bring a civil action in an appropriate federal district court for "appropriate" (including injunctive) relief.

Finally, Congress expanded the reporting responsibilities of the Federal Reserve Board from their statutorily mandated annual report to Congress under the Truth in Lending Act to one on the ECOA as well.

C. Congressional Intent: The Balancing of Creditor and Consumer Interests

1. The competing interests — As amended, the ECOA represents the conflicting interests inherent in the credit-granting process, interests which were made known throughout the Act's formative stages. Ascertaining congressional intent involves examination of all the positions to see how they are meshed in ECOA.

Although many laws at both the state and federal levels

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15 U.S.C. § 1691c(c) (1976). The FTC has begun stricter enforcement of the Board's regulations within the past two years. See notes 176-81 and accompanying text infra.

15 U.S.C. § 1691e(b) (1976). As of October 1979, no class actions involving ECOA had reached the trial stage in the federal courts.


Id.


Every state has legislation that governs the amount of interest to be charged when
arose during this century to govern the ever-expanding field of consumer credit, the decision as to whom credit should be granted has traditionally been one for the creditor to make unhampered by government regulation. The "three C's of credit" — the character, capacity, and capital of the applicant — have traditionally governed the creditor's decision, with differences in sex, marital status, age, and race often playing important roles in the process. At the congressional hearings on the ECOA, representatives of the credit industry fervently argued that the Act would destroy the freedom of choice necessary to make rational credit-granting decisions, to the detriment of creditors and consumers alike. Particularly troublesome was the Act's proscription of "discrimination" in the granting of credit. One writer in an industry publication commented:

Regrettably, the word "discrimination" is susceptible of two interpretations, one of which is intended to come within the prohibition of the Act — the other being essential to the survival of the credit business. . . . Any grant or denial of credit is by its very nature, discriminatory; that is, in order to survive economically, every credit grantor must discriminate between those whom he believes will pay their debts and those who will not.

Thus, what creditors feared is that the ECOA represented the first step on the road toward "automatic" granting of credit to

the parties to a loan agreement fail to specify the rate of interest. Usury laws, effective in nearly every state, specify the maximum legal rate of interest which may be charged. States also generally have laws patterned after the Uniform Small Loan Act to govern loans not exceeding a statutorily prescribed amount, as well as laws covering practices of lending institutions licensed by the state. See generally B. Curran, Trends in Consumer Credit Legislation (1965).


The "evolution" of the cash-and-carry society of yesteryear into the credit-dominated economy of today is demonstrated by figures available from the Federal Reserve Board. At the end of 1939, the total amount of outstanding consumer credit (excluding real estate mortgage credit) was $7.2 billion. By the end of 1966, it had grown to $42.3 billion and to $69.9 billion by the end of 1963. 50 Fed. Reg. Bull. 376 (1964). At the end of 1977, that figure had grown to a staggering $216.6 billion. 64 Fed. Res. Bull. A42 (1978).

M. Neifeld, Neifeld's Manual on Consumer Credit 501 (1961). Neifeld labels divorcees, Indians living on reservations, and those living in an "untidy home" or a "rundown neighborhood" poor credit risks. Id. at 512.

See, e.g., 1974 Credit Discrimination Hearings, supra note 15, at 96-112 (statements of Thomas A. Haeussler, President of Capital Financial Services, Inc., and Robert Norris, General Counsel of the National Consumer Finance Association).

those who met certain government standards.50

Equal rights advocates, on the other hand, fought strongly for legislation to curtail the traditional freedom of creditors "arbitrarily" to select those to whom credit would be granted. The Chairman of the United States Civil Rights Commission went so far as to attack the idea of creditworthiness itself, saying that use of the "purportedly neutral standard" operated "to preclude a disproportionate number of minorities who are less well-educated, occupy poorer-paying jobs, and hence have inferior credit ratings or no credit record," and was therefore discriminatory.51 Calling for creditors to make their decisions solely on the basis of ability to repay, sponsors of the legislation defined age, sex, and race as "extraneous factors of group identification" which ought not to play any part in a creditor's decision.52 One witness went further and demanded a ban on all characteristics which could be shown to be significantly related to any of the prohibited criteria.53 Under this view, for example, if home ownership could be shown to be closely correlated with sex, then creditors could no longer employ home ownership as a factor in the granting of credit.

In examining the legislative history of the ECOA to ascertain congressional intent in this area, it becomes clear that Congress balanced the interests on each side in framing the legislation. Representative Leonor Sullivan, perhaps the most zealous advocate of the ECOA, revealed the nature of this compromise when she said:

[W]e recognize that while every person should have equal opportunity to qualify for credit on the basis of his or her creditworthiness, the business firm which extends credit requires and deserves the right to refuse those who cannot or will not fulfill the obligation of repayment, and to inquire into any circumstances in the applicant's situation which would make it impossible for the creditor to apply appropriate legal remedies in case of default.54

Such a view was reflected in the congressional reports which ac-

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50 Brown, supra note 49, at 28.
54 Id. at 29.
accompanied both the 1974 Act and the 1975 amendments.\textsuperscript{55} Congress therefore wished to let the creditor retain the right to make rational credit-granting decisions, but it defined "rational" to exclude consideration of the characteristics listed in the Act as prohibited criteria.

Allied with the concern that creditors not be so limited by the provisions of the Act as to damage their ability to make reasonable credit-granting decisions was the question of the proper means to determine whether "discrimination" had in fact occurred. The provisions of one of the original pieces of legislation in this area, introduced in the House, defined the term as the making of "any invidious discrimination,"\textsuperscript{56} while that of another proposed bill defined it as the taking of "any arbitrary action based on any characteristic attributable to the sex or marital status of an applicant."\textsuperscript{57} Concern was expressed by various witnesses at the problems likely to arise if discrimination was defined in the bill itself because it might unnecessarily limit or expand liability.\textsuperscript{58} Eventually the decision was made to omit a definition from the Act itself.\textsuperscript{59} The meaning of the term, however, is stated in the Senate report accompanying the 1974 Act: "Discrimination in the extension of credit occurs when a credit applicant is not evaluated pursuant to a creditor's ordinary credit criteria, but is judged — and frequently denied credit — not individually, but because of membership in a class."\textsuperscript{60}

2. Proof of discrimination under the ECOA — Proving that one is the victim of illegal discrimination by a creditor under such a definition is no simple task. To make it easier for an ECOA suit to be brought, Congress specifically indicated that a test of discrimination created by the courts in the equal employment opportunity area was to be applied in ECOA suits as well. In a report on the 1976 amendments to the Act, the Senate Committee on Banking, Housing, and Urban Affairs clearly indicated that

\textsuperscript{57} H.R. 14908, 93d Cong., 1st Sess. § 702(f) (1974).
\textsuperscript{58} H.R. 14866, 93d Cong., 1st Sess. § 3(5) (1974).
\textsuperscript{60} See, e.g., 1974 Credit Discrimination Hearings, supra note 15, at 72 (appendix to the statement of Jeffrey M. Bucher, Governor, Federal Reserve Board).
\textsuperscript{59} A unanimous vote of the Subcommittee on Consumer Affairs of the House Committee on Banking and Currency decided to remove all adjectives before the word "discriminate," thereby letting the courts decide on a case-by-case basis which types of credit discrimination to permit. 1974 Credit Discrimination Hearings, supra note 15, at 402. See generally Baer, The Equal Credit Opportunity Act and the "Effects" Test, 95 BANKING L.J. 241, 245-48 (1978).
the so-called "effects test" be used by the courts in the evaluation of ECOA suits to determine whether discrimination was present.\footnote{S. REP. No. 589, 94th Cong., 2d Sess. 4-5 (1976), reprinted in [1976] U.S. CODE CONG. & Ad. News 403, 406.}

As applied by the United States Supreme Court in such cases as \textit{Griggs v. Duke Power Co.}\footnote{401 U.S. 424 (1971).} and \textit{Albermarle Paper Co. v. Moody},\footnote{422 U.S. 405 (1975).} this test states that any employment practice or procedure is prohibited if its use has a discriminatory impact upon a group which the statute in question is designed to protect.\footnote{In \textit{Albermarle Paper Co. v. Moody}, the Court explained the relative burdens of proof in an employment discrimination case brought under Title VII. The initial burden is on the plaintiff to show that the practice used by the employer chooses applicants in a racial pattern significantly different from that of the applicant pool. Such a showing represents a prima facie case of discrimination, requiring a shift in the burden of proof to the defendant, who must demonstrate that the practice has "a manifest relationship to the employment in question." If the employer meets this burden, the plaintiff must then attempt to show that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" \footnote{Id. at 425.} Such a showing by the plaintiff would demonstrate that the employer was using the challenged employment practice as a "pretext for discrimination."}

More recent cases, however, indicate that the Court may wish to make the plaintiff's burden of proof more difficult. In \textit{General Electric Co. v. Gilbert},\footnote{429 U.S. 125 (1976).} the Court ruled that a disability plan which denied benefits to those with pregnancy-related disabilities

\textit{Griggs v. Duke Power Co.}, for example, black employees of the defendant brought suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. \textsection{2000e} (1976), alleging that defendant's policy of requiring a high school diploma or the passing of certain intelligence tests as a condition of employment or transfer to higher-level jobs constituted illegal discrimination. The Court of Appeals found for the company on the ground that the employees had failed to show that the adoption of the employment policy was motivated by discriminatory intent. Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970). The Supreme Court reversed, holding that Title VII outlawed any employment practice (albeit neutral on its face) that had the \textit{effect} of discrimination. In short, discriminatory intent was held not to be an essential element in plaintiffs' burden of proof in Title VII cases. For an analysis of \textit{Griggs}, see Blumrosen, \textit{Griggs v. Duke Power Co.: Strangers in Paradise}, 71 Mich. L. Rev. 59 (1972).


\textit{Id. at} 425.

did not constitute a showing of sex discrimination in violation of Title VII.\textsuperscript{70} In a racial discrimination suit brought against an employer as a violation of the equal protection component of the due process clause of the Fifth Amendment, the Court ruled that the Title VII requirement of a mere showing of discriminatory impact was insufficient in constitutional cases:\textsuperscript{71} "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution."\textsuperscript{72}

Despite this alteration in the burden of proof a plaintiff must bear, the congressional intent that the effects test be applied in ECOA cases remains.\textsuperscript{73} The puzzle is to determine to what extent a creditor may in effect discriminate against an applicant by using either the prohibited criteria themselves or proxy criteria so closely correlated with the prohibited criteria as to result in the very discrimination which the ECOA was designed to prevent. The language of the ECOA is somewhat confusing in this regard, because age, marital status, and the receipt of income from a public assistance program may all be taken into account,\textsuperscript{74} although the Act prohibits their use to discriminate.\textsuperscript{75} This lack of clarity hinders analysis as to which criteria affect the receipt of credit; the fact that applicants in one age group are being denied credit more than those in another age group is not easily labelled a violation of the Act.\textsuperscript{76} Examination of Regulation B\textsuperscript{77} provides a clearer view of what creditors may and may not use in their decisions whether to grant credit.

\section*{II. Regulation B}

Although representatives of the Federal Reserve Board argued

\textsuperscript{70} The Court reasoned: "[T]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." 429 U.S. at 135 (quoting Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974)). Plaintiffs therefore failed to make the requisite showing of gender-based effect. For criticism of this decision and its reasoning, see Comment, \textit{General Electric Co. v. Gilbert: A Lesson in Sex Education and Discrimination — The Relationship Between Pregnancy and Gender and the Vitality of Disproportionate Impact Analysis}, 1977 \textit{Utah L. Rev.} 119 (1977).

\textsuperscript{71} Washington v. Davis, 426 U.S. 229 (1976).

\textsuperscript{72} Id. at 242.

\textsuperscript{73} See note 61 and accompanying text supra.

\textsuperscript{74} 15 U.S.C. § 1691(b) (1976).


\textsuperscript{76} For example, the use of "any empirically derived credit system which considers age" is permitted "if such system is demonstrably and statistically sound" and if "the age of an elderly applicant [is not] assigned a negative factor or value. . . ." 15 U.S.C. § 1691(b)(3) (1976).

\textsuperscript{77} 12 C.F.R. § 202 (1979).
that the ECOA would be better enforced without the promulgation of regulations,\textsuperscript{18} Congress chose the Board to create specific rules to enforce the broad mandates of the Act.\textsuperscript{19} Perhaps the best way to become acquainted with the major provisions of Regulation B\textsuperscript{80} is to observe its impact upon a typical credit transaction. To do so, we will follow Ms. X, a 35-year-old divorcée with two children, as she enters a bank to obtain an installment loan.

Regulation B prohibits the bank from making “any oral or written statement, . . . to applicants or prospective applicants that would discourage on a prohibited basis\textsuperscript{81} a reasonable person from making or pursuing an application.”\textsuperscript{82} It is in relation to the

\textsuperscript{18} 1974 Credit Discrimination Hearings, supra note 15, at 231 (statement of Jeffrey M. Bucher, Governor, Federal Reserve Board).

\textsuperscript{19} 15 U.S.C. § 1691b (1976). Following passage of the original Act in late 1974, the Board began to work on a set of preliminary regulations, which it published in April 1975 in order to allow the public an opportunity to comment upon them. 40 Fed. Reg. 18,183 (1975). After hearings were held in May, the Board published revised regulations in September. 40 Fed. Reg. 42,030 (1975). In response to pressure from business groups, the new regulations limited application of many parts of the Act (as authorized by 15 U.S.C. § 1691b (1976)) to consumer credit. Exempted from various provisions of the Act (such as inquiries as to marital status and the requiring of notice as to the main provisions of the ECOA) were business, securities, public utility, and “incidental” credit. 40 Fed. Reg. 42,032 (1975). See also Geary, Equal Credit Opportunity — An Analysis of Regulation B, 31 BUS. LAW. 1641, 1644-45 (1976). Criticism of the Board’s decision in this matter may be found in Note, Equal Credit: Promise or Reality?, 11 HARV. CIV. RTS. - CIV. LIB. L. REV. 186, 202-03 (1976). The final rules, issued just six days before the Act took effect, reflected further pressures placed on the Board by both consumer and creditor lobbyists. 40 Fed. Reg. 49,298 (1975). See Fed Shifts Plan on Equal Credit, N.Y. Times, September 8, 1975, at 43, col. 5; Federal Reserve Officials Tell Women They Will Revise Rules on Credit Bias, N.Y. Times, September 19, 1975, at 30, col. 1. The final regulations included such pro-consumer provisions as requiring creditors to provide each applicant with a summary of the main provisions of the ECOA, 40 Fed. Reg. 49,299-300 (1975), and the forbidding of the “discouragement” of applicants on a prohibited basis, 40 Fed. Reg. 49,299 (1975), as well as such pro-creditor provisions as further expansion of the aforementioned exemptions for non-consumer credit. 40 Fed. Reg. 49,305 (1975).

Following passage of the ECOA Amendments of 1976, much the same procedure was followed in order to amend the regulations. Proposed changes were published in July 1976, 41 Fed. Reg. 29,870 (1976), hearings were held in August, and a revised set of regulations were published in November. 41 Fed. Reg. 49,123 (1976). Changes included amendment of the ECOA notice requirement so that only rejected applicants need be given the notice. 41 Fed. Reg. 49,129 (1976). Finally, in early 1977, the current regulations were published, to take effect with the ECOA amendments on March 23, 1977. 42 Fed. Reg. 1242 (1977).

\textsuperscript{80} For an exhaustive examination of the provisions of the current version of Regulation B, see Ziino, A Review of the Federal Equal Credit Opportunity Act, 27 DRAKE L. REV. 1 (1977).

\textsuperscript{81} Prohibited basis means race, color, religion, national origin, sex, marital status, or age (provided that the applicant has the capacity to enter into a binding contract); the fact that all or part of the applicant’s income derives from any public assistance program, or the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act or any State law upon which an exemption has been granted by the Board.


\textsuperscript{82} 12 C.F.R. § 202.5(a) (1979).
information which may be requested in the application itself, however, that the regulations have their greatest effect. The general rule is that "[e]xcept as otherwise provided in this section, a creditor may request any information in connection with an application," yet the regulations list several exceptions to this general rule "so as to prohibit the requesting of information of which the sole utility would be to assist in discrimination."

The bank may not request that Ms. X inform it of her sex, race, color, religion, national origin, birth control practices, or child-bearing intentions or capability. If Ms. X applies for individual, unsecured credit, the bank may not ask her marital status unless she resides in a community property state or property upon which she is relying to repay the loan is located in such a state. Otherwise, the bank may legally ask her only to indicate whether she is married, unmarried, or separated. Information regarding Ms. X's ex-husband may be obtained only if she is relying on alimony, child support, or separate maintenance payments from him as a basis for repaying the loan. The bank's application must inform Ms. X that income from these sources need not be disclosed if she does not want it included when the bank determines her creditworthiness.

In evaluating the application of Ms. X, the bank is governed by Regulation B's general rule that "[e]xcept as otherwise provided in the Act and this Part [of the Code of Federal Regulations], . . . any information [may be used] that the creditor obtains, so long as the information is not used to discriminate against an applicant on a prohibited basis." The significance of this provision is explained by the Board's comments to Regulation B, which state that the words "to discriminate" are to be read in light of congressional intent that the effects test be used to measure discrimination in the credit-granting process. To confirm this interpretation, the Board included a footnote follow-
ing the provision discussing the effects test and citing the legisla-
tive history supporting its use under the ECOA.95 The Board con-
cluded, however, that the effects test was not well-suited for regu-
laratory implementation.96 Congressional intent regarding the test
was thus implemented solely by the provision quoted above and
its accompanying footnote.

In contrast to this general proscription against discrimination,
the regulations weave a complex pattern of permission and prohi-
bition with regard to the use of age, marital status, and income
from a public assistance program. Neither Ms. X’s age nor any
money that she may, for example, receive from welfare may be
taken into account in evaluating her application,97 with two ex-
ceptions. If the bank has a “demonstrably and statistically
sound, empirically derived credit system,”98 it may use her age as
a predictive variable in assessing creditworthiness.99 If it instead
has a “judgmental system of evaluating creditworthiness,”100 it
may consider her age or welfare payments “only for the purpose
of determining a pertinent element of creditworthiness.”101 Fur-
ther provisions covering the evaluation of Ms. X’s application
prohibit the bank from (1) using statistics on her likelihood of
bearing children to predict future diminished income,102 (2) tak-
ing into account the existence of a telephone listing in Ms. X’s
name,103 and (3) discounting or excluding from consideration the
income of Ms. X due to a prohibited basis104 or because the in-
come is derived from part-time employment.105 The bank may
consider the likelihood that alimony, child support, or separate
maintenance payments will be consistently received using speci-
fied guidelines, and to the extent that it determines them to be
consistent, must count them as income if Ms. X so desires.106

95 12 C.F.R. § 202.6(a) n.7 (1979).
98 Such a system is defined as one: (1) in which the data used to develop the system are
either the complete population or a statistically appropriate sample thereof, (2) which is
designed to predict the creditworthiness of applicants with respect to “legitimate business
interests of the creditor,” (3) which separates good and poor credit risks “at a statistically
significant rate,” and (4) which is periodically reassessed as to its predictive ability using
100 Such a system is defined as any evaluation system “other than a demonstrably and
104 See note 81 supra.
106 Id.
After evaluating Ms. X's application, the bank is bound by Regulation B not to refuse to grant her credit, assuming she is creditworthy, on any prohibited basis.\(^{107}\) Several provisions of the regulations dealing with the establishment of accounts in Ms. X's own name (as opposed to that of her ex-husband) help to fulfill one of the purposes of the ECOA, which is to permit a woman to open an account and create her own credit history.\(^{108}\)

The other major portion of the regulations likely to affect Ms. X is the section requiring the bank to provide notification of the action it takes regarding her application for credit.\(^{109}\) With respect to a "completed" application,\(^{110}\) the bank must notify Ms. X of its decision within thirty days after receipt of the "completed" application.\(^{111}\) If "adverse action"\(^{112}\) is taken regarding an uncompleted application or an existing account, Ms. X must also be notified within thirty days.\(^{113}\) Such a notification (for any of the actions listed above) must include all of the following:

1. A statement of the action taken,
2. a statement of the basic provisions of ECOA,\(^{114}\)
3. the name and address of the relevant federal agency that administers compliance concerning the creditor providing the notification, and
4. either:
   a. a statement of the specific reasons for the action taken,\(^{115}\) or
   b. a disclosure of the applicant's right to receive such a statement of reasons.\(^{116}\)

Despite the length of Regulation B, creditors and applicants alike may be left unsure as to what may be legally asked of an applicant and which acts by a creditor constitute discrimination. Although the regulations reflect congressional intent that the ef-

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\(^{107}\) 12 C.F.R. § 202.7(a) (1979).
\(^{108}\) 12 C.F.R. § 202.7(b)-.7(d) (1979).
\(^{110}\) An application is deemed "completed" only if the creditor "has received all the information that the creditor regularly obtains and considers in evaluating applications for the amount and type of credit requested . . . provided, however, that the creditor has exercised reasonable diligence in obtaining such information." 12 C.F.R. § 202.2(f) (1979).
\(^{112}\) "Adverse action" is defined in 12 C.F.R. § 202.2(c), following the definition included in the statute at 15 U.S.C. § 1691(d)(6) (1976). See note 35 supra.
\(^{115}\) The regulations provide a sample form. 12 C.F.R. § 202.9(b)(2) (1979).
ffects test be applied, they do little to implement the test in any concrete fashion. This is striking in light of the generally accepted conclusion that the ECOA represents at least as much as a piece of civil rights legislation as a bill to regulate financial institutions. An examination of the characteristics of those denied credit and those who perceive such denial as discriminatory serves to illuminate the criteria that play an important role in the credit-granting process, whether they are formally legal or illegal according to the ECOA and regulations. An examination of the everyday operation of the credit-granting process may demonstrate which credit-granting criteria operate to deny credit to those for whom the ECOA signalled the end of discrimination.

III. EXAMINING THE EFFECTIVENESS OF ECOA: REASONS FOR USING A SURVEY

Several methods are available to examine the effectiveness of the ECOA and Regulation B. Most common would be an appraisal of lawsuits brought under the Act. This would permit a study of the common types of fact situations which lead to litigation as well as those provisions of the ECOA and Regulation B which give the courts special problems of interpretation. There are two problems with this approach, however, one practical and one theoretical. First, there are only four reported cases involving the ECOA, making it all but impossible to draw any sort of

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117 One witness who testified before the Board at hearings on the amended regulations noted:

The proposal . . . makes no reference to any of the criteria currently in use which are directly discriminatory on the basis of race — such as prior home ownership, minimum educational requirements, length of residence in the community — all of which are commonly used by mortgage lenders. . . . If the Board feels that it has insufficient data concerning the relationship of these criteria to creditworthiness to justify an outright prohibition, there are other approaches to the problem short of leaving lending institutions and. . . applicants totally without guidance.


118 Baer, supra note 59, at 255.

119 National State Bank v. Long, 469 F. Supp. 1068 (D.N.J. 1979) (dictum) (the ECOA does not preempt state anti-redlining law since it does not specifically include geographic location in its list of prohibited credit-granting criteria); Shuman v. Standard Oil Co. of California, 453 F.Supp. 1150 (N.D. Cal. 1978) (alleged wrongful denial of credit card permits actual damages under the ECOA — including compensation for embarrassment, humiliation, mental distress, and harm to one’s reputation caused by the denial — and punitive damages arising from a “reckless disregard” of the requirements of the law); Smith v. Lakeside Foods, 449 F.Supp. 171 (N.D. Ill. 1978) (credit application containing neither designation that indication of applicant’s title — Mr., Miss, Mrs., or Ms. — is optional nor conspicuous notice of the ECOA required by Regulation B violates the Act
generalization. Second, even if there were a larger number of lawsuits, the problem would still remain of limiting analysis to only those situations deemed serious enough to require a lawyer and subsequent litigation. This would doubtlessly exclude a large number of credit problems with which the ECOA was designed to deal.  

Examination of consumer complaints filed with state and federal agencies, consumer groups, or the Better Business Bureau in order to discover whether reports of illegal discrimination were frequent represents another method of assessing how well the legislation is working. Again, two problems arise. First, it is doubtful whether such complaints would be open to public inspection under the Freedom of Information Act (FOIA). That Act "does not apply to matters that are . . . contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." Even assuming that records of such complaints were available, analysis would again be limited to those situations which consumers bothered to report, thereby biasing the results. Numerous studies of consumer complaint behavior demonstrate that the "complainer" is not an average type of person.

A third avenue is to examine creditor records in order to assess
compliance with the Act and the regulations. Although Regulation B requires that monitoring information be submitted by creditors to the Federal Reserve Board to allow the Board to check compliance with the ECOA, the FOIA exemption mentioned above would certainly preclude private researchers from obtaining access to such records. Further problems, which even the Board encounters, include the enormous amount of time and money necessary to do even an adequate job of monitoring compliance as well as the possibility that such records are biased in favor of creditors.

Another choice, the one to be employed in this article, involves a random sampling of consumers to ascertain their perceptions of possible discrimination in the credit-granting process. While this involves relying upon non-lawyers to report on what are often legal questions, and raises traditional survey problems such as sampling error, the advantages of such a “grass roots” approach far outweigh these potential disadvantages. This method allows for the discovery of problems which are ordinarily never brought to the attention of a lawyer or bureaucrat and also provides some hard data with which to support recommendations for law reform. Furthermore, the approach stresses how intended beneficiaries of the Act feel; it is these feelings of perceived discrimination that may well result in potential litigation under the ECOA.

IV. Survey Background, Methodology, and Statistical Model Employed

A. Background

The survey discussed here was sponsored by the Federal Reserve Board to examine various facets of the consumer credit area. A nationwide representative sample of 2563 Americans

125 12 C.F.R. § 202.13 (1979). Such information is used to some extent in preparing the Board’s annual reports to Congress on how well the ECOA is working. See, e.g., BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ANNUAL REPORT TO CONGRESS ON EQUAL CREDIT OPPORTUNITY FOR THE YEAR 1977, at 2-3 (1978).
126 See note 123 accompanying text supra.
127 See text accompanying notes 135-45 infra.
128 See text accompanying notes 143-45 infra.
129 The need for such hard data was noted in Hays, A Suggested Analysis for Regulation of Equal Credit Opportunity, 52 WASH. L. REV. 335, 366 (1977).
130 The survey was jointly funded by the Board, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation.
131 Areas of inquiry covered by the survey include: attitudes toward the use of credit; knowledge of interest rates and finance charges on recent loans; attitudes toward and experience with credit cards (including credit card billing errors); and a large amount of information on housing, major additions and repairs, vehicles, durable purchases, and
was interviewed in August-September of 1977 by the Survey Research Center (SRC) of the University of Michigan. One section of the questionnaire was specifically designed to elicit responses relevant to the operation of the ECOA.

B. Questions Chosen for Inclusion in the Model

Since the purpose of the article is to assess the effectiveness of the ECOA and Regulation B, the questions chosen are those believed to be the best for locating the presence of adverse credit actions of a potentially discriminatory nature. Any predictive model involves two types of variables: those which measure the phenomenon which the model attempts to explain, called dependent variables, and those used to predict or explain the phenomenon under investigation, called independent variables.

recreation and hobby items — information such as the number owned, purchased, and how each was paid for. In addition, the survey questioned respondents on their holdings of assets, including savings and checking accounts, certificates of deposit, real estate holdings, and stocks and bonds. Finally, the survey attempted to discover the processes used by consumers in shopping for both products and credit. A summary of the survey results is presented in T. Durkin & G. Eliehausen, 1977 Consumer Credit Survey (1978), published by the Federal Reserve Board. More detailed information on the survey may be obtained by writing to the Economic Behavior Program, Survey Research Center, University of Michigan, P.O. Box 1248, Ann Arbor, MI 48106. A copy is on file with the UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM.

The Survey Research Center's (SRC) national sample of dwellings is a multi-stage probability sample with units at different stages selected with probabilities proportional to 1970 population and housing unit counts. The sample design contains five stages of selection, with the overall probability of selection for any particular housing unit in the nation being the sum of all of the probability of selections at any particular stage in the process.

The sampling fraction for this survey was developed from the data contained in the following equation:

\[
\frac{\text{Co-operating number of households}}{\left(\frac{\text{Estimated total no. of households in U.S.}}{\text{X (coverage rate)}}\right) \times \text{X (response rate)}} = \frac{1}{20,317}
\]

In other words, if the SRC sampling procedure covers 95 percent of all American households, each respondent represents approximately 20,000 similar households.

Further information on the sampling methods used in this and other SRC surveys may be found in Surveys of Consumers, 1974-1975, at 221-23 (R. Curtin ed. 1976).

Questions relating to the ECOA were of four types: those probing "unfair treatment" the respondents had experienced in credit transactions, those asking respondents to tell of complaints they had made to someone other than a relative or a friend about unfavorable credit experiences, those asking for the respondent's knowledge of and attitude toward a dozen credit-granting criteria (both legal and illegal), and those used in this article, which deal with credit refusals and the perceived reasons therefor.
In this analysis, the responses to two survey questions were selected as dependent variables to measure the effectiveness of the ECOA and Regulation B: the presence of credit refusals or limitations within the past few years, and the perception that such refusals or limitations were due to the respondent's race, sex, age, or national origin.

Since this analysis is designed to discover which characteristics of credit applicants are associated with credit refusals and perceived discrimination, a large number of factors used by creditors in deciding whether to grant credit were examined as independent, or explanatory, variables. These were of two types: those prohibited by the ECOA and Regulation B and those not prohibited. Included in the first group were age, race, sex and marital status. Included in the second group were total family income, total amount of outstanding installment debt, home ownership, whether anyone in the family was employed, whether anyone in the family had a checking account, length of time at present address, and family size. The model thus attempts to weigh the relative influence of some illegal credit-granting criteria against some legal criteria to discover (1) whether there are significant differences between various types of respondents in the incidence of adverse credit decisions based on respondent characteristics prohibited by the ECOA, (2) whether those differences persist after adjustment for characteristics that creditors may legally employ, (3) whether individuals involved in an adverse credit decision felt they were discriminated against on a prohibited basis, and (4) whether the results from (3) reveal a "discrimination-perception-prone" type of individual.

C. Problems with the Model

There are four potential problem areas in the use of the current model.

1. Accuracy of the responses — Use of survey results assumes some degree of faith in the truthfulness of the respondents questioned. In this survey, for example, it is assumed that reports of credit refusals or limitations correctly represent actual incidents. It is also assumed that respondents accurately report their age, income, family size, and other objective factors. While there may be some doubts as to the accuracy of such reports, survey re-

134 See M. NEIFELD, supra note 47, at 505-15.
135 As one author states,
This concern is evoked by the uneasy feeling that the respondent may, for a variety of reasons, engage in a 'presentation of self' that is a subtle mixture of fact
searchers have generally concluded that use of such data is reliable.\textsuperscript{138}

2. \textit{Limitations on the dependent variables} — The first dependent variable listed above, self-reported incidence of credit refusals or limitations, is intended to represent the concept of “adverse action” mentioned in the Act\textsuperscript{137} and Regulation B.\textsuperscript{138} The way in which the question is phrased in the survey,\textsuperscript{139} however, does not meet all of the legal requirements laid out in the regulations for inclusion in the category of “adverse actions.”\textsuperscript{140} The essential reason for this discrepancy is that framing the question relating to this dependent variable so as to meet all of the regulatory requirements would have hopelessly complicated the question, thereby making the results of little empirical value. The question ultimately used\textsuperscript{141} attempts to balance comprehensibility to the respondent with the legal standards by which “adverse action” is defined.

3. \textit{Limitations on the independent variables} — The basic problem with use of the independent variables (those used to predict credit refusals or limitations and perceptions of discrimination) is the impossibility of including other predictors which may have important correlations with the independent variables used. For example, analysis of the effects of age on credit refusal may well reveal what appears to be widespread discrimination against young applicants which may not be accounted for by differences in income. The overriding factor here, of course, is the applicant’s credit history, which the survey does not measure directly. Great care should thus be taken in assessing the effects of any one independent variable used in the current model because a number of potentially important predictors, such as a detailed credit history and the length of time at one’s job, could not be included in this analysis as independent variables.\textsuperscript{142}
4. **Sampling error** — Although SRC scientifically selects a sample of the population so that it reflects population characteristics as accurately as possible,\(^{143}\) the very process of choosing a limited number of households to represent the entire population necessarily involves what is called *sampling error*.\(^{144}\) Sampling error represents the difference between the actual population value\(^{145}\) as to a particular measured response and the result found using only a sampling of the population. Such error in a survey of this size is represented in Table 1, where the chances are 95 in 100 that the population value being estimated by the sampling actually falls within the listed range on the table. The degree of error depends upon the sample percentage, as the presence of the various rows in Table 1 indicates. For example, Table 2 reveals that 35% of those who had lived at their present address two years or less reported credit refusals or limitations. According to Table 1, the actual population value for this subgroup lies somewhere between about 32.5% and 37.5% - using an interpolation of the "30 or 70" and the "50" percentage rows in the table.

**TABLE 1**

**APPROXIMATE SAMPLING ERROR FOR SAMPLE SIZE OF 2300**

<table>
<thead>
<tr>
<th>Percentages reported</th>
<th>Sampling error (in percentage points)</th>
</tr>
</thead>
<tbody>
<tr>
<td>50</td>
<td>± 2.65</td>
</tr>
<tr>
<td>30 or 70</td>
<td>± 2.40</td>
</tr>
<tr>
<td>20 or 80</td>
<td>± 2.10</td>
</tr>
<tr>
<td>10 or 90</td>
<td>± 1.60</td>
</tr>
<tr>
<td>5 or 95</td>
<td>± 1.15</td>
</tr>
</tbody>
</table>

Adapted from *SURVEYS OF CONSUMERS, 1974-1975*, at 229 (R. Curtin ed. 1976)

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\(^{143}\) See note 132 *supra*.

\(^{144}\) For a fuller description of this statistical concept, see T. Wonnacott & R. Wonnacott, *INTRODUCTORY STATISTICS* 300-01 (1969).

\(^{145}\) "Actual population value" refers to the number that would be found if the survey covered every household in the population.
### TABLE 2

**MULTIPLE CLASSIFICATION ANALYSIS OF REPORTED CREDIT REFUSALS OR LIMITATIONS**

<table>
<thead>
<tr>
<th>Cases</th>
<th>Reported Proportion</th>
<th>MCA Adjusted Proportion</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>All Respondents</strong></td>
<td>2286</td>
<td>.20</td>
</tr>
<tr>
<td><strong>Age</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>18-25 years</td>
<td>263</td>
<td>.43</td>
</tr>
<tr>
<td>26-35</td>
<td>505</td>
<td>.32</td>
</tr>
<tr>
<td>36-45</td>
<td>345</td>
<td>.19</td>
</tr>
<tr>
<td>46-55</td>
<td>388</td>
<td>.18</td>
</tr>
<tr>
<td>56-64</td>
<td>344</td>
<td>.06</td>
</tr>
<tr>
<td>65 and older</td>
<td>434</td>
<td>.04</td>
</tr>
<tr>
<td><strong>Race</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>White</td>
<td>1987</td>
<td>.18</td>
</tr>
<tr>
<td>Nonwhite</td>
<td>293</td>
<td>.30</td>
</tr>
<tr>
<td><strong>Marital Status</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Married</td>
<td>1555</td>
<td>.19</td>
</tr>
<tr>
<td>Divorced/separated</td>
<td>246</td>
<td>.31</td>
</tr>
<tr>
<td>Widowed</td>
<td>276</td>
<td>.07</td>
</tr>
<tr>
<td>Never married</td>
<td>205</td>
<td>.31</td>
</tr>
<tr>
<td><strong>Sex</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Male</td>
<td>1569</td>
<td>.20</td>
</tr>
<tr>
<td>Female</td>
<td>717</td>
<td>.19</td>
</tr>
<tr>
<td><strong>Total Family Income</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Less than $10,000</td>
<td>695</td>
<td>.25</td>
</tr>
<tr>
<td>$10,000-19,999</td>
<td>712</td>
<td>.22</td>
</tr>
<tr>
<td>$20,000 and over</td>
<td>579</td>
<td>.16</td>
</tr>
<tr>
<td><strong>Total Outstanding Installment Debt</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>$0</td>
<td>1292</td>
<td>.13</td>
</tr>
<tr>
<td>$1-499</td>
<td>168</td>
<td>.38</td>
</tr>
<tr>
<td>$500-999</td>
<td>144</td>
<td>.24</td>
</tr>
<tr>
<td>$1,000-1,999</td>
<td>187</td>
<td>.22</td>
</tr>
<tr>
<td>$2,000 and over</td>
<td>495</td>
<td>.29</td>
</tr>
<tr>
<td><strong>Anyone in Family Employed?</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>1641</td>
<td>.23</td>
</tr>
<tr>
<td>No</td>
<td>645</td>
<td>.11</td>
</tr>
<tr>
<td><strong>Own Home?</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>1589</td>
<td>.15</td>
</tr>
<tr>
<td>No</td>
<td>696</td>
<td>.31</td>
</tr>
<tr>
<td><strong>Length of Time at Present Address</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0-2 years</td>
<td>779</td>
<td>.35</td>
</tr>
<tr>
<td>3-5 years</td>
<td>293</td>
<td>.20</td>
</tr>
<tr>
<td>6-10 years</td>
<td>370</td>
<td>.14</td>
</tr>
<tr>
<td>11-20 years</td>
<td>394</td>
<td>.07</td>
</tr>
<tr>
<td>21 years or more</td>
<td>450</td>
<td>.09</td>
</tr>
</tbody>
</table>
### TABLE 2 (cont'd)

<table>
<thead>
<tr>
<th>Have a Checking Account?</th>
<th>Cases</th>
<th>Reported Proportion</th>
<th>MCA Adjusted Proportion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>1873</td>
<td>.19</td>
<td>.20</td>
</tr>
<tr>
<td>No</td>
<td>392</td>
<td>.24</td>
<td>.17</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Family Size</th>
<th>Cases</th>
<th>Reported Proportion</th>
<th>MCA Adjusted Proportion</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>466</td>
<td>.18</td>
<td>.18</td>
</tr>
<tr>
<td>2</td>
<td>724</td>
<td>.15</td>
<td>.18</td>
</tr>
<tr>
<td>3-4</td>
<td>752</td>
<td>.24</td>
<td>.21</td>
</tr>
<tr>
<td>5-7</td>
<td>316</td>
<td>.23</td>
<td>.22</td>
</tr>
<tr>
<td>8 or more</td>
<td>28</td>
<td>.32</td>
<td>.29</td>
</tr>
</tbody>
</table>

### TABLE 3

MULTIPLE CLASSIFICATION ANALYSIS OF PERCEIVED DISCRIMINATION IN CREDIT REFUSALS

<table>
<thead>
<tr>
<th>All Respondents</th>
<th>Cases</th>
<th>Reported Proportion</th>
<th>MCA Adjusted Proportion</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>431</td>
<td>.33</td>
<td>.33</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Age</th>
<th>Cases</th>
<th>Reported Proportion</th>
<th>MCA Adjusted Proportion</th>
</tr>
</thead>
<tbody>
<tr>
<td>18-25 years</td>
<td>109</td>
<td>.49</td>
<td>.45</td>
</tr>
<tr>
<td>26-35</td>
<td>161</td>
<td>.28</td>
<td>.35</td>
</tr>
<tr>
<td>36-45</td>
<td>59</td>
<td>.15</td>
<td>.21</td>
</tr>
<tr>
<td>46-55</td>
<td>66</td>
<td>.26</td>
<td>.20</td>
</tr>
<tr>
<td>56-64</td>
<td>19</td>
<td>.42</td>
<td>.32</td>
</tr>
<tr>
<td>65 and older</td>
<td></td>
<td>.53</td>
<td>.20</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Race</th>
<th>Cases</th>
<th>Reported Proportion</th>
<th>MCA Adjusted Proportion</th>
</tr>
</thead>
<tbody>
<tr>
<td>White</td>
<td>355</td>
<td>.33</td>
<td>.33</td>
</tr>
<tr>
<td>Nonwhite</td>
<td>75</td>
<td>.33</td>
<td>.35</td>
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</table>

<table>
<thead>
<tr>
<th>Marital Status</th>
<th>Cases</th>
<th>Reported Proportion</th>
<th>MCA Adjusted Proportion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Married</td>
<td>277</td>
<td>.20</td>
<td>.27</td>
</tr>
<tr>
<td>Divorced/separated</td>
<td>73</td>
<td>.49</td>
<td>.40</td>
</tr>
<tr>
<td>Widowed</td>
<td>19</td>
<td>.74</td>
<td>.62</td>
</tr>
<tr>
<td>Never married</td>
<td>62</td>
<td>.58</td>
<td>.43</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Sex</th>
<th>Cases</th>
<th>Reported Proportion</th>
<th>MCA Adjusted Proportion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>303</td>
<td>.23</td>
<td>.28</td>
</tr>
<tr>
<td>Female</td>
<td>128</td>
<td>.56</td>
<td>.45</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Total Family Income</th>
<th>Cases</th>
<th>Reported Proportion</th>
<th>MCA Adjusted Proportion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than $10,000</td>
<td>168</td>
<td>.46</td>
<td>.35</td>
</tr>
<tr>
<td>$10,000-19,999</td>
<td>148</td>
<td>.28</td>
<td>.32</td>
</tr>
<tr>
<td>$20,000 and over</td>
<td>89</td>
<td>.18</td>
<td>.34</td>
</tr>
<tr>
<td>Cases</td>
<td>Total Outstanding Installment Debt</td>
<td>Reported Proportion</td>
<td>MCA Adjusted Proportion</td>
</tr>
<tr>
<td>-------</td>
<td>-----------------------------------</td>
<td>---------------------</td>
<td>------------------------</td>
</tr>
<tr>
<td></td>
<td>None</td>
<td>.40</td>
<td>.31</td>
</tr>
<tr>
<td></td>
<td>$1-499</td>
<td>.31</td>
<td>.29</td>
</tr>
<tr>
<td></td>
<td>$500-999</td>
<td>.31</td>
<td>.33</td>
</tr>
<tr>
<td></td>
<td>$1,000-1,999</td>
<td>.27</td>
<td>.30</td>
</tr>
<tr>
<td></td>
<td>$2,000 or over</td>
<td>.28</td>
<td>.37</td>
</tr>
<tr>
<td></td>
<td><strong>Anyone in Family Employed?</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Yes</td>
<td>.30</td>
<td>.31</td>
</tr>
<tr>
<td></td>
<td>No</td>
<td>.48</td>
<td>.41</td>
</tr>
<tr>
<td></td>
<td><strong>Own Home?</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Yes</td>
<td>.24</td>
<td>.30</td>
</tr>
<tr>
<td></td>
<td>No</td>
<td>.43</td>
<td>.36</td>
</tr>
<tr>
<td></td>
<td><strong>Length of Time at Present Address</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>0-2 years</td>
<td>.37</td>
<td>.32</td>
</tr>
<tr>
<td></td>
<td>3-5 years</td>
<td>.16</td>
<td>.24</td>
</tr>
<tr>
<td></td>
<td>6-10 years</td>
<td>.16</td>
<td>.26</td>
</tr>
<tr>
<td></td>
<td>11-20 years</td>
<td>.26</td>
<td>.41</td>
</tr>
<tr>
<td></td>
<td>21 years or more</td>
<td>.54</td>
<td>.53</td>
</tr>
<tr>
<td></td>
<td><strong>Have a Checking Account?</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Yes</td>
<td>.30</td>
<td>.32</td>
</tr>
<tr>
<td></td>
<td>No</td>
<td>.44</td>
<td>.36</td>
</tr>
<tr>
<td></td>
<td><strong>Family Size</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>1</td>
<td>.55</td>
<td>.37</td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>.40</td>
<td>.41</td>
</tr>
<tr>
<td></td>
<td>3-4</td>
<td>.24</td>
<td>.28</td>
</tr>
<tr>
<td></td>
<td>5-7</td>
<td>.17</td>
<td>.28</td>
</tr>
<tr>
<td></td>
<td>8 or more</td>
<td>.25</td>
<td>.35</td>
</tr>
</tbody>
</table>
TABLE 4

SUMMARY STATISTICS FOR THE MULTIPLE CLASSIFICATION ANALYSES IN TABLES 2 AND 3

<table>
<thead>
<tr>
<th>Predictors</th>
<th>Credit Refusals or Limitations (beta)</th>
<th>Perceived Discrimination (beta)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Age</td>
<td>.219 (1)</td>
<td>.216 (1)</td>
</tr>
<tr>
<td>Race</td>
<td>.062 (7)</td>
<td>.029 (11)</td>
</tr>
<tr>
<td>Marital status</td>
<td>.051 (8)</td>
<td>.193 (2)</td>
</tr>
<tr>
<td>Sex</td>
<td>.023 (11)</td>
<td>.172 (3)</td>
</tr>
<tr>
<td>Total family income</td>
<td>.095 (5)</td>
<td>.068 (7)</td>
</tr>
<tr>
<td>Total outstanding installment debt</td>
<td>.128 (3)</td>
<td>.066 (8)</td>
</tr>
<tr>
<td>Family employment</td>
<td>.026 (10)</td>
<td>.074 (6)</td>
</tr>
<tr>
<td>Home ownership</td>
<td>.075 (6)</td>
<td>.085 (5)</td>
</tr>
<tr>
<td>Time at present address</td>
<td>.157 (2)</td>
<td>.125 (4)</td>
</tr>
<tr>
<td>Have checking account</td>
<td>.049 (9)</td>
<td>.033 (10)</td>
</tr>
<tr>
<td>Family size</td>
<td>.118 (4)</td>
<td>.053 (9)</td>
</tr>
<tr>
<td>Multiple R-SQRD</td>
<td>.167 (.155)</td>
<td>.257 (.197)</td>
</tr>
<tr>
<td>(Adjusted)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cases</td>
<td>2286</td>
<td>431</td>
</tr>
</tbody>
</table>

Numbers in parentheses indicate the rank order of the beta statistics.

V. SURVEY RESULTS

A. Explanation of the Statistical Analysis

The results are presented in Tables 2 through 4. Tables 2 and 3 present the proportions of respondents reporting credit refusals or limitations in Table 2 and of respondents perceiving discrimination in such adverse action in Table 3 in one column and "Multiple Classification Analysis (MCA) Adjusted Proportions" (to be explained infra) in the other. For example, looking at the "Reported Proportion" column in Table 2, we see that of the 263 respondents aged 18 to 25, 43% reported one or more credit refus-
als or limitations within the past few years. This contrasts with only 4% of those respondents aged 65 or older. Looking again at Table 2, we see that of those respondents who owned their own home, only 15% reported unfavorable credit decisions, while 31% of non-home owners reported such problems. Overall, as the top row in Table 2 indicates, 20% of the 2286 respondents\footnote{The difference between the 2563 respondents who were surveyed and the 2286 respondents labelled “all respondents” in Table 2 is due to 277 respondents who were eliminated from analysis for any of a number of reasons, such as failing to answer a question or replying “don’t know” to a question.} told interviewers that they had been denied credit or unable to obtain the desired amount within the past few years.

The “MCA Adjusted Proportion”\footnote{For a complete description of Multiple Classification Analysis and its uses, see F. Andrews, J. Morgan, J. Sonquist & L. Klem, Multiple Classification Analysis: A Report on a Computer Program for Multiple Regression Using Categorical Predictors (2d ed. 1973) [hereinafter cited as Andrews]. For an adaption of the MCA program compatible with many computers, see Institute for Social Research, University of Michigan, Osiris III, Volume I: System and Program Design 575-87 (1973).} column in Tables 2 and 3 gives an estimate of what the reported proportion would have been had the subgroup in that row been exactly like the total population with respect to all other predictor variables. For example, in Table 2, the 34% MCA adjusted proportion for those aged 18 to 25 represents the 43% reported proportion adjusted for the effect of all the other independent variables listed along the left side of the table. The effect of such adjustment is dramatically demonstrated by examining the reported and MCA adjusted proportions for the independent variable “Total family income” in Table 3. Simply by looking at the reported proportions, it would seem that income has an enormous impact upon perceived discrimination, with those of low income much more likely to report that their credit refusal was due to an illegal criterion than those of higher income. As the numbers in the MCA column indicate, however, this is not due to income, for these differences all but disappear when adjustment is made for age, education, race, sex, and other factors associated with income that are included among the independent variables.

Table 4 shows summary statistics for each of the dependent variables. The beta statistic represents the net relationship between the independent and dependent variables after adjustment is made for the influence of all of the other independent (predictor) variables.\footnote{For a more complete description of the beta statistic, see Andrews, supra note 147, at 47-49.} More useful than examination of the actual beta values themselves is their ranking, which is indicated by the numbers in parentheses under each value. In predicting the incid-
ence of credit refusals or limitations using the eleven explanatory variables listed, Table 4 reveals that age is ranked as the best predictor, with time at present address second and total amount of debt third. The three best predictors of perceived discrimination are, in order, age, marital status, and sex.

The numbers in Table 4 labelled "Multiple R-SQRD" represent the proportion of variance in the dependent variable explained by variations in the predictor variables. Thus, using all eleven predictors together explains approximately 17% of the variance in adverse credit actions and approximately 26% of the variance in perceived discrimination. The rest of the variance, which cannot be explained by the combined use of these predictors, is due to other factors not included in the analysis and to error.

B. What the Tables Reveal

1. Credit refusals and limitations — As indicated by both Tables 2 and 4, age plays the most important role in predicting what type of person is most likely to report being refused credit or being limited in the amount granted. As reported earlier, 43% of those aged 18 to 25 report such refusals, but the percentage decreases as the age of the respondent increases, to a low of only 4% of those aged 65 or older (Table 2). Even after adjustment is made for the influence of factors such as income, home ownership, and length of time at present address, the age effect persists, as the beta ranking in Table 4 confirms. As regards the other illegal criteria, Table 2 reveals a troublesome difference between the reported refusal rate for whites and nonwhites, even after adjustment is made for relevant legal factors such as employment and income. Little difference, however, may be attributed to marital status or sex, which rank eighth and eleventh, respectively, out of the eleven predictors.

Of those factors that creditors may legally employ in deciding whether to grant credit, the time that the respondent had lived at his or her present address was the best predictor of reported refusals (Table 4). Generally, the longer the time at one address,
the less likely a respondent was to report being denied credit (Table 2). The total amount of outstanding installment debt ranked next among the legal criteria, with a somewhat confusing pattern to be found in Table 2. Adjustment for all predictors relegated the other legal criteria to relatively unimportant predictive status (Table 4).

2. Perceived discrimination — Age is the most important predictor overall of perceived discrimination (Table 4). Young people were more than twice as likely as the elderly to report believing that the credit they desired and could not obtain was withheld due to some illegal factor (Table 3). Marital status and sex ranked second and third in terms of their predictive ability (Table 4), with non-married respondents and women much more likely to report that their personal characteristics were responsible for their credit denials (Table 3). Race had a relatively insignificant impact on the perception of discrimination (Table 4), as reflected by the fact that 33% of both the white and nonwhite subsamples reported such a perception (Table 3). All of the other independent variables show little influence, excepting for the higher incidence of perceived discrimination among those who had lived at one address for a long time (Table 3).151

3. Summary of results — Several things stand out among the results. First, the young clearly report being turned down for credit more often than older respondents and they are more likely than their elders to view such action as arising from a discriminatory cause. Only 20% of the respondents, on average, indicated that they had been refused credit within the past few years, while 34% (after adjustment) of those aged 18 to 25 so replied. One third of those refused credit indicated that they thought age, sex, race, national origin, or marital status was involved in the creditor’s decision to deny them credit, while 45% of the youngest age group so reported (Table 3).

Considering the congressional concern about discrimination against the elderly in the credit market, this survey reveals little such behavior. Only 9% of the respondents aged 65 or older reported being refused credit (Table 2),152 while only one in five of

151 This result is difficult to explain under the model's theory. It may be that long-time residents at one address who are denied credit are forced to attribute such a denial to a personal characteristic because they simply cannot imagine another reason why they would be turned down.

152 This apparent lack of credit discrimination against the elderly may be due solely to a propensity among those aged 65 or older to apply for credit less often, thereby reducing the likelihood of credit refusals. It may also support the claims made by several creditors at hearings on the ECOA that there is little credit discrimination against the elderly because they are such excellent credit risks. See, e.g., 1974 Credit Discrimination Hear-
those refused credit saw the refusal as discriminatory (Table 3).

Sex discrimination seems absent from the results (Table 2), but many women denied credit clearly see the denial as one linked to illegal criteria (Table 3). Race presents the opposite situation, with the difference in credit refusals revealed in Table 2 not viewed by nonwhites as particularly discriminatory (Table 3). As for marital status, creditors appear to deny credit more often to non-married applicants than to married ones, even after adjusting for differences in income, employment, and other relevant factors (Table 2). Approximately half of the non-married respondents denied credit identified an illegal criterion as the reason for such denials (Table 3).

VI. POTENTIAL PROBLEMS AND RECOMMENDATIONS FOR REFORM

A. Youth Discrimination in the Granting of Credit

As indicated above, there is a serious problem in the granting of credit to those between the ages of 18 and 25: a larger proportion of this group than any other reports being denied credit and nearly half views it as arising from the age factor. It would seem that the ECOA offers these rejected applicants no legal recourse. Despite its sweeping language that "[i]t shall be unlawful for any creditor to discriminate against any applicant . . . on the basis of . . . age," it is clear from other provisions of the Act, Regulation B, and the legislative history that Congress intended that creditors be able to deny credit to young applicants solely because of their age. This is due largely to what is perceived as the legitimate interest of the creditor in selecting applicants who possess suitable "credit histories" which reflect the willingness and ability of the applicant to repay loans. One creditor has commented:

There is a clear relationship between age and ability to pay. Younger people have not had the time to accumulate possessions or capital, or acquire sizable incomes. They need to purchase practically everything — home, furniture, appliances, and insurance. Moreover, their wants

\[\text{ings, supra note 15, at 415-41 (statement of Richard F. Kerr on behalf of the National Retail Merchants Association).}\]

\[\text{153 See Part V B 3 supra, and Tables 2 and 3.}\]


\[\text{156 12 C.F.R. § 202.6(b)(2) (1979).}\]

and needs are greater because young people are economically more active in our society. They are likely to have young children to support. 158

The overgeneralizations in this statement are alarming. If ability to repay is the touchstone of creditworthiness, then it must be asked why there should be a greater incidence of reported credit refusals among younger respondents after adjustment for income, employment, and home ownership. The answer is obvious: young people are being denied credit because they are young, not because their income is low, because they have not lived in the area long enough, or because they rent their residence. While it may be granted that a rational creditor would ignore youth as a factor in a good credit risk, much the same statement could have been made twenty years ago about a divorced woman who showed promise as someone willing and able to repay her loan. Just as we no longer allow gender or marital status to serve as convenient proxies for a careful assessment of the real creditworthiness of an applicant, so we should not let age serve any longer. To allow age to remain a valid credit-granting factor only perpetuates the stereotype of young borrowers as poor credit risks, permitting irrational prejudice against all young applicants to remain unchallenged. The ECOA and Regulation B should be amended to require creditors to base their decisions solely on rational factors such as income, so that credit discrimination against the young will be as impermissible as it now is against the old.

B. Perceived Discrimination Against Women

Although there seems to be little difference between the reported incidence of credit refusals of men and women, those women who have experienced unfavorable credit decisions are quite likely to attribute the outcome to their gender. This special sensitivity may be due to the fact that the ECOA was created and publicized widely as a "women's bill," bringing a great deal of publicity to the problems faced by women in obtaining credit. 159 There seems little need for remedial legislative action absent greater evidence of actual discrimination. Creditors should be

158 1974 Credit Discrimination Hearings, supra note 15, at 423 (statement of Richard F. Kerr on behalf of the National Retail Merchants Association).

159 Popular magazines helped to publicize the problem of credit discrimination against women and the response of the ECOA. See Myerson, How to Fight for the Credit That is Due You, REDBOOK, September 1974, at 76; What Women Should Know About Credit, AM. HOME, September 1975, at 6; Women Move Toward Credit Equality, TIME, October 27, 1975, at 63.
warned, however, that many women applying for credit may be prone to viewing rejections as evidence of sex discrimination. Careful attention must be paid to providing a full and accurate statement of the reasons for taking any adverse action against a female applicant so as to prevent such perceptions from developing into costly litigation.

C. Marital Status Discrimination

Evidence of discrimination based on marital status found in the survey is somewhat disheartening in light of the Board's enormous efforts to comply with the spirit of the ECOA by including so many provisions in Regulation B designed to prevent such discrimination. Indeed, there are so many sections of the regulations devoted to the prevention of discrimination based on marital status that it is doubtful that creditors who are unable to afford large legal staffs can comply with the many nuances of Regulation B. The problem here may lie in the lack of education among creditors and consumers alike as to the provisions of the Act and the regulations, education which would serve to alleviate problems other than those relating to marital status as well.

1. Educating the creditors — Recognizing these problems, the Board has undertaken an "advisory visit program" for member banks, to assist creditors in understanding many of the complicated provisions of the regulations. Evidence gathered from the examination of such banks indicates that ignorance of the law's many parts is "the single most significant obstacle to full compliance."\(^{160}\) A recent report of the Board to Congress reveals that the program is working well.\(^{161}\)

2. Educating the consumers — Responses to questions in the survey reveal widespread ignorance of those criteria which creditors may not legally employ in the granting of credit.\(^{162}\) As indicated below in Table 5, only 59% of the respondents knew that race was an illegal criterion, while that figure for nonwhite respondents was less than 50%. Only 52% overall and 43% of women recognized sex as an impermissible factor to use in granting credit, while only one in five respondents knew marital status to be illegal. Fewer than one in five labelled age an illegal criterion, possibly because of confusion over whether "age" referred to discrimination against the elderly or to age discrimination generally.

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\(^{160}\) Board of Governors of the Federal Reserve System, supra note 125, at 4.

\(^{161}\) Id.

\(^{162}\) Such ignorance is no doubt due in part to the time when the survey was conducted—just six months after the ECOA amendments took effect.
| TABLE 5 |

PERCEIVED ILLEGALITY OF VARIOUS CREDIT-GRANTING CRITERIA

Percent indicating they thought it was illegal for creditor to use:

<table>
<thead>
<tr>
<th>Age</th>
<th>Race</th>
<th>Sex</th>
<th>Marital status</th>
</tr>
</thead>
<tbody>
<tr>
<td>All respondents</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Age</td>
<td>Race</td>
<td>Sex</td>
<td>Marital status</td>
</tr>
<tr>
<td>18-25</td>
<td>15</td>
<td>70</td>
<td>63</td>
</tr>
<tr>
<td>25-34</td>
<td>25</td>
<td>80</td>
<td>72</td>
</tr>
<tr>
<td>35-44</td>
<td>20</td>
<td>63</td>
<td>55</td>
</tr>
<tr>
<td>45-54</td>
<td>21</td>
<td>60</td>
<td>55</td>
</tr>
<tr>
<td>55-64</td>
<td>15</td>
<td>51</td>
<td>47</td>
</tr>
<tr>
<td>65 or older</td>
<td>9</td>
<td>33</td>
<td>28</td>
</tr>
</tbody>
</table>

Family income

<table>
<thead>
<tr>
<th>Income Level</th>
<th>Age</th>
<th>Race</th>
<th>Sex</th>
<th>Marital status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than $5000</td>
<td>12</td>
<td>37</td>
<td>30</td>
<td>12</td>
</tr>
<tr>
<td>$5,000 - 9,999</td>
<td>15</td>
<td>54</td>
<td>48</td>
<td>17</td>
</tr>
<tr>
<td>$10,000 - 14,999</td>
<td>17</td>
<td>66</td>
<td>58</td>
<td>18</td>
</tr>
<tr>
<td>$15,000 - 19,999</td>
<td>21</td>
<td>68</td>
<td>61</td>
<td>24</td>
</tr>
<tr>
<td>$20,000 - 24,999</td>
<td>24</td>
<td>70</td>
<td>67</td>
<td>26</td>
</tr>
<tr>
<td>$25,000 or over</td>
<td>26</td>
<td>75</td>
<td>66</td>
<td>29</td>
</tr>
</tbody>
</table>

Age of respondent

<table>
<thead>
<tr>
<th>Age Group</th>
<th>Age</th>
<th>Race</th>
<th>Sex</th>
<th>Marital status</th>
</tr>
</thead>
<tbody>
<tr>
<td>18-25</td>
<td>15</td>
<td>70</td>
<td>63</td>
<td>22</td>
</tr>
<tr>
<td>25-34</td>
<td>25</td>
<td>80</td>
<td>72</td>
<td>27</td>
</tr>
<tr>
<td>35-44</td>
<td>20</td>
<td>63</td>
<td>55</td>
<td>25</td>
</tr>
<tr>
<td>45-54</td>
<td>21</td>
<td>60</td>
<td>55</td>
<td>22</td>
</tr>
<tr>
<td>55-64</td>
<td>15</td>
<td>51</td>
<td>47</td>
<td>14</td>
</tr>
<tr>
<td>65 or older</td>
<td>9</td>
<td>33</td>
<td>28</td>
<td>8</td>
</tr>
</tbody>
</table>

Education of respondent

<table>
<thead>
<tr>
<th>Education Level</th>
<th>Age</th>
<th>Race</th>
<th>Sex</th>
<th>Marital status</th>
</tr>
</thead>
<tbody>
<tr>
<td>8th grade or less</td>
<td>8</td>
<td>27</td>
<td>19</td>
<td>6</td>
</tr>
<tr>
<td>Some high school</td>
<td>15</td>
<td>46</td>
<td>39</td>
<td>13</td>
</tr>
<tr>
<td>High school graduate</td>
<td>16</td>
<td>60</td>
<td>57</td>
<td>20</td>
</tr>
<tr>
<td>Some college</td>
<td>25</td>
<td>77</td>
<td>70</td>
<td>28</td>
</tr>
<tr>
<td>College graduate</td>
<td>27</td>
<td>84</td>
<td>79</td>
<td>32</td>
</tr>
</tbody>
</table>

Race

<table>
<thead>
<tr>
<th>Race</th>
<th>Age</th>
<th>Race</th>
<th>Sex</th>
<th>Marital status</th>
</tr>
</thead>
<tbody>
<tr>
<td>White</td>
<td>18</td>
<td>61</td>
<td>55</td>
<td>20</td>
</tr>
<tr>
<td>Black</td>
<td>17</td>
<td>46</td>
<td>42</td>
<td>18</td>
</tr>
<tr>
<td>Other</td>
<td>15</td>
<td>50</td>
<td>41</td>
<td>14</td>
</tr>
</tbody>
</table>

Sex

<table>
<thead>
<tr>
<th>Sex</th>
<th>Age</th>
<th>Race</th>
<th>Sex</th>
<th>Marital status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>21</td>
<td>64</td>
<td>58</td>
<td>20</td>
</tr>
<tr>
<td>Female</td>
<td>13</td>
<td>51</td>
<td>43</td>
<td>20</td>
</tr>
</tbody>
</table>

The demographic factor which clearly distinguishes respondents on their knowledge of these criteria is, not surprisingly, their level of education. This is a hopeful sign, however, for it seems to indicate that educational efforts are likely to succeed. Based on this assumption, the Board has issued a series of consumer-oriented pamphlets designed to inform consumers in layman’s terms what the ECOA permits and prohibits and where aggrieved applicants can go for help with their problems.183 Representatives of the Board are also participating in a number of seminars and presentations designed to give greater publicity to

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consumer credit protection laws, including the ECOA.\textsuperscript{164}

An earlier version of Regulation B\textsuperscript{165} required creditors to provide a summary statement of the ECOA\textsuperscript{166} to all applicants, whereas the current regulations only require that rejected applicants be provided such a statement.\textsuperscript{167} Further educational efforts might well include a return to the former provision, so that all who apply for credit are made as fully aware of their rights under the ECOA as they now are of interest rates under the Truth in Lending Act.\textsuperscript{168}

\textbf{D. Race Discrimination and the Effects Test}

Even after adjustment is made for a number of factors pertaining to race, for example, and length of time at present address, the reported refusal rate for nonwhites is still higher than it is for whites. If this reported difference represents an actual difference, \textit{i.e.} if creditors actually deny credit more often to nonwhites than to whites, all other things being equal, how might it be decided whether such conduct constitutes discrimination under the ECOA? Since congressional intent was that the effects test be applied, it is necessary to imagine how a court might apply that test in a credit discrimination suit.

The Federal Reserve Board has suggested a scenario for such a suit.\textsuperscript{169} In the first step of a three-step process, the plaintiff would attempt to show that a certain standard used for deciding to whom credit is granted, although neutral on its face, results in the denial of credit more often to one group than another. Following the \textit{Albermarle Paper Co.} procedure,\textsuperscript{170} this would constitute a prima facie showing of discrimination. The burden would then shift to the creditor to demonstrate that the credit standard is customarily applied to all applicants, and that the standard has a manifest relationship to creditworthiness. The plaintiff would then have the option of moving to the third step, which, analogizing to \textit{Albermarle}, would involve attempting to prove that an alternative credit standard would have a lesser adverse impact

\textsuperscript{164} Board of Governors of the Federal Reserve System, \textit{supra} note 125, at 18-19.
\textsuperscript{166} Such a statement is codified at 12 C.F.R. \textsection 202.9(b) (1979).
\textsuperscript{167} 12 C.F.R. \textsection 202.9(a) (1979).
\textsuperscript{168} 15 U.S.C. \textsection 1631(a) (1976). "By 1977 levels of [interest] rate awareness reached 54.4 per cent for closed-end credit from institutional sources and 64.7 per cent and 71.3 per cent for retail revolving credit and bank credit-card credit respectively." T. Durkin & G. Ellienhausen, \textit{supra} note 131, at 5.
\textsuperscript{170} See text accompanying notes 65-68 \textit{supra}.
upon the affected group and that the alternative would serve the creditor's legitimate interests as well as the original standard.

The *Gilbert* decision, however, casts doubts on how seriously the Supreme Court views the effects test as applied in *Albemarle*. Given the lack of guidelines in Regulation B as to precisely how the effects test applies in the credit area, "creditors and their lawyers are justifiably concerned about the prospect of the effects test being applied." The Board suggests that those few creditors who use "demonstrably and statistically sound, empirically derived credit systems" will have little trouble, since the very existence of the system provides a rebuttal to alleged discrimination, in that it demonstrates the relationship of the criteria to the creditor's legitimate interests. For the majority of creditors who use a "judgmental system," however, the Board is not so optimistic. It merely suggests that lending institutions carefully examine their practices in the credit-granting process to ensure that they are "rational" and that factors are used which have "a manifest relationship to creditworthiness."

Whether the Board should attempt to end this confusion by specifically regulating the precise items which may and may not be used in the granting of credit is, however, still open to doubt. There is of yet no judicial interpretation of the effects test in this area. Since the test itself was created by the courts, it can be argued that it would be best to wait for a judicial decision as to how the test is to apply under the ECOA. In addition, as one commentator has made clear, there are vast differences between the employment and credit arenas which may cause a strict interpretation of the regulations to reduce the amount of available credit, thereby harming the very people the ECOA was designed to assist.

**E. Administrative Enforcement**

1. *Current enforcement efforts* — Within the past three years, a number of agencies have taken steps which indicate that the ECOA may be vigorously enforced even if private actions remain scarce. The first Federal Trade Commission (FTC) consent order

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172 Division of Consumer Affairs, Federal Reserve Board, supra note 169, at 107.

173 *Id.*

174 *Id.*

issued under the Act came in February 1977 against a Chicago mail-order house which had discriminated in several ways on the bases of sex and marital status. In November 1978, the FTC announced that it had reached a settlement with Bloomingdale's department store whereby the store paid a civil fine of $50,000 and agreed to contact all rejected applicants whose rights might have been violated and invite them to reapply. The store was accused of failing to consider the income of credit applicants derived from alimony, child support payments, and part-time employment, as well as neglecting to inform rejected applicants of the precise reasons for the actions. The FTC enjoined Montgomery Ward in a consent judgment from failing to provide a statement of the specific reasons applicants were denied credit. More specifically, the company was prohibited from failing to disclose several factors actually considered in taking adverse actions, from giving false or misleading reasons for adverse action that the company actually did not use in its credit scoring system, and from giving general reasons for adverse action rather than specific ones. Most recently, in the first action under the ECOA involving a finance company, the Commission issued a consent order against Westinghouse Credit Company requiring redress for alleged past violations of the Act and implementation of an educational program to prevent future violations.

The Justice Department has also acted under the authority given it by the 1976 amendments to the ECOA. In April 1978, it filed its first action under the Act, alleging that a Dallas real estate developer refused to sell home sites or make mortgages available to blacks. A court order was sought to enjoin the de-

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175 Aldens violated no fewer than eight regulations and was ordered to cease and desist from the following:

discrimination against credit applicants on account of sex or marital status, and employing these factors in a credit scoring system contrary to Regulation B; failing to recognize the receipt of regular child support payments as income when evaluating credit applications; requesting the name of the applicant's spouse upon application for an unsecured credit account in a non-community property state; failing to preserve certain credit records including reports from credit reporting agencies; and neglecting to provide rejected credit applicants with specific reasons within the specified time period.

Id.


178 Id.


fendant from further violations of the Act and to require the developer to correct the lingering effects of its alleged discriminatory practices. The case was settled in November 1978 by entry of a consent decree providing for injunctive and affirmative relief. The Department also brought suit in May 1978 against a Pennsylvania kitchenware company, alleging that it had discriminated against blacks, Hispanics, and married persons in installment purchases by applying different standards of creditworthiness to different demographic subgroups. In addition to injunctive relief, the suit seeks to make the company take corrective measures including the payment of monetary damages. These cases are typical of the others brought by the Justice Department in the past two years.

The Federal Reserve Board continues to emphasize examinations of member banks as the chief weapon in its potential enforcement arsenal. Governor Jackson of the Board has informed

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184 Id.
186 5 CONS. CRED. GUIDE (CCH), Report No. 253 (May 18, 1978), at 5.
187 Id.
188 A case filed in May 1978, United States v. Sumner Advertising Agency (W.D. Tex.), alleges that a marketing company, two of its employees, and two land developers violated the ECOA by discouraging blacks, Hispanics, persons on public assistance, and persons over 65 years of age from applying for financing the purchase of residential land. A consent decree was filed in September 1978 against three of the five defendants who had ceased marketing residential property, with the proviso that if any of the three were to resume the residential property business, the federal government would have to be notified and semianual reports submitted demonstrating compliance with the ECOA. As of February 1979, the case was still pending against the remaining two defendants. REPORT OF THE ATTORNEY GENERAL, supra note 185. A case filed in October 1978 alleged sex and marital status discrimination by a mortgage company in selecting applicants to be given mortgage loans. In United States v. Citizens Mortgage Co. (E.D. Va.), a court-approved consent decree filed simultaneously with the complaint provided for injunctive relief, application of uniform and specific lending standards spelled out in the decree, a program for educating employees of the defendant about their responsibilities under the decree and the ECOA, notice to real estate brokers who deal with the defendant of non-discriminatory loan standards now used, and public notice of the same. The decree applies to defendant's ten offices in five states. Id. Most recently, in January 1979, a consent decree was announced by the Department for a suit brought against a Kentucky bank, which permanently enjoins the bank from discriminating in favor of male loan applicants, discounting the income of married women in loan applications, ignoring sources of income other than from employment, and failing to provide a written notice of denial to loan applicant. 5 CONS. CRED. GUIDE (CCH), Report No. 271 (January 25, 1979) at 2-3.
189 Between April 1977 and August 1978, Board examiners found nearly 18,000 possible violations of Regulation B among inspections of 861 state member banks, almost half relating to nonconforming application forms. Another quarter related to incomplete notifications of reasons for credit denials. The major substantive violations of Regulation B concerned improper requests for the signature of a nonapplicant spouse. "A good number of these institutions have now been brought into compliance after further clarification as to what Regulation B requires. The Federal Reserve Banks are dealing with the others on
Congress that the agency’s enforcement program “seeks to effect voluntary compliance whenever possible,” although he promised that the Board would take “appropriate administrative action” (including referral of some matters to the Attorney General) “when warranted.” Jackson also stated that the Board “could decide to make the identity of the [offending] institutions public” if repeated violations occur and voluntary compliance is not obtained.

2. Enforcement guidelines proposed — Another sign of the growing commitment to making the ECOA work came when five enforcing agencies proposed uniform guidelines for administrative enforcement of the ECOA, Regulation B, and the Fair Housing Act, the general objective of which is to require corrective action from violators of the regulations and to promote future compliance. For example, if a creditor runs afoul of the prohibition against discouraging applications on a prohibited basis, the proposed policy suggests that “[t]he creditor will be required to solicit credit applications from the discouraged class through affirmative advertising . . . subject to review by the enforcing agency.” Even more severe is the proposed action to be taken against those creditors who employ discriminatory elements in their credit evaluation systems. A creditor found to have discriminated in this manner “will be required to re-evaluate, in accordance with a non-discriminatory written loan policy, all credit applications rejected during a period of time to be determined by the agency.” In addition, all applicants rejected by the creditor under the discriminatory system must be invited to reapply, and refunds furnished to them of “any fees or costs paid . . . in connection with their original applications.”

As of November 1979, these guidelines had been sent to an interdepartmental “Examination Council” made up of representatives of the five agencies responsible for their enforcement. This

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110 Id. at 744.

111 Id.

112 The agencies involved were the Board of Governors of the Federal Reserve System; the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, and the National Credit Union Administration.


115 See note 81 supra for the Regulation B definition of “prohibited basis.”


117 Id.

118 Id.
Council will rewrite the guidelines in accordance with their potential feasibility as determined by, for example, bank examiners for the Federal Reserve Board checking with various types of regulated institutions. The guidelines will "probably not be submitted again for public comment," and will go into effect sometime in early 1980.

3. Greater enforcement initiative required — At this stage, it is difficult to assess the performance of those agencies charged with enforcing the ECOA. According to the Federal Reserve Board's 1978 report to Congress, agency action in this area has come largely in response to consumer complaints, which have been few in number. In his 1978 report to Congress on the ECOA, the Attorney General suggested three possible explanations for the lack of complaints and lawsuits: consumer ignorance of the law; the willingness of creditors to change a practice brought to their attention by enforcement agencies, thereby avoiding a lawsuit; and the tendency of creditors to alter credit standards so as to grant credit to rejected applicants who complain to the creditor, thereby allowing the underlying discrimination to continue.

Whether enforcement agencies should continue to act only upon receipt of consumer complaints is highly questionable. Although Congress intended that private actions be the primary enforcement tool against creditor violations of the ECOA, it is also clear that the tripartite division of enforcement among private citizens, the regulatory agencies, and the Attorney General was believed necessary to ensure the strong enforcement of the Act. Mere reactive measures fail to reflect the vigorous efforts which those who passed the Act thought were necessary to deal with equal credit violations.

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2 Id.
3 BOAR D OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, supra note 125, at 2.
4 ATTORNEY GENERAL, REPORT TO CONGRESS PURSUANT TO THE EQUAL CREDIT OPPORTUNITY ACT AMENDMENTS OF 1976, reprinted in 5 CONS. CRED. GUIDE (CCH) ¶ 98,040 (1978) [hereinafter referred to as 1977 ATTORNEY GENERAL REPORT].
5 See text accompanying notes 162-64 supra and Table 5 for evidence of such ignorance.
8 "Since discrimination is inherently insidious, almost presumptively intentional, yet often difficult to detect and ferret out, the Committee believes that strong enforcement of this Act is essential to accomplishing its purposes. The bill therefore provides enforcement opportunities of three kinds." Id.
Support for this position is found in the survey. Respondents were asked if they had ever been treated unfairly in any credit transactions, and if so, whether any action was taken. The 388 respondents who reported being treated unfairly and who took action took a total of 535 actions, 61.5% of which involved complaining to the creditor. In only thirteen cases did a consumer complain to a public third party such as the government or the media about unfair treatment, reflecting the paucity of complaints received by federal enforcement agencies. Although the problems most often mentioned by those who believed that they had been treated unfairly involved a credit refusal or limitation, not a single respondent complaining to a public third party mentioned the problem of credit availability. The number of cases is too small to allow generalizations, but this result certainly suggests that the agencies charged with enforcing the ECOA fail to receive a representative sampling of consumer credit complaints. To permit these agencies to act only when prodded by consumer complaints thus risks exclusion of many equal credit violations, a result contrary to the vigorous eradication of unfair credit practices that the ECOA was designed to ensure.

Despite this conclusion, few can doubt that the ECOA enforcement agencies generally lack the resources required to institute aggressive investigations of creditor practices in their respective areas to discover potential violations of the Act and Regulation B. If such resources were made available, other agencies could create educational enforcement programs similar to the successful one of the Federal Reserve Board. Congressional recognition of the expertise of the Civil Rights Division of the Department of Justice, which formed the basis for inclusion of that agency in the ECOA enforcement arsenal, suggests a more forceful role for the newly reorganized Housing and Credit Section of the Division. Creditors would thereby be put on notice that their activi-

207 The questions were: "In your opinion, have you ever been treated unfairly in your credit transactions? What was the problem? Did you try to do anything about this? What did you do?"
208 T. Durkin & G. Elliehausen, supra note 131, at 29.
209 This figure represents 2.5 percent of all actions taken. Id. at 31.
210 See text accompanying notes 201-04 supra.
211 T. Durkin & G. Elliehausen, supra note 131, at 29.
212 Id. at 30.
213 See notes 189-91 and accompanying text supra.
ties would be as closely monitored as are those of employers and those in the housing field.

CONCLUSION

The Equal Credit Opportunity Act and Regulation B represent an attempt to ensure that all creditworthy individuals are provided with equal access to the economic necessity of credit. While Congress intended that the law be a balancing of consumer and creditor interests, examination of survey results indicates that current practices may not be achieving that goal. The young, the unmarried, and the nonwhite all report having experienced unfavorable credit decisions more often than the rest of the sample, with young and female respondents likely to view such adverse decisions as the result of creditor concern with factors which the law requires they ignore.

Changes in the law and regulations, of course, can alter only creditor practices and not unfounded consumer perceptions. Furthermore, the results of a single survey serve only to reveal potential problem areas at the time the survey was conducted. The suggestions for reform offered here represent changes designed to respond to both the problems suggested by the survey and congressional intent as to how such problems should be handled. Whether the ECOA and Regulation B prove effective in allowing access to the credit market regardless of immutable characteristics can only be discovered by further examination, including surveys, designed to measure the effectiveness of such reform.

—James A. Burns, Jr.