

FOIA MARKER

**This is not a textual record. This is used as an
administrative marker by the William J. Clinton
Presidential Library Staff.**

Collection/Record Group: Clinton Presidential Records
Subgroup/Office of Origin: Counsel Office
Series/Staff Member: Marvin Krislov
Subseries: Steve Neuwirth

OA/ID Number: 8190
FolderID:

Folder Title:
Same Sex Marriage: VHDA [Virginia Housing Development Authority]

Stack:	Row:	Section:	Shelf:	Position:
S	113	3	9	2

February 12, 1996

MEMORANDUM FOR MARVIN KRISLOV

FROM: Chrysanthe Gussis

RE: Possible Theories for a Federal Reserve Board Ruling that the VHDA
"Family" Provision Violates the Equal Credit Opportunity Act.

Under the Equal Credit Opportunity Act (ECOA), it is unlawful to discriminate on the basis of marital status. 15 U.S.C. 1691(a)(1). This means that creditors may not consider whether joint applicants are married in determining credit-worthiness. On its face, the VHDA prohibition violates ECOA. The provision prohibits the Virginia Housing Development Authority (VHDA) from lending to low and moderate income joint applicants who are not a family. "Family" is defined as "two or more individuals related by blood, marriage or adoption."

However, ECOA exempts from liability those who offer credit pursuant to any "special purpose credit program" as determined by Federal Reserve Board regulations. 15 U.S.C. 1691(c)(3). The Federal Reserve regulations include as a special purpose credit "[a]ny credit assistance program expressly authorized by federal or state law for the benefit of an economically disadvantaged class of persons." 12 C.F.R. 202.8(a)(1). VHDA asserts that it is this type of program. The Fed Board leaves it to the agency administering the loan to determine what constitutes such a program. 12 C.F.R. Pt. 202, Supp. I. The agency is responsible for promulgating regulations consistent with Federal and State law. Id.

There are several grounds the Board could put forth to hold the VHDA program invalid. It may rule that the VHDA restriction is not consistent with federal or state law. The "family" provision clearly violates the spirit of ECOA. The Act's legislative history makes clear that special purpose credit programs are encouraged so long as there is no accompanying restriction of credit available to applicants not in the targeted category. S. Rep. 94-589 at 6. Congress wanted to ensure that the special purpose credit program "would not become a loophole for invidious actions against any other group of creditworthy customers." 121 Cong. Rec. 27, 138 (1975) (emphasis in original). The VHDA "family" provision seems to be more designed to exclude a particular group, rather than include those in its targeted category.

The VHDA policy is inconsistent with the Virginia Human Rights Act which declares the state policy to "safeguard all individuals within the Commonwealth from unlawful discrimination because of . . . marital status . . . in real estate transactions." Virginia Code 2.1-715. The Act further provides that "conduct which violates any . . . federal statute or regulation governing discrimination on the basis of . . . marital status . . . shall be an 'unlawful discriminatory practice' for the purposes of this chapter." Virginia Code 2.1-716.

In addition, while the Board provides little regulatory guidance for special purpose credit

programs authorized by law, programs set up by non-profit or for-profit organizations qualify for the exemption only if they are established or administered so as not to discriminate against an applicant on the basis of marital status. 12 C.F.R. 202.8(b)(2). While the VHDA asserts it is not limited by the requirements of 208.8(b)(2) as a program authorized by law, it clearly violates the spirit of that section and thereby is inconsistent with federal law. The VHDA "family" provision was specifically established to discriminate against unmarried joint applicants and promote "traditional" family structures.

There is no relevant caselaw. Prior Board rulings are available from the Federal Reserve.

DATE: FEBRUARY 7, 1996

CLIENT: WHO
LIBRARY: NEWS
FILE: ALLNWS

YOUR SEARCH REQUEST IS:

VIRGINIA HOUSING DEVELOPMENT AUTHORITY AND LENDER OR LENDING AND HOUS! AND
HOUSEHOLD AND DATE=1994

NUMBER OF STORIES FOUND WITH YOUR REQUEST THROUGH:

LEVEL 1... 5

1ST STORY of Level 1 printed in FULL format.

Copyright 1994 News World Communications, Inc.
The Washington Times

July 7, 1994, Thursday, Final Edition

SECTION: Part C; METROPOLITAN TIMES; METROPOLITAN VOICES; Pg. C2

LENGTH: 475 words

HEADLINE: Virginia housing law shift involves issues of fairness

BODY:

In an otherwise complete article on the action of the Virginia Housing Development Authority (VHDA) to change its lending policies to allow loans to people living in unrelated households, the reporter left out an important issue - the principal reasons why VHDA made the change ("Agency opens state loans to gay couples," June 23).

* The long-standing policy that we changed restricted loans to single persons and to "families" defined as two or more people living in an economic unit and related by blood, marriage, or adoption. We chose to change our policy by defining eligible borrowers in terms of single persons and "households."

This allowed us to eliminate the policy's discrimination against unrelated people, without making judgments about what constitutes a family and, we hoped, without the need to confront the governor.

The reason for the change was that our policy was contrary to the Federal Equal Credit Opportunity Act, which bars discrimination on the basis of marital status; all federal mortgage loan programs; secondary mortgage lending programs operated by federally chartered entities, such as Fannie Mae and Freddie Mac; Virginia law, which allows multiple ownership of property; and private-sector lending practices of banks, mortgage bankers, and savings and loans. For this reason, among others, representatives of those institutions, as well as home builders, supported changes to the policy.

In addition, as the article pointed out, there were whole classes of individuals who were unfairly deprived of home-buying opportunities simply because they live in unrelated households. The restricted groups include such people as second cousins, engaged couples, roommates, widowed sisters-in-law or brothers-in-law.

By opposing the policy change, Gov. George Allen and his far-right allies were willing to deny these people the right to secure a loan from VHDA, as they chased in full cry after the specter of gays and unmarried couples who might also benefit from the changed policy.

The governor's concern about gays and unmarried couples owning a home with VHDA loans extends only to those that happen to be young and healthy - as he would have carved out a special exemption for the elderly and the disabled.

The Washington Times, July 7, 1994

Because of the inconsistency of our lending policy with every other public and private lending practice, the effect on the state's reputation and the potential for economic investment; and our belief that VHDA should be assisting low-income people to become homeowners and not making judgments about how "family" ought to be defined, we saw the previous policy as flawed, morally, legally, and practically. That is way it was changed.

ALBERT C. EISENBERG

Vice Chairman

Arlington County Board

Arlington

LANGUAGE: ENGLISH

LOAD-DATE: July 7, 1994

DATE: FEBRUARY 7, 1996

CLIENT: WHO
LIBRARY: NEWS
FILE: ALLNWS

YOUR SEARCH REQUEST IS:
VIRGINIA HOUSING AND HOUSEHOLD AND DATE=1994

NUMBER OF STORIES FOUND WITH YOUR REQUEST THROUGH:
LEVEL 1... 17

12TH STORY of Level 1 printed in FULL format.

Copyright 1994 The Washington Post
The Washington Post

June 22, 1994, Wednesday, Final Edition

SECTION: FIRST SECTION; PAGE A13

LENGTH: 564 words

HEADLINE: Defying Allen, Panel Approves Home Loans to Unrelated Couples

SERIES: Occasional

BYLINE: Peter Baker, Washington Post Staff Writer

DATELINE: RICHMOND, June 21, 1994

BODY:

Despite the vehement objections of Gov. George Allen, Virginia housing commissioners approved new regulations today allowing homosexual couples, unmarried heterosexuals and other unrelated people to jointly obtain state housing loans. } "household"

The 6 to 1 vote by the Virginia Housing Development Authority was in defiance of Allen, who told board members they should reject the proposed change because it would condone living arrangements he considers immoral.

"It's not about people's relationships or even what constitutes a relationship. That's not for us to decide," said Commissioner Albert C. Eisenberg, who also is an Arlington County Board member. "Rather, it's about fulfilling our mission to provide housing to low-income people."

The decision was the second time in his five months in office that Allen has been thwarted in trying to advance his conservative social agenda. In March, the General Assembly passed a watered-down version of his proposal to require parental notification before teenage girls can have abortions, prompting Allen to veto the bill.

The dispute over housing loans focuses on a long-standing state rule that has required borrowers applying jointly to be related by blood, marriage or adoption. } "family"

Housing officials proposed dropping the requirement last year to make Virginia policy conform with federal rules and the practices of most private lenders. But the idea triggered furious protest from Allen and some of his supporters, who said the housing authority would be redefining family to include live-in lovers.

"The issue here is that the mission of the VHDA is to provide low-interest loans to low-income families.

The Washington Post, June 22, 1994

That's families," said State Treasurer Ronald L. Tillett, Allen's only representative on the panel and the sole dissenter in today's vote. "This changes that mission."

The board, dominated by more-liberal commissioners appointed by past Democratic governors, refused to back down. The only compromise offered was a bit of wordsmithing, changing the term "family" to "household."

It didn't persuade Tillett. "It's intellectual dishonesty," he said. "It's semantics. It's a way of making adjustments in wording to accomplish what was originally intended."

Created in 1972, the housing authority is an independent agency that does not use state tax dollars and therefore is not under Allen's control. The authority makes about 4,000 mortgage loans a year to low-income residents who benefit from lower interest rates, smaller down payment requirements and looser debt guidelines than they would face from other lenders.

Authority officials said the rule change was a result of concern that unrelated elderly and disabled Virginians could not pool their resources and apply for such loans. The proposal won the support of the real estate and mortgage banking industries.

Gay-rights groups complained that Allen twisted the issue into one dealing with homosexuality for political gain. //

"People tried to portray this as a gay issue, which it wasn't," said Ray McCawley, a gay Richmond resident who has attended housing authority meetings since the dispute arose. "It's a matter of fairness. VHDA was trying to do the right thing, and somebody tried to make it an issue."

But Allen's conservative supporters said the authority could have drawn up exemptions for the elderly and disabled if that were truly the motivation. //

LANGUAGE: ENGLISH

LOAD-DATE: June 23, 1994

448 S.E.2d 417 printed in FULL format.

LOUISE R. EURE v. JEFFERSON NATIONAL BANK

Record No. 931353

SUPREME COURT OF VIRGINIA

248 Va. 245; 448 S.E.2d 417; 1994 Va. LEXIS 116

September 16, 1994, Decided

PRIOR HISTORY: [***1] FROM THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE. Robert S. Wahab, Jr., Judge Designate.

COUNSEL: Thomas F. McPhaul (Robert C. Nusbaum; John M. McGowan; Hofheimer, Nusbaum, McPhaul & Samuels, on briefs), for appellant.

Gregory S. Larsen (Roy, Laine, Larsen, Romm & Lascara, on brief), for appellee.

JUDGES: Present: Carrico, C.J., Compton, Stephenson, Lacy, Hassell, and Keenan, JJ., and Poff, Senior Justice

OPINIONBY: HARRY L. CARRICO

OPINION: [*246] [**417] OPINION BY CHIEF JUSTICE HARRY L. CARRICO

This case involves the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 through 1691f (1988 & Supp. IV 1992) (ECOA or the Act). In pertinent part, the Act provides that "it shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . on the basis of . . . marital status." 15 U.S.C. § 1691(a)(1). Any creditor who fails to comply with the requirements of the Act shall be [**418] liable to an aggrieved applicant for actual damages, 15 U.S.C. § 1691e(a), and for punitive damages not to exceed \$ 10,000, 15 U.S.C. § 1691e(b). [*247] Pursuant to § 1691b(a)(1), the Federal Reserve Board has prescribed regulations to carry out the purposes of the [***2] Act. One such regulation provides that "a creditor shall not require the signature of an applicant's spouse . . . , other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested." 12 C.F.R. § 202.7(d)(1) (1993).

In the present case, the record shows that on July 17,

1987, Chesapeake Bay Builders, Inc. (Bay Builders) executed a promissory note in the sum of \$ 100,000, payable to the order of Chesapeake Bank and Trust (Chesapeake Bank), the predecessor in interest to the appellee, Jefferson National Bank (Jefferson National). On the same date, Charles H. Eure, Jr., who was a principal in Bay Builders, and his spouse, Louise R. Eure, executed an "Unconditional Guaranty" in which they agreed to guarantee payment of "all liabilities" of Bay Builders to Chesapeake Bank. n1

n1 Similar guaranties were executed by other principals in Bay Builders and their spouses, namely, Arnold Abrons and Annette A. Abrons, William M. Verebely, Jr., and Claudia B. Verebely, John H. Martin and Virginia B. Martin, and David E. Blevins and Nancy B. Blevins.

[***3]

Bay Builders defaulted in payment of the note, and Jefferson National made demand upon the guarantors to pay the balance due. When the demand was not met, Jefferson National brought this action against Bay Builders and the guarantors seeking to recover the sum of \$ 72,714.10, plus interest, attorney's fees, and costs. n2

n2 At the time the action was brought, Charles H. Eure, Jr., was deceased, and his estate was named a party defendant to the action.

In her responsive pleadings, Louise R. Eure asserted the defense that she was required to sign the guaranty "solely on the basis of her marital status as the wife of Charles H. Eure, Jr.," that the transaction violated the Act, and, therefore, that the guaranty was void as applied to her. In a pretrial hearing, the trial court struck Mrs. Eure's defense and later entered judgment against her for the balance due on the promissory note executed

by Bay Builders.

We awarded Mrs. Eure an appeal limited to the question whether the trial court erred in ruling that the Act does [***4] not provide a defense to a person whose signature has been required on a credit instrument solely because of his or her status as a spouse of [*248] an applicant for credit. Finding that the court erred in its ruling, we will reverse.

At the outset of our discussion, we note that Mrs. Eure had no interest in Bay Builders, that she was not a joint applicant for credit, and that Chesapeake Bank made no inquiry concerning Mrs. Eure's credit standing. Further, Jefferson National does not question Mr. Eure's creditworthiness; indeed, a financial statement submitted to Chesapeake Bank at the time it extended credit to Bay Builders showed that Mr. Eure earned more than \$ 200,000 per year as president of Norfolk Shipbuilding and Drydock Corp. and that he had a net worth in excess of \$ 2 million.

Nor can it seriously be questioned that Mrs. Eure's signature was required on the guaranty. While Chesapeake Bank's loan officer testified that "there was no banking regulation, rule or policy which required" Mrs. Eure's signature, he admitted it was "a fairly common practice" to "ask the wife [of a stockholder in a closely held corporation, such as Bay Builders,] to sign on board a guaranty." Furthermore, [***5] one of the "terms and conditions" upon which Chesapeake Bank committed itself to make the \$ 100,000 loan in question was that Mrs. Eure would be a guarantor, along with her spouse, of the promissory note covering the loan.

This reduces Jefferson National's argument to the proposition that the Act may not be used defensively to avoid liability on a credit instrument. n3 Jefferson National maintains [***419] that the Act specifically provides only for the recovery of damages, which may be sought by way of counterclaim, and that, had Congress intended to provide additional relief in the form of a defense, "it would have included such a provision" in the Act.

n3 Jefferson National does argue that any right Mrs. Eure may have had to rely on the ECOA violation either for the recovery of damages or for defensive use was barred by the two-year statute of limitations contained in the Act. 15 U.S.C. § 1691e(f) (1988). Mrs. Eure concedes that had she sought to recover damages for the ECOA violation, rather than to assert it as a defense, her claim would have been barred. But she says the two-year statute does not bar defensive use of the violation, and we agree.

United States v. Western Pac. R.R. Co., 352 U.S. 59, 72, 1 L. Ed. 2d 126, 77 S. Ct. 161 (1956) (using statute of limitations to cut off defense is contrary to statute's purpose of keeping stale litigation out of the courts).

[***6]

Jefferson National opines that Congress's intent to not provide a defense in the Act is evident from a comparison of its provisions with those of the Truth in Lending Act, 15 U.S.C. §§ 1601 through 1667e (1988 & Supp. IV 1992). Jefferson National points out that, originally, the Truth in Lending Act contained no provision [*249] allowing it to serve as a defense; later, however, it was amended to provide that it did not bar a consumer from "asserting a violation [of its provisions] as an original action, or as a defense or counterclaim to an action to collect amounts owed by the consumer." 15 U.S.C. § 1640(h). The legislation under consideration here has not been similarly amended, Jefferson National says, and, hence, ECOA "simply does not contemplate the extraordinary relief of debt avoidance."

On the other hand, Mrs. Eure argues that she does not seek "invalidation of the debt" covered by the promissory note but only to have the guaranty she executed declared unenforceable as to her. She concedes the correctness of decisions cited by Jefferson National wherein use of the Act as a defensive measure was denied. See [***7], e.g., *Riggs Nat'l Bank v. Lynch*, 829 F. Supp 163 (E.D. Va. 1993); *CMF Virginia Land, L.P. v. Brinson*, 806 F. Supp. 90 (E.D. Va. 1992). However, she distinguishes those decisions on the ground that, in each instance, both the borrower and the borrower's spouse sought to invalidate a credit instrument on the basis of a violation of the Act. To permit use of the Act as a defense in such circumstances, Mrs. Eure says, "would allow the primary debtor to escape liability on a debt instrument executed independently of any ECOA violation."

Here, Mrs. Eure maintains, she was not a primary debtor on the loan made by Chesapeake Bank; she merely guaranteed a loan made to her spouse's corporation, a transaction from which she derived no benefit. She says that "allowing only her to escape liability on an instrument executed solely as a result of an ECOA violation would further the goals of ECOA to deter discrimination in credit transactions while reinforcing the necessary expectations that primary debtors, debtors who have received the benefits of the loan, will remain liable for repayment of the debt."

Continuing, Mrs. Eure asserts [***8] that Jefferson National is incorrect in saying that Congress intended the provision for the award of actual and punitive dam-

ages to be the exclusive remedy for ECOA violations. Mrs. Eure points out that Congress "did more" than provide a remedy by way of damages; it granted both state and federal courts broad equitable jurisdiction in enforcing the Act. In 15 U.S.C. § 1691e(c), "the appropriate United States district court or any other court of competent jurisdiction" is given the authority to "grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under [*250] [ECOA]." And this grant of equitable jurisdiction, Mrs. Eure maintains, distinguishes ECOA from the Truth in Lending Act, which contains no similar grant.

Furthermore, Mrs. Eure argues, "it is a fundamental principle of contract law that contracts executed in violation of law cannot be enforced." The guaranty agreement she signed, Mrs. Eure maintains, is "a contract growing out of an illegal act and a contract contrary to public policy" under both ECOA and a similar Virginia statute. n4 She says that both federal and Virginia decisions provide [**420] "the authority [***9] to set aside the obligations of an instrument executed in violation of ECOA." Hence, she concludes, a decision by this Court "not to enforce a Guaranty Agreement procured in violation of ECOA will be supported by clear precedent."

n4 Va. Code §§ 59.1-21.19 through 59.1-21.28 comprise Virginia's Equal Credit Opportunity Act. The provisions of the Virginia act generally parallel those of the federal act.

We agree that "clear precedent" will support such a decision. Indeed, the clearest federal precedent on the subject is found in a decision of the Supreme Court of the United States. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 70 L. Ed. 2d 833, 102 S. Ct. 851 (1982), is directly on point on the question whether the specific remedies provided for the violation of an act of Congress must be deemed exclusive or whether the violation may also be used defensively to avoid the obligation of a contract.

Mullins involved a contract requiring the steel company to [***10] make contributions to employee health and retirement funds based on the hours worked by the company's miners and on the coal it produced and purchased from others. The company made the contributions based on the hours its miners worked and on the coal it produced. However, the company failed to report the coal it purchased from others and to make contributions based on the purchased coal. The company defended its failure on the ground that the requirement to make contributions based on purchased coal was void and unenforceable as violative of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and section 8(e) of

the National Labor Relations Act, 29 U.S.C. § 158(e).

The Court noted that "sections 1 and 2 of the Sherman Act prohibit contracts, combinations, and conspiracies in restraint of trade, as well as monopolization and attempts to monopolize." 455 U.S. at 78. The Court also noted that "section 8(e) of the [*251] NLRA forbids contracts between a union and an employer whereby the employer agrees to cease doing business with or to cease handling the products [***11] of another employer." *Id.*

The respondent espoused two propositions which, he said, were established by the Court's earlier opinion in *Kelly v. Kosuga*, 358 U.S. 516, 3 L. Ed. 2d 475, 79 S. Ct. 429 (1959), first, "that when a contract is wholly performed on one side, the defense of illegality to enforcing performance on the other side will not be entertained," and, second, "that the express remedies provided by the Sherman Act are not to be added to by including the avoidance of contracts as a sanction." *Mullins*, 455 U.S. at 81. In response, the Court stated it was apparent from the opinion in *Kosuga* that "both propositions were subject to the limitation that the illegality defense should be entertained in those circumstances where its rejection would be to enforce conduct that the antitrust laws forbid." *Mullins*, 455 U.S. at 81-82.

The Court held that while "employer contributions to union welfare funds may be quite legal more often than not, . . . an agreement linking contributions to purchased [***12] coal, if illegal, is subject to the defense of illegality." *Id.* at 82. And the Court allowed the defense notwithstanding the fact that both the Sherman Act and the NLRA provided specific remedies for their violation. Criminal penalties as well as civil relief by way of treble damages and injunction are provided for violations of the Sherman Act's provisions. 15 U.S.C. §§ 1, 2, 15, and 26. For violations of the NLRA, the National Labor Relations Board is empowered "to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce." 29 U.S.C. § 160(a). Neither act contains any provision permitting defensive use of a violation to avoid liability under a contract. In allowing such defensive use in *Mullins*, the Court stated:

Refusing to enforce a promise that is illegal under the antitrust or labor laws is not providing an additional remedy contrary to the will of Congress. A defendant proffering the defense seeks only to be relieved of an illegal obligation and does not ask any affirmative remedy, [***13] based on the antitrust or labor laws. "Any one sued upon a contract may set up as a defence that it is a violation of [an] act of Congress, and if found to be so,

that fact will constitute a good defence to the action."
[**421]

[*252] *Id.* at 81 n.7 (quoting *Bement v. National Harrow Co.*, 186 U.S. 70, 88, 46 L. Ed. 1058, 22 S. Ct. 747 (1902)).

These views apply with equal force here. To deny Mrs. Eure the right to use the ECOA violation defensively would be to enforce conduct that is forbidden by the Act. Such use, therefore, would not be contrary to the will of Congress or in any manner inconsistent with or derogatory of the remedies specifically provided by the Act. Indeed, to permit such use would give effect to the clear legislative intent to deter discrimination in the particular area of endeavor regulated by ECOA.

Virginia law is in accord. In *Blick v. Marks, Stokes and Harrison*, 234 Va. 60, 360 S.E.2d 345 (1987), we stated that "generally, a contract based on an act forbidden by a statute is void and no action will lie to [***14] enforce the contract." *Id.* at 64, 360 S.E.2d at 348. While *Blick* was decided under an exception to the general rule, applicable if it is manifest the General Assembly did not intend to render contracts made in contravention of the statute void, *id.*, we cautioned that the line of cases applying the exception should be "compared, not confused, with . . . a different set of decisions," *id.* at 66, 360 S.E.2d at 349. These "different" decisions, we said, stand for the proposition that a contract made in violation of a statute enacted to protect the public against fraud or imposition or to safeguard the

public health or morals "is illegal and unenforceable by the guilty party." *Id.* (quoting *Lasting Products Co. v. Genovese*, 197 Va. 1, 8, 87 S.E.2d 811, 816 (1955)).

Listed as an example of the "different" decisions was *Bowen Electric Co. v. Foley*, 194 Va. 92, 72 S.E.2d 388 (1952), where we held that the plaintiff-appellant's failure to register as a contractor as required by statute barred its [***15] recovery of the balance due on a contract for the erection of an outdoor theater. Also listed was *Colbert v. Ashland Construction Co.*, 176 Va. 500, 11 S.E.2d 612 (1940), where we held that the plaintiff-appellant's failure to register under the fictitious name statute barred his recovery of the balance due on a construction contract.

We think that ECOA, like the statutes involved in *Foley* and *Colbert*, is a statute enacted to protect the public against fraud or imposition or to safeguard the public health or morals. In both *Foley* and *Colbert*, we allowed defensive use of a statutory violation to avoid liability under a contract. We hold that Mrs. Eure was entitled to make similar use of the ECOA violation involved [*253] in this case to avoid liability, but only her liability, under the guaranty agreement she executed in favor of Chesapeake Bank.

Accordingly, we will reverse the judgment of the trial court and enter final judgment here in favor of Mrs. Eure.

Reversed and final judgment.

February 8, 1996

MEMORANDUM FOR MARVIN KRISLOV

FROM: Chrysanthé Gussis

RE: Virginia Housing Development Authority Loan Program

This memo examines whether the Equal Credit Opportunity Act prohibits the Virginia Housing Development Authority from denying home loans to joint applicants who are not related by blood, marriage or adoption. The memo also looks at whether this restriction violates state statutory provisions.

I. ECOA and the VHDA Provision

Background. From 1981 to 1994, VHDA had used the word "family" to determine joint applicant eligibility. This restriction was never challenged in court. In 1994 VHDA adopted a broader "household" standard to make its rules consistent with those of the private lending sector and the federal government. "Household" was defined as "two or more individuals living together on the premises as a single, nonprofit housekeeping unit." In 1996, under pressure from the Governor, the standard was changed back to "family" to promote "traditional family values" with the available resources.

ECOA. Under the Equal Credit Opportunity Act (ECOA), it is unlawful to discriminate on the basis of marital status. 15 U.S.C. 1691(a)(1). This means that creditors may not consider whether joint applicants are married in determining credit-worthiness. On its face, the VHDA prohibition violates ECOA. The provision prohibits the Virginia Housing Development Authority (VHDA) from lending to low and moderate income joint applicants who are not a family. "Family" is defined as "two or more individuals related by blood, marriage or adoption."

However, ECOA exempts from liability those who offer credit pursuant to any "special purpose credit program" as determined by Federal Reserve Board regulations. 15 U.S.C. 1691(c)(3). The Federal Reserve regulations include as a special purpose credit "[a]ny credit assistance program expressly authorized by federal or state law for the benefit of an economically disadvantaged class of persons." 12 C.F.R. 208.8(a)(1). The regulations also exempt "[a]ny credit assistance program offered by a [501(c)(3)] not-for-profit organization . . . for the benefit of . . . an economically disadvantaged class of persons." 12 C.F.R. 208.8(a)(2). The regulations allow this second exemption "only if [the program] was established and is administered so as not to discriminate against an applicant on any prohibited basis." 208.8(b)(2).

VHDA is a nonprofit public mortgage finance company not funded through state tax dollars. From the information available to me at this time, it is unclear whether VHDA falls under the first or second exemption.

Find out which

The VHDA program contains provisions for waiver of the "family" requirement for joint applications from elderly or disabled persons. It may also contain a personal or financial hardship exception as well as a waiver for custodial relationships. However, these exemptions are not automatic, but are reviewed on a case-by-case basis. Incomes from two unrelated persons will not be allowed under the new rule unless one of the exceptions is noted.

Implications. ECOA ensures that two incomes can be counted together to determine credit-worthiness regardless of the marital status of the applicants. Under the VHDA rule, whole classes of individuals are deprived of home-buying opportunities simply because they live in unrelated households. The VHDA policy clearly falls outside normal lending practices. Governor Allen has been clear that the purpose of the change was to promote "traditional family values." Not only does this seem to contradict the intent of the special purpose credit program, it also is a perverting of the purpose of the Act. In addition, only 4% of VHDA loans went to unmarried joint applicants, so concerns about the allocation of scarce resources seem unfounded.

Several federal agencies have voiced concerns to VHDA about the discriminatory nature of the provision, including the Federal Housing Administration, the Federal Trade Commission, and Rural and Community Development (formerly the Farmers Home Administration). HUD has asked the Federal Reserve for an opinion as to whether the new rules violate ECOA. If the provision is found to violate the Act, FHA could sever its connection with VHDA. FHA insures approximately 70% of VHDA loans.

example In addition to a violation of ECOA, opponents of the change are also claiming freedom of association and equal protection violations. Some have argued that because VHDA has taken away a right previously allowed to a minority group, then it becomes much more vulnerable to court action. Legal challenges are expected.

If federal regulators do not find the provision violates ECOA or another federal statute, other states may begin to pass similar legislation.

II. Other Statutory Claims.

claiming The VHDA policy may violate the Virginia Human Rights Act which declares the state policy to "safeguard all individuals within the Commonwealth from unlawful discrimination because of . . . marital status . . . in real estate transactions." Virginia Code 2.1-715. The Act further provides that "conduct which violates any . . . federal statute or regulation governing discrimination on the basis of . . . marital status . . . shall be an 'unlawful discriminatory practice' for the purposes of this chapter." Virginia Code 2.1-716.

The provision does not appear to violate the Virginia Equal Credit Opportunity Act which may not be interpreted more broadly than federal law and regulations. Virginia Code 59.1-21.24.

OTHER Fed Statutory Claims?

Jerry W. MARKHAM and Marcia J. Harris, a/k/a Marcia Markham,
Appellants,

v.

COLONIAL MORTGAGE SERVICE CO.,
ASSOCIATES, INC., et al.

No. 78-1616.

United States Court of Appeals,
District of Columbia Circuit.

Argued March 28, 1979.

Decided Aug. 2, 1979.

Plaintiffs, who, prior to their marriage, had unsuccessfully applied for mortgage loan, brought action under Equal Credit Opportunity Act against savings and loan association and others. The United States District Court for the District of Columbia, June L. Green, J., granted defendants' motions for summary judgment, and plaintiffs appealed. The Court of Appeals, Swygert, Circuit Judge, held that: (1) complaint alleging that savings and loan association refused to aggregate incomes of unmarried joint mortgage applicants when determining their creditworthiness in situation where incomes of two similarly situated married joint applicants would have been aggregated stated claim under Equal Credit Opportunity Act; (2) remand was required for consideration of whether plaintiffs would have remained ineligible for mortgage loan regardless of aggregation of their income; (3) defendants other than savings and loan association could not be held liable; (4) district court did not abuse its discretion in denying plaintiffs' interim fee award; and (5) motion for sanction for failure to comply with discovery requests was appropriately denied.

Affirmed in part and reversed and remanded in part.

1. Consumer Credit ⇐ 31

Inasmuch as state laws attaching in the event of marriage would not have affected creditworthiness of unmarried joint appli-

cants for mortgage loan, section of Equal Credit Opportunity Act allowing creditor to take state property laws directly or indirectly affecting creditworthiness into consideration in making credit decisions could not be used to justify refusal to aggregate incomes of unmarried joint applicants on basis of marital status. Truth in Lending Act, § 705(b) as amended 15 U.S.C.A. § 1691d(b); S.H.A.Ill. ch. 76, § 3.

2. Consumer Credit ⇐ 66

Complaint alleging that savings and loan association refused to aggregate incomes of unmarried joint mortgage applicants when determining their creditworthiness in a situation where incomes of two similarly situated married joint applicants would have been aggregated stated claim under Equal Credit Opportunity Act. Truth in Lending Act, § 702(a), (a)(1) as amended 15 U.S.C.A. § 1691(a), (a)(1); National Housing Act, § 527, 12 U.S.C.A. § 1735f-5.

3. Statutes ⇐ 217.4

When plain meaning of statute appears on its face, court need not concern itself with legislative history, especially when evidence of legislation's history does not argue persuasively for narrower meaning than that which was apparent from statutory language.

4. Federal Courts ⇐ 939

When district court incorrectly entered summary judgment for savings and loan association on ground that its failure to aggregate incomes of unmarried joint applicants for mortgage loan was not violation of Equal Credit Opportunity Act and where district court never reached question of whether applicants were otherwise eligible for a loan, remand was required for consideration of whether applicants were otherwise eligible for loan. Truth in Lending Act, § 702 et seq. as amended 15 U.S.C.A. § 1691 et seq.

5. Consumer Credit ⇐ 63

Defendants other than savings and loan association could not be held liable under Equal Credit Opportunity Act for

Cite as 605 F.2d 566 (1979)

association's refusal to aggregate incomes of unmarried joint mortgage applicants when determining their creditworthiness in situation where incomes of two similarly situated married joint applicants would have been aggregated, where there was no indication that such defendants participated in association's decision to discriminate or in any way benefited therefrom and where, at most, applicants' allegations described course of conduct whereby the defendants acted as conduits, transferring information from applicants to association and relating decisions back. Truth in Lending Act, § 702 et seq. as amended 15 U.S.C.A. § 1691 et seq.

6. Consumer Credit ⇐ 67

Where case brought under Equal Credit Opportunity Act had not yet come to a conclusion and was therefore not yet a successful action, district court did not abuse its discretion in denying plaintiffs' interim fee award. Truth in Lending Act, § 706(d) as amended 15 U.S.C.A. § 1691e(d).

7. Federal Civil Procedure ⇐ 1278

Motion for sanctions for failure to comply with discovery requests was appropriately denied by district court, where motion was made prior to any motion to compel discovery.

Appeal from the United States District Court for the District of Columbia (D.C. Civil Action No. 77-0232).

Jerry W. Markham, pro se.

Irving Kator, Washington, D. C., for appellee, Illinois Federal Service Savings and Loan Ass'n.

Matthew A. Kane, Washington, D. C., was on brief, for appellee, B. W. Real Estate, Inc.

Douglas L. Parker, Washington, D. C., was on brief, for amicus curiae, Consumer Federation of America urging reversal.

Drew S. Days III, Asst. Atty. Gen., Dept. of Justice, Earl J. Silbert, U. S. Atty., Wal-

ter W. Barnett and Cynthia L. Attwood. Attys., Dept. of Justice, Washington, D. C., were on brief, for amicus curiae, United States urging a remand.

Before WRIGHT, Chief Judge, SWYGERT, Circuit Judge,¹ and ROBB, Circuit Judge.

Opinion for the court filed by SWYGERT, Circuit Judge.

SWYGERT, Circuit Judge.

The Equal Credit Opportunity Act, 15 U.S.C. §§ 1691, et seq., prohibits creditors from discriminating against applicants on the basis of sex or marital status. We are asked to decide whether this prohibition prevents creditors from refusing to aggregate the incomes of two unmarried joint mortgage applicants when determining their creditworthiness in a situation where the incomes of two similarly situated married joint applicants would have been aggregated. The plaintiffs in this action, Jerry and Marcia Markham, appeal the judgment of the district court granting defendant Illinois Federal Service Savings and Loan Association's motion for summary judgment. We reverse. The plaintiffs also appeal the judgment of the district court granting a motion for summary judgment on behalf of defendants Colonial Mortgage Service Co. Associates, Inc., Al Shoemaker, and B.W. Real Estate, Inc. As to this matter, we affirm.

I

In November 1976, plaintiffs Marcia J. Harris² and Jerry Markham announced their engagement and began looking for a residence in the Capitol Hill section of Washington, D.C. One of the real estate firms which they contacted, defendant B.W. Real Estate, Inc., found suitable property for them, and in December 1976, Markham and Harris signed a contract of sale for the property.

1. The Honorable Luther M. Swygert of the United States Court of Appeals for the Seventh Circuit is sitting by designation.

2. Plaintiffs were married on April 9, 1977, and the complaint was amended to reflect the name change of Marcia Harris.

Cite as 605 F.2d 568 (1979)

Upon the recommendation of B.W. Real Estate, plaintiffs agreed to have defendant Colonial Mortgage Service Co. Associates, Inc. (Colonial Mortgage) conduct a credit check. Plaintiffs subsequently submitted a joint mortgage application to Colonial Mortgage, who in turn submitted it to Colonial Mortgage Service Company (Colonial-Philadelphia), a business entity located in Philadelphia and not a party to this action.

In March 1976, Colonial-Philadelphia had entered into an agreement with defendant Illinois Federal Service Savings and Loan Association (Illinois Federal), whereby Illinois Federal agreed to purchase certain mortgages and trust deeds offered it by Colonial-Philadelphia. Pursuant to this agreement, Colonial-Philadelphia offered plaintiffs' mortgage application to Illinois Federal.

Plaintiffs and B.W. Real Estate had decided that February 4, 1977 would be an appropriate closing date for the purchase of the Capitol Hill residence. Accordingly, plaintiffs arranged to terminate their current leases, change mailing addresses, and begin utility service at the new property. On February 1, the loan committee of Illinois Federal rejected the plaintiffs' application. On February 3, the eve of the settlement date, plaintiffs were informed through a B.W. Real Estate agent that their loan application had been denied because they were not married. They were advised that their application would be re-submitted to the "investor"—who was not identified—on February 8, but that approval would be contingent upon the submission of a marriage certificate.

On February 8, the Illinois Federal loan committee reconsidered the plaintiffs' application, but again denied it. A letter was sent that date from Illinois Federal to Colonial-Philadelphia, which letter stated that the application had been rejected with the statement: "Separate income not sufficient for loan and job tenure."

3. The district court referred explicitly to Illinois law, although it is questionable whether the applicable law is that of Illinois or the District of Columbia. We have not been asked to de-

On February 9, 1977 plaintiffs filed this suit, alleging violation of the Equal Credit Opportunity Act. After the district court separately granted the motions of Illinois Federal and the other defendants for summary judgment on May 25, 1978, plaintiffs brought this appeal.

II

A.

[1] We address first the appeal from the district court's summary judgment entered in favor of Illinois Federal. The district court concluded as a matter of law that plaintiffs could not state a claim under the Equal Credit Opportunity Act even if they showed that Illinois Federal's refusal to aggregate their incomes resulted, in whole or in part, in the denial of their loan application. This conclusion was based on the premise that creditors need not ignore the "special legal ties created between two people by the marital bond." It was the court's conclusion that under Illinois law the mere fact of marriage provides creditors with greater rights and remedies against married applicants than are available against unmarried applicants. Presumably the district court believed that this excused Illinois Federal under 15 U.S.C. § 1691d(b), which allows a creditor to take "[s]tate property laws directly or indirectly affecting creditworthiness" into consideration in making credit decisions.

We fail to see the relevance of any special legal ties created by marriage with respect to the legal obligations of joint debtors. This was not an instance where a single person is applying for credit individually and claiming income from a third party for purposes of determining creditworthiness. In such an instance, the absence of a legal obligation requiring continuance of the income claimed by the applicant from the third party would reflect on the credit applicant's creditworthiness. Inasmuch as the Markhams applied for their mortgage

side that question, however, and in view of the fact that the law in both jurisdictions is in relevant part substantially the same, we need not decide it.

jointly, they would have been jointly and severally liable on the debt. Each joint debtor would be bound to pay the full amount of the debt; he would then have a right to contribution from his joint debtor. See 4 A. Corbin, *Contracts* §§ 924, 928 (1951). See also *Clayman v. Goodman Properties, Inc.*, 171 U.S.App.D.C. 88, 518 F.2d 1026 (1973); *Welch v. Sherwin*, 112 U.S.App.D.C. 124, 300 F.2d 716 (1962); Ill. Ann.Stat. ch. 76, § 3 (Smith-Hurd). While it may be true that judicially-enforceable rights such as support and maintenance are legal consequences of married status, they are irrelevancies as far as the creditworthiness of joint applicants is concerned. Illinois Federal would have had no greater rights against the Markhams had they been married, nor would the Markhams have had greater rights against each other on this particular obligation. Thus, inasmuch as the state laws attaching in the event of marriage would not affect the creditworthiness of these joint applicants, section 1691d(b) may not be used to justify the refusal to aggregate the plaintiffs' incomes on the basis of marital status.

B.

[2] We turn to a consideration of whether the Equal Credit Opportunity Act's prohibition of discrimination on the basis of sex or marital status makes illegal Illinois Federal's refusal to aggregate plaintiffs' income when determining their creditworthiness. Illinois Federal contends that neither the purpose nor the language of the Act requires it to combine the incomes of unmarried joint applicants when making that determination.

We start, as we must, with the language of the statute itself. *March v. United States*, 165 U.S.App.D.C. 267, 274, 506 F.2d 1306, 1313 (1974). 15 U.S.C. § 1691(a) provides:

It shall be unlawful for any creditor to discriminate against any applicant, with

4. 12 U.S.C. § 1735f-5 requires that "every person engaged in making mortgage loans secured by residential real property consider without prejudice the combined income of both hus-

respect to any aspect of a credit transaction—

(1) on the basis of sex or marital status

This language is simple, and its meaning is not difficult to comprehend. Illinois Federal itself has correctly phrased the standard in its brief: The Act forbids discrimination "on the basis of a person's marital status, that is, to treat persons differently, all other facts being the same, because of their marital status" Brief for Defendant Illinois Federal at 18. Illinois Federal does not contend that they would not have aggregated plaintiffs' income had they been married at the time. Indeed, Illinois Federal concedes that the law would have required it to do so.⁴ Thus, it is plain that Illinois Federal treated plaintiffs differently—that is, refused to aggregate their incomes—solely because of their marital status, which is precisely the sort of discrimination prohibited by section 1691(a)(1) on its face.

[3] Despite the section's clarity of language, Illinois Federal seeks to avoid a finding of prohibited discrimination by arguing that it was not the Congressional purpose to require such an aggregation of the incomes of non-married applicants. It can be assumed, *arguendo*, that one, perhaps even the main, purpose of the act was to eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider apart from their husbands as individually worthy of credit. But granting such an assumption does not negate the clear language of the Act itself that discrimination against any applicant, with respect to any aspect of a credit transaction, which is based on marital status is outlawed. When the plain meaning of a statute appears on its face, we need not concern ourselves with legislative history, see *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 61

band and wife for the purpose of extending mortgage credit . . . to a married couple or either member thereof." See also Brief for Defendant Illinois Federal at 14.

L.Ed. 442 (1917), especially when evidence of the legislation's history as has been presented to us does not argue persuasively for a narrower meaning than that which is apparent from the statutory language.⁵ See *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48, 49 S.Ct. 52, 73 L.Ed. 170 (1928). We believe that the meaning of the words chosen by Congress is readily apparent.

Illinois Federal expresses the fear that a holding such as we reach today will require it to aggregate the incomes of all persons who apply for credit as a group. Lest it be misinterpreted, we note that our holding is not itself that far-reaching. It does no more than require Illinois Federal to treat plaintiffs—a couple jointly applying for credit—the same as they would be treated if married. We have not been asked to decide what the effect of the Act would have been had plaintiffs not applied for credit jointly. Nor do we have before us a question of whether the Act's marital status provision in any way applies to a situation where more than two people jointly request credit. We hold only that, under the Act Illinois Federal should have treated plaintiffs—an unmarried couple applying for credit jointly—the same as it would have treated them had they been married at the time.

C.

[4] Illinois Federal also contends that, regardless of this court's decision on the issue of income aggregation, the judgment of the district court should be affirmed.

5. For example, defendant Illinois Federal makes much of certain statements of Representative Leonora Sullivan, to whom it refers as a sponsor of the Act, in its attempt to define the Act's purpose and scope in narrow terms. See Brief for Defendant Illinois Federal at 10-11. While not purporting to engage in an extensive review of the relevant history, we do note in passing the following remarks of Representative Sullivan offered in connection with the 1976 Amendment to the Act which she called "[o]stensibly a 'women's' law":

The Equal Credit Opportunity Act will undoubtedly help many women, and men too, who are creditworthy and who happen to be single, divorced, separated or widowed.

The premise of this contention is that, even had the incomes of plaintiffs' been combined, Illinois Federal would still not have extended the loan because of lack of sufficient job tenure or credit history. Due to the district court's basis for decision and the state of the record, we are not in position to pass on the validity of this separate issue.

The district court entered summary judgment for Illinois Federal on the ground that the failure to aggregate incomes was not a violation of the Act. Thus, having no need to do so, it never reached the question of whether plaintiffs were otherwise eligible for the loan. Whether Illinois Federal would have otherwise extended the loan is a question of fact that is material, given our disposition of the aggregation issue. Accordingly, if there is a genuine dispute over that issue, summary judgment is inappropriate. Fed.R.Civ.P. 56. On the record, there appears to be such a dispute. Although Illinois Federal contends that plaintiffs would remain ineligible regardless of aggregation, plaintiffs assert that they were told the loan would be forthcoming if they produced a marriage certificate. Because we remand the case to the district court, we deem it sufficient to note the appearance of a genuine issue of material fact on this state of the record. Following remand, further discovery and additional affidavits may either confirm or dispel this appearance.⁶

III

[5] Plaintiffs also appeal from the district court's entry of summary judgment in

in overcoming traditional and often irrational discriminations in the credit market . . .

121 Cong.Rec. 27136 (1975).

6. For example, it may be determined how the marital status of applicants affects Illinois Federal's "judgmental evaluation" of their job tenure and credit history.

Because this issue of creditworthiness *vel non* as determined by allegedly nondiscriminatory factors has not been finally decided, we do not reach the question of whether Illinois Federal would be liable to plaintiffs under the Act, if the proscribed discrimination were but one of several reasons for the denial of credit.

Cite as 605 F.2d 566 (1979)

favor of the other defendants: Colonial Mortgage, Al Shoemaker, and B.W. Real Estate. The district court based its judgment on alternative grounds, holding first that these defendants had done nothing which could be construed as a discriminatory act, and second, that regardless of their actions they were not "creditors" as that term is used in the Act. We affirm on the first ground, thus we do not reach the second.

There is no indication that these three defendants participated in Illinois Federal's decision to discriminate or in any way benefited therefrom. At most, plaintiffs' allegations describe a course of conduct whereby these defendants acted as conduits, transferring information from plaintiffs to Illinois Federal and relaying decisions back. Inasmuch as we are unable to find on the record an instance where one of these three defendants participated in a decision to discriminate against plaintiffs on the basis of marital status, we affirm the order of the district court granting summary judgment in favor of defendants Colonial Mortgage, Al Shoemaker, and B.W. Real Estate.

IV.

[6] There remain two issues requiring our attention. Plaintiffs have appealed from the district court's order denying their motion for an interim award of attorney fees. We note simply that the Act provides:

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

15 U.S.C. § 1691e(d). Because this case has not yet come to a conclusion, not even a preliminary one,⁷ and is not yet a "successful action," we hold the district court did not abuse its discretion in denying plaintiffs an interim fee award.

[7] Finally, plaintiffs contend that the district court abused its discretion in denying their motions to compel discovery and for sanctions for failure to comply with discovery requests. The motion for sanctions, made prior to any motion to compel discovery, was appropriately denied by the district court. The motion to compel discovery was regarded as moot by the district court after its decision to grant Illinois Federal's summary judgment motion. Because we reverse the summary judgment, we remand the question of the appropriate scope of discovery to the district court for consideration in light of our decision today.

In sum, the order of the district court granting summary judgment to defendant Illinois Federal is reversed, and the cause is remanded along with the discovery question. The order of the district court granting summary judgment to defendants Colonial Mortgage, Al Shoemaker, and B.W. Real Estate is affirmed, as are the orders denying discovery sanctions and interim attorney fees.



7. Cf. *Howard v. Phelps*, 443 F.Supp. 374 (E.D. La.1978), relied on by plaintiffs, where the court allowed an interim award of attorney fees

under the Civil Rights Attorney Fees Awards Act, 42 U.S.C. § 1988, after preliminary injunctive relief had been obtained.

VA Hsg Dev Auth
Regi.
Defining Family
narrowing
under
Equal Credit Opp.

THE WHITE HOUSE
WASHINGTON

February 1, 1996

NOTE TO: LEON PANETTA
HAROLD ICKES
JACK QUINN

FROM: KITTY HIGGINS *Kitty*

I want to make you aware of an issue HUD has brought to my attention. (see attached memo). HUD is working with the Federal Reserve and with Justice on the appropriate response.

cc: Doug Sosnik
Marcia Hale
Mike McCurry

From: Kathleen Wallman.

Kd dot to Marvin

*Are you aware of this?
What do you think we
should do?*

Kw

*Kw -
Please
call me
when you
have a
moment
to talk
about
this
issue
I
will
be
in
the
office
on
2/1/96
Thank
you
Kathy
Higgins*

MEMORANDUM

DATE: January 25, 1996
TO: Kitty Higgins
FROM: Bruce Katz 
RE: Virginia Housing Development Authority Loan Program

I thought you should be aware of a sensitive issue that has arisen concerning the Virginia Housing Development Authority (VHDA) and Governor George Allen.

VHDA is approved to make loans insured by the Federal Housing Administration (FHA). From 1981 through 1994, under VHDA's regulations, individuals and "families" were eligible borrowers, limiting the program to persons who were related by marriage, blood, or adoption, and thereby excluding unmarried straight, as well as gay and lesbian couples. (Unrelated elderly and disabled persons could seek a waiver.) In 1994, VHDA's Board of Directors changed the regulation to permit "households" to borrow, making their rules consistent with generally accepted lending practices. Governor Allen's appointees now dominate the Board. At his request, the new Board voted on Tuesday to again restrict participation to "families."

A Democratic appointee to the Board has asked HUD whether this policy change will affect VHDA's participation in the FHA loan program. At issue is whether or not this policy violates the Equal Credit Opportunity Act (ECOA), which prohibits discrimination based on marital status. FHA expressly requires all FHA lenders to comply with ECOA. Failure to do so can result in sanctions, including withdrawal of approval to originate FHA loans. Critics allege the new policy is a clear violation of ECOA. VHDA asserts that the policy complies with all fair lending laws.

which?
We are looking at the issue and have asked the Federal Reserve, which interprets ECOA, for guidance. They have said that they will respond to us next week. The Federal Reserve is unlikely, however, to give us an opinion that the program is either permissible or impermissible. Programs that violate the statute's prohibitions may be authorized nonetheless if they qualify for special-purpose credit status. However, the Board's regulations provide that it does not determine whether individual programs qualify for special-purpose credit status: "It is the agency's responsibility to promulgate a regulation that is consistent with federal and state law."

After we get guidance from the Federal Reserve, we will consult with the Department of Justice. In addition, we will consult with the White House, if and before FHA takes any action in this matter.

If you have any questions, please feel free to call me.

§ 201.4(a)(3)
24CLA269*1976

§ 201.4(b)
1980LF58*1979
1980LF122*1979

§ 201.4(c)
24CLA265*1976

§ 201.104
24CLA258*1976

§ 201.107(d)
24CLA236*1976

§ 201.108
1980LF119*1979

§ 201.109
24CLA260*1976

§ 201.109(d)
24CLA260*1976

§ 201.109(e)
24CLA260*1976

§ 201.109(f)
24CLA260*1976

Part 202

Cir. 1
536FS1278*1982
788FS623*1992

Cir. 2
757FS295*1991
Cir. 3
492FS683*1980
571FS552*1983

Cir. 4
450FS669*1978
829FS167*1992
843FS1010*1994

Cir. 5
708F2d145*1983
481FS728*1979
513FS1040*1981

Cir. 6
696FS1157*1988
Cir. 7
615F2d1172*1978

Cir. 9
498FS382*1980
Cir. 10
807F2d164*1986

Ga
320SE770*1984
74NW1589*1979
63VaL858*1977
1990WLR769*1990
111ARF651n

§ 202.1
et seq.
Cir. 5
730F2d1042*1984
434FS561*1977

Cir. 9
666F2d1276*1981
Cir. 10
784FS815*1992
51BRW214*1985

La
487So2d172*1986
Vi
470A2d1159*1983

§§ 202.1 to 202.1103
1981WLR662*1981

§§ 202.1 to 202.14
Me
602A2d1165*1991

§§ 202.1 to 202.13
Md
425A2d1024*1981
1981WLR658*1981

§ 202.1
Cir. 1
449FS172*1978

§ 202.1(b)
Cir. 1
779FS628*1989

Cir. 2
757FS295*1991

Cir. 4
612FS625*1985
Cir. 10
807F2d165*1986

Cir. 11
791FS867*1992
1981WLR693*1981

§ 202.1(b)(2)
1981WLR693*1981

§ 202.1(c)
74NW1589*1979

§ 202.1(c)(4)
1981WLR694*1981

§ 202.1(d)
571FS555*1983

§ 202.1(d)(1)
Cir. 3
571FS555*1983

§ 202.1(d)(2)(i)
Cir. 3
724F2d796*1983

§ 202.1(d)(2)(i)
Cir. 3
571FS555*1983

§ 202.1(f)
Cir. 4
810FS678*1993

§ 202.2
Cir. 1
788FS623*1992

Cir. 4
488FS567*1978
Cir. 7
615F2d1171*1978

Cir. 11
678F2d139*1982

Iowa
433NW713*1988

Md
639A2d234*1994

§ 202.2(a)
Cir. 5
730F2d1045*1984

§ 202.2(c)
Cir. 3
571FS563*1983

Cir. 5
634F2d272*1981
708F2d146*1983
730F2d1042*1984

§ 202.2(c)(1)
Cir. 5
730F2d1046*1984

Cir. 11
678F2d139*1982

§ 202.2(c)(1)(i)
Cir. 11
678F2d139*1982

§ 202.2(c)(1)(ii)
Cir. 5
634F2d271*1981

Cir. 6
533FS1312*1982

§ 202.2(c)(2)
Cir. 11
678F2d139*1982

§ 202.2(c)(2)(i)
Cir. 5
730F2d1045*1984

Cir. 11
678F2d139*1982

§ 202.2(c)(2)(ii)
Cir. 5
634F2d272*1981

§ 202.2(c)(2)(iii)
Cir. 5
730F2d1045*1984
1981WLR668*1981

§ 202.2(c)(3)
Cir. 5
634F2d272*1981

§ 202.2(e)
Cir. 1
536FS1278*1982

Cir. 3
595FS808*1984
839FS328*1993

Cir. 4
829FS168*1993
843FS1010*1994

Cir. 5
634F2d269*1981
729F2d351*1984

Cir. 6
533FS1312*1982

Cir. 7
669FS922*1987

Cir. 9
498FS383*1980

Cir. 10
784FS816*1992

Cir. 11
700FS1123*1988
791FS867*1985

Colorado
809P2d1102*1990

320SE771*1984

Iowa
433NW712*1985

§ 202.2(f)
Cir. 3
832FS150*1993

Cir. 9
498FS383*1980

Cir. DC
659FS1564*1984

§ 202.2(g)
Cir. 9
809P2d1103*1990

§ 202.2(i)
Cir. 9
688F2d1238*1982

Cir. 11
700FS1123*1988

§ 202.2(j)
Cir. 4
832FS150*1993

Cir. 10
19BRW718*1982

§ 202.2(l)
Cir. 3
571FS561*1983

Cir. DC
659FS1564*1984

§ 202.2(m)
Cir. 2
900F2d18*1989

Cir. 6
533FS1312*1982

Cir. 9
724F2d793*1981

§ 202.2(n)
Cir. 3
743F2d178*1984

Cir. 4
488FS568*1978

Cir. 7
653FS1341*1979

Cir. 9
666F2d1276*1979

§ 202.2(p)(2)
1981WLR686*1981

§ 202.2(q)
Cir. 6
533FS1312*1982

§ 202.2(s)
Cir. 9
843FS648*1994

§ 202.2(t)
Cir. 5
708F2d145*1983

§ 202.2(w)
Cir. 9
688F2d1238*1982

§ 202.2(x)
Cir. 3
571FS561*1983
839FS328*1993

§ 202.2(y)
1981WLR683*1981

§ 202.2(z)
Cir. 5
729F2d349*1984

§ 202.3
Cir. 1
449FS172*1978

Cir. 7
481FS747*1979

§ 202.3(a)(4)
Cir. 6
624FS161*1985

§ 202.3(c)
Cir. 5
476FS768*1979

§ 202.3(e)
1981WLR665*1981

§ 202.3(e)(1)
Cir. 7
615F2d1171*1978

§ 202.3(e)(2)
Cir. 6
624FS161*1985

§ 202.3(e)(4)
Cir. 7
481FS747*1979

§ 202.3(h)
Cir. 5
476FS768*1979

§ 202.3(j)
Cir. 5
476FS768*1979

§ 202.3(k)
Cir. 5
476FS768*1979

§ 202.3(n)
Cir. 5
65CaL1059*1977

§ 202.4
Cir. 4
612FS624*1985

Cir. 8
522FS838*1981

§ 202.4(b)
65CaL1059*1977

§ 202.4(c)
Cir. 9
453FS1156*1977

§ 202.4(c)(4)
Cir. 7
449FS171*1977

§ 202.4(d)
449FS171*1977
63VaL858*1977

§ 202.5
Cir. 8
522FS838*1981

§ 202.5(a)
Cir. 5
476FS768*1979

§ 202.5(j)
615F2d1174*1978

481FS747*1979
1981WLR656*1981

§ 202.5(b)
Cir. 9
453FS1156*1977

§ 202.5(b)(1)
1981WLR665*1981

§ 202.5(b)(1)(iv)
65CaL1060*1976

§ 202.5(c)
Md
425A2d1029*1981

§ 202.5(c)(1)
Md
425A2d1024*1981

§ 202.5(c)(2)
Cir. 5
634F2d269*1981

§ 202.5(c)(5)
Cir. 5
490FS1030*1980

§ 202.5(d)
Cir. 3
571FS564*1983

§ 202.5(d)(1)
Md
615F2d1173*1978

§ 202.5(d)(3)
Cir. 7
615F2d1173*1978

§ 202.5(d)(4)
1981WLR665*1981

§ 202.5(d)(5)
1981WLR665*1981

§ 202.5(f)
434FS563*1977

§ 202.5(h)
Cir. 5
434FS563*1977

§ 202.5(i)
65CaL1059*1977

§ 202.5(i)(1)
65CaL1059*1977

§ 202.5(j)
65CaL1060*1977

§ 202.5(m)
Cir. 5
434FS562*1977

§ 202.5(m)(2)
Cir. 5
434FS561*1977

§ 202.6
Cir. 5
490FS1029*1980

§ 202.6(a)
Cir. 5
634F2d269*1981

§ 202.6(b)
Cir. 3
571FS562*1983

§ 202.6(b)(3)
1981WLR687*1981

§ 202.6(b)(4)
1981WLR671*1981

§ 202.6(b)(5)
Calif
278CaR629*1991

§ 202.6(b)(6)
1981WLR683*1981

§ 202.6(c)
Cir. 5
730F2d1045*1984

§ 202.7
Cir. 3
595FS808*1984

§ 202.7(b)
Cir. 7
615F2d1175*1980

§ 202.7(c)
Cir. 2
669FS53*1987

§ 202.7(c)(1)
Cir. 9
688F2d1237*1982

§ 202.7(c)(2)
Cir. 9
688F2d1237*1982

§ 202.7(c)(3)
Cir. 9
688F2d1237*1982

§ 202.7(c)(4)
Cir. 9
688F2d1237*1982

§ 202.7(c)(5)
Cir. 9
688F2d1237*1982

§ 202.7(c)(6)
Cir. 9
688F2d1237*1982

§ 202.7(c)(7)
Cir. 9
688F2d1237*1982

§ 202.7(c)(8)
Cir. 9
688F2d1237*1982

§ 202.7(c)(9)
Cir. 9
688F2d1237*1982

§ 202.7(c)(10)
Cir. 9
688F2d1237*1982

§ 202.7(c)(11)
Cir. 9
688F2d1237*1982

§ 202.7(c)(12)
Cir. 9
688F2d1237*1982

§ 202.7(c)(13)
Cir. 9
688F2d1237*1982

§ 202.7(c)(14)
Cir. 9
688F2d1237*1982

§ 202.7(c)(2)
Cir. 9
688F2d1237*1982

§ 202.7(d)
Cir. 2
536FS1278*1982

§ 202.7(e)
Cir. 3
703FS1045*1989

§ 202.7(f)
Cir. 3
571FS564*1983

§ 202.7(g)
Cir. 3
595FS808*1984

§ 202.7(h)
Cir. 4
135BRW776*1992

§ 202.7(i)
Cir. 4
806FS94*1992

§ 202.7(j)
Cir. 4
829FS168*1993

§ 202.7(k)
Cir. 4
843FS1010*1994

§ 202.7(l)
Cir. 4
815F2d350*1987

§ 202.7(m)
Cir. 4
753F2d593*1985

§ 202.7(n)
Cir. 4
666F2d1277*1982

§ 202.7(o)
Cir. 4
784FS816*1992

§ 202.7(p)
Cir. 4
19BRW719*1982

§ 202.7(q)
Cir. 4
809P2d1102*1991

§ 202.7(r)
Cir. 4
842P2d544*1992

§ 202.7(s)
Cir. 4
929F2d872*1991

§ 202.7(t)
Cir. 4
788FS623*1992

§ 202.7(u)
Cir. 4
900F2d18*1990

§ 202.7(v)
Cir. 4
703FS1045*1989

§ 202.7(w)
Cir. 4
757FS295*1991

§ 202.7(x)
Cir. 4
839FS328*1993

§ 202.7(y)
Cir. 4
135BRW776*1992

§ 202.7(z)
Cir. 4
616FS553*1985

§ 202.7(a)
Cir. 4
806FS94*1992

§ 202.7(d)(4) Cir. 2 703FS1045 ¹ 1989 Cir. 5 704F2d779 ¹ 1983 815F2d350 ¹ 1987	Cir. 8 630FS723 ¹ 1986 Cir. 10 807F2d165 ¹ 1986 1981WLR668 ¹ 1981	§ 202.11 Cir. 5 434FS563 ¹ 1977	et seq. Cir. 2 660FS950 ¹ 1986 Cir. 9 209F2d472 ¹ 1993 64NYL755 ¹ 1988
§ 202.7(d)(4)(i) 1990WLR788 ¹ 1990	§ 202.9(a)(1)(i) Cir. 4 832FS150 ¹ 1993 Cir. 6 624FS162 ¹ 1985	§ 202.12 Cir. 7 481FS747 ¹ 1979	§§ 204.1 to 204.12 69TxL1391 ¹ 1991
§ 202.7(d)(5) Cir. 1 929F2d872 ¹ 1990 Cir. 2 703FS1045 ¹ 1989 Cir. 7 753F2d593 ¹ 1985 Cir. 9 816F2d491 ¹ 1987 Cir. 10 784FS815 ¹ 1992 Cir. 11 700FS1123 ¹ 1988 791FS867 ¹ 1992 Cir. 12 809P2d1101 ¹ 1991 Ga 320SE770 ¹ 1984 Ill 424NE762 ¹ 1981	§ 202.9(a)(1)(ii) Cir. 10 807F2d165 ¹ 1986	§ 202.13 Cir. 5 490FS1030 ¹ 1980	§§ 204.1 to 204.12 35CLA1127 ¹ 1993
§ 202.7(d)(6) Cir. 2 703FS1045 ¹ 1989	§ 202.9(a)(1)(iii) Cir. 6 533FS1312 ¹ 1982	§ 202.13(a) Cir. 1 449FS172 ¹ 1977	§§ 204.1 to 204.5 Cir. 2 495FS468 ¹ 1980
§ 202.8(a) Cir. 3 743F2d176 ¹ 1984	§ 202.9(a)(2) Cir. 10 807F2d165 ¹ 1986 Pa 536A2d341 ¹ 1987	§ 202.14(b)(2) Cir. 7 844FS439 ¹ 1994	§ 204.1 347US376 ¹ 1954 74SC552 ¹ 1954
§ 202.8(a)(3) Cir. 3 743F2d176 ¹ 1984 571FS552 ¹ 1983	§ 202.9(a)(2)(i) Cir. 5 708F2d147 ¹ 1983	§ 202.901(a) Cir. 5 708F2d147 ¹ 1983	§ 204.1(b) 1980LF121 ¹ 1979
§ 202.8(a)(3)(i) Cir. 3 743F2d177 ¹ 1984	§ 202.9(b) 63VaL859 ¹ 1978	§ 202.901(f) Cir. 5 708F2d147 ¹ 1983	§ 204.1(c) 1980LF121 ¹ 1979
§ 202.8(a)(3)(ii) Cir. 3 743F2d176 ¹ 1984	§ 202.9(b)(2) Cir. 5 708F2d145 ¹ 1983 729F2d352 ¹ 1984 730F2d1048 ¹ 1984 481FS729 ¹ 1979 Cir. 6 696FS1157 ¹ 1988 Cir. 8 522FS838 ¹ 1981 Cir. 9 724F2d791 ¹ 1983 1981WLR669 ¹ 1981	§ 202.1101 Cir. 8 630FS725 ¹ 1986	§ 204.1(c)(4) 64NYL793 ¹ 1989
§ 202.8(b) Cir. 3 571FS553 ¹ 1983	§ 202.9(c)(3) Cir. 10 807F2d166 ¹ 1986	§ 202.1104 1981WLR662 ¹ 1980	§ 204.1(c)(5) 1982ILLR335 ¹ 1981 64NYL755 ¹ 1989 140PaL2373 ¹ 1991
§ 202.8(b)(2) Cir. 3 743F2d175 ¹ 1984	§ 202.9(d) Cir. 10 807F2d166 ¹ 1986	Part 203 74NwL601 ¹ 1979	§ 204.1(d) 1980LF121 ¹ 1979
§ 202.8(c) Cir. 3 571FS553 ¹ 1983	§ 202.9(e) Cir. 8 522FS838 ¹ 1981 Cir. 10 807F2d166 ¹ 1986	§ 203.1 et seq. Cir. 7 653FS1335 ¹ 1987	§ 204.1(e) 1980LF121 ¹ 1979
§§ 202.9 to 202.13 1981WLR668 ¹ 1981	§ 202.9(f) Cir. 10 807F2d168 ¹ 1986	§ 203.1(b) Cir. 7 653FS1335 ¹ 1986	§ 204.1(f) 1980LF117 ¹ 1979
§ 202.9 Cir. 3 571FS563 ¹ 1983	§ 202.9(g) Cir. DC 659FS1564 ¹ 1986	§ 203.4 469FS1072 ¹ 1979	§ 204.1(f)(1) Cir. 2 495FS469 ¹ 1980 1980LF118 ¹ 1979
§ 202.9(2) Cir. 5 708F2d146 ¹ 1983 Cir. 6 624FS161 ¹ 1985 Cir. 7 481FS747 ¹ 1979 844FS439 ¹ 1994	§ 202.10 Cir. 7 615F2d1173 ¹ 1978 Mo 741SW293 ¹ 1982	Part 204 443US344 ¹ 1978 61L2593 ¹ 1978 99SC2804 ¹ 1978 Cir. 9 500F2d285 ¹ 1974 Cir. 10 728F2d437 ¹ 1984 Cir. DC 413FS498 ¹ 1976 35CLA1128 ¹ 1988 72Geo31 ¹ 1983 1980LF69 ¹ 1981 91McL238 ¹ 1992 91McL269 ¹ 1992 69TxL1407 ¹ 1991 86YLJ47 ¹ 1976	§ 204.1(f)(2) Cir. 2 495FS467 ¹ 1980 1980LF118 ¹ 1979
			§ 204.1(f)(3) 1980LF52 ¹ 1979 1980LF124 ¹ 1979
			§ 204.1(f)(4) Cir. 2 495FS469 ¹ 1980
			§ 204.1(f)(5) 1980LF122 ¹ 1979
			§ 204.1(g) 1980LF124 ¹ 1979
			§ 204.1(h) 1980LF125 ¹ 1979
			§ 204.1(i) 1980LF112 ¹ 1979
			§ 204.2 Cir. 2 495FS468 ¹ 1980

§ 204.2(a) 30StnL45 ¹ 1977	§ 204.5(c) 1980LF124 ¹ 1980	§ 204.9 1988ILLR247 ¹ 1988	§ 205.2(g) Tenn. 826SW913 ¹ 1991
§ 204.2(a)(1)(v) 1988ILLR262 ¹ 1988	§ 204.5(d)(2) 1980LF125 ¹ 1980	§ 204.102 1980LF121 ¹ 1979	§ 205.3 So C 382SE254 ¹ 1988
§ 204.2(a)(2) 1980LF47 ¹ 1979	§ 204.5(f) 1980LF47 ¹ 1981 1980LF118 ¹ 1980	§ 204.110 1980LF120 ¹ 1979	§ 205.3(b) N Y 494NYS2d606 ¹ 1985
§ 204.2(a)(2)(ix) 1980LF418 ¹ 1991	§ 204.5(f)(1) 1980LF119 ¹ 1979	§ 204.112 1980LF122 ¹ 1979 64NYL792 ¹ 1970	§ 205.3(e) Cir. 5 703F2d938 ¹ 1982
§ 204.2(b)(1)(3) 1980LF250 ¹ 1992	§ 204.5(f)(1)(ii) 1980LF119 ¹ 1980	§ 204.112(b) 1982ILLR334 ¹ 1980	§ 205.6 Calif 281CaR464 ¹ 1991
§ 204.2(f)(1)(iv) Cir. DC 1980LF110 ¹ 1993 1980LF116 ¹ 1980	§ 204.5(f)(2) 1980LF116 ¹ 1980	§ 204.112(c) Cir. 6 850F2d1177 ¹ 1980 1982ILLR336 ¹ 1980	§ 205.6(b)(1) Calif 281CaR467 ¹ 1991
§ 204.2(h)(1)(ii)(A) 1988ILLR268 ¹ 1988	§ 204.5(f)(2)(i)(A) 1980LF121 ¹ 1980	§ 204.116 1980LF112 ¹ 1979	§ 205.6(b)(2) Calif 281CaR464 ¹ 1991
§ 204.2(h)(1)(iii) 64NYL755 ¹ 1988	§ 204.5(f)(2)(i)(B) 1980LF121 ¹ 1980	§ 204.118 1980LF125 ¹ 1979	§ 205.6(b)(2)(ii) Calif 281CaR466 ¹ 1991
§ 204.2(h)(2)(ii) 1988ILLR268 ¹ 1988	§ 204.5(f)(2)(i)(C) 1980LF122 ¹ 1980	§ 204.122 1988ILLR267 ¹ 1988	§ 205.6(b)(4) Calif 281CaR466 ¹ 1991
§ 204.2(i) Cir. 2 936F2d727 ¹ 1991 Cir. 6 850F2d1176 ¹ 1974 91McL264 ¹ 1992 140PaL2373 ¹ 1991	§ 204.5(f)(2)(i)(D) 1980LF121 ¹ 1980	§ 204.128(a) 64NYL791 ¹ 1988	§ 205.7(a)(4) Cir. 3 728FS1113 ¹ 1990
§ 204.3 1980LF48 ¹ 1981	§ 204.5(f)(2)(ii) 1980LF122 ¹ 1980	§ 204.128(c) 495US674 ¹ 1990 109L2691 ¹ 1990 110SC2042 ¹ 1990 Cir. 2 936F2d727 ¹ 1990	§ 205.7(a)(9) Cir. 2 674FS1497 ¹ 1987
§ 204.3(a) 1988ILLR262 ¹ 1988	§ 204.5(f)(2)(v) 1980LF126 ¹ 1980	§ 204.130(b) Cir. 2 550NE314 ¹ 1990	§ 205.11 Cir. 2 674FS1497 ¹ 1987
§ 204.3(b) Cir. 2 495FS468 ¹ 1980 605FS557 ¹ 1983	§ 204.5(f)(2)(vi) 1980LF127 ¹ 1980	§ 204.130(e) Ind 550NE314 ¹ 1990	§ 205.11(c)(2)(i) Cir. 5 14F3d282 ¹ 1994
§ 204.3(b)(2) 83CR1670 ¹ 1983	§ 204.5(f)(2)(vii) 1980LF124 ¹ 1980	§ 204.5(f)(3) 1980LF128 ¹ 1979	§ 205.11(c)(2)(ii) Cir. 5 14F3d282 ¹ 1994
§ 204.3(d) Cir. 2 495FS468 ¹ 1980	§ 204.5(f)(3)(i)(A) 1980LF47 ¹ 1981	§ 204.5(f)(3)(i)(B) 1980LF47 ¹ 1981	Part 206 401US621 ¹ 1971 28L2373 ¹ 1971 91SC1094 ¹ 1971 Cir. 2 281FS7123 ¹ 1968 309FS986 ¹ 1970 Cir. 5 357F2d299 ¹ 1966 Cir. DC 420F2d85 ¹ 1959 71CaL1512 ¹ 1982
§ 204.3(e) 1980LF48 ¹ 1981	§ 204.8 64NYL743 ¹ 1988	§ 204.8 1988ILLR240 ¹ 1988	§ 206.6(f) Cir. 5 357F2d28 ¹ 1961
§ 204.3(f) 1980LF48 ¹ 1981	§ 204.8(a) 1988ILLR240 ¹ 1988	§ 204.8(a)(2) 1988ILLR267 ¹ 1988	§ 206.8 1988ILLR320 ¹ 1988
§ 204.3(f)(1) 64NYL740 ¹ 1988	§ 204.8(a)(2)(i) 1988ILLR267 ¹ 1988	§ 204.8(a)(2)(ii) 1988ILLR267 ¹ 1988	§ 206.17(6) Cir. 7 956F2d1365 ¹ 1992
§ 204.5 1980LF46 ¹ 1981 30StnL45 ¹ 1977 32StnL734 ¹ 1981	§ 204.8(c) 1988ILLR267 ¹ 1988	§ 204.8(d) 1988ILLR268 ¹ 1988	
§ 204.5(a)(1)(i) 1980LF121 ¹ 1979	§ 205.2 Cir. 5 703F2d939 ¹ 1982	§ 204.8(e) 1988ILLR268 ¹ 1988	
§ 204.5(a)(1)(iii) 1980LF47 ¹ 1980	§ 205.2(a)(1) N Y 446NYS2d848 ¹ 1981		
§ 204.5(a)(2)(iii) 1980LF47 ¹ 1980			

800
546
9380

Also State Ftlaw? State EP Law?

Fed Hsg Admin requires compl. w/ any other statutes?

Under Baehr might const. sex discrim.

✓ ~~Moral~~ States may not be taken into acct.
"Family" may do so.

Look at EEOC Provisions of 42 USC §2000e

816 F 2d 487

605 F 2d 566

615 F 2d 1169

✓ How is family defined / dif from household

✓ ~~Eligible~~ under the exception before? Must have been

Regs give great discretion to states
to setup such mortgage guidelines
for purposes they see fit

Fed Board does not determine whether individual
progs ~~state~~ qualify for ~~fed~~ ^{special} purpose credit
Agency's responsibility to promulgate reg
consistent w/ fed + state law.

More articles?

MAIL-IT REQUESTED: FEBRUARY 7, 1996

100Y5T

CLIENT: WHO
LIBRARY: NEWS
FILE: CURNWS

YOUR SEARCH REQUEST AT THE TIME THIS MAIL-IT WAS REQUESTED:
VIRGINIA AND LEND! AND (HOUSING OR HOUSE) AND FAMILY AND DATE AFT 1/96

NUMBER OF STORIES FOUND WITH YOUR REQUEST THROUGH:
LEVEL 1... 18

LEVEL 1 PRINTED

THE SELECTED STORY NUMBERS:
3,9

DISPLAY FORMAT: FULL

MULTIPLE DOCUMENTS ON A PAGE

SEND TO: CORBELLI, LINDA
OA - LIBRARY
ROOM G-007 NEOB
725 17TH STREET, NW
WASHINGTON DISTRICT OF COLUMBIA 20503

*****03721*****

LEVEL 1 - 3 OF 18 STORIES

Copyright 1996 American Banker-Bond Buyer a division
of Thomson Publishing Corporation
The Mortgage Marketplace

February 5, 1996

SECTION: Vol. 6; No. 5; Pg. 12

LENGTH: 385 words

HEADLINE: Federal Agencies Study Law Limiting Home Loans to Families

BODY:

A new provision prohibiting Virginia's Housing Development Authority from lending to low and moderate income joint applicants who aren't related by marriage, blood, or adoption could violate the Equal Credit Opportunity Act and limit banks' mortgage lending opportunities, said banking regulators. But the agency's attorney says ECOA specifically exempts programs like Virginia's.

The Federal Reserve and the Federal Housing Administration, an arm of HUD, are investigating guidelines passed Jan. 23 limiting the state government agency to lend only to "families."

The change reflects the drive by Gov. George Allen, a Republican, to promote family values. Virginia isn't the only state where such sentiments persist, so unless federal regulators block this ruling there's a chance other conservative states could pass similar legislation. That in turn would curb financial institutions' ability to lend to all LMI segments, which could interfere with their CRA goals.

The policy change exempts the elderly and people with disabilities, but these exceptions will be reviewed on a case by case basis.

Critics of the rule change say the agency has put itself at high risk for liability. According to the Equal Credit Opportunity Act, it is unlawful to discriminate on the basis of marital status; this includes joint applications.

Marital status discrimination, along with age discrimination, has been an area of increased focus by fair lending police. Such discrimination could affect gay couples; straight, unmarried couples; and singles who want to purchase a home together.

The VHDA doesn't know how many people will be affected by the decision. The Virginia American Civil Liberties Union said it plans to fight the rule, in court if necessary.

LANGUAGE: ENGLISH

LOAD-DATE: February 5, 1996

LEVEL 1 - 9 OF 18 STORIES

Copyright 1996 The Richmond Times Dispatch
The Richmond Times Dispatch

February 4, 1996, Sunday, CITY EDITION

SECTION: AREA/STATE, Pg. A-1

LENGTH: 896 words

HEADLINE: HOUSING AUTHORITY RULES MAY VIOLATE FEDERAL LAW;
VIRGINIA BOARD VOTED TO CHANGE WORD 'HOUSEHOLD' TO 'FAMILY'

BYLINE: Virginia Churn; Times-Dispatch Staff Writer

BODY:

New Virginia Housing Development Authority rules that keep homosexuals and unmarried couples from getting its mortgages may violate the law, three federal agencies say.

One of those agencies -- the U.S. Department of Housing and Urban Development's Federal Housing Administration -- insures 50 percent to 70 percent of the VHDA mortgages.

VHDA provides mortgages to help low income Virginians buy houses.

The VHDA's board of commissioners voted Jan. 23 to substitute the word "family" for the word "household" in its single-family lending rules. The new rules, which take effect tomorrow, define families as people related by blood, marriage or adoption.

VHDA disclosed that HUD has indicated that it has asked the Federal Reserve for an opinion on whether the new rules violate the Equal Credit Opportunity Act.

Meanwhile, the Federal Trade Commission has asked VHDA to explain why the change did not violate the equal credit act or federal bans on discrimination on the basis of marital status.

VHDA spokesman Mike Anderson said the authority replied to the FTC that the general counsel had concluded that the single-family program is a "special purpose credit program" under the equal credit act. That program allows VHDA to deny loans to applicants that don't meet its family classification, the authority argued.

Lloyd A. Jones, state director of Rural and Community Development, formerly the Farmers Home Administration, said he has written expressing concern about possible "discriminatory practices that could be involved with this (regulatory) change."

"We are still working with them, but certainly we are concerned what the decision may be at the Washington level for a future working relationship," Jones said. "Hopefully we will be able to continue without being in a position

lots of agencies have objected to change

The Richmond Times Dispatch, February 4, 1996

of being considered discriminatory. That decision will lie with our Washington office."

The agency's Washington office is looking at the VHDA rule change from the standpoint of civil rights, fair housing and equal credit laws, Jones said.

Albert C. Eisenberg, a VHDA commissioner from Arlington County, said Jones' letter "fires a shot across the bow, and in my view it underscores the reckless nature" of the VHDA board in making the rule change.

Eisenberg has called the family regulation "blatantly discriminatory" and a step that puts VHDA outside normal lending practices.

Single people still are allowed to buy homes through VHDA, but two unrelated people will not be allowed to do so unless the applicants come under one of the exceptions to the rule. There are waivers for custodial relationships and for elderly and disabled people who live together to save money.

The VHDA had used the word "family" since 1981, but in June 1994 it adopted the word "household," a change the authority said made its rules consistent with those of the private lending sector and the federal government.

def Household was defined as "two or more individuals living together on the premises as a single, nonprofit housekeeping unit."

The idea is to promote the family, VHDA board members have said. They said their bonding authority might be limited and they wanted to make sure the authority's resources went to assist families.

Gov. George Allen and six of his appointees to the nine-member VHDA board supported the change back to "family," as did groups that promote family values and support traditional families.

But homosexual groups, Realtors, and civil rights groups say the new rule is discriminatory and denies homeownership to some low or moderate-income borrowers, particularly women and blacks.

Kent Willis, director of the American Civil Liberties Union of Virginia, said the change violates the Equal Credit Opportunity Act.

so should be an exception Willis said the purpose of the act was to expand opportunity, which he added was the "opposite of what they are using it for here."

VHDA's board had its general counsel, the Richmond law firm of Christian, Barton, Epps, Brent & Chappell, prepare an opinion before the board acted on the regulatory change.

However, the ACLU's Willis, said, "This is a perversion of the purpose of the special purpose program."

Only a small portion of VHDA loans have gone to unrelated couples since the 1994 rule change allowed loans to households -- the total was 606 loans between June 21, 1994, and Dec. 31, 1995. *41%*

It made more than 11,000 in its last fiscal year.

The Richmond Times Dispatch, February 4, 1996

The VHDA does not expect the new family rule to make a significant change in its loan production, said Donald L. Ritenour, VHDA director of single-family development.

so he
compelling
interest
like

A letter on the rule change was sent Jan. 24 to lenders originating VHDA loans -- mortgage bankers and savings and community banks -- Ritenour said. People already in the loan process will be handled under the old rules, he said.

A loan reservation is made when a lender starts processing a loan. That step usually comes after a borrower finds a house, signs a contract and goes to a lender to determine whether he is eligible for a VHDA loan, which are to help low- and moderate-income Virginians become homeowners.

VHDA's reassurances are not appeasing the opponents of the change, however.

"We are going to pursue this," said Eisenberg, the commissioner from Arlington County. "I have put my teeth around that leg and I'm not letting go."

LOAD-DATE: February 6, 1996

MAIL-IT REQUESTED: FEBRUARY 7, 1996

100Y5T

CLIENT: WHO
LIBRARY: NEWS
FILE: CURNWS

YOUR SEARCH REQUEST AT THE TIME THIS MAIL-IT WAS REQUESTED:
VIRGINIA AND LEND! AND (HOUSING OR HOUSE) AND FAMILY AND DATE AFT 1/1/96 AND
DATE BEF 2/1/96

NUMBER OF STORIES FOUND WITH YOUR REQUEST THROUGH:
LEVEL 1... 46

LEVEL 1 PRINTED

THE SELECTED STORY NUMBERS:
7,12,13,14

DISPLAY FORMAT: FULL

MULTIPLE DOCUMENTS ON A PAGE

SEND TO: CORBELLI, LINDA
OA - LIBRARY
ROOM G-007 NEOB
725 17TH STREET, NW
WASHINGTON DISTRICT OF COLUMBIA 20503

*****03837*****

LEVEL 1 - 7 OF 46 STORIES

Copyright 1996 National Public Radio
NPR

SHOW: All Things Considered (NPR 4:30 pm ET)

January 26, 1996

Transcript # 2104-13

TYPE: Package

SECTION: News; Domestic

LENGTH: 703 words

HEADLINE: Virginia Stops Housing Loans to Gays, Unwed Couples

GUESTS: DAVID BOTKINS, Governor Allen Spokesman; MICHAEL MILLER, Chairman, Virginia Housing Development Authority; AL EISENBERG, Board Member, Virginia Housing Development Authority; KENT WILLIS, A.C.L.U.;

BYLINE: ADAM HOCHBERG

HIGHLIGHT:

In an effort to promote "traditional family values", Republican Governor George Allen has ordered the Virginia Housing Development Authority to stop first-time home buyer loans to gays and unmarried couples.

*racially
discrim.*

BODY:

LINDA WERTHEIMER, Host: It's All Things Considered. I'm Linda Wertheimer.

NOAH ADAMS, Host: And I'm Noah Adams. The Housing Authority of Virginia, which provides first-time home loans to state residents with low and moderate incomes has decided to stop lending to couples who are not married or gay. The new policy, which goes in to effect next month, was promoted by Republican Governor George Allen, but questions are being raised about it's legality. NPR's Adam Hochberg reports.

ADAM HOCHBERG, Reporter: The decision only affects only a small number of low and moderate income people who apply for loans through the Virginia Housing Development Authority. Of the more than 11,000 home loans issued last year, only about 600 went to unrelated couples. But Virginia Governor George Allen says no money at all should go to those couples, that Housing Authority loans should be issued only to individuals or to families who are related to each other. A spokesman for Allen, David Botkins, says the governor hopes the new policy will help encourage Virginians to establish stable families.

*legit
govt interest*

DAVID BOTKINS, Allen Spokesperson: The governor feels that home ownership should be encouraged and not discourage among families. The family unit is very important to the majority of Americans and home ownership is an important mix to this situation.

All Things Considered (NPR), January 26, 1996

ADAM HOCHBERG: The new policy reverses a decision the Housing Authority board made two years ago, when it loosened its loan requirements to included unrelated people living together. At the time, Governor Allen and other Virginia conservatives accused the authority of promoting anti-family values. Since then, the make-up of the board has changed and now most of the members are appointees of the governor. Chairman Michael Miller says the board was following the governor's wishes and what he believes to be the wished of most Virginia residents.

MICHAEL MILLER, Chairman, Virginia Housing Development Authority: [unintelligible] from a traditional family, husband, wife, children that home ownership builds strong communities, socially it's very favorable. It's just a good thing, in my opinion.

ADAM HOCHBERG: Opponents of the new policy call it unfair and possibly illegal. Al Eisenberg [sp] was one of only two housing board members to vote against the change. He says it discriminates, not only against homosexual couples, but also against other people who live in non-traditional households.

AL EISENBERG, Board Member, Virginia Housing Development Authority: We are now stuck with a situation in which engaged couples to widows to roommates, who simply want to borrow money together to have a piece of the American dream, can't do so because the agency that is designed precisely to provide them with this kind of assistance won't provide them the loan.

but court poor incomes
ADAM HOCHBERG: Critics also say the new restrictions won't have much effect because an unmarried person could still qualify for a home loan as an individual, then invite anybody else to move in to the house. There also may be potential legal problems with the new rule. The Federal Housing Administration is looking in to whether it violates civil rights laws and Kent Willis of the American Civil Liberties Union says his organization is thinking of challenging the policy in court.

KENT WILLIS, American Civil Liberties Union: We're looking at things everywhere from the Fair Housing Act to the Equal Credit Opportunity Act that says you can't discriminate on the basis of marital status to fundamental Constitutional issues, such as freedom of association and equal protection.

never challenged
ADAM HOCHBERG: Michael Miller, the board chairman who supports the rules, says lawyers advise him that it's both constitutional and legal under Federal Fair Housing laws. He points out that the same rule was in effect between 1980 and 1994 and it was never challenged. I'm Adam Hochberg reporting.

The preceding text has been professionally transcribed. However, although the text has been checked against an audio track, in order to meet rigid distribution and transmission deadlines, it may not have been proofread against tape.

LANGUAGE: ENGLISH

LOAD-DATE: January 27, 1996

LEVEL 1 - 12 OF 46 STORIES

Copyright 1996 Landmark Communications, Inc.
The Virginian-Pilot (Norfolk)

January 24, 1996, Wednesday, FINAL EDITION

SECTION: LOCAL, Pg. B7

LENGTH: 441 words

HEADLINE: TROUBLE AHEAD FOR SOME NONTRADITIONAL HOME LOANS;
THE LIMITATIONS ARE 'BIGOTED NONSENSE,' SAYS ONE CRITIC.

BYLINE: STAFF REPORT

DATELINE: RICHMOND

BODY:

If you are a single parent who wants to share home ownership with another single parent, an engaged couple or a gay couple, you will soon find it impossible to qualify for a Virginia Housing Development Authority home loan.

Housing commissioners Tuesday approved a regulation critics say discriminates against unmarried couples and same-sex couples.

The change - a move backed by the governor - becomes effective on loans being processed starting Feb. 5.

The broader "household" standard, had been in use since 1994.

"We feel that the new definition is the proper definition of a family unit," said Michael G. Miller, chairman of the VHDA board.

The loudest board voice in opposition, Commissioner Albert C. Eisenberg, saw it differently. "It is bigoted nonsense elevated to formal state policy," he said.

Eisenberg raised questions about the risk of costly legal challenges, and whether the FHA would sever its connection with VHDA. The federal housing authority insures roughly 70 percent of VHDA loans.

"What the policy will do for sure," said Kent Willis of the ACLU "is inspire lawyers to look for challenges."

The nonprofit Virginia Housing Development Authority is a public mortgage finance company that made some \$ 906 million in mortgage loans to 11,400 borrowers in the last fiscal year. Most of those loans, 34 percent, were to married couples with dependents, and 19 percent were to marrieds. Singles made up 33 percent of the borrower pool, followed by singles with dependents (10 percent) and other households (4 percent).

Under the rules change, some of those "others" who share living quarters,

get
an it

The Virginian-Pilot (Norfolk), January 24, 1996

would probably qualify for a loan as single.

But they would not be able to count two incomes toward credit-worthiness.

Real estate associations opposed the language change, as did the civil rights group Virginians for Justice, which speaks up for equal rights for gays and lesbians.

yes [Opponents of the "family" language argue that mortgage lending shouldn't be tied to marital status or relationships but should be managed based on credit-worthiness.

Representatives from the Family Foundation and Concerned Women for America endorsed the change.

Reportedly, 18 of the 20 speakers at a public hearing last week urged against the change.

The vote came one month after Gov. George F. Allen's emissary and then-director of the Virginia Department of Housing and Community Development David Caprara brought the new language to the VHDA's Board of Commissioners. Tuesday's vote was along party lines, with the six Allen appointees forming the majority to approve the change 6-2.

GRAPHIC: Graphic, THE NEW RULE, A single-family loan can be made to more than one person only if all such persons . . . are related by blood, marriage or adoption or by legal custodial relationship. Exceptions may be made by the executive director in cases of personal or financial hardship in which one of the persons is elderly (62 or older) or is physically or mentally disabled.

LOAD-DATE: January 25, 1996

LEVEL 1 - 13 OF 46 STORIES

Copyright 1996 The Richmond Times Dispatch
The Richmond Times Dispatch

January 24, 1996, Wednesday, CITY EDITION

SECTION: BUSINESS, Pg. C-1

LENGTH: 805 words

HEADLINE: VHDA MAKES LOANS 'FAMILY' AFFAIR;
GAY, UNMARRIED COUPLES EXCLUDED IN LATEST CHANGE

BYLINE: Virginia Churn; Times-Dispatch Staff Writer

The Richmond Times Dispatch, January 24, 1996

BODY:

The Virginia Housing Development Authority yesterday enacted rules for single-family lending that effectively exclude engaged couples, gay and lesbian couples and other unrelated adults from joining together to buy a house with a VHDA loan.

The board of commissioners voted 6 to 2 in favor of adopting regulations that substitute the word "family" for the word "household" in its single-family lending rules. The regulations will be effective for loan reservations taken on Feb. 5.

The VHDA had used the word "family" since 1981, but in June 1994 adopted "household." VHDA said the change made its rules consistent with those of the private lending sector and the federal government.

For financing of a single-family dwelling, family is defined as "two or more individuals related by blood, marriage or adoption." The new regulations include a waiver to allow those in custodial relationships, as well as elderly or handicapped people living together to save money, to apply together for a VHDA mortgage loan. *waiver exception*

Household was defined as "two or more individuals living together on the premises as a single, nonprofit housekeeping unit."

The change back to family has been described by critics as "mean-spirited" and "blatantly discriminatory," but applauded by Concerned Women of America and the Family Foundation as a necessary support for traditional families.

VHDA Commissioner J. Stephen Britt, an Arlington County lawyer, said the regulations comply with fair-housing and fair-credit laws. Discrimination is not what the change is about, he said, and the new regulations are "proper and defensible."

However, the new regulations may be tested in court and are being studied by the Federal Housing Administration.

"The change in rules has been brought to HUD's (U.S. Department of Housing and Urban Development) attention, FHA's attention, and we are taking a look at the change in those rules," in particular as they relate to the Equal Credit Opportunity Act, which FHA follows, said Alex Sachs, a HUD/FHA spokesman in Washington.

The ACLU of Virginia also will look at the new regulations, said Kent Willis, its director.

"When VHDA takes away a right previously allowed to a minority group, then it stands out and makes it much more vulnerable to court action," Willis said. "If something like this got to court, it has the potential to set precedent because a judge would be forced to make a difficult decision.

"There is no doubt that civil rights and gay and lesbian rights groups believe this should be challenged in court."

The VHDA change will affect not only gays and lesbians buying houses

The Richmond Times Dispatch, January 24, 1996

together, but also not-yet-married heterosexual couples and single mothers pooling resources to get a house, Willis said.

2 The change to "family" was suggested by David Caprara, former director of the Virginia Department of Housing and Community Development, because, Caprara has said, most government-assistance programs penalize two-parent families.

The VHDA action yesterday restored "the historical family definition supported by Governor Allen," said Michael G. Miller of Richmond, chairman of the VHDA board.

"The new regulation still allows single persons to purchase homes through VHDA. Incomes from two unrelated people will not be allowed under the new rule unless one of the exceptions is noted," Miller said.

clearly #1 says bonding practice
 "In the near future, VHDA's single-family bonding authority may be limited due to the extreme growth of its single-family loan program. The new rule will allow VHDA's resources to be directed to assist families in realizing the American dream," he added.

"This regulation will prevent many low and moderate-income Virginians from attaining the dream of owning their home," said David Perry of Richmond, a lobbyist for Virginians for Justice, a group that promotes equal justice for gays, lesbians and bisexuals.

Commissioners Albert C. Eisenberg of Arlington County and Michael J. Schewel, a Richmond lawyer, voted against the change to "family."

Eisenberg said the change places VHDA outside normal lending practice and "punishes all unrelated households for what it suspects or assumes about some."

The original adoption of "household" had nothing do with sexual preference, Schewel said. Unmarried people and gays were the incidental beneficiaries, he said.

Schewel proposed amending VHDA's loan documents to say borrowers would be in default if they get a divorce, abuse their spouse or child, or engage in illegal sex acts -- since the authority is protecting family values and not grandstanding politically.

Schewel's suggestion brought the board full circle in an "Alice in Wonderland on the James," Eisenberg said. "Mr. Schewel's proposal has every bit as much merit as what we did this morning."

LOAD-DATE: January 26, 1996

Can't be used to determine credit-worthiness

LEVEL 1 - 14 OF 46 STORIES

Copyright 1996 The Roanoke Times & World News
Roanoke Times & World News

January 24, 1996, WEDNESDAY, METRO EDITION

SECTION: VIRGINIA, Pg. C5

LENGTH: 444 words

HEADLINE: HOUSING ELIGIBILITY LIMITED;
BOARD DISALLOWS SINGLE PAIRS, GAYS

BYLINE: SUE ROBINSON SAIN STAFF WRITER

DATELINE: RICHMOND

BODY:

If you are an engaged couple, a gay couple, or a single parent who wants to share home ownership with another single parent, you will soon find it impossible to qualify for a Virginia Housing Development Authority home loan.

Housing commissioners approved a regulation Tuesday that critics say discriminates against unmarried and same-sex couples.

The change - backed by the governor - becomes effective on loans being processed starting Feb.5.

The broader "household" standard had been in use since 1994.

"We feel that the new definition is the proper definition of a family unit," said Michael Miller, chairman of the housing authority board.

The loudest board voice in opposition, Commissioner Albert Eisenberg, saw it differently.

"It is bigoted nonsense elevated to formal state policy," he said. The new policy "uniquely combines bigotry with stupidity."

Eisenberg raised questions about the risk of costly legal challenges, and if the Federal Housing Administration would sever its connection with the housing authority. The FHA insures roughly 70 percent of housing authority loans.

"What the policy will do for sure," said Kent Willis of the American Civil Liberties Union "is inspire lawyers to look for challenges."

The nonprofit housing authority is a public mortgage finance company that made some \$ 906 million in mortgage loans to 11,400 borrowers in the last fiscal year. Many of those loans, 34 percent, were to married couples with dependents, and 19 percent were to married couples. Singles made up 33 percent of the borrower pool, followed by singles with dependents (10 percent) and other households (4 percent).

Under the rule change, some of those "others" who share living quarters would

likely apply for a loan as single. But they would not be able to count two incomes toward their credit-worthiness.

The housing authority's mission, as articulated in its brochure, is "to help our fellow Virginians obtain safe, sound and decent housing otherwise unaffordable to them ... to operate in such a manner that all low- and moderate-income citizens have equal opportunity to benefit."

Some real estate associations opposed the language change, as did the civil rights group Virginians for Justice, which speaks up for equal rights for gays and lesbians.

Opponents of the "family" language argue that mortgage lending shouldn't be tied to marital status or relationships but should be managed based on credit-worthiness.

Representatives from the Family Foundation and Concerned Women for America endorsed the change.

At a public hearing last week, 18 of the 20 speakers voiced opinions against the change.

LOAD-DATE: January 25, 1996

MAIL-IT REQUESTED: FEBRUARY 9, 1996

100Y5T

CLIENT: WHO
LIBRARY: NEWS
FILE: CURNWS

YOUR SEARCH REQUEST AT THE TIME THIS MAIL-IT WAS REQUESTED:
VIRGINIA W/50 HOUS! W/50 (FAMILY OR HOUSEHOLD) AND DATE AFT 2/1/96

NUMBER OF STORIES FOUND WITH YOUR REQUEST THROUGH:
LEVEL 1... 58

LEVEL 1 PRINTED

THE SELECTED STORY NUMBERS:
11,25

DISPLAY FORMAT: FULL

MULTIPLE DOCUMENTS ON A PAGE

SEND TO: CORBELLI, LINDA
OA - LIBRARY
ROOM G-007 NEOB
725 17TH STREET, NW
WASHINGTON DISTRICT OF COLUMBIA 20503

*****03703*****

LEVEL 1 - 11 OF 58 STORIES

Copyright 1996 Landmark Communications, Inc.
The Virginian-Pilot (Norfolk)

February 7, 1996, Wednesday, FINAL EDITION

SECTION: FRONT, Pg. A10

LENGTH: 366 words

HEADLINE: VIRGINIA HOUSING DEVELOPMENT AUTHORITY;
SCRAP THIS NEEDLESS RULE

BODY:

The Virginia Housing Development Authority provides mortgages to low-income Virginians so they can buy houses.

But in a misguided move to promote family values, the authority Monday changed the wording of its regulations to ban loans to unrelated or unmarried people. In other words, gays or unmarried heterosexual couples.

While ensuring that state money does not help these folks buy homes, the VHDA has also made it harder for a pair of mothers to consolidate households and buy a house together or for friends to pool their resources to join the ranks of homeowners.

There is a powerful incentive for unrelated, unmarried people to combine funds to buy a home: IRS regulations clearly favor home ownership with the mortgage-interest deduction. No one knows this better than "house-poor" renters who can't save for a down payment.

The VHDA board appears to have invented an issue to appeal to a narrow political constituency. There was no public outrage in the state because unmarried, unrelated people qualified for VHDA loans.

In fact, only a handful of VHDA mortgages went to these folks anyway. Between June 1994 and December 1995 the agency made 11,000 loans. Only 606 were to unmarried and unrelated singles. And not all of that 6 percent came from the ranks of gays and unmarried heterosexual couples.

But with its new regulations the authority has opened a new can of worms. The U.S. Department of Housing and Urban Development's Federal Housing Administration - which insures at least half of the VHDA loans - has asked the Federal Reserve to investigate whether these rules violate the Equal Credit Opportunity Act.

That act prohibits discrimination on the basis of marital status. Now the Federal Trade Commission has made inquiries about how these changes comply with the Equal Credit Act. The state director of the Rural and Community Development, formerly the Farmers Home Administration, has expressed concern over the possible discriminatory nature of the regulation changes.

Thanks to the VHDA change, Virginia may be heading for costly legal battles - which it surely will lose. These could have been avoided had the VHDA left well

The Virginian-Pilot (Norfolk), February 7, 1996

enough alone.

LOAD-DATE: February 8, 1996

LEVEL 1 - 25 OF 58 STORIES

Copyright 1996 American Banker-Bond Buyer a division
of Thomson Publishing Corporation
The Mortgage Marketplace

February 5, 1996

SECTION: Vol. 6; No. 5; Pg. 12

LENGTH: 385 words

HEADLINE: Federal Agencies Study Law Limiting Home Loans to Families

BODY:

A new provision prohibiting Virginia's Housing Development Authority from lending to low and moderate income joint applicants who aren't related by marriage, blood, or adoption could violate the Equal Credit Opportunity Act and limit banks' mortgage lending opportunities, said banking regulators. But the agency's attorney says ECOA specifically exempts programs like Virginia's.

The Federal Reserve and the Federal Housing Administration, an arm of HUD, are investigating guidelines passed Jan. 23 limiting the state government agency to lend only to "families."

The change reflects the drive by Gov. George Allen, a Republican, to promote family values. Virginia isn't the only state where such sentiments persist, so unless federal regulators block this ruling there's a chance other conservative states could pass similar legislation. That in turn would curb financial institutions' ability to lend to all LMI segments, which could interfere with their CRA goals.

The policy change exempts the elderly and people with disabilities, but these exceptions will be reviewed on a case by case basis.

Critics of the rule change say the agency has put itself at high risk for liability. According to the Equal Credit Opportunity Act, it is unlawful to discriminate on the basis of marital status; this includes joint applications.

Marital status discrimination, along with age discrimination, has been an area of increased focus by fair lending police. Such discrimination could affect gay couples; straight, unmarried couples; and singles who want to purchase a

home together.

The VHDA doesn't know how many people will be affected by the decision. The Virginia American Civil Liberties Union said it plans to fight the rule, in court if necessary.

LANGUAGE: ENGLISH

LOAD-DATE: February 5, 1996

MAIL-IT REQUESTED: FEBRUARY 9, 1996

100Y5T

CLIENT: WHO
LIBRARY: NEWS
FILE: CURNWS

YOUR SEARCH REQUEST AT THE TIME THIS MAIL-IT WAS REQUESTED:
VIRGINIA W/50 HOUS! W/50 (FAMILY OR HOUSEHOLD) AND DATE AFT 1/23/96
AND VIRGINIA W/10 HOUSING AUTHORITY

NUMBER OF STORIES FOUND WITH YOUR REQUEST THROUGH:
LEVEL 1... 154 LEVEL 2... 3

LEVEL 2 PRINTED

THE SELECTED STORY NUMBERS:
1-2

DISPLAY FORMAT: FULL

MULTIPLE DOCUMENTS ON A PAGE

SEND TO: CORBELLI, LINDA
OA - LIBRARY
ROOM G-007 NEOB
725 17TH STREET, NW
WASHINGTON DISTRICT OF COLUMBIA 20503

*****03556*****

LEVEL 2 - 1 OF 3 STORIES

Copyright 1996 The Richmond Times Dispatch
The Richmond Times Dispatch

February 4, 1996, Sunday, CITY EDITION

SECTION: AREA/STATE, Pg. A-1

LENGTH: 896 words

HEADLINE: HOUSING AUTHORITY RULES MAY VIOLATE FEDERAL LAW;
VIRGINIA BOARD VOTED TO CHANGE WORD 'HOUSEHOLD' TO 'FAMILY'

BYLINE: Virginia Churn; Times-Dispatch Staff Writer

BODY:

New Virginia Housing Development Authority rules that keep homosexuals and unmarried couples from getting its mortgages may violate the law, three federal agencies say.

One of those agencies -- the U.S. Department of Housing and Urban Development's Federal Housing Administration -- insures 50 percent to 70 percent of the VHDA mortgages.

VHDA provides mortgages to help low income Virginians buy houses.

The VHDA's board of commissioners voted Jan. 23 to substitute the word 'family' for the word 'household' in its single-family lending rules. The new rules, which take effect tomorrow, define families as people related by blood, marriage or adoption.

VHDA disclosed that HUD has indicated that it has asked the Federal Reserve for an opinion on whether the new rules violate the Equal Credit Opportunity Act.

Meanwhile, the Federal Trade Commission has asked VHDA to explain why the change did not violate the equal credit act or federal bans on discrimination on the basis of marital status.

VHDA spokesman Mike Anderson said the authority replied to the FTC that the general counsel had concluded that the single-family program is a 'special purpose credit program' under the equal credit act. That program allows VHDA to deny loans to applicants that don't meet its family classification, the authority argued.

Lloyd A. Jones, state director of Rural and Community Development, formerly the Farmers Home Administration, said he has written expressing concern about possible 'discriminatory practices that could be involved with this (regulatory) change.'

'We are still working with them, but certainly we are concerned what the decision may be at the Washington level for a future working relationship,' Jones said. 'Hopefully we will be able to continue without being in a position

of being considered discriminatory. That decision will lie with our Washington office."

The agency's Washington office is looking at the VHDA rule change from the standpoint of civil rights, fair housing and equal credit laws, Jones said.

Albert C. Eisenberg, a VHDA commissioner from Arlington County, said Jones' letter "fires a shot across the bow, and in my view it underscores the reckless nature" of the VHDA board in making the rule change.

Eisenberg has called the family regulation "blatantly discriminatory" and a step that puts VHDA outside normal lending practices.

Single people still are allowed to buy homes through VHDA, but two unrelated people will not be allowed to do so unless the applicants come under one of the exceptions to the rule. There are waivers for custodial relationships and for elderly and disabled people who live together to save money.

The VHDA had used the word "family" since 1981, but in June 1994 it adopted the word "household," a change the authority said made its rules consistent with those of the private lending sector and the federal government.

Household was defined as "two or more individuals living together on the premises as a single, nonprofit housekeeping unit."

The idea is to promote the family, VHDA board members have said. They said their bonding authority might be limited and they wanted to make sure the authority's resources went to assist families.

Gov. George Allen and six of his appointees to the nine-member VHDA board supported the change back to "family," as did groups that promote family values and support traditional families.

But homosexual groups, Realtors, and civil rights groups say the new rule is discriminatory and denies homeownership to some low or moderate-income borrowers, particularly women and blacks.

Kent Willis, director of the American Civil Liberties Union of Virginia, said the change violates the Equal Credit Opportunity Act.

Willis said the purpose of the act was to expand opportunity, which he added was the "opposite of what they are using it for here."

VHDA's board had its general counsel, the Richmond law firm of Christian, Barton, Epps, Brent & Chappell, prepare an opinion before the board acted on the regulatory change.

However, the ACLU's Willis, said, "This is a perversing of the purpose of the special purpose program."

Only a small portion of VHDA loans have gone to unrelated couples since the 1994 rule change allowed loans to households -- the total was 606 loans between June 21, 1994, and Dec. 31, 1995.

It made more than 11,000 in its last fiscal year.

The Richmond Times Dispatch, February 4, 1996

The VHDA does not expect the new family rule to make a significant change in its loan production, said Donald L. Ritenour, VHDA director of single-family development.

A letter on the rule change was sent Jan. 24 to lenders originating VHDA loans -- mortgage bankers and savings and community banks -- Ritenour said. People already in the loan process will be handled under the old rules, he said.

A loan reservation is made when a lender starts processing a loan. That step usually comes after a borrower finds a house, signs a contract and goes to a lender to determine whether he is eligible for a VHDA loan, which are to help low- and moderate-income Virginians become homeowners.

VHDA's reassurances are not appeasing the opponents of the change, however.

"We are going to pursue this," said Eisenberg, the commissioner from Arlington County. "I have put my teeth around that leg and I'm not letting go."

LOAD-DATE: February 6, 1996

LEVEL 2 - 2 OF 3 STORIES

Copyright 1996 News World Communications, Inc.
The Washington Times

February 3, 1996, Saturday, Final Edition

SECTION: Part A; METROPOLITAN TIMES; Pg. A10

LENGTH: 533 words

HEADLINE: Housing proposal's creator celebrates

BYLINE: Gary Scheets; THE WASHINGTON TIMES

BODY:

David Caprara probably knew the kind of firestorm he was going to unleash when he authored an amendment to the charter of the Virginia Housing Development Authority that barred unmarried couples - including homosexuals - from obtaining first-time home loans from the agency.

Calling it a "great day" for hard-working families in Virginia, Mr. Caprara said, "This decisive vote by Governor George Allen's appointees restores the direction of state policy toward offering husband-wife families as the linchpin for homeownership and community revitalization."

The Washington Times, February 3, 1996

The vote last month was seen as a victory for Mr. Allen's conservative agenda, which suffered a setback in November, when Republicans failed to seize control of the General Assembly.

Mr. Caprara, who left the housing agency commission to seek the Republican nomination in Virginia's 1st Congressional District, sees the fight over loans to nontraditional households as another battle in a 30-year culture war between groups such as the Christian Coalition on the right and the American Civil Liberties Union on the left.

"The battle lines are clearly drawn," Mr. Caprara said in the lobby of the Omni Richmond hotel between campaign stops. "On the one side we have the ACLU and an array of secular forces who deny the very existence of the husband-and-wife family unit.

"On the other side stands Governor George Allen, VHDA commissioners and hundreds of thousands of hard-working Virginia families seeking to expand the dream of homeownership."

Mr. Caprara, who worked for the federal Department of Housing and Urban Development and the National Center for Neighborhood Enterprise, said he went with HUD Secretary Jack Kemp in 1992 to see the devastation left by the Los Angeles riots after the Rodney King verdict. He said he noticed that people who owned their homes took no part in the destruction of their neighbors' property.

That concern about property "tells you something right there about the value of homeownership," Mr. Caprara said.

Phyllis Withers, an emergency coordinator with the Virginia Fire Marshal's Office who worked with Mr. Caprara at the housing authority, said Mr. Caprara is using the issue of denying loans to unmarried couples to launch his political campaign.

"He gives every appearance of playing both sides for his own political advantage, Ms. Withers said.

The new regulations will almost certainly face a court challenge.

Albert C. Eisenberg, a member of the VHDA commission and the Arlington County Board, said at the public hearing on the charter amendment that focusing the state loan program on married couples will only "benefit the household types that the mortgage markets best accommodate already."

After the vote, Mr. Eisenberg said: "Bigoted nonsense has been elevated to the level of state policy.

"Lost in all this was the humanity. They failed to consider the effects on people."

Mr. Caprara said it depends on how you look at things.

"The left is blind to the damage that policies which undermine the family have created in low-income communities," he said.

The Washington Times, February 3, 1996

GRAPHIC: Photo, David Caprara

LANGUAGE: ENGLISH

LOAD-DATE: February 3, 1996

LEVEL 1 - 1 OF 1 ITEM

Copyright (c) Hofstra Law Review 1993
Hofstra Law Review

Spring, 1993

21 Hofstra L. Rev. 603

LENGTH: 36083 words

MORTGAGE DISCRIMINATION: PAPERWORK AND PROHIBITIONS PROVE INSUFFICIENT--IS IT
TIME FOR SIMPLIFICATION AND INCENTIVES?

Robert G. Boehmer *

-----Footnotes-----

* Assistant Professor of Legal Studies, Terry College of Business, University
of Georgia. B.S., University of Oregon School of Business, 1974; J.D.,
University of Oregon School of Law, 1977.

-----End Footnotes-----

TEXT:

... [*612] implemented by the specific rules concerning taking
applications, id. section 202.5, evaluation of applications, id. section
202.6, and the actual extension of credit, id. section 202.7. There is an
exception to this nondiscrimination rule applicable to **special purpose credit
programs**. Id. section 202.8 (as authorized by 15 U.S.C. section 1691(c)).

n70 15 U.S.C. sections 1601-1693r (1988). The central provision of the ECOA,
the discrimi- nation prohibition, is located at 15 ...

ing the unreasonableness of the chosen forum.

Finally, plaintiffs argue that this Court should decline to enforce the forum clause and deny the motion to transfer on the ground that Texas has a strong public policy which would be undermined by a transfer of the cause. In this regard, they observe that under Texas law choice of forum clauses are unenforceable. See *Fidelity Union Life Ins. Co. v. Evans*, 477 S.W.2d 535 (Tex.1972). However, it has already been established in this district that federal and not state law governs the enforceability of forum clauses for federal courts sitting in diversity jurisdiction. *Taylor*, 474 F.Supp. at 147. Consequently, that Texas policy is irrelevant to this Court.

Next, plaintiffs contend that this Court should recognize the public policy of Texas, as manifested by the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA), to protect consumers from unfair trade practices, and should refuse to enforce the clause on this basis. However, as has been noted earlier, Texas law is likely to be inapplicable to this action, in light of the choice of law clauses in the contracts. In addition, to the extent that policies of the Texas DTPA might be implicitly contravened by enforcing a forum selection clause, that policy would be oriented towards protecting ordinary consumers, as compared with knowledgeable, experienced businessmen. See *Sampson, Distant Forum Abuse in Consumer Transactions: A Proposed Solution*, 51 Tex.L.Rev. 269 (1973). Thus, this argument too lacks merit.

5. Section 1404(a) provides:

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

6. Section 1406(a) provides:

The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

7. It may be noted that questions concerning the enforcement of a forum clause often are raised

In sum, this Court is of the opinion that this forum selection clause should be enforced.

IV.

[8] As a final matter, this Court should indicate whether it is transferring this action pursuant to 28 U.S.C. § 1404(a)⁵ or 28 U.S.C. § 1406(a).⁶ Section 1404(a) permits transfers from a district court where venue is proper to another court where a transfer would serve the convenience of the parties and witnesses. Section 1406(a) requires a court to either dismiss or transfer a case which was filed in the wrong venue.

Courts have differed as to how to treat a motion to transfer on the basis of a forum selection clause.⁷ Some courts have dealt with such a motion to transfer as are pursuant to section 1406(a).⁸ Some have treated it as a motion pursuant to section 1404(a).⁹ At least one court avoided the issue by granting a transfer without referring to either statute.¹⁰ Another court granted a transfer simultaneously under sections 1404(a) and 1406(a).¹¹

The statutory selection may be more than academic. The statutory basis for transfer in a diversity of citizenship case may determine what the applicable law is, including whether the choice of law rules of the state of the transferee court or the transferor court apply. See *Ellis v. Great Southwestern Corp.*, 646 F.2d 1099, 1109 (5th Cir. 1981) (citing *Martin v. Stokes*, 623 F.2d 469 (6th Cir.1980) approvingly for this proposition). That is, at least in this circuit, the choice of law rules of the transferor court's

and treated as motions to dismiss. *E.g. Bense*, 683 F.2d 718; *Anastasi Bros.*, 519 F.Supp. 862; *Gordonsville*, 549 F.Supp. 200.

8. *E.g. Cutter*, 510 F.Supp. 905; *Full-Sight*, 466 F.Supp. 71 (court also described section 1404(a) as an alternative basis for transfer).

9. *E.g. In re Fireman's Fund Ins. Co., Inc.*, 588 F.2d 93 (5th Cir.1979) (circuit court affirmed lower court's granting of transfer pursuant to section 1404(a); *Broetje*, 545 F.Supp. 362).

10. *Taylor*, 474 F.Supp. 145.

11. *Kline v. Kawai America Corporation*, 498 F.Supp. 868.

Cite as 571 F.Supp. 551 (1983)

state would apply in a section 1404(a) transfer, while the choice of law rules of the transferee court's state would apply in a section 1406(a) transfer for improper venue (as long as the transfer is not because of lack of personal jurisdiction over the defendants). See *id.*

[9] While it appears that a transfer on the basis of a forum selection clause may be accomplished pursuant to either provision, this Court is of the opinion that such a transfer is more appropriately treated under section 1406(a). It is true that venue in the plaintiff's chosen court, while contrary to the contractual agreement, may satisfy the legal requirements for venue of 28 U.S.C. § 1391. However, the nature of a motion to enforce a forum selection clause is that venue is wrong in the first instance, see 15 *Wright, Miller & Cooper, Federal Practice and Procedure* § 3847 (1982), and a plaintiff should not be allowed to gain an advantage by bringing suit in the wrong court.

Accordingly, pursuant to 28 U.S.C. § 1406(a), this Court orders the transfer of this action to the United States District Court for the Southern District of California.

It is so ORDERED.



UNITED STATES of America

v.

AMERICAN FUTURE SYSTEMS, INC., et al.

Civ. A. No. 78-1517.

United States District Court,
E.D. Pennsylvania.

Dec. 22, 1982.

As Modified upon Determination of
Motion for Reconsideration
Aug. 10, 1983.

Government brought action seeking permanent injunctive relief against defend-

ants' alleged violations of Equal Credit Opportunity Act. The District Court, Giles, J., held that special purpose credit program of company engaged in business of selling china, cookware, crystal and tableware to college students, which discriminated in credit extensions not on the basis of difference in credit need but rather on assumption that certain classes of society were less credit worthy than the market target group, the white single female, and which made distinctions between applicants based upon race, marital status or other prohibited bases, violated Equal Credit Opportunity Act.

Order in accordance with opinion.

1. Consumer Credit — 33

Chief operating officer, who was 97% stockholder of company and who regularly participated in determining policy for extension of credit to all classifications of customers, was a "creditor" in meaning of Equal Credit Opportunity Act and regulation B; furthermore, acceptance corporation, which was a wholly owned subsidiary of the company and whose business was the billing and collection of the credit transactions secured through the company's sales, was also a creditor. Truth in Lending Act, § 702(e), as amended, 15 U.S.C.A. § 1691a(e).

2. Consumer Credit — 31

Special purpose credit program of company engaged in business of selling china, cookware, crystal and tableware to college students, which discriminated in credit extensions not on the basis of difference in credit need but rather on assumption that certain classes of society were less credit worthy than the market target group, the white single female, and which made distinctions between applicants based upon race, marital status or other prohibited bases, violated Equal Credit Opportunity Act. Truth in Lending Act, §§ 701-707, as amended, 15 U.S.C.A. §§ 1691-1691f.

3. Consumer Credit — 31

Preponderance of evidence standard is applicable in assessing whether special cred-

it purpose programs are either established or administered with the purpose of evading the requirements of Equal Credit Opportunity Act or regulation B or whether in absence of purposeful discrimination, equitable relief is necessary to enforce the requirements imposed by law. Truth in Lending Act, §§ 704, 706, as amended, 15 U.S.C.A. §§ 1691c, 1691e.

4. Consumer Credit — 31

In order for a special purpose credit program to qualify under Equal Credit Opportunity Act, credit extension terms for participants must be no less favorable than credit given to a defendant's primary credit applicants to whom credit is ordinarily available for similar types and amounts. Truth in Lending Act, § 702(e), as amended, 15 U.S.C.A. § 1691a(e).

5. Consumer Credit — 31

While inquiry as to race, sex or marital status may be permitted to ascertain eligibility of an applicant to participate in the same special purpose credit program, there is not authorization under Equal Credit Opportunity Act for use of the demographic data to discriminate among persons having the same need. Truth in Lending Act, § 702(e), as amended, 15 U.S.C.A. § 1691a(e).

1. Section 1691 of the ECOA provides in pertinent part:

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

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

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

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

• • • • •

(c) It is not a violation of this section for a creditor to refuse to extend credit offered pursuant to—

(1) any credit assistance program expressly authorized by law for an economically disadvantaged class of persons;

(2) any credit assistance program administered by a nonprofit organization for its members or an economically disadvantaged class of persons; or

Gary Tilles, Rachel Shao, Robert S. Forster, Asst. U.S. Attys., Philadelphia, Pa., Diane Dorfman, Teresa Milton, Housing & Credit Sec., Civ. Rights Div., Washington, D.C., for the U.S.

Thomas P. Preston, Alison Lazerwitz, Duane, Morris & Heckscher, Henry Reath, Philadelphia, Pa., for defendants.

MEMORANDUM

GILES, District Judge.

INTRODUCTION

In this action, the United States of America, through the Office of the Attorney General, sues defendants alleging that they are creditors within the meaning of the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691-1691f¹ and that certain of their business practices violate the ECOA with respect to the prohibited criteria of race, sex, marital status, and year in college. The United States seeks permanent injunctive relief. Defendants admit discrimination based upon certain classifications but assert that this is expressly permitted and encouraged under the ECOA through "special purpose credit programs." See Regulation B, 12 C.F.R. § 202, *et seq.*²

(3) any special purpose credit program offered by a profit-making organization to meet special social needs which meets standards prescribed in regulations by the Board; if such refusal is required by or made pursuant to such program.

2. Section 202.8 of Regulation B provides:

(a) Standards for programs. Subject to the provisions of subsection (b), the Act and this Part are not violated if a creditor refuses to extend credit to an applicant solely because the applicant does not qualify under the special requirements that define eligibility for the following types of special purpose credit programs:

• • • • •

(3) any special purpose credit program offered by a for-profit organization or in which such an organization participates to meet special social needs, provided that:

(i) the program is established and administered pursuant to a written plan that (A) identifies the class or classes of persons that the program is designed to benefit and (B)

I conclude that defendants' actions and programs are clear violations of the ECOA and injunctive relief is warranted. The following constitutes the court's findings of fact and conclusions of law pursuant to Fed.R. Civ.P. 52(a).

FINDINGS OF FACT

1. American Future Systems, Inc. (hereinafter "AFS") is a corporation organized under the laws of the Commonwealth of Pennsylvania with its principal office located at 715 Lancaster Avenue, Bryn Mawr, PA. AFS was incorporated on March 28, 1973.

2. AFS is engaged in the business of selling china, cookware, crystal and tableware and of extending credit to persons who purchase AFS' wares.

3. For each year since its incorporation AFS cash sales have constituted less than 5% of the corporation's sales; the remaining sales are made on credit.

4. AFS is a creditor subject to the provisions of the ECOA.

5. AFS does business in the Eastern District of Pennsylvania.

sets forth the procedures and standards for extending credit pursuant to the program; and

(ii) the program is established and administered to extend credit to a class of persons who, pursuant to the customary standards of creditworthiness used by the organization extending the credit, either probably would not receive such credit or probably would receive it on less favorable terms than are ordinarily available to other applicants applying to the organization for a similar type and amount of credit.

(b) Applicability of other rules. (1) All of the provisions of this Part shall apply to each of the special purpose credit programs described in subsection (a) to the extent that those provisions are not inconsistent with the provisions of this section.

(2) A program described in subsections (a)(2) or (a)(3) shall qualify as a special purpose credit program under subsection (a) only if it was established and is administered so as not to discriminate against an applicant on the basis of race, color, religion, national origin, sex, marital status, age (provided that the applicant has the capacity to enter into a binding contract), income derived from a public assistance program, or good faith ex-

6. Edward M. Satell is the President, chief executive officer, and principal shareholder of AFS and has held those positions since the incorporation of AFS in 1973.

7. Between 1959 and the incorporation of AFS in 1973, Edward M. Satell was the President of American Foresight Company, a company similar in nature to AFS that was established by Mr. Satell in 1959.

8. Edward Satell resides in the Eastern District of Pennsylvania.

9. Edward Satell is a creditor subject to the provisions of the Equal Credit Opportunity Act, 15 U.S.C. § 1691-1691f.

10. James Brown has been the Vice-President of AFS since its incorporation.

11. Marty Zeises has held the title of either Regional Manager or Regional Vice-President since the incorporation of AFS; both positions have involved substantially the same responsibilities.

12. There are 1,442,222 shares of AFS stock issued and outstanding owned by the following:

Edward Satell	—	960,000 shares
James Brown	—	20,000 shares

ercise of any right under the Consumer Credit Protection Act or any State law upon which an exemption has been granted therefrom by the Board; except that all program participants may be required to share one or more of those characteristics so long as the program was not established and is not administered with the purpose of evading the requirements of the Act or this Part.

(c) Special rule concerning requests and use of information. If all participants in a special purpose credit program described in subsection (a) are or will be required to possess one or more common characteristics relating to race, color, religion, national origin, sex, marital status, age, or receipt of income from a public assistance program and if the special purpose credit program otherwise satisfies the requirements of subsection (a), then, notwithstanding the prohibitions of sections 202.5 and 202.6, the creditor may request of an applicant and may consider, in determining eligibility for such program, information regarding the common characteristics required for eligibility. In such circumstances, the solicitation and consideration of that information shall not constitute unlawful discrimination for the purposes of the Act or this Part.

Marty Zeises — 10,000 shares
AFS Treasury Stock — 452,222 shares

13. First National Acceptance Corporation (hereinafter "FNAC") is a wholly owned subsidiary of AFS. FNAC is organized under the laws of the Commonwealth of Pennsylvania with its principal offices located at 715 Lancaster Avenue, Bryn Mawr, PA. FNAC performs the billing and collection responsibilities for certain sales contracts generated by AFS.

14. FNAC does business in the Eastern District of Pennsylvania.

15. FNAC is a creditor subject to the provisions of the Equal Credit Opportunity Act, 15 U.S.C. § 1691-1691f.

16. FNAC's officers are Edward M. Satell and James Brown.

17. The function of the AFS sales committee is, among other things, to review sales performance, to facilitate communication among persons involved with sales performance, and to review sales ideas for the future.

18. From the incorporation of AFS to the present, Edward M. Satell, James Brown, and Marty Zeises have served on the AFS sales committee.

19. The function of the AFS finance committee is, among other things, to review financial performance and the financial needs of the company.

20. From the incorporation of AFS to the present, Edward Satell and James Brown have been members of the AFS finance committee.

21. Since AFS' incorporation, Edward Satell and James Brown have been involved with establishing the credit policies of AFS.

22. Edward Satell regularly participates in the decision of whether or not to extend credit to classes of applicants for credit from AFS and regularly arranges for the extension of credit to groups of persons.

23. Edward Satell regularly participates in making decisions concerning the terms and conditions upon which credit is granted to AFS customers and in the establishment of criteria for evaluating credit applicants.

24. James Brown is in charge of AFS' credit department.

25. Since AFS' incorporation, James Brown has had the responsibility for evaluating the creditworthiness of individual credit applicants in those instances where individual applicants have been evaluated.

25A. Since AFS' incorporation, Edward Satell has been involved with establishing the sales policies of AFS.

26. Since AFS' incorporation, Edward Satell and James Brown have been involved with establishing AFS' compensation policies for individuals involved in the sale of merchandise to the public.

27. Since AFS' incorporation, Edward Satell and Marty Zeises, among others, have established training programs for sales personnel, have written training material for sales personnel, and have conducted training programs for sales personnel.

28. AFS' marketing program is divided into two separate programs. One program, called the American Prestige Series, is primarily conducted during the traditional school year and is designed to sell kitchenware and tabletop products to college students by making sales demonstrations to groups of students in their college residences. The other program is primarily conducted during the summer months when sales of kitchenware and tabletop products are made through a sales presentation in the purchaser's home.

28(a). The testimony was undisputed that AFS is unique in the credit field because it is successful in extending credit to young people who would otherwise be unable to obtain credit in the traditional marketplace.

28(b). The testimony was also undisputed that AFS programs have a social utility in that they afford young people, including minorities, an opportunity to obtain credit despite their youth and lack of prior credit history.

28(c). AFS has a laudable objective of providing credit to the maximum extent possible consistent with its ability to make a

Cite as 571 F.Supp. 551 (1983)

profit and to expand credit to young people based on AFS's general operating experience.

28(d). AFS misinterpreted the ECOA and Treasury Regulations to permit them to identify a preferred group within the special social need category to which their programs were targeted.

29. AFS, believing it could legally do so, and using payment history data gathered to determine ways to extend credit while maximizing profit, concedes that it intentionally differentiated among applicants for credit in its college and summer sales programs between the ages of 18-21 on the basis of race, sex and marital status.

30. Prior to the 1979 summer sales season, AFS had no credit program formally described in writing or designated as a "special purpose credit program."

31. Prior to establishing and committing itself to a "special purpose credit program," AFS did not seek the advice of the Treasury Department, as it could have, though was not required to, under 12 C.F.R. § 202.1(d).³

32. AFS intended to differentiate on the basis of race, sex and marital status as described above since its incorporation in mid-1973 and prior to the passage of the ECOA in 1975.

33. AFS's primary sales target has always been the white single female population between the age of 18-21 living at her parents' home and with a parent who could co-sign for the credit extension. It has encouraged sales to this preferred group by adoption of a policy (by specific directions to its sales force), to sell in areas believed to be all white, or predominantly white, and by avoiding sales areas where the minority population might be substantial. It has dis-

3. Section 202.1(d) provides in pertinent part: Issuance of staff interpretations.

(1) Unofficial staff interpretations will be issued at the staff's discretion where the protection of section 706(e) of the Act is neither requested nor required, or where a rapid response is necessary.

(2)(i) Official staff interpretations will be issued at the discretion of designated officials. No such interpretation will be issued approv-

couraged sales personnel to pursue minority or non-preferred groups through deferred commission arrangements on such sales which arrangements are markedly different from, and substantially less lucrative than, the immediate full commission arrangements for sales to the preferred market group of white single females between the ages of 18 and 21.

34. Although AFS's minority sales gradually rose in 1980-81 to approximately 13% of all sales, historically the percentage of such sales has been very low because AFS does not seek to sell to a class of minority females. The non-preferred sales, which are to almost all black females, are explained by mostly unavoidable encounters of salespersons with black or other minority persons as part of "mixed audiences" in markets targeted by AFS as "all-white colleges," "all white neighborhoods" and "all white high schools."

35. AFS avoids black or other minority population areas because of its belief that though there will be a high volume of sales, even on a deferred basis, there will also be a concomitantly high degree of defaults or bad accounts. This, it asserts, would be an undue risk to its margin of narrow profit since an unacceptably large portion of its overhead costs would have to be devoted to collection efforts.

36. On all deferred shipment sales, a large deposit is encouraged to be made although the minimum applicable to all sales will be accepted. The merchandise is not delivered and remains in the possession of AFS until it is paid for in full or the company is satisfied that the person is a credit-worthy risk, having made a certain number of successive monthly payments. On all defaulted deferred shipment accounts AFS

ing creditors' forms or statements. Any request for an official staff interpretation of this part must be in writing and addressed to the Director of the Division of Consumer Affairs, Board of Governors of the Federal Reserve System, Washington, D.C. 20551. The request must contain a complete statement of all relevant facts concerning the credit transaction or arrangement and must include copies of all pertinent documents.

not only retains the merchandise, but also retains any deposits and payments made on accounts. Presently, for deferred accounts, largely minority, AFS finds that three successive payments evidence reliable creditworthiness although prior to the 1978-1979 sales seasons, a minimum of 6 to 8 consecutive monthly payments was required.

37. Only about 10% of AFS's total summer sales are outside the age range of 18-21 and the non-college sales are *de minimus* in the winter sales season.

38. In addition to their standard credit test, AFS states that they have three special purpose credit programs—two in the winter and one in the summer.

39. In the summer sales program, the white single employed female between the age of 18-21 and living at home with a parent able to co-sign the credit application is the primary sales target for the company. AFS's policy with respect to such sales is immediate shipment of goods without credit checks of either the applicant or parent co-signer. Parents are not required but are requested to sign the credit application.

40. On the other hand, as to all persons outside the prime sales target group, principally minority females of the same age group, sales are not encouraged. Should sales be made to them, they are on a deferred shipment basis and the applicant and parent co-signer are subjected to individual credit checks. Parents are strongly encouraged to co-sign in those instances where, if the children have no prior credit, the purchase is to be based on the parents' credit. About 80% of the persons in this non-preferred category do qualify for credit under the AFS customary credit standards. Upon credit approval, the goods are shipped.

The treatment of this category of non-preferred sales is supposed to be a separate special purpose credit program. The groups of persons falling into this category are all males, all married couples and all minorities of all races and colors other than white.

41. In the college or winter sales program there is an intended special purpose credit program for credit sales to four year

college white single females, other than freshmen. A separate program exists for all other categories of persons.

42. White females in four year colleges who are seniors, juniors or sophomores are treated as preferred sales targets, regardless of age, prior credit histories, or any other normal indicia of creditworthiness. Sales to this group are always made on an immediate shipment basis unless there is a specific request for delay in shipment.

All students in colleges having less than four year programs are sold on a deferred shipment basis.

43. White persons predominate in the number of non-preferred sales. However, if the number of sales made to black and white purchasers were more nearly equal, the percentages of sales to each group would show that black customers predominate in the deferred sales category.

44. Black females and others in the same college years, including all freshmen, are automatically treated on a deferred shipment basis. If there is an inquiry, they are encouraged to buy on a deferred shipment basis, but if they insist, they receive immediate shipment. Currently, after three successive payments, the purchaser is eligible to receive shipment of the goods. The finance charges are the same whether there is deferred or immediate shipment.

45. There are no credit checks of any applicant in the winter program and there is no parental co-signer requested for any sale.

46. AFS' summer sales program targeted to white single females living at home with at least one parent available to co-sign the credit application, does not, standing alone, qualify as a special purpose credit program. The credit extension is intended for the white parent. The white parent who is already presumed creditworthy by AFS, is not, therefore, in need of special credit treatment and, in any event, is beyond the age group of 18 to 21.

47. The record evidence is uncontradicted that nation-wide, credit is available to persons 18 to 21 who do not themselves

have prior credit experience if a parent co-signs who is creditworthy.

48. AFS has therefore targeted its primary sales efforts to a market to which credit is normally available.

49. I do not credit AFS' contention that its primary sales market is distinguished by the fact that a parent is requested to co-sign but is not required to do so. The market is targeted with the expectation that a parent will co-sign. The prospective purchaser is not informed in advance of the sales presentation that the parent is not required to co-sign. If the parent refuses to co-sign, the salesperson informs the purchaser that credit will nevertheless be extended to the child.

50. Over 75% of the credit applications are co-signed in this primary summer market, supporting the conclusion that the sales effort is designed initially to lead the purchaser and parent to believe that co-signing is required and not optional. Accepting the credit application after parental refusal to co-sign is not responsive to a special social need of the youth involved, but is a sales technique to consummate the sale while indirectly generating parental responsibility for the sale.

51. The summer sales program for minority and other non-preferred applicants is also not a special purpose credit program. The distinction made on the basis of race is not a reflection of a different "special social need" from that experienced by the primary marketing group, but rather is a reflection of the individual business judgment of AFS on how best to retail its product.

52. Persons in the non-preferred group have to meet the customary credit standards to obtain immediate shipment. If youth in this category are not able to meet those standards, the parent is required to co-sign and withstand a credit check against the AFS customary credit standards. Since there is no deviation from the customary credit standards and because credit would normally be available when a creditworthy parent co-signs, there is no special need exception extended to youth in this category.

53. The spouse of a married applicant is "requested" to co-sign in the same manner as parents of youth purchasers and with the same intent of obtaining the co-signature without first having to disclose that it is not required.

54. As in the summer sales programs, there is no difference in the special social need among prospective applicants for credit in the winter sales program based upon race, sex, year in school or marital status and hence no rational reason to distinguish among them. The prohibited distinctions are based upon AFS' exercise of business judgment and not upon a difference in special social needs among youths 18-21 or year in school.

55. Although AFS believes that it has three separate special purpose credit programs, all customers, whether a racial minority or white, single or married, preferred or non-preferred, are told that there is but one credit program objective; that is to sell quality products to females principally between the ages of 18-21 and to make credit available on credit terms outside of the customary credit standards. There is no policy of publication to prospective applicants that they are participants in any special credit purpose program. All applicants between 18-21 are carefully led to believe that they are being treated the same as all other applicants.

56. AFS does not tell minorities or other non-preferred groups that their credit terms are different because of race, sex or marital status. It acknowledges that to do so would cause humiliation, embarrassment and distress to the applicants. Such disclosure would obviously discourage sales and risk harm to the reputation of the company. Consequently, all sales persons are instructed to extend credit on an immediate shipment basis to any minority or non-preferred group buyer who insists upon it.

57. Because the participants in the AFS "special purpose credit programs" for non-preferred sales are not told that they fall into this category, they are not offered a special purpose credit program opportunity

which they would also have the opportunity of declining.

58. Non-preferred "special purpose credit programs" customers do not receive notice of adverse action, that is, that they are being rejected for the credit terms extended to other persons identically situated, except for the characteristics of race, sex, marital status, or year in school.

59. AFS credit extension programs do not qualify as special purpose credit programs because they are not offered within the meaning of the ECOA nor are minority applicants informed they are participants in such a "special purpose credit program" within the scope of Regulation B.

60. Generally, in AFS "special purpose credit programs," individual applications are not considered for creditworthiness against any criteria except the applicant's race, sex, marital status or year in school. Each minority or other non-preferred customer has to prove individual creditworthiness to obtain credit while preferred customers, who receive immediate shipment, do not.

61. AFS seeks to justify its credit extension distinctions based upon sales and account currency statistics generated originally by its predecessor company, American Foresight, which purport to show that minority customers, as a group, are less creditworthy than white counterparts. However, there has been no showing by AFS that the statistics generated by American Foresight were valid and non-biased. Nevertheless, in mid-1973, AFS used this data to map out a market of white single females as its primary sales target group to which sales were encouraged and credit made immediately available. Sales to minorities as a class were discouraged and, if sold, credit to minorities was deferred since shipments were deferred until payment was made.

62. Although AFS did not use a racial coding system, in the 1973-74 sales seasons, in reliance on the American Foresight data, it did distinguish minority applicants by instructing salespersons that all sales to minorities were to be on a deferred shipment basis only. Sophomores and freshmen were

also deferred regardless of race, sex, age or marital status.

63. In the 1974-75 sales seasons, AFS began to employ a formal racial coding system on its sales contracts and account records. It sought to obtain new empirical data for decision making in development of a credit extension policy. Those minorities and freshmen to whom sales were made, though discouraged, were all sold on a deferred shipment basis.

64. In 1975-1976, sales to minorities continued to be discouraged and sales to white single females continued to be the only primary sales market target. Due to financing problems on deferred sales agreements, immediate shipments were made to all customers.

65. Based solely on race, and separately for college year, AFS made a study of its accounts for the 1975-1976 season which indicated that the minorities, sophomores and freshmen tended to be more delinquent than white female four year college upper class accounts.

66. In 1976-1977, AFS continued the racial coding system and resumed its previous deferral of sales to all minorities and freshmen.

67. AFS discovered in its analysis of data for 1976-1977 that its sales persons were miscoding minority sales as white sales in order to qualify for immediate sales commissions. The number of miscoded accounts is not known. A quality bonus system was installed to attempt to correct temptation or tendency to miscode, but there is no record information to gauge its success in the face of a compensation system that continued to provide a strong pecuniary motive for miscoding by dramatically favoring immediate compensation for preferred group sales as opposed to the deferred compensation program for deferred non-preferred sales.

68. The same coding and sales system was operating in 1978-1979, except that Spanish surnamed persons and Orientals were separately coded because of expansion of AFS sales to the western part of the

United States. Prior thereto, all such sales had either been coded as white or black.

69. From November, 1978 through August, 1979, AFS dropped the racial codes. Therefore, it cannot be determined for that period what the delinquency rate was for minority accounts. Minorities were still sold goods on a deferred basis.

70. From September, 1979 to the present the racial coding has been resumed based on a belief derived from internally generated data that minority accounts are still less creditworthy than those of the preferred market group.

71. AFS's coding system and experimental data analysis are racially suspect, and thus invalid, because its commission system for salespersons was orientated towards the primary market group and created a motive for the misrepresentation of black sales as white sales to gain immediate commissions. The Government's witness evidence, corroborated by the defendant's own experience, shows that some salespersons miscoded black sales as white sales to obtain immediate commissions, even though this was against AFS' specific instructions to the contrary.

72. AFS instituted, and still has, a quality bonus system to insure compliance with the company's instructions. However, AFS' statistical analyses did not take into account nor correct for the motive and instances of intentional miscoding of applications.

73. In any year where coding was undertaken, the number of listed minority sales was so small compared to listed preferred sales that intentional miscodings by a few salespersons could have a significant effect upon the analysis for minority account delinquencies.

74. The coding system is also numerically suspect because AFS relied upon visual observations of the salespersons. Spanish surnamed persons, Orientals and blacks were subject to be miscoded as white sales because of color of skin, surname or the apparent absence of some other racial or ethnic stereotypical characteristic. Appli-

cants were not asked their race or ethnic background.

75. At no time did AFS or its predecessor, American Foresight, employ a statistically non-biased data collection model to develop the conclusions upon which it relied to differentiate on the basis of characteristics otherwise prohibited by the ECOA.

75(a). AFS presented evidence by Dr. David Hildebrand, a professor of statistics at the University of Pennsylvania, Wharton School of Business, who believed that AFS' "special purpose credit programs" were founded on sound statistical principles. Dr. Hildebrand testified that AFS' data base was adequate and that he could not find any systematic errors that would affect his statistical findings.

75(b). Dr. Bernard Siskin, a statistical expert who testified for the Government, conceded that assuming AFS' data were statistically valid, its data showed default rates between minorities and non-minorities to be consistently and statistically significant, and that the difference between shipped and deferred sales had no effect on default rates.

76. The testimony of Dr. Bernard Siskin is credited that the AFS data system and analyses are statistically biased and, therefore, statistically unreliable, because it was the AFS sales policy to discourage sales to the class of minority persons or other non-preferred groups between the ages of 18-21 while encouraging sales to the preferred market group.

77. Further, the testimony of Dr. Siskin is credited that AFS data and analyses are statistically invalid because they fail to show a valid statistical basis for exclusion of factors other than race, sex and marital status, which reasonably could influence the default or delinquency rates of accounts, such as income level of applicants, differences in sales presentations, reputation of the creditor, AFS selective sales market policy, or the influence of deferred shipments on customers generally.

78. The distinctions made by AFS among the groups within the 18-21 age

group or year in school are not designed to accomplish a "special social need" as defined in the ECOA.

79. The alleged "special purpose credit programs" of AFS do not meet a "special social need" under the Act. Neither the sales program nor the policy is designed to extend credit to minorities or the non-preferred categories of persons as a class but rather is designed to extend credit only to those minorities or non-preferred sales who are unavoidably encountered in AFS when it attempts to reach the class of white females falling into the primary market group.

80. AFS has had difficulty obtaining lenders to finance or purchase deferred sales contracts, as opposed to immediate shipment contracts. However, AFS does not contend that the reason is in any way related to any lender policy based upon race, color, sex or marital status.

81. Nationally, all youths between the ages of 18 and 21 who are not regularly employed and who have not had prior credit experience are considered to be less than creditworthy and cannot obtain credit without a parental co-signer who is creditworthy. This is so regardless of race, color, marital status, or year in school. Because one of the purposes of the ECOA is to promote equal and non-discriminatory access to credit opportunity in a credit oriented society, extension of credit by a profit-making organization to persons otherwise disabled credit-wise, could constitute meeting a special social need through a special purpose credit program.

82. Though AFS purports to meet three separate "special social needs" using three separate programs, AFS, in fact, has properly identified and attempted to address only one special social need common to all three programs—namely, credit opportunity commonly denied to all members of the age group 18 to 21 who have no prior credit history.

83. Additional findings of fact in the appendix to this opinion supplement all of

the foregoing and are incorporated herein by reference.

DISCUSSION

The purpose of the ECOA is to promote equal credit opportunity through elimination of specified non-objective factors such as race, sex, and marital status. The ECOA also recognizes that because of economic disadvantages and special social needs, certain classes of persons cannot realistically participate in the credit market when customary lending standards are applied. Consequently, the ECOA provides that it shall not be a violation if credit terms offered to persons participating in special purpose credit programs are denied to persons who would meet the creditor's customary credit standards. 15 U.S.C. § 1691(c)(3). Although the ECOA does not expressly state that the credit terms extended pursuant to a special purpose credit program must be more favorable than customary credit terms, this is implied by the special purpose credit program exemption and by the requirement that the special programs meet special social needs. *Id.*

A profit-making organization such as AFS is authorized to offer a special purpose credit program to meet special social needs. Any such program must meet standards prescribed by Regulations of the Board of Governors of the Federal Reserve System ("Board"). *Id.* Effective March 23, 1977, the Board promulgated Regulation B, 12 C.F.R. § 202 *et seq.*,⁴ to effectuate the purposes of the ECOA. Regulation B does not specify the special social needs to be addressed by special purpose credit programs. It would seem that any rationally identified social need would qualify so long as it is special and is neither singled out with the intent, nor has the effect, of circumventing the non-discrimination provisions of the ECOA and the implementing regulations.

[1] AFS is a creditor. Defendant Edward Satell, however, contends that under the evidence he is not a creditor within the meaning of the ECOA or Regulation B.

Cite as 571 F.Supp. 551 (1983)

The ECOA defines creditor as "any person who regularly extends, renews or continues credit; any person who regularly arranges for the extension, renewal or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew or continue credit." 15 U.S.C. § 1691a(e). Regulation B defines creditor as "a person who, in the ordinary course of business, regularly participates in the decision of whether or not to extend credit." 12 C.F.R. § 202.2(1). As the chief operating officer and 97% stockholder of AFS, Satell regularly participates in determining policy for the extension of credit to all classifications of customers. Salespersons do not have discretion to deviate from that policy. Though he may not personally or directly review each credit application, there is no need to do so since the bulk of AFS sales credit is not generally extended based on a review of individual creditworthiness. Therefore, Satell is a creditor within the meaning of the Act and its implementing regulations.

Defendant, First National Acceptance Corporation (FNAC) is also a creditor;⁵ it is a wholly owned subsidiary of AFS, Satell is its president and James Brown, the AFS vice president, is its vice president. FNAC's business is the billing and collection of the credit transactions secured through AFS sales. On deferred accounts this would include determinations of when an account was creditworthy so as to offer shipment of the goods prior to full payment. Consequently, FNAC is a participant with AFS in carrying out AFS credit policies.

[2,3] In this action for injunctive relief, the United States has the burden of proof that the defendant creditors have violated the ECOA. Although the ECOA is silent regarding the standard of proof to be applied, no reason exists to apply a stricter standard than a preponderance of the evidence in assessing whether defendants' special credit purpose programs are either established or administered with the purpose

of evading the requirements of the ECOA or Regulation B or whether in the absence of purposeful discrimination, equitable relief is necessary to enforce the requirements imposed by law. See 15 U.S.C. §§ 1691c and 1691e. I find beyond question that the United States has met its burden and that injunctive relief is warranted.

Despite their contentions that they have three separate special purpose credit programs, defendants identified but one special social need—the extension of credit to the class of youth between the ages of 18 and 21 excluded from the customary credit market due to the lack of prior credit experience. Each youth applicant in this category, irrespective of race, color, marital status or year in college, shares the same credit disability. There is no evidence warranting the distinctions made by defendants between applicants based upon race, marital status or other prohibited bases with respect to this special social need.

AFS does not contest what it has done but whether its admitted practices were contrary to the law. Defendants admittedly differentiate in credit extensions between participants in their credit programs, not on the basis of a difference in credit need, but rather on the assumption that certain classes of society are less creditworthy than the market target group—the white single female. The credit terms extended to the primary marketing group, which constitutes the vast majority of defendants' sales, could be deemed the "customary standards of creditworthiness" against which to gauge compliance with the ECOA.

None of the applicants in the primary group has prior credit. Hence, there is no basis for applying less favorable credit terms to minorities, married persons or other discriminatees. However less favorable credit terms are extended to non-preferred customers than to the primary marketing targets. Such distinctions are not responsive and remedial of a special social need of the disadvantaged but relate solely to de-

5. A corporation is deemed to be a "person" under the applicable statute and regulations.

See 15 U.S.C. § 1691a(f) and 12 C.F.R. § 202-2(x).

4. See footnote 2 *supra*.

Cite as 571 F.Supp. 551 (1983)

defendants' conscious marketing decision to maximize profits by excluding, or severely restricting, the socially disadvantaged from its credit market.

[4] In order for a special purpose credit program to qualify, the credit extension terms for participants must be no less favorable than credit given to defendants' primary credit applicants to whom credit is ordinarily available for similar types and amounts. Therefore, I conclude that as a matter of law the credit extension programs for AFS non-preferred customers, (minorities, married persons and college students other than sophomores, juniors and seniors in four year colleges), are not designed to, and do not, benefit those groups in comparison with the preferred customers identically situated. Defendants' programs, as established and administered, have the clear effect of discriminating on prohibited bases without meeting any special social needs.

[5] Defendants assert that section 202.8(c) of Regulation B authorizes the use of demographic data to establish creditworthiness criteria among applicants based upon otherwise prohibited bases.⁶ This argument fails. While inquiry as to race, sex or marital status may be permitted to ascertain the eligibility of an applicant to participate in the same special purpose credit program, there is no authorization for use of the demographic data to discriminate among persons having the same need. This provision of the regulation merely recognizes that many persons *regardless* of race, sex, or marital status may share the same disadvantage and permits such credit inquiry into those common characteristics as may be required for participation in the same

program designed to meet the common social need.

AFS asserts that the discriminatory distinctions made are necessary so it can afford to give credit to minorities and other non-preferred customers. This argument is not recognition of a special social need for customers but only a marketing approach of the creditors to insure their profits by restricting credit opportunities based on race, sex, and marital status in violation of the ECOA.

Defendants argue that their own statistical analyses justify the assigning of a negative value to the prospective accounts of minorities and others. Only as to age does the ECOA permit a creditor to use an empirically derived credit system with respect to an otherwise protected classification for purposes of determining creditworthiness. See 15 U.S.C. § 1691(b)(3). See also 12 C.F.R. § 202.6(b). Even then, the system must be demonstrably and statistically sound in accordance with regulations of the Board and, most importantly, in the operation of any such system, the age of an elderly applicant may not be assigned a negative factor or value. One may infer from this statutory provision that the use of empirically derived systems for other classifications of persons protected under the ECOA is absolutely prohibited, or at least that any empirically derived system may not assign a negative value to characteristics such as race, color, sex or marital status as do defendants.

Even assuming AFS's statistics were demonstrably and statistically sound, the distinctions in the credit programs would not be protected under either the ECOA or Regulation B; so long as the protected group is assigned less favorable credit terms than others, there is unlawful dis-

section, then, notwithstanding the prohibitions of §§ 202.5 and 202.6, the creditor may request of an applicant and may consider, in determining eligibility for such program, information regarding the common characteristics required for eligibility. In such circumstances, the solicitation and consideration of that information shall not constitute unlawful discrimination for the purposes of the Act or this part.

crimination whether disguised or well-intended. Where the individual applicant is subject to adverse treatment based upon group performance, he or she is victimized by the stigma of race, color, sex, marital status and other criteria specifically prohibited under the ECOA for the benefit of the individual's equal credit opportunity.

The ECOA creates in each individual applicant a direct right to challenge a credit denial or credit practice believed to be discriminatory. 15 U.S.C. § 1691e(a)⁷. This right is not diminished by the provision of the ECOA recognizing the need for some disparate, but not less favorable, treatment to meet special social needs. Likewise, the ECOA places the burden upon the creditor to justify the special social needs and any disparate treatment to each credit applicant against whom adverse action is taken. 15 U.S.C. § 1691(d).⁸

Extension of credit on a discriminatory basis within a special purpose credit program is a denial of equal credit opportunity and therefore a denial of credit. Each credit applicant must be able to presume equal credit opportunity will be extended on the basis of the individual credit application and on the same terms as all other persons similarly situated, unless "given" a bona fide explanation for the rejection or disparate treatment. See 12 C.F.R. § 202.9. If a person does not qualify under customary credit standards, the applicant may be offered an opportunity to participate in a special purpose credit program designed to meet a special social need. AFS does not inform minority and other non-preferred applicants for credit that they are being treated differently because it knows that to do so would be detrimental to its business

and of great humiliation and embarrassment to its customers. Such non-disclosure is inconsistent with the purposes of the ECOA.

CONCLUSION

It would be incongruous to construe either the ECOA or Regulation B to permit either conscious discrimination against the uninformed, the misinformed or the unwilling or to make distinctions among participants in the special purpose credit program except upon defined special social need. While the ECOA appears to recognize that a creditor could have several special credit purpose programs, each would have to address a distinct special social need. To permit a creditor to discriminate on otherwise prohibited bases within the class of persons sharing the same special social need as defendants unjustifiably claim a right to do, would be a mockery of the non-discrimination provisions of the ECOA.

An appropriate order follows.

ORDER

AND NOW, this 22nd day of December, 1982, it is hereby ORDERED that an injunction is hereby issued permanently enjoining defendants, their officers, agents, employees, successors, and all persons in active concert or participation with any of them from:

1. Discriminating in violation of the special purpose credit program provisions of the ECOA against any person participating in such a program and sharing the disability of no prior credit experience on the basis of race, color, religion, national origin, sex, marital status, or age, provided the participant has the capacity to contract;

tion 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. Such term does not include 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.

See also 12 C.F.R. § 202.2(c).

6. 12 C.F.R. § 202.8(c) provides that:

[I]f all participants in a special purpose credit program described in paragraph (a) of this section are or will be required to possess one or more common characteristics relating to race, color, religion, national origin, sex, marital status, age or receipt of income from a public assistance program and if the special purpose credit program otherwise satisfies the requirements of paragraph (a) of this

7. § 1691e. Individual or class action for actual damages.

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

8. Section 1691(d)(6) provides:

For purposes of this subsection, the term "adverse action" means a denial or revoca-

202.3

as elderly and are most favored by a creditor on the basis of age.

(w) *Open-end credit* means credit extended under a plan under which a creditor may permit an applicant to make purchases or obtain loans from time to time directly from the creditor or indirectly by use of a credit card, check, or other device.

(x) *Person* means a natural person, corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

(y) *Pertinent element of creditworthiness*, in relation to a judgmental system of evaluating applicants, means any information about applicants that a creditor obtains and considers and that has a demonstrable relationship to a determination of creditworthiness.

(z) *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.

(aa) *State* means any State, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

[Reg. B. 50 FR 48026, Nov. 20, 1985, as amended at 54 FR 50485, Dec. 7, 1989]

§ 202.3 Limited exceptions for certain classes of transactions

(a) *Public utilities credit*—(1) *Definition*. Public utilities credit refers to extensions of credit that involve public utility services provided through pipe, wire, or other connected facilities, or radio or similar transmission (including extensions of such facilities), if the charges for service, delayed payment, and any discount for prompt payment are filed with or regulated by a government unit.

(2) *Exceptions*. The following provisions of this regulation do not apply to public utilities credit:

(i) Section 202.5(d)(1) concerning information about marital status;

(ii) Section 202.10 relating to furnishing of credit information; and

(iii) Section 202.12(b) relating to record retention.

(b) *Securities credit*—(1) *Definition*. Securities credit refers to extensions of credit subject to regulation under section 7 of the Securities Exchange Act of 1934 or extensions of credit by a broker or dealer subject to regulation as a broker or dealer under the Securities Exchange Act of 1934.

(2) *Exceptions*. The following provisions of this regulation do not apply to securities credit:

(i) Section 202.5(c) concerning information about a spouse or former spouse;

(ii) Section 202.5(d)(1) concerning information about marital status;

(iii) Section 202.5(d)(3) concerning information about the sex of an applicant;

(iv) Section 202.7(b) relating to designation of name, but only to the extent necessary to prevent violation of rules regarding an account in which a broker or dealer has an interest, or rules necessitating the aggregation of accounts of spouses for the purpose of determining controlling interests, beneficial interests, beneficial ownership, or purchase limitations and restrictions;

(v) Section 202.7(c) relating to action concerning open-end accounts, but only to the extent the action taken is on the basis of a change of name or marital status;

(vi) Section 202.7(d) relating to the signature of a spouse or other person;

(vii) Section 202.10 relating to furnishing of credit information; and

(viii) Section 202.12(b) relating to record retention.

(c) *Incidental credit*. (1) *Definition*. Incidental credit refers to extensions of consumer credit other than credit of the types described in paragraphs (a) and (b) of this section:

(i) That are not made pursuant to the terms of a credit card account;

(ii) That are not subject to a finance charge (as defined in Regulation Z, 12 CFR 226.4); and

(iii) That are not payable by agreement in more than four installments.

(2) *Exceptions*. The following provisions of this regulation do not apply to incidental credit:

(i) Section 202.5(c) concerning information about a spouse or former spouse;

(ii) Section 202.5(d)(1) concerning information about marital status;

(iii) Section 202.5(d)(2) concerning information about income derived from alimony, child support, or separate maintenance payments;

(iv) Section 202.5(d)(3) concerning information about the sex of an applicant, but only to the extent necessary for medical records or similar purposes;

(v) Section 202.7(d) relating to the signature of a spouse or other person;

(vi) Section 202.9 relating to notifications;

(vii) Section 202.10 relating to furnishing of credit information; and

(viii) Section 202.12(b) relating to record retention.

(d) *Government credit*—(1) *Definition*. Government credit refers to extensions of credit made to governments or governmental subdivisions, agencies, or instrumentalities.

(2) *Applicability of regulation*. Except for § 202.4, the general rule prohibiting discrimination on a prohibited basis, the requirements of this regulation do not apply to government credit.

[Reg. B. 50 FR 48026, Nov. 20, 1985, as amended at 54 FR 50485, Dec. 7, 1989]

§ 202.4 General rule prohibiting discrimination.

A creditor shall not discriminate against an applicant on a prohibited basis regarding any aspect of a credit transaction.

§ 202.5 Rules concerning taking of applications.

(a) *Discouraging applications*. A creditor shall not make any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage on a prohibited basis a reasonable person from making or pursuing an application.

(b) *General rules concerning requests for information*. (1) Except as provided in paragraphs (c) and (d) of this section, a creditor may request any information

in connection with an application.

(2) *Required collection of information*. Notwithstanding paragraphs (c) and (d) of this section, a creditor shall request information for monitoring purposes as required by § 202.13 for credit secured by the applicant's dwelling. In addition, a creditor may obtain information required by a regulation, order, or agreement issued by, or entered into with, a court or an enforcement agency (including the Attorney General of the United States or a similar state official) to monitor or enforce compliance with the act, this regulation, or other federal or state statute or regulation.

(3) *Special purpose credit*. A creditor may obtain information that is otherwise restricted to determine eligibility for a special purpose credit program, as provided in § 202.8 (c) and (d).

(c) *Information about a spouse or former spouse*. (1) Except as permitted in this paragraph, a creditor may not request any information concerning the spouse or former spouse of an applicant.

(2) *Permissible inquiries*. A creditor may request any information concerning an applicant's spouse (or former spouse under paragraph (c)(2)(v) of this section

[45 FR 67058, Oct. 9, 1980, as amended at 56 FR 19574, Apr. 29, 1991]) that may be requested about the applicant if:

(i) The spouse will be permitted to use the account;

(ii) The spouse will be contractually liable on the account;

(iii) The applicant is relying on the spouse's income as a basis for repayment of the credit requested;

(iv) The applicant resides in a community property state or property on which the applicant is relying as a basis for repayment of the credit requested is located in such a state; or

(v) The applicant is relying on alimony, child support, or separate maintenance payments from a spouse or former spouse as a basis for repayment of the credit requested.

This paragraph does not limit or abrogate any federal or state law regarding privacy, privileged information, credit reporting limitations, or similar restrictions on obtainable information.

before making a decision, and offering to
application form to the consumer.

before making a decision, and offering to send an application form to the consumer.

5. *Completed Application—diligence requirement.* The regulation defines a completed application in terms that give a creditor the latitude to establish its own information requirements. Nevertheless, the creditor must act with reasonable diligence to collect information needed to complete the application. For example, the creditor should request information from third parties, such as a credit report, promptly after receiving the application. If additional information is needed from the applicant, such as an address or telephone number needed to verify employment, the creditor should contact the applicant promptly. (But see comment 9(a)(1)-3, which discusses the creditors's option to deny an application on the basis of incompleteness.)

Business credit. For deciding whether

2(g) Business credit.

2(g) **Business credit.**

1. **Definition.** The test for deciding whether a transaction qualifies as business credit is one of primary purpose. For example, an open-end credit account used for both personal and business purposes is not business credit unless the primary purpose of the account is business-related. A creditor may rely on an applicant's statement of the purpose for the credit requested.

2(j) Credit.

2(1) *Credit*. Regulation B covers a wider range of credit transactions than Regulation Z (Truth in Lending). For purposes of Regulation B a transaction is credit if there is a right to defer payment of a debt—regardless of whether the credit is for personal or commercial purposes, the number of installments required for repayment, or whether the transaction is subject to a finance charge.

2(1) Creditor.

2(1) **Creditor.** The term creditor includes all persons participating in the credit decision. This may include an assignee or a potential purchaser of the obligation who influences the credit decision by indicating whether or not it will purchase the obligation if the transaction is consummated.

2. *Referrals to creditors.* For certain purposes, the term creditor includes persons such as real estate brokers who do not participate in credit decisions but who regularly refer applicants to creditors or who select or offer to select creditors to whom credit requests can be made. These persons must comply with §202.4, the general rule prohibiting discrimination, and with §202.5(a), on discouraging applications.

2(p) Empirically derived and other credit systems.

2(p) Empirically derived and terms.

1. Purpose of definition. The definition under §202.2(p)(1) through (iv) sets the criteria that a credit system must meet in order for the system to use age as a pre-

and may consider age only for the purpose of determining a "pertinent element of creditworthiness." (Both types of systems may favor an elderly applicant. See § 202.6(b)(2).)

2. Periodic revalidation. The regulation does not specify how often credit scoring systems must be revalidated. To meet the requirements for statistical soundness, the credit scoring system must be revalidated frequently enough to assure that it continues to meet recognized professional statistical standards.

standards.
2(w) Open-end credit.

standards.

2(w) Open-end credit.

1. Open-end real estate mortgages. The term open-end credit does not include negotiated advances under an open-end real estate mortgage or a letter of credit.

Prohibited basis.

applicant. Prohib

2(z) Prohibited basis.

2(2) *Prohibited basis.*

1. *Persons associated with applicant.* Prohibited persons as used in this regulation refers not only to certain characteristics—the race, color, religion, national origin, sex, marital status, or age—of an applicant (or officers of an applicant in the case of a corporation) but also to the characteristics of individuals with whom an applicant is affiliated or with whom the applicant associates. This means, for example, that under the general rule stated in § 202.4, a creditor may not discriminate against an applicant because of that person's personal or business dealings with members of a certain religion, because of the national origin of any persons associated with the extension of credit (such as the tenants in the apartment complex being financed), or because of the race of other residents in the neighborhood where the property offered as collateral is located.

2. *National origin.* A creditor may not refuse to grant credit because an applicant comes from a particular country but may take the applicant's immigration status into account. A creditor may also take into account any applicable law, regulation, or executive order restricting dealings with citizens (or the government) of a particular country or imposing limitations regarding credit extended for their use.

3. Public assistance program. Any Federal, state, or local governmental assistance program that provides a continuing, periodic income supplement, whether premised on entitlement or need, is public assistance for purposes of the regulation. The term includes (but is not limited to) Aid to Families with Dependent Children, food stamps, rent and mortgage supplement or assistance programs, Social Security and Supplemental Security Income, and unemployment compensation. Only physicians, hospitals, and others to whom the benefits are payable need consider Medicare and Medicaid as public assistance.

Federal Reserve System

Section 202.3—Limited Exceptions for Certain Classes of Transactions

1. *Scope.* This section relieves burdens with regard to certain types of credit for which full application of the procedural requirements of the regulation is not needed. All classes of transactions remain subject to the general rule given in § 202.4, barring discrimination on a prohibited basis, and to any other provision not specifically excepted.

3(a) *Public utilities credit.*

1. *Definition.* This definition applies only to credit for the purchase of a utility service, such as electricity, gas, or telephone service. Credit provided or offered by a public utility for some other purpose—such as for financing the purchase of a gas dryer, telephone equipment, or other durable goods, or for insulation or other home improvements—is not excepted.

2. **Security deposits.** A utility company is a creditor when it supplies utility service and bills the user after the service has been provided. Thus, any credit term (such as a requirement for a security deposit) is subject to the regulation.

3. *Telephone companies.* A telephone company's credit transactions qualify for the exceptions provided in §202.3(a)(2) only if the company is regulated by a government unit or files the charges for service, delayed payment, or any discount for prompt payment with a government unit.

3(c) *Incidental credit.*

1. **Examples.** If a service provider (such as a hospital, doctor, lawyer or retailer) allows the client or customer to defer the payment of a bill, this deferral of debt is credit for purposes of the regulation, even though there is no finance charge and no agreement for payment in installments. Because of the exceptions provided by this section, however, these particular credit extensions are excepted from compliance with certain procedural requirements as specified in the regulation.

3(d) Government credit.

1. *Credit to governments.* The exception relates to credit extended to (not by) governmental entities. For example, credit extended to a local government by a creditor in the private sector is covered by this exception, but credit extended to consumers by a federal or state housing agency does not qualify for special treatment under this category.

Section 202.4—General Rule Prohibiting Discrimination

1. *Scope of section.* The general rule stated in §202.4 covers all dealings, without exception, between an applicant and a creditor, whether or not addressed by other provisions of the regulation. Other sections of the regulation identify specific practices that the Board has decided are impermissible because

they could result in credit discrimination on a basis prohibited by the act. The general rule covers, for example, application procedures, criteria used to evaluate creditworthiness, administration of accounts, and treatment of delinquent or slow accounts. Thus, whether or not specifically prohibited elsewhere in the regulation, a credit practice that treats applicants differently on a prohibited basis violates the law because it violates the general rule.

Section 202.5—Rules Concerning Taking of Applications

5(a) Discouraging applications:

1. **Potential applicants.** Generally, the regulation's protections apply only to persons who have requested or received an extension of credit. In keeping with the purpose of the act—to promote the availability of credit on a nondiscriminatory basis § 202.5(a) covers acts or practices directed at potential applicants. Practices prohibited by this section include:

- A statement that the applicant should not bother to apply, after the applicant states that he is retired.

- Use of words, symbols, models or other forms of communication in advertising that express, imply or suggest a discriminatory preference or a policy of exclusion in violation of the act.

- Use of interview scripts that discourage applications on a prohibited basis.

2. **Affirmative advertising.** A creditor may affirmatively solicit or encourage members of traditionally disadvantaged groups to apply for credit, especially groups that might not normally seek credit from that creditor.

5(b) General rules concerning requests for information.

1. *Requests for information.* This section governs the types of information that a creditor may gather. Section 202.6 governs how information may be used.

Paragraph 5(b)(2)

1. *Local laws.* Information that a creditor is allowed to collect pursuant to a "state" statute or regulation includes information required by a local statute, regulation, or ordinance.

2. *Information required by Regulation C.* Regulation C generally requires creditors covered by the Home Mortgage Disclosure Act (HMDA) to collect and report information about the race or national origin and sex of applicants for home improvement loans and home purchase loans, including some types of loans not covered by § 202.13. Certain creditors with assets under \$30 million, though covered by HMDA, are not required to collect and report these data; but they may do so at their option under HMDA, without violating the ECOA or Regulation B.

MAIL-IT REQUESTED: FEBRUARY 9, 1996

100Y5T

CLIENT: WHO
LIBRARY: BANKNG
FILE: FRRS

YOUR SEARCH REQUEST AT THE TIME THIS MAIL-IT WAS REQUESTED:
SPECIAL PURPOSE CREDIT PROGRAM OR 12 PRE/5 202.8

NUMBER OF DOCUMENTS FOUND WITH YOUR REQUEST THROUGH:
LEVEL 1... 4

LEVEL 1 PRINTED

DISPLAY FORMAT: FULL

MULTIPLE DOCUMENTS ON A PAGE

SEND TO: CORBELLI, LINDA
OA - LIBRARY
ROOM G-007 NEOB.
725 17TH STREET, NW
WASHINGTON DISTRICT OF COLUMBIA 20503

*****03474*****

LEVEL 1 - 1 OF 4 DOCUMENTS

VOLUME III FEDERAL RESERVE REGULATORY SERVICE

PART: 6. CONSUMER and COMMUNITY AFFAIRS
SUBPART -- Regulation B

Regulation B, Equal Credit Opportunity

6-022

SECTION 202.5 -- Rules Concerning Taking of Applications

FRRS 6-022

(b) General rules concerning requests for information.

(1) Except as provided in paragraphs (c) and (d) of this section, a creditor may request any information in connection with an application. n1

n1 This paragraph does not limit or abrogate any federal or state law regarding privacy, privileged information, credit reporting limitations, or similar restrictions on obtainable information.

(2) Required collection of information. Notwithstanding paragraphs (c) and (d) of this section, a creditor shall request information for monitoring purposes as required by section 202.13 for credit secured by the applicant's dwelling. In addition, a creditor may obtain information required by a regulation, order, or agreement issued by, or entered into with, a court or an enforcement agency (including the attorney general of the United States or a similar state official) to monitor or enforce compliance with the act, this regulation, or other federal or state statute or regulation.

(3) Special-purpose credit. A creditor may obtain information that is otherwise restricted to determine eligibility for a special-purpose credit program, as provided in section 202.8(c) and (d).

Transmittal 157 (3/94)

LEVEL 1 - 2 OF 4 DOCUMENTS

VOLUME III FEDERAL RESERVE REGULATORY SERVICE

PART: 6. CONSUMER and COMMUNITY AFFAIRS
SUBPART -- Regulation B

Regulation B, Equal Credit Opportunity

6-053

SECTION 202.11 -- Relation to State Law

FRRS 6-053

(b) Preempted provisions of state law.

(1) A state law is deemed to be inconsistent with the requirements of the act and this regulation and less protective of an applicant within the meaning of section 705(f) of the act to the extent that the law --

(i) requires or permits a practice or act prohibited by the act or this regulation;

(ii) prohibits the individual extension of consumer credit to both parties to a marriage if each spouse individually and voluntarily applies for such credit;

(iii) prohibits inquiries or collection of data required to comply with the act or this regulation;

(iv) prohibits asking or considering age in an empirically derived, demonstrably and statistically sound, credit scoring system to determine a pertinent element of creditworthiness, or to favor an elderly applicant; or

(v) prohibits inquiries necessary to establish or administer a special-purpose credit program as defined by section 202.8.

(2) A creditor, state, or other interested party may request the Board to determine whether a state law is inconsistent with the requirements of the act and this regulation.

Transmittal 157 (3/94)

LEVEL 1 - 3 OF 4 DOCUMENTS

VOLUME III FEDERAL RESERVE REGULATORY SERVICE

PART: 6. CONSUMER and COMMUNITY AFFAIRS
SUBPART -- Regulation B

Background and Summary of Regulation B
SPECIAL-PURPOSE CREDIT PROGRAMS (§ 202.8)

6-149

FRRS 6-149

A creditor may extend special-purpose credit to applicants who meet certain requirements. The following types of credit programs meet the definition of special-purpose credit programs:

- * any credit assistance program expressly authorized by federal, state, or local law for the benefit of economically disadvantaged applicants

- * any credit assistance program offered by a nonprofit organization for the benefit of its members or for the benefit of an economically disadvantaged class of people

- * any special-purpose credit program that is offered by a for-profit organization to meet special social needs and that meets the following requirements:

- A written plan designates those classes of applicants who are eligible and the procedures and standards for the extension of credit.

- The program extends credit to those applicants who probably would not be able to obtain such credit or would obtain credit on less favorable terms than would other applicants.

Applicants in a special-purpose credit program may be required to have one or more common characteristics relating to race, color, religion, national origin, sex, marital status, age, or receipt of income from a public assistance program. A creditor may request and consider these characteristics in determining the eligibility of applicants without violating the regulation. If financial need is a criterion in determining eligibility, a creditor may request and consider information concerning the applicant's marital status; the applicant's receipt of income from alimony, child support, or separate maintenance payments; or the spouse's financial resources. In addition, it may obtain the signature of a spouse or other person on the application or credit instrument, if required for program eligibility under federal or state law. Any denial of credit to an applicant who does not qualify under a special-purpose credit program is not a violation of the regulation; however, an adverse action notice must be provided.

Transmittal 157 (3/94)

LEVEL 1 - 4 OF 4 DOCUMENTS

VOLUME III FEDERAL RESERVE REGULATORY SERVICE

PART: 6. CONSUMER and COMMUNITY AFFAIRS
SUBPART -- Regulation B

Official Staff Commentary on Regulation B
INTRODUCTION

6-195.5

SECTION 202.8 -- Special-Purpose Credit Programs

FRRS 6-195.5

8(a) Standards for Programs

1. Determining qualified programs. The Board does not determine whether individual programs qualify for special-purpose credit status, or whether a particular program benefits an "economically disadvantaged class of persons." The agency or creditor administering or offering the loan program must make these decisions regarding the status of its program.
2. Compliance with a program authorized by federal or state law. A creditor does not violate Regulation B when it complies in good faith with a regulation promulgated by a government agency implementing a **special-purpose credit program** under section 202.8(a)(1). It is the agency's responsibility to promulgate a regulation that is consistent with federal and state law.
3. Expressly authorized. Credit programs authorized by federal or state law include programs offered pursuant to federal, state, or local statute, regulation or ordinance, or by judicial or administrative order.
4. Creditor liability. A refusal to grant credit to an applicant is not a violation of the act or regulation if the applicant does not meet the eligibility requirements under a special-purpose credit program.

Transmittal 157 (3/94)

that tends to indicate that the credit history being considered by the creditor does not accurately reflect the applicant's creditworthiness; and

(iii) On the applicant's request, the credit history, when available, of any account reported in the name of the applicant's spouse or former spouse that the applicant can demonstrate accurately reflects the applicant's creditworthiness.

(7) *Immigration status.* A creditor may consider whether an applicant is a permanent resident of the United States, the applicant's immigration status, and any additional information that may be necessary to ascertain the creditor's rights and remedies regarding repayment.

(c) *State property laws.* A creditor's consideration or application of state property laws directly or indirectly affecting creditworthiness does not constitute unlawful discrimination for the purposes of the Act or this regulation.

§ 202.7 Rules concerning extensions of credit.

(a) *Individual accounts.* A creditor shall not refuse to grant an individual account to a creditworthy applicant on the basis of sex, marital status, or any other prohibited basis.

(b) *Designation of name.* A creditor shall not refuse to allow an applicant to open or maintain an account in a birth-given first name and a surname that is the applicant's birth-given surname, the spouse's surname, or a combined surname.

(c) *Action concerning existing open-end accounts—(1) Limitations.* In the absence of evidence of the applicant's inability or unwillingness to repay, a creditor shall not take any of the following actions regarding an applicant who is contractually liable on an existing open-end account on the basis of the applicant's reaching a certain age or retiring or on the basis of a change in the applicant's name or marital status:

(i) Require a reapplication, except as provided in paragraph (c)(2) of this section;

(ii) Change the terms of the account; or

(iii) Terminate the account.

(2) *Requiring reapplication.* A creditor may require a reapplication for an

open-end account on the basis of a change in the marital status of an applicant who is contractually liable if the credit granted was based in whole or in part on income of the applicant's spouse and if information available to the creditor indicates that the applicant's income may not support the amount of credit currently available.

(d) *Signature of spouse or other person—(1) Rule for qualified applicant.* Except as provided in this paragraph, a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested.

(2) *Unsecured credit.* If an applicant requests unsecured credit and relies in part upon property that the applicant owns jointly with another person to satisfy the creditor's standards of creditworthiness, the creditor may require the signature of the other person only on the instrument(s) necessary, or reasonably believed by the creditor to be necessary, under the law of the state in which the property is located, to enable the creditor to reach the property being relied upon in the event of the death or default of the applicant.

(3) *Unsecured credit—community property states.* If a married applicant requests unsecured credit and resides in a community property state, or if the property upon which the applicant is relying is located in such a state, a creditor may require the signature of the spouse on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the community property available to satisfy the debt in the event of default if:

(i) Applicable state law denies the applicant power to manage or control sufficient community property to qualify for the amount of credit requested under the creditor's standards of creditworthiness; and

(ii) The applicant does not have sufficient separate property to qualify for the amount of credit requested without regard to community property.

(4) *Secured credit.* If an applicant requests secured credit, a creditor may require the signature of the applicant's

spouse or other person on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the property being offered as security available to satisfy the debt in the event of default, for example, an instrument to create a valid lien, pass clear title, waive inchoate rights or assign earnings.

(5) *Additional parties.* If, under a creditor's standards of creditworthiness, the personal liability of an additional party is necessary to support the extension of the credit requested, a creditor may request a cosigner, guarantor, or the like. The applicant's spouse may serve as an additional party, but the creditor shall not require that the spouse be the additional party.

(6) *Rights of additional parties.* A creditor shall not impose requirements upon an additional party that the creditor is prohibited from imposing upon an applicant under this section.

(e) *Insurance.* A creditor shall not refuse to extend credit and shall not terminate an account because credit life, health, accident, disability, or other credit-related insurance is not available on the basis of the applicant's age.

§ 202.8 Special purpose credit programs.

(a) *Standards for programs.* Subject to the provisions of paragraph (b) of this section, the act and this regulation permit a creditor to extend special purpose credit to applicants who meet eligibility requirements under the following types of credit programs:

(1) Any credit assistance program expressly authorized by federal or state law for the benefit of an economically disadvantaged class of persons;

(2) Any credit assistance program offered by a not-for-profit organization, as defined under section 501(c) of the Internal Revenue Code of 1954, as amended, for the benefit of its members or for the benefit of an economically disadvantaged class of persons; or

(3) Any special purpose credit program offered by a for-profit organization or in which such an organization participates to meet special social needs, if:

(1) The program is established and administered pursuant to a written plan that identifies the class of persons that the program is designed to benefit and sets forth the procedures and standards for extending credit pursuant to the program; and

(ii) The program is established and administered to extend credit to a class of persons who, under the organization's customary standards of creditworthiness, probably would not receive such credit or would receive it on less favorable terms than are ordinarily available to other applicants applying to the organization for a similar type and amount of credit.

(b) *Rules in other sections.* (1) *General applicability.* All of the provisions of this regulation apply to each of the special purpose credit programs described in paragraph (a) of this section unless modified by this section.

(2) *Common characteristics.* A program described in paragraph (a)(2) or (a)(3) of this section qualifies as a special purpose credit program only if it was established and is administered so as not to discriminate against an applicant on any prohibited basis; however, all program participants may be required to share one or more common characteristics (for example, race, national origin, or sex) so long as the program was not established and is not administered with the purpose of evading the requirements of the act or this regulation.

(c) *Special rule concerning requests and use of information.* If participants in a special purpose credit program described in paragraph (a) of this section are required to possess one or more common characteristics (for example, race, national origin, or sex) and if the program otherwise satisfies the requirements of paragraph (a) of this section, a creditor may request and consider information regarding the common characteristic(s) in determining the applicant's eligibility for the program.

(d) *Special rule in the case of financial need.* If financial need is one of the criteria under a special purpose program described in paragraph (a) of this section, the creditor may request and consider, in determining an applicant's eligibility for the program, information

§ 202.9

regarding the applicant's marital status; alimony, child support, and separate maintenance income; and the spouse's financial resources. In addition, a creditor may obtain the signature of an applicant's spouse or other person on an application or credit instrument relating to a special purpose program if the signature is required by Federal or State law.

§ 202.9 Notifications.

(a) *Notification of action taken, ECOA notice, and statement of specific reasons—*

(1) *When notification is required.* A creditor shall notify an applicant of action taken within:

- (i) 30 days after receiving a completed application concerning the creditor's approval of, counteroffer to, or adverse action on the application;
- (ii) 30 days after taking adverse action on an incomplete application, unless notice is provided in accordance with paragraph (c) of this section;
- (iii) 30 days after taking adverse action on an existing account; or
- (iv) 90 days after notifying the applicant of a counteroffer if the applicant does not expressly accept or use the credit offered.

(2) *Content of notification when adverse action is taken.* A notification given to an applicant when adverse action is taken shall be in writing and shall contain: a statement of the action taken; the name and address of the creditor; a statement of the provisions of section 701(a) of the Act; the name and address of the Federal agency that administers compliance with respect to the creditor; and either:

- (i) A statement of specific reasons for the action taken; or
- (ii) A disclosure of the applicant's right to a statement of specific reasons within 30 days, if the statement is requested within 60 days of the creditor's notification. The disclosure shall include the name, address, and telephone number of the person or office from which the statement of reasons can be obtained. If the creditor chooses to provide the reasons orally, the creditor shall also disclose the applicant's right to have them confirmed in writing within 30 days of receiving a written request for confirmation from the applicant.

(3) *Notification to business credit applicants.* For business credit, a creditor shall comply with the requirements of this paragraph in the following manner:

(i) With regard to a business that had gross revenues of \$1,000,000 or less in its preceding fiscal year (other than an extension of trade credit, credit incident to a factoring agreement, or other similar types of business credit), a creditor shall comply with paragraphs (a) (1) and (2) of this section, except that:

(A) The statement of the action taken may be given orally or in writing, when adverse action is taken;

(B) Disclosure of an applicant's right to a statement of reasons may be given at the time of application, instead of when adverse action is taken, provided the disclosure is in a form the applicant may retain and contains the information required by paragraph (a)(2)(ii) of this section and the ECOA notice specified in paragraph (b)(1) of this section;

(C) For an application made solely by telephone, a creditor satisfies the requirements of this paragraph by an oral statement of the action taken and of the applicant's right to a statement of reasons for adverse action.

(ii) With regard to a business that had gross revenues in excess of \$1,000,000 in its preceding fiscal year or an extension of trade credit, credit incident to a factoring agreement, or other similar types of business credit, a creditor shall:

(A) Notify the applicant, orally or in writing, within a reasonable time of the action taken; and

(B) Provide a written statement of the reasons for adverse action and the ECOA notice specified in paragraph (b)(1) of this section if the applicant makes a written request for the reasons within 60 days of being notified of the adverse action.

(b) *Form of ECOA notice and statement of specific reasons.*

(1) *ECOA notice.* To satisfy the disclosure requirements of paragraph (a)(2) of this section regarding section 701(a) of the Act, the creditor shall provide a notice that is substantially similar to the following:

The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The Federal agency that administers compliance with this law concerning this creditor is (name and address as specified by the appropriate agency listed in appendix A of this regulation).

(2) *Statement of specific reasons.* The statement of reasons for adverse action required by paragraph (a)(2)(i) of this section must be specific and indicate the principal reason(s) for the adverse action. Statements that the adverse action was based on the creditor's internal standards or policies or that the applicant failed to achieve the qualifying score on the creditor's credit scoring system are insufficient.

(c) *Incomplete applications—*(1) *Notice alternatives.* Within 30 days after receiving application that is incomplete regarding matters that an applicant can complete, the creditor shall notify the applicant either:

(i) Of action taken, in accordance with paragraph (a) of this section; or

(ii) Of the incompleteness, in accordance with paragraph (c)(2) of this section.

(2) *Notice of incompleteness.* If additional information is needed from an applicant, the creditor shall send a written notice to the applicant specifying the information needed, designating a reasonable period of time for the applicant to provide the information, and informing the applicant that failure to provide the information requested will result in no further consideration being given to the application. The creditor shall have no further obligation under this section if the applicant fails to respond within the designated time period. If the applicant supplies the requested information within the designated time period, the creditor shall take action on the application and notify the applicant in accordance with paragraph (a) of this section.

(3) *Oral request for information.* At its option, a creditor may inform the applicant orally of the need for additional information; but if the application remains incomplete the creditor shall send a notice in accordance with paragraph (c)(1) of this section.

(d) *Oral notifications by small-volume creditors.* The requirements of this section (including statements of specific reasons) are satisfied by oral notifications in the case of any creditor that did not receive more than 150 applications during the preceding calendar year.

(e) *Withdrawal of approved application.* When an applicant submits an application and the parties contemplate that the applicant will inquire about its status, if the creditor approves the application and the applicant has not inquired within 30 days after applying, the creditor may treat the application as withdrawn and need not comply with paragraph (a)(1) of this section.

(f) *Multiple applicants.* When an application involves more than one applicant, notification need only be given to one of them, but must be given to the primary applicant where one is readily apparent.

(g) *Applications submitted through a third party.* When an application is made on behalf of an applicant to more than one creditor and the applicant expressly accepts or uses credit offered by one of the creditors, notification of action taken by any of the other creditors is not required. If no credit is offered or if the applicant does not expressly accept or use any credit offered, each creditor taking adverse action must comply with this section, directly or through a third party. A notice given by a third party shall disclose the identity of each creditor on whose behalf the notice is given.

[Reg. B, 50 FR 48026, Nov. 20, 1985, as amended at 54 FR 50485, Dec. 7, 1989]

§ 202.10 Furnishing of credit information.

(a) *Designation of accounts.* A creditor that furnishes credit information shall designate:

(1) Any new account to reflect the participation of both spouses if the ap-

3. *Collecting information on behalf of creditors.* Loan brokers, correspondents, or other persons do not violate the ECOA or Regulation B if they collect information that they are otherwise prohibited from collecting, where the purpose of collecting the information is to provide it to a creditor that is subject to the Home Mortgage Disclosure Act or another federal or state statute or regulation requiring data collection.

5(d) *Other limitations on information requests.*

Paragraph 5(d)(1)

1. *Indirect disclosure of prohibited information.* The fact that certain credit-related information may indirectly disclose marital status does not bar a creditor from seeking such information. For example, the creditor may ask about:

- The applicant's obligation to pay alimony, child support, or separate maintenance.
- The source of income to be used as the basis for repaying the credit requested, which could disclose that it is the income of a spouse.
- Whether any obligation disclosed by the applicant has a co-obligor, which could disclose that the co-obligor is a spouse or former spouse.
- The ownership of assets, which could disclose the interest of a spouse.

Paragraph 5(d)(2)

1. *Disclosure about income.* The sample application forms in appendix B to the regulation illustrate how a creditor may inform an applicant of the right not to disclose alimony, child support, or separate maintenance income.

2. *General inquiry about source of income.* Since a general inquiry about the source of income may lead an applicant to disclose alimony, child support, or separate maintenance, a creditor may not make such an inquiry on an application form without prefacing the request with the disclosure required by this paragraph.

3. *Specific inquiry about sources of income.* A creditor need not give the disclosure if the inquiry about income is specific and worded in a way that is unlikely to lead the applicant to disclose the fact that income is derived from alimony, child support or separate maintenance payments. For example, an application form that asks about specific types of income such as salary, wages, or investment income need not include the disclosure.

5(e) *Written applications.*

1. *Requirement for written applications.* The requirement of written applications for certain types of dwelling-related loans is intended to assist the federal supervisory agencies in monitoring compliance with the ECOA and the Fair Housing Act. Model ap-

plication forms are provided in appendix B to the regulation, although use of a printed form of any kind is not required. A creditor will satisfy the requirement by writing down the information that it normally considers in making a credit decision. The creditor may complete the application on behalf of an applicant and need not require the applicant to sign the application.

2. *Telephone applications.* A creditor that accepts applications by telephone for dwelling-related credit covered by §202.13 can meet the requirements for written applications by writing down pertinent information that is provided by the applicant(s).

3. *Computerized entry.* Information entered directly into and retained by a computerized system qualifies as a written application under this paragraph. (See the commentary to §202.13(b).)

Section 202.6—Rules Concerning Evaluation of Applications

6(a) *General rule concerning use of information.*

1. *General.* When evaluating an application for credit, a creditor generally may consider any information obtained. However, a creditor may not consider in its evaluation of creditworthiness any information that it is barred by §202.5 from obtaining.

2. *Effects test.* The effects test is a judicial doctrine that was developed in a series of employment cases decided by the Supreme Court under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.). Congressional intent that this doctrine apply to the credit area is documented in the Senate Report that accompanied H.R. 6516, No. 94-589, pp. 4-5; and in the House Report that accompanied H.R. 6516, No. 94-210, p. 5. The act and regulation may prohibit a creditor practice that is discriminatory in effect because it has a disproportionately negative impact on a prohibited basis, even though the creditor has no intent to discriminate and the practice appears neutral on its face, unless the creditor practice meets a legitimate business need that cannot reasonably be achieved as well by means that are less disparate in their impact. For example, requiring that applicants have incomes in excess of a certain amount to qualify for an overdraft line of credit could mean that women and minority applicants will be rejected at a higher rate than men and non-minority applicants. If there is a demonstrable relationship between the income requirement and creditworthiness for the level of credit involved, however, use of the income standard would likely be permissible.

6(b) *Specific rules concerning use of information.*

Paragraph 6(b)(1)

1. *Prohibited basis—marital status.* A creditor may not use marital status as a basis for determining the applicant's creditworthiness. However, a creditor may consider an applicant's marital status for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit. For example, in a secured transaction involving real property, a creditor could take into account whether state law gives the applicant's spouse an interest in the property being offered as collateral.

2. *Prohibited basis—special purpose credit.* In a special purpose credit program, a creditor may consider a prohibited basis to determine whether the applicant possesses a characteristic needed for eligibility. (See §202.8.)

Paragraph 6(b)(2)

1. *Favoring the elderly.* Any system of evaluating creditworthiness may favor a credit applicant who is age 62 or older. A credit program that offers more favorable credit terms to applicants age 62 or older is also permissible; a program that offers more favorable credit terms to applicants at an age lower than 62 is permissible only if it meets the special-purpose credit requirements of §202.8.

2. *Consideration of age in a credit scoring system.* Age may be taken directly into account in a credit scoring system that is "demonstrably and statistically sound," as defined in §202.2(p), with one limitation: an applicant who is 62 years old or older must be treated at least as favorably as anyone who is under age 62.

3. *Consideration of age in a judgmental system.* In a judgmental system, defined in §202.2(t), a creditor may not take age directly into account in any aspect of the credit transaction. For example, the creditor may not reject an application or terminate an account because the applicant is 60 years old. But a creditor that uses a judgmental system may relate the applicant's age to other information about the applicant that the creditor considers in evaluating creditworthiness. For example:

- A creditor may consider the applicant's occupation and length of time to retirement to ascertain whether the applicant's income (including retirement income) will support the extension of credit to its maturity.
- A creditor may consider the adequacy of any security offered when the term of the credit extension exceeds the life expectancy of the applicant and the cost of realizing on the collateral could exceed the applicant's equity. (An elderly applicant might not qualify for a 5 percent down, 30-year mortgage loan but might qualify with a larger downpayment or a shorter loan maturity.)
- A creditor may consider the applicant's age to assess the significance of the length of the applicant's employment (a young appli-

cant may have just entered the job market) or length of time at an address (an elderly applicant may recently have retired and moved from a long-term residence).

As the examples above illustrate, the evaluation must be made in an individualized, case-by-case manner; and it is impermissible for a creditor, in deciding whether to extend credit or in setting the terms and conditions, to base its decision on age or information related exclusively to age. Age or age-related information may be considered only in evaluating other "pertinent elements of creditworthiness" that are drawn from the particular facts and circumstances concerning the applicant.

4. *Consideration of age in a combined system.* A creditor using a credit scoring system that qualifies as "empirically derived" under §202.2(p) may consider other factors (such as credit report or the applicant's cash flow) on a judgmental basis. Doing so will not negate the classification of the credit scoring component of the combined system as "demonstrably and statistically sound." While age could be used in the credit scoring portion, however, in the judgmental portion age may not be considered directly. It may be used only for the purpose of determining a "pertinent element of creditworthiness." (See comment 6(b)(2)-3.)

5. *Consideration of public assistance.* When considering income derived from a public assistance program, a creditor may take into account, for example:

- The length of time an applicant will likely remain eligible to receive such income.
- Whether the applicant will continue to qualify for benefits based on the status of the applicant's dependents (such as Aid to Families with Dependent Children or Social Security payments to a minor).
- Whether the creditor can attach or garnish the income to assure payment of the debt in the event of default.

Paragraph 6(b)(5)

1. *Consideration of an individual applicant.* A creditor must evaluate income derived from part-time employment, alimony, child support, separate maintenance, retirement benefits, or public assistance (all referred to as "protected income") on an individual basis, not on the basis of aggregate statistics, and must assess its reliability or unreliability by analyzing the applicant's actual circumstances, not by analyzing statistical measures derived from a group.

2. *Payments consistently made.* In determining the likelihood of consistent payments of alimony, child support, or separate maintenance, a creditor may consider factors such as whether payments are received pursuant to a written agreement or court decree; the length of time that the payments have been received; whether the payments are regularly received by the applicant; the avail-

by a legend placed next to the spouse's signature—that the spouse's signature is only to grant a security interest and that signing the instrument does not impose personal liability.

Paragraph 7(d)(5)

Qualifications of additional parties. In establishing guidelines for eligibility of guarantors, cosigners, or similar additional parties, a creditor may restrict the applicant's choice of additional parties but may not discriminate on the basis of sex, marital status or any other prohibited basis. For example, the creditor could require that the additional party live in the creditor's market area.

2. Reliance on income of another person—individual credit. An applicant who requests individual credit relying on the income of another person (including a spouse in a noncommunity property state) may be required to provide the signature of the other person to make the income available to pay the debt. In community property states, the signature of a spouse may be required if the applicant relies on the spouse's separate income. If the applicant relies on the spouse's future earnings that as a matter of state law cannot be characterized as community property until earned, the creditor may require the spouse's signature, but need not do so—even if it is the creditor's practice to require the signature when an applicant relies on the future earnings of a person other than a spouse. (See §202.6(c) on consideration of state property laws.)

3. Renewals. If the borrower's creditworthiness is reevaluated when a credit obligation is renewed, the creditor must determine whether an additional party is still warranted and, if not, release the additional party.

Paragraph 7(d)(6)

1. Guarantees. A guarantee on an extension of credit is part of a credit transaction and therefore subject to the regulation. The rules in §202.7(d) bar a creditor from requiring the signature of a guarantor's spouse just as they bar the creditor from requiring the signature of an applicant's spouse. For example, when all officers of a closely held corporation are required to personally guarantee a corporate loan, the creditor may not automatically require that spouses of married officers also sign. However, an evaluation of the financial circumstances of an officer may indicate that an additional signature is necessary, and this may be the signature of a spouse in appropriate circumstances.

7(e) Insurance.

1. Differences in terms. Differences in the availability, rates, and other terms on which credit-related casualty insurance or credit life, health, accident, or disability insurance

is offered or provided to an applicant does not violate Regulation B.

2. Insurance information. A creditor may obtain information about an applicant's age, sex, or marital status for insurance purposes. The information may only be used, however, for determining eligibility and premium rates for insurance, and not in making the credit decision.

Section 202.8—Special Purpose Credit Programs

8(a) Standards for programs.

1. Determining qualified programs. The Board does not determine whether individual programs qualify for special purpose credit status, or whether a particular program benefits an "economically disadvantaged class of persons." The agency or creditor administering or offering the loan program must make these decisions regarding the status of its program.

2. Compliance with a program authorized by Federal or State law. A creditor does not violate Regulation B when it complies in good faith with a regulation promulgated by a government agency implementing a special purpose credit program under §202.8(a)(1). It is the agency's responsibility to promulgate a regulation that is consistent with Federal and State law.

3. Expressly authorized. Credit programs authorized by Federal or State law include programs offered pursuant to Federal, State or local statute, regulation or ordinance, or by judicial or administrative order.

4. Creditor liability. A refusal to grant credit to an applicant is not a violation of the act or regulation if the applicant does not meet the eligibility requirements under a special purpose credit program.

8(b) Rules in other sections.

1. Applicability of rules. A creditor that rejects an application because the applicant does not meet the eligibility requirements (common characteristic or financial need, for example) must nevertheless notify the applicant of action taker as required by §202.9.

8(c) Special rule concerning requests and use of information.

1. Request of prohibited information. This section permits a creditor to request and consider certain information that would otherwise be prohibited by §§202.5 and 202.6 to determine an applicant's eligibility for a particular program.

2. Examples. Examples of programs under which the creditor can ask for and consider information related to prohibited basis are:

- Energy conservation programs to assist the elderly, for which the creditor must consider the applicant's age.

- Programs under a Minority Enterprise Small Business Investment Corporation, for which a creditor must consider the applicant's minority status.

8(d) Special rule in the case of financial need.

Federal Reserve System

1. Request of prohibited information. This section permits a creditor to request and consider certain information that would otherwise be prohibited by §§202.5 and 202.6, and to require signatures that would otherwise be prohibited by §202.7(d).

2. Examples. Examples of programs in which financial need is a criterion are:

- Subsidized housing programs for low- to moderate-income households, for which a creditor may have to consider the applicant's receipt of alimony or child support, the spouse's or parents' income, etc.

- Student loan programs based on the family's financial need, for which a creditor may have to consider to spouse's or parents' financial resources.

3. Student loans. In a guaranteed student loan program, a creditor may obtain the signature of a parent as a guarantor when required by federal or state law or agency regulation, or when the student does not meet the creditor's standards of creditworthiness. (See §202.7(d)(1) and (5).) The creditor may not require an additional signature when a student has a work or credit history that satisfies the creditor's standards.

Section 202.9—Notifications

1. Use of the term adverse action. The regulation does not require that a creditor use the term adverse in communicating to an applicant that a request for an extension of credit has not been approved. In notifying an applicant of adverse action as defined by §202.2(c)(1), a creditor may use any words or phrases that describe the action taken on the application.

2. Expressly withdrawn applications. When an applicant expressly withdraws a credit application, the creditor is not required to comply with the notification requirements under §202.9. (The creditor must, however, comply with the record retention requirements of the regulation. See §202.12(b)(3).)

3. When notification occurs. Notification occurs when a creditor delivers or mails a notice to the applicant's last known address or, in the case of an oral notification, when the creditor communicates the credit decision to the applicant.

4. Location of notice. The notifications required under §202.9 may appear on either or both sides of a form or letter.

9(a) Notification of action taken, ECOA notice, and statement of specific reasons.

Paragraph 9(a)(1)

1. Timing of notice—when an application is complete. Once a creditor has obtained all the information it normally considers in making a credit decision, the application is complete and the creditor has 30 days in which to notify the applicant of the credit decision. (See also comment 2(f)–5.)

2. Notification of approval. Notification of approval may be express or by implication. For example, the creditor will satisfy the notification requirement when it gives the applicant the credit card, money, property, or services requested.

3. Incomplete application—denial for incompleteness. When an application is incomplete regarding matters that the applicant can complete and the creditor lacks sufficient data for a credit decision, the creditor may deny the application giving as the reason for denial that the application is incomplete. The creditor has the option, alternatively, of providing a notice of incompleteness under §202.9(c).

4. Incomplete application—denial for reasons other than incompleteness. When an application is missing information but provides sufficient data for a credit decision, the creditor may evaluate the application and notify the applicant under this section as appropriate. If credit is denied, the applicant must be given the specific reasons for the credit denial (or notice of the right to receive the reasons); in this instance the incompleteness of the application cannot be given as the reason for the denial.

5. Length of counteroffer. Section 202.9(a)(1)(iv) does not require a creditor to hold a counteroffer open for 90 days or any other particular length of time.

6. Counteroffer combined with adverse action notice. A creditor that gives the applicant a combined counteroffer and adverse action notice that complies with §202.9(a)(2) need not send a second adverse action notice if the applicant does not accept the counteroffer. A sample of a combined notice is contained in form C-4 of Appendix C to the regulation.

7. Denial of a telephone application. When an application is conveyed by means of telephone and adverse action is taken, the creditor must request the applicant's name and address in order to provide written notification under this section. If the applicant declines to provide that information, then the creditor has no further notification responsibility.

Paragraph 9(a)(3)

1. Coverage. In determining the rules in this paragraph that apply to a given business credit application, a creditor may rely on the applicant's assertion about the revenue size of the business. (Applications to start a business are governed by the rules in §202.9(a)(3)(1).) If an applicant applies for credit as a sole proprietor, the revenues of the sole proprietorship will determine which rules in the paragraph govern the application. However, if an applicant applies for business purpose credit as an individual, the rules in paragraph 9(a)(3)(1) apply unless the application is for trade or similar credit.

LEGISLATIVE HISTORY

P.L. 94-237

The House amendment adopted the same policy, and in addition defined a primary prevention program as a program designed to discourage persons from beginning drug abuse.

Under the Senate amendment a primary prevention program includes programs designed to discourage persons from beginning drug abuse.

STANDARDS FOR EFFECTIVENESS

The Senate bill required and the Senate amendment will require each applicant for a treatment or rehabilitation grant under the special projects authority to propose performance standards or research protocols to measure their own effectiveness.

The House amendment contained no comparable provision.

ALLOCATION OF FUNDS

The House amendment required State agencies reviewing applications for special project grants and contracts to take into account the allocation of funds under the State formula grant section of this act.

The Senate bill contained and the Senate amendment will contain no comparable provision.

[page 8]

STATISTICAL RECORDS

The House amendment required that any system of records maintained by NIDA containing information about patients (other than patients directly receiving clinical services from the Institute) be maintained and used solely as statistical records.

The Senate bill contained and the Senate amendment will contain no comparable provision.

HARLEY O. STAGGERS,
PAUL G. ROGERS,
DAVID SATTERFIELD,
RICHARDSON PREYER,
J. W. SYMINGTON,
TIM LEE CARTER,
JAMES T. BROTHILL,
Managers on the Part of the House.

W. D. HATHAWAY,
HARRISON A. WILLIAMS, Jr.,
JENNINGS RANDOLPH,
EDWARD M. KENNEDY,
W. F. MONDALE,
ALAN CRANSTON,
GAYLORD NELSON,
ABE RIBICOFF,
EDMUND S. MUSKIE,
SAM NUNN,
JACOB JAVITS,
CHARLES PERCY,
RICHARD S. SCHWEIKER,
J. GLENN BEALL,
PAUL LAXALT,
Managers on the Part of the Senate.

EQUAL CREDIT OPPORTUNITY ACT

P.L. 94-239

EQUAL CREDIT OPPORTUNITY ACT AMENDMENTS OF 1976

P.L. 94-239, see page 90 Stat. 251

House Report (Banking, Currency and Housing Committee)
No. 94-210, May 14, 1975 [To accompany H.R. 6516]

Senate Report (Banking, Housing and Urban Affairs Committee)
No. 94-589, Jan. 21, 1976 [To accompany H.R. 6516]

House Conference Report No. 94-873, Mar. 4, 1976
[To accompany H.R. 6516]

Senate Conference Report No. 94-685, Mar. 9, 1976
[To accompany H.R. 6516]

Cong. Record Vol. 121 (1975)

Cong. Record Vol. 122 (1976)

DATES OF CONSIDERATION AND PASSAGE

House June 3, 1975; March 9, 1976

Senate February 2, March 9, 1976

The Senate Report and the House Conference Report are set out.

SENATE REPORT NO. 94-589

[page 1]

The Committee on Banking, Housing and Urban Affairs, to which was referred the bill (H.R. 6516) to amend title VII of the Consumer Credit Protection Act to include discrimination on the basis of race, color, religion, national origin, and age, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

HISTORY OF THE LEGISLATION

The Equal Credit Opportunity Act Amendments bill, S. 1927, was introduced by Senators Biden and Proxmire on June 12, 1975. Earlier, Senator Brock had introduced a bill, S. 483, dealing exclusively with age discrimination; and a House-passed bill, H.R. 6516, had been sent to the Senate. All three bills were referred to the Consumer Affairs Subcommittee, which held hearings on them on July 15, 17 and 24, 1975. That Subcommittee met in executive session on September 29, 1975, and recommended a revised version of S. 1927 to the full Committee. In meetings on December 12 and 15 the full Committee met and approved the bill as recommended, with several amendments. The Committee then substituted the text of its bill for that of H.R. 6516, which without objection is herewith reported.

LEGISLATIVE HISTORY

P.L. 94-239

[page 2]

NATURE AND SCOPE OF THE LEGISLATION

Hearings in the House of Representatives in 1974 produced testimony of discrimination against credit applicants on account of their sex or marital status, and also on account of other characteristics unrelated to creditworthiness. The resulting legislation, the Equal Credit Opportunity Act of 1974 (Title V of Public Law 93-495), enacted at the end of the 93rd Congress, dealt only with discrimination on the grounds of sex or marital status, and this legislation is therefore the natural extension of that Act to encompass other categories of discriminatory practices.

The bill expands the prohibitions against discrimination in credit transactions to include age, race, color, religion, national origin, receipt of public assistance benefits, and exercise of rights under the Consumer Credit Protection Act. At the same time, the bill recognizes the utility and desirability of "affirmative action" type credit programs whether offered under governmental auspices or by private credit grantors. The bill also recognizes the genuine need of creditors to know their applicants' age and the source of their income in order to make a determination of creditworthiness.

In one of its most important provisions, the bill establishes for the first time in federal legislation the right of rejected credit applicants to obtain a statement of reasons for the action taken against them.

The remainder of the bill is incidental to its major purpose of extending the federal ban on discriminatory credit practices. The bill creates a new Consumer Advisory Council in the Federal Reserve Board to advise and consult with it concerning its supervisory functions under this Act and the rest of the Consumer Credit Protection Act. In the process this Council will absorb the existing Truth in Lending Advisory Committee. The bill further clarifies the relationship of this Act to existing or future state law dealing with credit discrimination, generally permitting such state law to continue in effect so long as it is not inconsistent with this Act.

The bill substantially strengthens the enforcement mechanisms in the present law. The ceiling for class action recoveries of civil penalties is raised from the present formula of the lesser of \$100,000 or 1% of the creditor's net worth, to the lesser of \$500,000 or 1%. The U.S. Attorney General is empowered to bring enforcement actions, either on referral from other agencies or on his own initiative where there are patterns or practices in violation of the Act. The Federal Reserve Board and the Attorney General, will be required to submit annual reports on their activities.

The original Equal Credit Opportunity Act, dealing only with discrimination on the grounds of sex or marital status, applied to *all* credit transactions, not only those involving consumer applicants. The Federal Reserve Board's regulations under that Act have recognized that there are often significant operational differences between consumer and business credit, and this bill permits the Board to exempt classes of business credit transactions where the Act's prohibitions and remedies prove unnecessary.

EQUAL CREDIT OPPORTUNITY ACT

P.L. 94-239

[page 3]

Need for the Legislation

Credit has ceased to be a luxury item, either for consumers or for business entrepreneurs. Consumer credit outstanding continues to grow at a phenomenal pace and now stands slightly below \$200 billion, not even counting 1-4 family mortgage credit which would add more than \$400 billion to that total. Virtually all home purchases are made on credit. About two-thirds of consumer automobile purchases are on an installment basis. Large department stores report that 50% or more of their sales are on revolving or closed-end credit plans. Upwards of 15% of all consumer disposable income is devoted to credit obligations other than home mortgages.

In this circumstance the Committee believes it must be established as clear national policy that no credit applicant shall be denied the credit he or she needs and wants on the basis of characteristics that have nothing to do with his or her creditworthiness. The Committee readily acknowledges that irrational discrimination is not in the creditor's own best interests because it means he is losing a potentially valuable and creditworthy customer. But, despite this logical truth, the hearing record is replete with examples of refusals to extend or to continue credit arrangements for applicants falling within one or more of the categories addressed by this bill.

Discrimination against the elderly was the most often cited abuse, despite the fact that in the experience of many creditors their older customers were their best customers. The Committee finds no justification for any policy of refusing to extend credit to persons merely because they fall within certain age groups, particularly when the only reasons offered for such blanket refusals are the unavailability of credit life insurance, or the mere "likelihood" of insufficient income on retirement, or the possibility that the applicant will not survive through the full term of an adequately secured mortgage.

Past instances of discrimination against racial minorities were cited in the record. More recently, studies conducted by federal agencies have indicated the strong probability of race discrimination in mortgage credit. (The pilot studies conducted by the Comptroller of the Currency and the Federal Home Loan Bank Board are contained in the hearing record.) In its testimony, the Department of Justice also noted the emerging problems of credit discrimination as a result of the Arab oil boycott; the Department urged the inclusion of race, color, religion and national origin to parallel other civil rights legislation.

In short, this bill identifies characteristics of applicants which the Committee believes are, and must be, irrelevant to a credit judgment, and prohibits or curtails their use.

At the same time the Committee recognizes and affirms the creditor's right to make a rational decision about an applicant's creditworthiness. Thus the bill allows inquiries about the applicant's age and about whether the applicant's income is from public assistance and permits use of those characteristics in scientifically sound credit

[page 4]

scoring systems. It also permits and encourages "affirmative action" type credit programs.

LEGISLATIVE HISTORY

P.L. 94-239

The requirement that creditors give reasons for adverse action is, in the Committee's view, a strong and necessary adjunct to the antidiscrimination purpose of the legislation, for only if creditors know they must explain their decisions will they effectively be discouraged from discriminatory practices. Yet this requirement fulfills a broader need: rejected credit applicants will now be able to learn where and how their credit status is deficient and this information should have a pervasive and valuable educational benefit. Instead of being told only that they do not meet a particular creditor's standards, consumers particularly should benefit from knowing, for example, that the reason for the denial is their short residence in the area, or their recent change of employment, or their already over-extended financial situation. In those cases where the creditor may have acted on misinformation or inadequate information, the statement of reasons gives the applicant a chance to rectify the mistake.

Beyond these substantive needs, and now that the law will be expanded considerably beyond its present sex and marital status scope, the Committee believes it is essential that strong enforcement mechanisms be established, and that the states be left free to develop their own more vigorous anti-discrimination laws. On the former point, the bill increases the ceiling for class action recoveries of punitive damages, and authorizes enforcement actions by the Attorney General as well as by other agencies. State laws on credit discrimination are not displaced unless they are inconsistent with the federal law, and states with substantially similar or stronger laws may be exempted from this Act in favor of their local laws.

In sum, this bill is intended to prevent the kinds of credit discrimination which have occurred in the past, and to anticipate and prevent discriminatory practices in the future. The Committee believes the bill will do this without infringing on the freedom of creditors to make informed credit judgments and avoid unsound practices. This legislation should therefore redound to the benefit of both creditors and applicants, by producing a more informed and competitive marketplace, where credit applicants can be assured of evenhanded treatment in their quest for what has become a virtual necessity of life.

EXPLANATION OF THE LEGISLATION

Categories of Prohibited Discrimination

The prohibitions against discrimination on the basis of race, color, religion or national origin are unqualified. In the Committee's view, these characteristics are totally unrelated to creditworthiness and cannot be considered by any creditor. In determining the existence of discrimination on these grounds, as well as on the other grounds discussed below, courts or agencies are free to look at the effects of a creditor's practices as well as the creditor's motives or conduct in individual transactions. Thus judicial constructions of anti-discrimination legislation in the employment field, in cases such as *Griggs v. Duke Power Company*, 401 U.S. 424 (1971); and *Albemarle Paper Company v. Moody* (U.S. Supreme Court, June 25, 1975), are intended to serve

1. 91 S.Ct. 849. 28 L.Ed.2d 158.

[page 5]

as guides in the application of this Act, especially with respect to the allocations of burdens of proof.

EQUAL CREDIT OPPORTUNITY ACT

P.L. 94-239

Creditors are obviously free to require that their applicants have reached the age of majority so that they are competent to enter binding contracts. Creditors are precluded from rejecting or "blackballing" any applicant solely because of his or her age, but creditors may inquire about the applicant's age in order to assess other factors directly related to creditworthiness. Thus a creditor justifiably may inquire how close to retirement an applicant is so that he may judge whether the applicant's income will continue at a sufficient level to support the credit extension. Similarly, the creditor is entitled to ask the applicant's age to gauge the pattern or intensity of his or her credit history. The Federal Reserve Board is given authority to identify other pertinent elements of creditworthiness for which age is a necessary preliminary inquiry. One such element might be the adequacy of any security offered by the applicant. An elderly applicant might not qualify for a 5%-down condominium loan because the duration of the loan exceeds his life expectancy and the condominium itself has a speculative future value. But that same applicant ought to be deemed creditworthy when he seeks a \$10,000 home improvement loan secured by a \$50,000 homestead.

Similar considerations apply in the case of public assistance recipients, and the Committee intends this category to be read broadly to include all federal, state or local governmental assistance programs, whether premised on entitlement or need. Blackballing such applicants, or arbitrarily discounting such income, is forbidden, but this provision in the bill should not be read to mandate extensions of credit to individuals on public assistance whose incomes can be expected to be low or marginal. To the extent such income levels, either alone or in conjunction with other income (for example, social security plus pension), would meet the creditor's usual standards, the Committee believes it is intolerable that the recipients of such income should be disadvantaged because of its source. Creditors can still consider the amount and stability of such income, or its accessibility through judicial process, in the same way they would consider the incomes of others. The Committee believes and intends that this provision in the bill will help assure reasonable access to the credit market to those persons who are financially dependent, and, in the case of public assistance to the needy, will help in their quest for financial independence.

The prohibition in subsection 701(a)(3) is intended to bar retaliatory credit denials or terminations against applicants who exercise their rights under any part of the Consumer Credit Protection Act. That would include this title, the Fair Credit Reporting Act, and also the various chapters of the Truth in Lending Act. The "good faith" qualification recognizes that some applicants may engage in frivolous or nuisance disputes which do reflect on their willingness to honor their obligations.

The essential prohibition in this legislation is directed at discrimination "against" applicants. Nothing in this section should be read to bar occasional extensions of credit to individuals who would not normally qualify, or to bar experimental or ongoing special programs which

[page 6]

prefer applicants in certain categories so long as there is no accompanying restriction of credit available to applicants not in those categories. For example, this Act is not intended to prohibit positive credit programs aimed at "young adults" or "golden age" accounts.

LEGISLATIVE HISTORY

P.L. 94-239

Credit Scoring Systems

The provision in section 701(b) authorizing the inclusion of age and public assistance income in empirically derived credit scoring systems provoked considerable discussion in the Subcommittee and in the Committee. These systems are being used more and more frequently, predominantly by the larger creditors who have the statistical base and the resources to devise workable and reliable scoring techniques. The "system" usually consists of an allocation of points to characteristics of the applicant, the total number of points depending on how that applicant compares to a statistical sampling of previous applicants with similar credentials.

Creditor witnesses strongly urged that this bill permit the use of age and source of income in such scoring systems. In their experience age tended to be one of the best "predictors" of the eight to twelve characteristics typically incorporated into these scoring systems.

The following table indicates, for one large retailer, how the composite scores produced by their scoring system correlate to the actual performance of their credit customers.

CREDIT SCORE RELATED TO ACCOUNT PERFORMANCE--SPRING 1974

Score	Average dollars		Balance dollars		Charged off annually as percent of all balances
	Annual sales	Balance of open accounts	2 to 8 months delinquent as percent of all balances	6 to 8 months delinquent as percent of all balances	
180 to 189	179	251	10.23	1.52	6.85
190 to 199	186	254	9.54	1.38	6.35
200 to 209	235	258	8.20	1.06	4.78
210 to 219	276	279	6.83	.82	3.75
220 to 229	312	298	5.76	.62	3.00
230 to 239	346	315	4.88	.49	2.56
240 to 249	367	323	4.22	.42	2.13
250 to 259	382	324	3.82	.36	1.86
260 to 269	393	326	3.53	.30	1.60
270 to 279	413	325	3.25	.28	1.54
280 to 289	436	335	3.01	.24	1.44
290 to 299	447	335	2.75	.23	1.38
300 to 309	460	341	2.61	.21	1.18
310 to 319	471	346	2.39	.18	1.10
320 to 329	477	354	2.36	.18	1.00
330 and up	482	338	2.02	.15	.91
Total	377	317	4.15	.42	2.15

Though some members of the Committee were concerned that these scoring systems were inherently discriminatory in that they saddled each applicant with the statistical characteristics of similar prior applicants, a majority of the Committee believes that, on balance, a carefully constructed scoring system is in fact more fair and less discriminatory than a system which relies in large part on the subjective impressions and judgments of individual credit grantors or their employees. And the testimony before the Subcommittee did not seem to indicate that creditors using scoring systems had been the source of serious complaints.

[page 7]

The scoring systems which may include age and public assistance factors under this section are those which are "demonstrably and statistically sound" as this phrase may be spelled out in Board regulations. By this the Committee means that any such system must be based on sound statistical methodology, and that its results must be

EQUAL CREDIT OPPORTUNITY ACT

P.L. 94-239

statistically significant and useful in the context of a particular creditor's operations. Thus the Committee does not sanction the use of age and public assistance benefits in a numeric scoring system which is a mere consensus of the subjective views of a particular creditor's loan officers.

Affirmative Action Programs

Certain credit programs are specifically designed to prefer members of economically disadvantaged classes, and the Committee does not intend to undermine these programs. Rather, subsection 701(c) makes it clear that denials of credit to persons ineligible for those programs does not violate this Act.

Examples of such programs would include government sponsored housing credit subsidies for the aged or the poor. Credit offered to a limited clientele by non-profit organizations—such as credit unions, or educational loan programs—would enjoy the same protection.

In addition, subsection 701(c) (3) authorizes the Board to prescribe standards for other special purpose programs offered by profit-making organizations (commercial creditors) which will likewise be immune from a charge that they violate the Act. By its reference to "special social needs" the Committee expects that the minimum requirement for any such program will be that it is designed to increase access to the credit market by persons previously foreclosed from it.

Reasons for Adverse Action

The Committee believes that the provision entitling rejected applicants to a statement of reasons for adverse action is among the most significant parts of the bill. With few exceptions, creditors have refused to do anything more than notify rejected applicants of the fact of the rejection. Only rarely do creditors give even a cursory explanation of the reasons why. The creditors' apparent rationale has been that since they had no legal obligation to explain their action they would not venture the effort or the potential embarrassment of doing so.

The Committee is convinced that this attitude is not only shortsighted on the creditors' part, but that it deprives rejected credit applicants of necessary and useful information. Further, the Committee believes that this disclosure is essential to achieve the anti-discrimination goals of the legislation, for a creditor who knows he may have to explain his decision is much less likely to rest it on improper grounds. In addition, we believe that knowing the reasons for adverse action will, over time, have a very beneficial educational effect on the credit-consuming public and a beneficial competitive effect on the credit marketplace.

That a refusal to disclose reasons is shortsighted for creditors is borne out by the experience of creditors who have volunteered that information. Often, it appears, disclosure permits the applicant to correct or supplement information in his application, causing the creditor to change his decision and make a profitable loan he otherwise

[page 8]

would have rejected. In other cases the disclosure of reasons appears to be a valued public relations tool. National BankAmericard, Inc., for example, has recommended to its member banks that they adopt a policy of giving reasons to rejected applicants.

LEGISLATIVE HISTORY

P.L. 94-239

tion of that process, and permit a more coordinated approach to the implementation of consumer legislation. This provision also checks the proliferation of this kind of advisory committee and results in some savings of federal funds.

Relation to State Laws

The present Equal Credit Opportunity Act leaves almost totally unclear the status of existing or future state laws dealing with discrimination in credit transactions. The Committee believes that practices of discrimination are so abhorrent that federal law ought not foreclose the states from initiating their own laws unless those laws are incompatible with this legislation. A similar policy has been adopted by the Congress with respect to Truth in Lending and more recently with the Fair Credit Billing Act.

This bill clarifies the relationship of the Equal Credit Opportunity Act to state law in several ways.

First, the amended section 705(e) makes it clear that where both state law and federal law are violated by the same conduct, an aggrieved applicant is entitled to but one recovery of monetary damages. He may choose to sue under the state law or under the federal law, but not both. At the same time, an applicant is free to pursue administrative, injunctive or declaratory relief under either federal or State law without being forced to make an election of remedies. Thus an aggrieved applicant may utilize any conciliation services available under state law without foregoing his or her right to seek monetary damages separately. Or that applicant might seek a declaratory judgment in federal court without losing any available claim to monetary damages under state law. The Committee assumes, however, that in any such bifurcated proceeding the normal rules of res judicata and collateral estoppel will apply.

New subsections (f) and (g) of section 705 track similar language in the Fair Credit Billing Act. State law is displaced by this Act only to the extent of inconsistencies between them, and the Board may determine whether such inconsistencies exist. The Committee appreciates that the limitation set on the Board's authority in this regard—that the Board cannot find state law inconsistent if it “gives greater protection to the applicant”—is somewhat imprecise. Identical language in the Fair Credit Billing Act was found manageable by the Board, however, and the Committee believes that it is better to use a familiar standard in this area than to attempt a separate “laundry list” of inconsistencies for different parts of the Consumer Credit Protection Act. The Committee intends that those state laws which give greater protection to the applicant, as determined by the Board, shall apply equally to all credit granting institutions doing business in that state.

[page 13]

Some states (e.g., Massachusetts) have adopted antidiscrimination legislation quite similar to this Act. Other states may be expected to do so in the future. Subsection 705(g) like comparable provisions in the Truth in Lending and Fair Credit Billing Acts, will permit classes of transactions in such states to be exempted from the substantive requirements and prohibitions of the federal law whenever the local law is substantially the same or stronger than the federal. To resolve an uncertainty under prior legislation, this bill makes clear that where such exemptions are made in favor of state law, the full remedial

EQUAL CREDIT OPPORTUNITY ACT

P.L. 94-239

and enforcement structure of this Act remains in place. Thus aggrieved applicants retain their access to the federal courts, and the federal enforcement agencies may retain their authority to act against violators. It is expected, however, that these agencies will generally defer to the appropriate state officials.

Civil Liability

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 accomplish its purposes. The bill therefore provides enforcement opportunities of three kinds. Under section 704 (which remains unchanged) various federal agencies are given administrative enforcement responsibility. Under the revised section 706, the United States Attorney General is also authorized to bring enforcement actions, either on referral of cases from the administrative agencies, or on the Attorney Generals' own initiative where there are patterns or practices in violation of the Act. The entrusting of enforcement responsibility to the Attorney General is premised on the assumption that that office's experience in the enforcement of other civil rights legislation can be effectively expanded and built on to achieve maximum compliance with the antidiscrimination policies of the Equal Credit Opportunity Act.

The chief enforcement tool, however, will continue to be private actions for actual and punitive damages. Much of the testimony received in the hearings, and much of the debate in Subcommittee and Committee centered on the adequacy of the recovery ceiling for punitive damages in class actions. The present law sets that ceiling at the lesser of \$100,000 or 1% of the creditors' net worth. The Subcommittee had recommended that this be changed to the greater of \$50,000 or 1%. The Committee eventually agreed upon a level of \$500,000 or 1% of the creditor's net worth, whichever is less.

The setting of any ceiling on class action liability is meant to limit the exposure of creditors to vast judgments whose size would depend on the number of members who happened to fall within the class. The risk of any ceiling on class action recoveries is that, if it is too low, it acts as a positive disincentive to the bringing of such actions and thus frustrates the enforcement policy for which class actions are recognized.

In the context of this Act, where individual recoveries of punitive damages could be as high as \$10,000, a \$100,000 ceiling tends to discourage the bringing of a class action whenever there are more than

[page 14]

10 members in the class. In a parallel situation under Truth in Lending, where the class action ceiling is also \$100,000, several courts have noted the incompatibility of that ceiling with the effective use of the class action device. *Boggs v. Alto Trailer Sales, Inc.* (No. 74-1605, 5th Cir., April 14, 1975); *Weathersby v. Fireside Thrift Co.* (No. C-73-0563 A.J.Z., N.D. Calif., Feb. 25, 1975).

The Committee wishes to avoid any implication that the ceiling on class action recovery is meant to discourage use of the class action device. The recommended \$500,000 limit, coupled with the 1% formula, provides, we believe, a workable structure for private enforcement. Small businessmen are protected by the 1% measure, while a

LEGISLATIVE HISTORY

P.L. 94-239

potential half million dollar recovery ought to act as a significant deterrent to even the largest creditor. Creditors are also protected by the list of factors (in section 706(b)) a court should consider in determining any class action award.

The Committee is aware of the many difficulties surrounding the use of class actions for civil penalties or punitive damages. The largest obstacle to class actions may lie in the procedural rules applicable to them—as, for example, the notification requirements under the case of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974)²—rather than in any necessarily arbitrary ceiling on recovery. For this reason the Committee, through its Subcommittee on Consumer Affairs, intends to look at alternative private enforcement procedures such as the so-called *qui tam* or private attorney general action. We are hopeful that there may be workable and effective substitutes for the class action as a consumer enforcement device not only for this Act but also for other similar legislation.

The Committee also recommends a change in the statute of limitations applicable to actions brought under this Act. The present one-year limitation is, we believe, too short a period of time for violations of antidiscrimination legislation. The development and investigation of the necessary facts—especially in the case of agency or Attorney General actions—may require more than a year. Discriminatory practices, unlike violations of Truth in Lending, are not apparent from the face of particular documents or contracts. The Committee therefore recommends that the statute of limitations be extended to two years. In addition, where an agency or attorney General action has been commenced within two years of a violation, and where it is likely that individual applicants may only learn of potential violations through publicity surrounding the government's action, we believe the affected applicant should have a reasonable additional time to bring his or her private action. The bill therefore permits private actions to be brought within one year after the commencement of a government action where both involve the same conduct.

Finally, the Committee has added a new subsection 706(j) to make clear that if a creditor's credit granting standards are otherwise subject to discovery in any judicial or administrative proceeding, nothing in this Act clothes those standards with immunity. Such standards may be relevant and necessary in particular actions, and the Committee does not intend to preclude such discovery by any inference in this Act that those standards are beyond reach.

2. 94 S.Ct. 2140, 40 L.Ed.2d 722.

[page 15]

Effective date

The substantive provisions of this bill would become effective eighteen months after its enactment. This period should give the Federal Reserve Board time to promulgate necessary regulations sufficiently in advance of the effective date to allow creditors to bring their practices into compliance.

The original Equal Credit Opportunity Act allowed only twelve months between enactment and effective date, and as a result the actual content of final regulations was not known until a few days before they became effective. Since the purpose of these regulations is to effectuate compliance and not to trap creditors in unintended violations, the

EQUAL CREDIT OPPORTUNITY ACT

P.L. 94-239

Committee believes it is very important that the Board have sufficient time to draft, and that creditors have adequate time to adjust to, new regulations. The necessity for phasing in new regulations over a period of a year or more should be avoided.

The remainder of this Act—beyond the substantive requirements and prohibitions—will take effect on enactment. This would include the provisions on civil liability and enforcement, and on relation to state law.

COST OF LEGISLATION

In compliance with Sec. 252(a)(1) of the Legislative Reorganization Act of 1970, as amended (2 U.S.C. 190j), the Committee estimates that there will be no measurable cost to the Federal Government in carrying out the provisions of this legislation. Enforcement activities by federal agencies, including the drafting of regulations, can be carried out with present agency resources, or with minimal additions. Since the Consumer Advisory Council created by this legislation would absorb the existing Truth in Lending Advisory Committee, no new expenditures for that Council are anticipated beyond whatever per diem is required for additional Council members.

[page 16]

SECTION-BY-SECTION ANALYSIS

Section 1. Short title.—This section provides that this Act may be cited as the Equal Credit Opportunity Act Amendments of 1975. It also incorporates the short title of Title VII of the Consumer Credit Protection Act ("The Equal Credit Opportunity Act") into a new section 709 of that title.

Section 2. Prohibited discrimination: Statements of Reasons.—This section re-writes section 701 of the present Equal Credit Opportunity Act.

Subsection (a) adds the following new categories of prohibited discrimination: race, color, religion, national origin, age (provided the applicant has the capacity to contract), receipt of public assistance benefits, or exercise of rights under the Consumer Credit Protection Act. These are in addition to the existing prohibitions against discrimination on the grounds of sex or marital status.

Subsection (b) confirms that it is not a violation of this Act for creditors to inquire about marital status in order to ascertain the creditors rights and remedies in a particular transaction; nor is it a violation to inquire of the applicant's age or about public assistance benefits for the purpose of assessing legitimate elements of credit-worthiness. Empirical credit scoring systems which consider age or public assistance benefits may be used so long as they are demonstrably and statistically sound.

Subsection (c) makes clear that it is not a violation of this Act to refuse credit under three types of specially limited affirmative-action type programs: programs authorized by law for economically disadvantaged persons; programs run by non-profit organizations for their members or for economically disadvantaged persons; or special credit programs offered by profitmaking organizations to meet special social needs approved in Board regulations.

LEGISLATIVE HISTORY

P.L. 94-239

small business people out of the credit business and into the hands large credit grantors. Ultimately, this could lead to a monopoly of credit granting in the hands of large national firms or the government itself. I do not believe that is in anyone's best interest.

JESSE HELMS.

[page 21]

ADDITIONAL VIEWS OF MR. GARN

Although I completely agree with the objectives of the Equal Credit Opportunity Amendments, I have reservations concerning some of the specific provisions of the legislation.

Exemption of Business Credit

The Subcommittee bill considered by the full Committee provided that the Federal Reserve may by regulations exempt from the provisions of the Act any class of transactions not primarily for personal, family or household purposes. Language was added by the full Committee to require that prior to exempting any class of transactions the Board make an express finding that the application of such provision or provisions would not contribute substantially to carrying out the purposes of the Act. Since there was a paucity of evidence at the hearings on the legislation indicating that there had been abuses in the business credit area, I would hope that the Board take prompt action to exempt business credit from provisions of the Act written with consumer credit in mind.

For example, the requirement for written reasons for credit declinations was not fashioned in the light of commercial practice. Commercial credit involves the extension of credit between merchants for inventory stock, plant equipment, and the like. The very nature of most business to business relationships means that purchases are made frequently and continuously, often without a lot of red tape. Making this provision applicable to business credit would be very expensive and place impediments in the way of commercial transactions. The additional expense and paper work would be astronomical and would not contribute to the achievement of the purposes of the Act.

Written Reasons for Adverse Action

Although the Committee was wise in not requiring automatic written reasons for denial of credit it does require a written notification to the applicant of his or her rights to the reasons for the denial. I am concerned with the potential burden that this provision will place on credit grantors. The cost of compliance will ultimately be borne by the consumer.

Industry practice differs regarding the giving of notice of denial of credit. Some large retailers and credit-card grantors mail a written notification of a declination while other retailers and finance companies prefer to notify an applicant orally that the credit application has been denied. The cost of such written notifications can run into millions of dollars.

The authors of this provision seem to ignore the lesson of Truth in Lending and RESPA that what is intended as a simple disclosure provision too often turns out to be a bureaucratic nightmare of paperwork. I am particularly concerned with the burden this section will put on small business. Without question, its effect will be to force an increasing number of small credit grantors out of the credit business.

EQUAL CREDIT OPPORTUNITY ACT

P.L. 94-239

[page 22]

Good Faith Reliance on Board Opinions

The Committee by a tie vote failed to approve an amendment which would permit creditors to rely upon interpretations to be issued by duly authorized officials or employees of the Federal Reserve System, in addition to the present permission for them to rely upon regulations and interpretations issued by the Board.

The need for this provision is twofold. The simplicity perceived by the authors of Truth in Lending has not materialized, leaving credit grantors with a maze of unclear and often complicating statutory provisions, regulations and court opinions which make compliance next to impossible. Although the Federal Reserve System has been helpful in issuing staff letters of advice, neither the Board nor Congress have done much to clarify the law. Whereas cases in the 5th and 9th Federal Circuits have held staff opinions to be entitled to great deference, the 2nd Circuit in *Ives v. Grant* (CA 2, July 31, 1975) gave staff opinions "short shrift."

In failing to solve the problem arising under Truth in Lending by clearly drafted legislation and binding interpretative opinions, Congress and the Board are merely shifting the burden and responsibility to the Federal court system. This is reflected in the 1975 Annual Report of the Administrative Office of the United States Courts showing a rise in Truth in Lending caseload from 415 in fiscal years 1972 to 2,237 in fiscal year 1975, a 439% increase. This solution has resulted in more confusion, conflicting judgments, huge court costs and attorneys' fees with a great waste of time and energy of the courts and industry which could better be spent in solving more serious problems of our society.

Due Process in the Rulemaking Procedure

During the consideration of the Equal Credit Opportunity Act Amendments I offered and withdrew, upon assurance that there would be later hearings on the subject, an amendment to provide for an adjudicatory proceeding when the Federal Reserve Board engages in rulemaking under the Equal Credit Opportunity Act. The purpose of this proposal is to assure that all parties have an opportunity to be heard and that a record be established sufficient for a judicial determination as to whether the agency has abused its discretion or acted in an arbitrary or capricious manner.

Since it is important that the public have confidence in the integrity of the regulatory process, I am hopeful that the Consumer Affairs Subcommittee at an early date will fully explore this matter in oversight hearings.

Civil Liability

One of the most controversial issues faced by the Committee dealt with the limitation of liability in class action suits. The Subcommittee had raised the present ceiling of \$100,000.00 or 1 per cent of the net worth of the creditor, whichever is greater, to \$50,000.00 or 1 per cent of the net worth of the creditor, whichever is the lesser. I offered an amendment to restore the present limitations on class action liability because I felt that the greater limitation in the Subcommittee's bill would be excessive.

A \$50,000.00 maximum liability could wipe out a small business. On the other hand, a 1 per cent of net worth limitation for large firms

LEGISLATIVE HISTORY

P.L. 94-239

[page 8]

credit-granting standards. The substitute bill contains a compromise provision which permits the use of age (but not public assistance income) in a credit scoring system provided such system does not assign a negative value to elderly applicants, and is scientifically sound based on the particular creditor's actual customer experience.

As in the Senate amendment any such scoring system must meet standards promulgated in regulations of the Board. It is not the intention of the Conferees, however, that each such system be approved by the Board on an *ad hoc* basis.

In the substitute bill, the separate House provision permitting more favorable treatment of applicants on the basis of age is retained with the modification that it applies only to elderly applicants.

AFFIRMATIVE ACTION PROGRAMS

Both the original House bill and the Senate amendment contained provisions specifically permitting the continuance of affirmative action type programs authorized by law, or offered by non-profit organizations. The substitute bill adopts the Senate version of this provision which is applicable to all "credit" programs rather than the narrower "loan" programs cited in the House bill. The Conferees were aware that there are a number of such ongoing programs. This provision merely clarifies the Congressional intent under the original Equal Credit Opportunity Act that credit denials pursuant to such programs are not violations of the Act.

Similarly, in the case of special purpose credit programs offered by profit-making organizations, the Conferees approved the language common to both the House bill and the Senate amendment exempting such programs from the restrictions of the Act so long as they conform to Board regulations. The intent of this section of the statute is to authorize the Board to specify standards for the exemption of classes of transactions when it has been clearly demonstrated on the public record that without such exemption the consumers involved would effectively be denied credit.

As in the case of government sponsored or non-profit programs, this provision is intended to confirm that ongoing special programs offered by commercial creditors are not automatically violative of this Act.

REASONS FOR ADVERSE ACTION

The Senate amendment provided that creditors must notify applicants of action taken on the application, and at least on request must give applicants statements of reasons for adverse action. The House bill contained no equivalent provision. The substitute bill set out in the Conference Report adopts the Senate provision, with two modifications: (1) the definition of "statement of reasons" is changed to require that it contain "the specific reasons for the adverse action taken"; and (2) an exemption from the requirements to give written notifications and statements of reasons is provided for creditors who act on 150 or fewer applications a year. The intention of this latter provision is to relieve the very small credit grantor from the burden of preparing formal written documents when that creditor conducts a small-volume credit operation.

EQUAL CREDIT OPPORTUNITY ACT

P.L. 94-239

[page 9]

BUSINESS CREDIT EXEMPTION

The original Equal Credit Opportunity Act applies to all credit transactions, and the House bill continues this scope. The Senate amendment, on the other hand, authorized the Federal Reserve Board to exempt classes of credit transactions (other than consumer credit transactions) if the Board expressly finds that application of the Act is not necessary to achieve its purpose. The Conferees accepted the Senate provision. The intention of the Conferees is to permit exemptions only when the inclusion of those classes of transactions would serve no useful purpose in achieving the antidiscrimination goals of this Act.

CONSUMER ADVISORY COUNCIL

The original House bill called for the creation of a new Advisory Committee to advise and consult with the Board concerning the Equal Credit Opportunity Act. The Senate amendment instead would establish a new Consumer Advisory Council to advise the Board on all its functions under the Consumer Credit Protection Act. This Council would also absorb the present functions of the Truth in Lending Advisory Committee. The Conference Report adopts the Senate provision.

FEDERAL TRADE COMMISSION ENFORCEMENT

The Conferees accepted, from the Senate amendment, a provision clarifying that the Federal Trade Commission could enforce this Act in the same manner as if it were an FTC trade regulation rule.

RELATIONS TO STATE LAWS

Both the House bill and the Senate amendment contained provisions restricting an aggrieved applicant to a single recovery when a creditor's conduct violates both state and federal law. With some technical changes, the Conference Report contains the Senate provision, which makes it clear that an applicant can bring only one lawsuit for monetary damages, but is not otherwise restricted in his or her remedies under state law and under this Act.

The Conference Report also contains two provisions, patterned on similar sections of the Fair Credit Billing Act, which make it clear that this Act does not preempt state law unless that law is inconsistent with the federal Act. Similarly, the Board is directed to exempt from the federal Act any classes of transactions which are subject to state law substantially similar or more protective than this Act. The provision also confirms that the permitted exemptions are from the "requirements" of this Act and not from its remedial provisions.

CIVIL LIABILITY

Both the House bill and the Senate amendment provided substantially expanded civil liability rules for violations of the Act. The House bill continued the present limits on punitive damages from the present Act: \$10,000 for individual actions, and \$100,000 for class actions. In addition the House bill would have required that violations

the award of attorneys' fees to be unjust on that issue.

I.

In the instant case this court found that the FERC erred as a matter of law in interpreting *force majeure* in a warranty contract to include foreseeable and anticipated events. Furthermore, this court held that the Commission's findings were not supported by substantial evidence in *Gulf Oil Corp. v. FERC*, 706 F.2d 444, 452-55 (3d Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 698, 79 L.Ed.2d 164 (1984). Gulf had not established substantial evidence that it tried to overcome the results of the *force majeure* event by doing everything within its control to prevent or minimize the event's occurrence and its effects. Nor had Gulf proven that a *force majeure* event caused the accidents, altercations, repairs or failure of production. Consequently, this court remanded the *force majeure* issue to the Commission for further proceedings.

In disputing WUL's petition for attorneys' fees, FERC argues that in deciding whether its position was substantially justified we should look to Rule 37 of the Federal Rules of Civil Procedure. Rule 37 considers a party's action "substantially justified" except where "no genuine dispute exists." Because Congress incorporated the "substantially justified" language from Rule 37 into the EAJA, FERC argues that "attorneys' fees should not be awarded unless the government position is found to be indefensible or the government has defended such a situation in which no genuine dispute exists." Response of the FERC in Opposition to Petitioner's Motion for Attorneys' Fees at 10. This illogical syllogism is exactly the same as the one this court rejected in *NRDC v. EPA*, 703 F.2d 700 (3d Cir.1983).

In that case this court explained:

The substantial justification language may have been borrowed from one of the Federal Rules of Civil Procedure, but that premise lends no support for the illogical syllogism the EPA erects from

it.... The EPA would rewrite the Act ... to give it a meaning that even the Justice Department [whose proposed limiting amendments were rejected] never sought.

Id. at 710-11.

In our view, the Committee reports from the House and the Senate set forth the correct standard as follows:

The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and fact, no award will be made.

S.Rep. No. 253, 96th Cong., 1st Sess. 6 (1979); H.R.Rep. No. 1418, 96th Cong., 2d Sess. 10, *reprinted in* 1980 U.S.Code Cong. & Ad.News 4953, 4989.

[1] We thus must determine whether the government has shown that its position concerning the *force majeure* issue had a reasonable basis in law or fact. In that regard FERC argues that the task of fashioning a remedy in the proceeding before it was complex and there was an absence of precedent for construing *force majeure* clauses in warranty contracts. We conclude that these explanations do not substantially justify FERC's position in the underlying action.

FERC had the benefit of this court's decision in *Gulf Oil I v. F.P.C.*, 563 F.2d 588 (3d Cir.1977), *cert. denied*, 434 U.S. 1062, 98 S.Ct. 1235, 55 L.Ed.2d 762 (1978), defining the meaning of *force majeure* in a warranty contract. It had the benefit of the Administrative Law Judge's decision which FERC reversed. It had the benefit of the advice of its own legal experts. Consequently, we will not accept FERC's arguments concerning the complexity of the case and absence of precedent directly on point to disallow an award of attorneys' fees to WUL. FERC has simply not shown how its position was substantially justified.

Similarly FERC has failed to show how an award of attorneys' fees would be unjust. This case stemmed from a Commission enforcement action against Gulf.

Cite as 743 F.2d 169 (1984)

FERC argues that awarding fees to WUL would act as a disincentive to the Commission to pursue such cases and liberally grant intervention. To the extent that an award of attorneys' fees will act as a disincentive to the Commission to take positions that it cannot substantially justify, we believe such an award is just.

We turn next to the issue whether WUL is entitled to the entire amount of its requested attorneys' fees. WUL challenged three aspects of the orders under review; however, WUL prevailed only on the *force majeure* issue. Thus, the question we must decide is whether prevailing on one issue entitles a petitioner to the fees it incurred in litigating the entire case.

[2] This question was squarely decided by this court in *Goldhaber v. Foley*, 698 F.2d 193, 196-97 (3d Cir.1983). In *Goldhaber*, we held that

it would be anomalous to charge the entire expense of litigation to the government in such a circumstance. Were we to do so, the government would bear the expense of defending even its reasonable positions.... The only solution consonant with the legislative intent [of the EAJA] as we discern it, is to charge the United States with that portion of the expenses attributable to its unjustifiable positions.

Id. at 197. Accordingly, WUL may be awarded attorneys' fees only for its effort concerning the *force majeure* claim and matters inextricably tied to litigating that claim.

Finally, we consider WUL's itemization of its attorneys' fees and expenses. Although we are satisfied that WUL offered a sufficiently detailed application for attorneys' fees for us to determine whether the hours claimed are justified, petitioner failed to itemize by issue its fee application. Such itemization is not necessary in every case; however, it is vital to the disposition of this case because WUL only prevailed in one of its three challenges involving the FERC. It is for that claim alone that the government's position was not substantially justified. Thus, we would need more

specific information from WUL before we could rule on its application for attorneys' fees.

Accordingly, we will direct the parties to attempt to amicably settle the attorneys' fee issue in a manner consistent with this opinion. We direct WUL to give to respondent its itemization of legal fees on the issue on which it prevailed. If the parties fail to amicably settle the attorneys' fee issue within 30 days from the date of this order, the matter will be referred to Magistrate Richard A. Powers, III, pursuant to Rule 33 of the Federal Rules of Appellate Procedure, to meet with the parties and proceed as he deems appropriate. We would hope that he could make a recommendation to this court within 30 days after receipt of the case.



UNITED STATES of America, Appellee.

v.

AMERICAN FUTURE SYSTEMS, INC.,
First National Acceptance Corporation
and Edward M. Satell, President of
American Future Systems, Inc., Appel-
lants.

No. 83-1766.

United States Court of Appeals,
Third Circuit.

Argued June 18, 1984.

Decided Sept. 5, 1984.

Rehearing Denied Oct. 2, 1984.

As Amended Oct. 10, 1984.

Government brought action seeking permanent injunctive relief against alleged violations of the Equal Credit Opportunity Act. The United States District Court for the Eastern District of Pennsylvania.

James T. Giles, J., 571 F.Supp. 551, found that a company selling china, cookware, crystal and tableware on a credit basis, its subsidiary and its president violated the Act by treating minorities, males and married persons less favorably than single white females in their credit programs and enjoined various marketing and hiring practices. Appeal was taken. The Court of Appeals, A. Leon Higginbotham, Jr., Circuit Judge, held that the company violated the Equal Credit Opportunity Act when it established a special credit program on the basis of the social need of persons in the age group of 18 to 21 who were excluded from the customary credit market and then administered programs which discriminated on prohibited basis such as race, sex and marital status and, further, it was proper to enjoin marketing and hiring practices which furthered the illegal discrimination in the extension of credit.

Affirmed.

1. Consumer Credit $\S$ 31

Company selling china, cookware, crystal and tableware on credit basis, its subsidiary and its president were "creditors" under Equal Credit Opportunity Act where company's sales on a credit basis amounted to over 95% of its total sales, subsidiary handled billing and collection of credit sales contracts and president established credit policies and regularly participated in decisions to extend or decline credit. Equal Credit Opportunity Act, §§ 701(a)(1), (c)(3), 702(e), as amended, 15 U.S.C.A. §§ 1691(a)(1), (c)(3), 1691a(e).

2. Consumer Credit $\S$ 31

Equal Credit Opportunity Act permits a special purpose credit program to differentiate between credit applicants on basis of race, sex or marital status in order to enhance credit opportunities for disadvantaged groups. Equal Credit Opportunity Act, § 701(c)(3), as amended, 15 U.S.C.A. § 1691(c)(3).

3. Consumer Credit $\S$ 31

Once their social need category such as age has been established and all class mem-

bers having that need have been defined, creditor may institute more than one special credit program to address that need, so long as other prohibited factors not inextricably tied to defined need are not used as basis for differentiating treatment of individuals. Equal Credit Opportunity Act, § 701(c)(3), as amended, 15 U.S.C.A. § 1691(c)(3).

4. Consumer Credit $\S$ 31

Finding that company selling china, cookware, crystal and tableware on credit basis had no credit program formally described in writing or designated as "special purpose credit program" was sufficient basis for finding violation of Equal Credit Opportunity Act section providing for special purpose credit program responsive to special social needs of a class of persons if administered pursuant to written plan. Equal Credit Opportunity Act, § 701(c)(3), as amended, 15 U.S.C.A. § 1691(c)(3).

5. Consumer Credit $\S$ 31

Special purpose credit program satisfies Equal Credit Opportunity Act if credit applicants either "would not receive such credit" or "probably would receive it on less favorable terms than are ordinarily available to other applicants applying to the organization for similar type and amount of credit"; if credit was offered to class of persons between ages of 18 and 21 who but for alleged special purpose credit program would not receive credit, charging special purpose credit program participants higher terms than customary credit program participants would not in and of itself be fatal. Equal Credit Opportunity Act, § 701(c)(3), as amended, 15 U.S.C.A. § 1691(c)(3).

6. Consumer Credit $\S$ 31

Where a social need behind special purpose credit program was defined as extending credit to persons between ages of 18 and 21 excluded from customary credit market, but each person in class did not receive same credit terms solely because of person's sex, race, or marital status, special social credit program violated Equal Credit

Opportunity Act. Equal Credit Opportunity Act, § 701(c)(3), as amended, 15 U.S.C.A. § 1691(c)(3).

7. Consumer Credit $\S$ 31

Where social need sought to be addressed by special credit program of company selling china, cookware, crystal and tableware on credit basis, its subsidiary and its president was extending credit to persons between the ages of 18 and 21 excluded from the customary credit market but credit terms offered to minorities, married persons and males were less favorable than those credit terms offered to single white females, company, subsidiary and president violated Equal Credit Opportunity Act in designing and administering credit program which discriminated on prohibited basis such as race, sex and marital status which were not related to social need program sought to address. Equal Credit Opportunity Act, § 701(c)(3), as amended, 15 U.S.C.A. § 1691(c)(3).

8. Consumer Credit $\S$ 31

District court could enjoin marketing and hiring practices of company selling china, cookware, crystal and tableware on credit basis which furthered company's illegal discrimination on basis of race, sex, and marital status in extension of credit. Equal Credit Opportunity Act, § 701 et seq., as amended, 15 U.S.C.A. § 1691 et seq.

Henry T. Reath (argued), Alison R. Lazewitz, Duane, Morris & Heckscher, Philadelphia, Pa., for appellants.

Edward S.G. Dennis, Jr., U.S. Atty., Philadelphia, Pa., William Bradford Reynolds, Asst. Atty. Gen., Charles Justin Cooper, Deputy Asst. Atty. Gen., Jessica Dunsay Silver, Dennis J. Dimsey (argued), Attys., Dept. of Justice, Washington, D.C., for appellee.

Before ALDISERT, Chief Judge, and HIGGINBOTHAM and ROSENN, Circuit Judges.

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, Jr., Circuit Judge.

This case involves an appeal from a district court order finding that Appellants, American Future Systems, Inc., ("AFS"), First National Acceptance Corporation ("FNAC"), and Edward M. Satell ("Satell"), President of American Future Systems, Inc., violated the anti-discrimination provisions of the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 *et seq.* (1982).

Appellants argue that the district court erred as a matter of law in finding that appellant violated the ECOA by treating minorities, males and married persons less favorably than single white females in their credit programs. Appellants also challenge the breadth of the district court's order enjoining AFS's marketing and hiring practices. Finally, appellants FNAC and Satell argue that the district court erred as a matter of law in finding them to be creditors and therefore subject to the terms of the ECOA.

We will affirm the district court's order finding that AFS, FNAC and Satell are creditors who violated the ECOA by discriminating against credit applicants based on prohibited criteria such as race, sex and marital status. We also will affirm the district court's order concerning AFS's business practices because the order is tailored to ensure that AFS does not continue its illegal practice of discriminating on the basis of race, sex and marital status in the extension of credit.

I.

The parties have not challenged the district court's extensive factual findings as modified upon determination of AFS's Motion for Reconsideration. Thus, these factual findings of the district court are accepted as correct.

American Future Systems, Inc. sells china, cookware, crystal and tableware, and AFS extends credit to its customers. Since its incorporation, AFS's sales on a credit

basis have amounted to over 95% of its total sales.

First National Acceptance Corporation is a wholly owned subsidiary of AFS. FNAC handles the billing and collection for credit sales contracts initiated by AFS.

Edward M. Satell has been president, chief executive officer and principal shareholder of AFS since its incorporation in 1973. Satell is also an officer of FNAC. Satell helped establish AFS's credit policies. Moreover, Satell regularly participates in decisions to extend or to decline credit to classes of AFS's credit applicants. In addition, Satell regularly takes part in decisions concerning the terms and conditions upon which credit is granted. He also participates in establishing the criteria for evaluating credit applicants.

AFS alleges that its customary credit standards require the credit applicant to satisfy a three-part test: 1) a telephone in the residence; 2) positive credit experience of at least \$100; and 3) employment with regular income. Although the district court made no finding in this regard, for purposes of this appeal we will assume that appellants' assertion is true.

The district court found that "AFS is unique in the credit field because it is successful in extending credit to young people who would otherwise be unable to obtain credit in the traditional market place." *United States v. American Future Systems, Inc.*, 571 F.Supp. 551, 554 ¶28(a) (E.D.Pa.1983). "AFS programs have a social utility in that they afford young people, including minorities, an opportunity to obtain credit despite their youth and lack of prior credit history." *Id.* at 554 ¶28(b).

"AFS has a laudable objective of providing credit to the maximum extent possible consistent with its ability to make a profit and to expand credit to young people based on AFS's general operating experience." *Id.* at 554 ¶28(c).

AFS markets its goods through three separate programs: (1) a summer program;

(2) a winter program for single white females; and (3) a winter program for minorities, married persons and males.¹

A. Summer Program.

AFS's preferred sales target in this program has always been the group of single white females between the ages of 18 and 21 living at home with a parent who could co-sign for the credit extension. Although requested, the parent of the single white female need not co-sign in order for credit to be extended. AFS automatically ships the goods to the applicants in this group without checking the credit of the single white female applicant or the parent(s), if the parent(s) co-signed.

The district court explained how AFS reached its preferred market of 18 to 21 year old single white females:

[AFS] has encouraged sales to this preferred group by adoption of a policy (by specific directions to its sales force), to sell in areas believed to be all white, or predominantly white, and by avoiding sales areas where the minority population might be substantial. It has discouraged sales personnel to pursue minority or non-preferred groups through deferred commission arrangements on such sales which arrangements are markedly different from, and substantially less lucrative than, the immediate full commission arrangements for sales to the preferred market group of white single females between the ages of 18 and 21.

Id. at 555 ¶33.

The district court pointed out further:

The non-preferred sales, which are to almost all black females, are explained by mostly unavoidable encounters of salespersons with black or other minority persons as part of "mixed audiences" in markets targeted by AFS as "all white colleges," "all white neighborhoods" and "all white high schools."

Id. at 555 ¶34.

Where sales presentations are made to persons outside the preferred single white

female in her sophomore, junior or senior year in college or nursing school.

Cite as 743 F.2d 169 (1984)

female group, goods are shipped on a deferred basis, following among other things a satisfactory credit check made on both the applicant and co-signer. About 20% of the persons in this non-preferred category fail to qualify for credit under AFS's alleged customary credit standards. Although, where possible, AFS avoids making sales to black and other minority persons, there is no evidence that AFS has expressly refused to sell its product on a cash basis to an individual solely based on factors such as race, sex, or marital status. However, if an applicant fails the credit check, credit is not extended. If credit is the only method by which an applicant can purchase, then no sale is made. This result cannot occur with the single white female group because there is no credit check of anyone in that group.

Parents of applicants in the non-preferred group are strongly encouraged to co-sign when the sale is based on their credit standing. Furthermore, a large deposit is encouraged on non-preferred program sales, although the minimum applicable to all sales will be accepted.

B. Winter Programs.

AFS alleges that it has two separate winter programs. One program comprises only single white females who are upper-classpersons (sophomores, juniors and seniors) in a four-year college or nursing school. The district court found this to be the preferred program. The other program comprises minorities, males and married persons attending college or vocational school; the district court found this to be the non-preferred program.²

The applicants for the preferred winter credit program for single white females "are treated as preferred sales targets, regardless of age, prior credit histories, or any other normal indicia of creditworthiness." *Id.* at 556 ¶42. They receive immediate credit. "Sales to this group are always made on an immediate shipment basis unless there is a specific request for a

delay in shipment." *Id.* at 556 ¶42 (emphasis added).

The non-preferred winter credit program comprises all minorities, males, married persons and freshmen in four-year colleges as well as students in junior colleges and vocational schools. This group receives their goods on a deferred shipment basis. Unlike the preferred winter credit program, the non-preferred credit program withholds the shipment of goods to its credit applicants until the applicant makes three successive monthly payments. If non-preferred applicants fail to make three consecutive monthly payments, AFS retains the payments made and retains the goods earmarked for shipment.

Both winter programs are designed to meet the "special social need" for credit shared by 18 to 21 year olds. The distinction between the two programs—based on race, sex and marital status—is not, however, a matter of differential "social need." Rather, it stems from a marketing judgment made by AFS. AFS does not inform potential credit applicants that they are participants in an alleged special purpose credit program. As the district court noted, "[a]ll applicants between 18-21 are carefully led to believe that they are being treated the same as all other applicants." *Id.* at 557 ¶55.

Potential credit applicants who fall into the non-preferred category because of their race, sex or marital status are therefore unable to decline credit offered through an alleged special purpose credit program. *Id.* at 557 ¶57. Moreover, these same non-preferred credit applicants are not told "that they are being rejected for the credit terms extended to other persons identically situated, except for the characteristics of race, sex, marital status, or year in school." *Id.* at 558 ¶58.

The district court also found that AFS attempts to justify its credit extension distinctions with sales and account currency

gated to the non-preferred program.

2. If a student is not a single white female upper-classperson, this student is automatically rele-

1. This program covered anyone between the ages of 18 and 21 who was not a single white

statistics, generated by its predecessor company American Foresight, that purport to show that minority customers are, as a group, less creditworthy than their white counterparts. The district court credited the testimony of Dr. Bernard Siskin, a statistical expert for the Government, that "the AFS data system and analyses are statistically biased and, therefore, statistically unreliable, because it was the AFS sales policy to discourage sales to the class of minority persons or other non-preferred groups between the ages of 18-21 while encouraging sales to the preferred market group." *Id.* at 559 ¶ 76. Moreover, AFS's statistical analyses did not account for salespersons' intentional miscoding of sales to blacks as sales to whites so as to obtain better commissions. *Id.* at 558 ¶ 67.

Based on these findings the district court held that AFS, FNAC and Satell are creditors who violated the anti-discrimination provisions of the ECOA.

Appellants do not appeal the district court's conclusion that AFS's summer program discriminated on the basis of race, sex and marital status in violation of the ECOA. Thus, we will restrict our review to the two winter credit programs that the district court also found to have violated the ECOA by discriminating on the basis of race, sex and marital status in the extension of credit.

II.

[1] The Equal Credit Opportunity Act proscribes discrimination in the extension of credit. Section 1691(a) of the ECOA states that

3. Appellants FNAC and Satell contend that the district court erred in finding that they were "creditors" under the ECOA. 15 U.S.C. § 1691a(e) defines a creditor as "any person who regularly extends, renews or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit." For the reasons set out in the district court's opinion, 571 F.Supp. at 561, we agree that FNAC and Satell are creditors under the ECOA.

[i]t shall be unlawful for any creditor⁽³⁾ to discriminate against any applicant, with respect to any aspect of a credit transaction—(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract).⁽⁴⁾

The ECOA does provide, however, for special purpose credit programs responsive to special social needs of a class of persons. Section 1691(c)(3) carves out this exception:

It is not a violation of this section for a creditor to refuse to extend credit offered pursuant to ... any special purpose credit program offered by a profit-making organization to meet special social needs which meets standards prescribed in regulations by the [Federal Reserve] Board.

The legislative history of this exception throws much light on its meaning. The Joint Conference Committee on the 1976 amendments explained the intent of special purpose credit programs and the circumstances under which special purpose programs would be permitted.

The intent of [the special purpose credit program language] of the statute is to authorize the [Federal Reserve] Board to specify standards for the exemption of classes of transactions when it has been clearly demonstrated on the public record that *without such exemption the consumers involved would effectively be denied credit.*

As in the case of Government sponsored or non-profit programs, *this provision is intended to confirm that ongoing special programs offered by com-*

4. The ECOA was originally passed in 1974 to prohibit credit discrimination on the grounds of sex and marital status. The Act was amended in 1976 to prohibit as well credit discrimination on the basis of race, color, religion, national origin and age. 15 U.S.C. § 1691(a)(1). The 1976 Amendments also included the exemption for special purpose credit programs. 15 U.S.C. § 1691(c)(3).

mercial creditors are not automatically violative of this Act.

H.R.Rep. No. 873, 94th Cong., 2d Sess. 8, reprinted in 1976 U.S.Code Cong. & Ad. News 403, 428 (emphasis added). However, this exemption is not without limitation.

The Senate Committee on Banking, Housing and Urban Affairs also expressed concern about the ECOA being read to discourage ongoing credit programs designed to address "special social needs." The Senate Report stated:

Certain credit programs are specifically designed to prefer members of economically disadvantaged classes, and the Committee does not intend to undermine these programs

In addition, subsection 701(c)(3) authorizes the Board to prescribe standards for other special purpose programs offered by profit-making organizations (commercial creditors) which will likewise be immune from a charge that they violate the Act. By its reference to "special social needs" the Committee expects that the minimum requirement for any such program will be that it is designed to increase access to the credit market by persons previously foreclosed from it.

S.Rep. No. 589, 94th Cong., 2d Sess. 7, reprinted in 1976 U.S.Code Cong. & Ad. News 403, 409.

The Chairperson of the House Subcommittee responsible for the language contained in § 1691(c)(3) explained further the reason for the special purpose credit program exemption and gave examples of contemplated programs:

[W]hen we wrote 701(c)(3) in the Subcommittee last year, we definitely had in mind programs offered by banks and other profitmaking organizations to extend credit to young people, or to old people, or to minority groups, but we did want firm standards to be set. In fact, as we wrote it last year, we proposed that every such plan should have specific Board approval or meet standards prescribed by the Board, so that this provision would not become a loop-

hole for invidious actions against any other group of creditworthy consumers.

121 Cong.Rec. 27, 138 (1975) (emphasis in original).

The Senate Subcommittee also gave examples of the sort of special purpose credit programs that were contemplated by this exemption.

The essential prohibition in this legislation is directed at discrimination "against" applicants. *Nothing in this section should be read to bar ... experimental or ongoing special programs which prefer applicants in certain categories so long as there is no accompanying restriction of credit available to applicants not in those categories. For example, this Act is not intended to prohibit positive credit programs aimed at the "young adults" or "golden age" accounts.*

S.Rep. No. 589, 94th Cong., 2d Sess. 5-6, reprinted in 1976 U.S.Code Cong. & Ad. News 403, 407 (emphasis added).

The Federal Reserve Board limits the special purpose credit program exception in Regulation B, which states that a program: shall qualify as a special purpose credit program under paragraph (a) of this section *only* if it was established and is administered so as not to discriminate against an applicant on the basis of race, color, religion, national origin, sex, marital status, age ..., [or] income derived from a public assistance program. ... except that all program participants may be required to share one or more of those characteristics so long as the program was not established and is not administered with the purpose of evading the requirements of the Act or this part.

12 C.F.R. § 202.8(b)(2) (1984) (emphasis added).

[2] Having found that AFS differentiates in its treatment of credit applicants based on race, sex, and marital status and having established that the ECOA permits special purpose credit programs to so differentiate under certain circumstances in order to enhance the credit opportunities

of disadvantaged groups, we will now consider whether AFS's credit programs satisfy the requirements of special purpose credit programs under the ECOA.

The ECOA sets forth general guidelines which must be satisfied in order for a credit program to qualify as "special" under the Act. A special purpose credit program must "meet special social needs," 12 C.F.R. § 202.8(a)(3) (1984); a program meets this requirement when it is

established and administered to extend credit to a class of persons who, ... (under the credit agencies' customary standards) probably would not receive such credit or probably would receive it on less favorable terms.

12 C.F.R. § 202.8(a)(3)(ii).

The district court made a finding which shows that the class of persons between the ages of 18 and 21 are in special need of credit assistance. The court stated:

Nationally, all youths between the ages of 18 to 21 who are not regularly employed and who have not had prior credit experience are considered to be less than creditworthy and cannot obtain credit without a parental co-signer who is creditworthy. This is so regardless of race, color, marital status, or year in school. Because one of the purposes of the ECOA is to promote equal and non-discriminatory access to credit opportunity in a credit oriented society, extension of credit by a profit-making organization to persons otherwise disabled credit-wise, could constitute meeting a special social need through a special purpose credit program.

571 F.Supp. at 560 ¶ 81.

In this case there is no dispute that we are concerned with the special requirements for eligibility under § 202.8(a)(3). The first pertinent requirement under § 202.8(a)(3) is that the "special purpose credit program [is] offered by a for-profit organization or in which such an organization participates to meet special social needs." In the case before us AFS is a for-profit organization which alleged that it operated three separate special-purpose

credit programs. The district court made a finding of fact that while AFS purported to have three special purpose credit programs, AFS identified only one special need. The district court defined that need as "the extension of credit to the class of youth between the ages of 18 and 21 excluded from the customary credit market due to the lack of prior credit experience." 571 F.Supp. at 561.

Section 202.8(a) provides that once the requirements necessary to address the particular social need are set, persons not within the special social need category may be excluded from participation in the particular credit program. It states:

the Act and this part are not violated if a creditor refuses to extend credit to the applicant solely because the applicant does not qualify under the special requirements that define eligibility for the following types of special purpose credit programs.

12 C.F.R. § 202.8(a).

[3] Thus, there is no question that AFS could have excluded persons not between the ages of 18 and 21. The dispute in this case concerns the AFS credit programs that treated applicants differently based on race, sex and marital status within a special need category defined only on the basis of age. The district court held that AFS could offer only one special purpose credit program because AFS identified only one special social need. 571 F.Supp. at 563. AFS argues that this conclusion is in error because the ECOA does not limit creditors in the number of credit programs they can employ to address a social need. Thus, we consider whether the ECOA prohibits an employer from having several special purpose credit programs responding to but one social need; that is, designed to address the social need of age but which do not differentiate on other prohibited bases such as race, sex or marital status.

We believe that the district court erred in its broad determination that in order to have more than one special purpose credit program, a creditor must identify more

Cite as 743 F.2d 169 (1984)

than one special social need. In combing the ECOA and its legislative history, we could find no language to support the district court's holding on this issue, nor do we believe that the ECOA should be so interpreted. We believe that once a social need category such as age has been established and all class members having that need have been defined, a creditor may institute more than one program to address that need; this is true so long as other prohibited factors not inextricably tied to the defined need are not used as a basis for differentiating the treatment of individuals.

For example, AFS could implement a winter credit program and a summer credit program provided both were designed to address the same social need of extending credit to young persons between the ages of 18 and 21 excluded from the customary credit market and provided neither differentiated its treatment of customers based on factors such as race, sex or marital status. In this case, these factors are simply not inextricably tied to the social need category of age in this case. In our view the mere existence of two special purpose credit programs (winter and summer) designed to respond to that same social need would not violate the ECOA.

[4] The second requirement under § 202.8(a)(3) is that the special purpose credit program be set out in writing.⁵ The complaint in this case was filed in May 1978. Yet, the district court made a finding of fact that "[p]rior to the 1979 summer sales season, AFS had no credit program formally described in writing or designated as a 'special purpose credit program.'" 571 F.Supp. at 555 ¶ 30. We believe this is a sufficient basis for finding a violation of the ECOA. Moreover, the district court found that credit applicants were not told they were participating in a special purpose credit program. It stated that "[a]ll applicants between 18-21 are carefully led to believe that they are being

treated the same as all other applicants." *Id.* at 557 ¶ 55.

Even assuming AFS satisfied the written requirement of § 202.8(a)(3)(i), AFS's credit programs fail to satisfy the third requirement for special purpose credit programs. The third requirement of § 202.8(a)(3) is that

[t]he program is established and administered to extend credit to a class of persons who, pursuant to the customary standards of creditworthiness used by the organization extending the credit, either probably would not receive such credit or probably would receive it on less favorable terms than are ordinarily available to other applicants applying to the organization for a similar type and amount of credit.

12 C.F.R. 202.8(a)(3)(ii).

The district court held that AFS's credit programs for non-preferred applicants violated the ECOA because "the credit extension terms for ... [non-preferred credit applicants] must be no less favorable than credit given to defendants' primary credit applicants to whom credit is ordinarily available for similar types and amounts." 571 F.Supp. at 562. In addition, the district court declared that "so long as the protected group is assigned less favorable credit terms than others, there is unlawful discrimination whether disguised or well-intended." *Id.* at 562-63.

[5] We believe that the district court erred in analyzing the requirements of § 202.8(a)(3)(ii) in this manner. The requirements of this section are framed in disjunctive terms. A credit program satisfies its requirements if the credit applicants either "would not receive such credit" or "probably would receive it on less favorable terms than are ordinarily available to other applicants applying to the organization for a similar type and amount of credit." 12 C.F.R. § 202.8(a)(3)(ii).

to benefit and (B) sets forth the procedures and standards for extending credit pursuant to the program." 12 C.F.R. § 202.8(a)(3)(i).

5. The special purpose credit program must be "established and administered pursuant to a written plan that (A) identifies the class or classes of persons that the program is designed

In this case the district court earlier found that AFS's programs were designed to extend "credit to the class of youth between the ages of 18 and 21 excluded from the customary credit market." 571 F.Supp. at 561. Thus, if AFS offered credit to the class of persons between the ages of 18 and 21 who but for the alleged special purpose credit program would not receive credit, then the alleged special purpose program satisfies the requirements of § 202.8(a)(3)(ii).

AFS could also, for example, satisfy § 202.8(a)(3)(ii) if its winter program (1) treated all persons 18 to 21 years old identically, i.e., with no distinctions based on race, sex or marital status; (2) extended credit to this class even though under AFS's customary credit standards its customers would not receive credit; but (3) charged special purpose program participants higher credit terms than persons participating in AFS's customary credit program. Charging special purpose credit program participants higher terms than customary credit program participants is not in and of itself fatal.⁶

Notwithstanding a credit program having satisfied these three requirements of § 202.8(a)(3), a program once established cannot discriminate on prohibited bases such as race, sex or marital status. Regulation B sets forth this limitation. It states that a program

shall qualify as a special purpose credit program under paragraph (a) of this section *only* if it was established and is administered so as not to discriminate

6. We believe that if a class of persons is identified and selected to participate in a special purpose credit program and that class of persons would qualify for credit under a creditor's customary standards of credit, then the portion of 12 C.F.R. § 202.8(a)(3)(ii) concerning the terms of the credit extension becomes implicated. In that situation we believe that so long as the special credit terms offered to that class of persons are more favorable than the terms that class otherwise would receive under a creditor's customary credit terms, the special credit purpose credit program does not necessarily violate the ECOA.

We recognize that a creditor under its customary standards of credit might have varying de-

against an applicant on the basis of race, color, religion, national origin, sex, marital status, age . . . , [or] income derived from a public assistance program, . . . except that all program participants may be required to share one or more of those characteristics so long as the program was not established and is not administered with the purpose of evading the requirements of the Act or this part.

12 C.F.R. § 202.8(b)(2) (emphasis added).

Congressman Annunzio, who recommended key amendments which broadened the types of discrimination prohibited by the ECOA, elaborated on the purpose of the ECOA:

The essential concept of nondiscrimination in the extension of credit is that each individual has a right when he applies for credit, to be evaluated as an individual: to be evaluated on his individual creditworthiness, rather than based on some generalization or stereotype about people who are similar to him in race, color, national origin, religion, age, sex or marital status. *Bias is not creditworthiness. Impression is not creditworthiness. An individual's ability and willingness to repay an extension of credit is creditworthiness.*

121 Cong.Rec. 16,740 (1975) (emphasis added).

The ECOA defines "discriminate" as follows: "*Discriminate against an applicant* means to treat an applicant less favorably than other applicants." 12 C.F.R. § 202.2(n) (1984). Thus, we must decide

degrees of preferred customers. We do not read § 202.8(a)(3)(ii) to require a creditor to extend its special purpose credit program participants more favorable credit terms than each and every customer who satisfies the company's customary credit standards. It is sufficient that the terms offered special purpose credit program participants are better than the terms they would have received but for their participation in the special purpose credit program. Of course, the creditor may not differentiate its treatment of persons within the defined special need category of age on the basis of other prohibited factors, i.e. race, sex or marital status, not inextricably tied to the need being addressed.

Cite as 743 F.2d 169 (1984)

whether AFS's alleged special purpose credit programs differentiate among applicants in an impermissible manner.

AFS readily admits that it treats participants in its alleged two winter credit programs, members of the class of persons between the ages of 18 and 21, differently on the basis of race, sex and marital status. According to AFS its winter program offers two separate special purpose credit programs: first, a credit program for single white females who are sophomores, juniors or seniors at either a four-year college or a nursing school and second, a program for all minorities, married persons, males, college freshmen and all students who attend junior or vocational schools.

The district court found the single white female group to be AFS's preferred marketing group. These females receive immediate credit and immediate shipment of goods. The district court found the group of minorities, married persons, males, freshmen and all students attending junior or vocational schools to be AFS's non-preferred group. Members of this group must make three consecutive payments before they receive their goods.

The district court stated:

[o]n an immediate delivery sale, the purchased merchandise is shipped to the customer as soon as the AFS verification process confirming the customer's address is complete. On a deferred delivery sale, the purchased merchandise is not shipped to the customer upon address verification but rather is shipped at some time in the future.

571 F.Supp. at 571 ¶ 76.

Participants in AFS's non-preferred credit program will *not* receive their merchandise as soon as their address is verified, nor are they permitted under ordinary circumstances to defer payment of their debt.⁷ They must make three consecutive monthly payments before their goods are shipped.

7. If an applicant insists on immediate shipment, AFS will grant that request. However, since AFS does not tell minorities or other non-preferred group members that their credit terms

Moreover, as the district court stated in its findings of fact, "[o]n all defaulted deferred shipment accounts AFS not only retains the merchandise, but also retains any deposits and payments made on accounts." *Id.* at 555-56. Thus, the district court concluded that within the group of persons between the ages of 18 and 21 the credit terms offered to minorities, males and married persons were less favorable than the credit terms offered to single white females.

Thus the specific issue before us is whether the ECOA permits such differential treatment where the district court expressly found that each person in the group of individuals between the ages of 18 and 21 shares the same credit disability. That is, once the social need is defined only as extending credit to a particular age group, can a creditor use factors such as race, sex and marital status in setting up special purpose credit programs designed to address that social need when such factors are not related to the need? Although special program "participants may be required to share one or more of those characteristics" ordinarily considered prohibited bases, 12 C.F.R. § 202.8(b)(2), we believe they may be required to share only those factors inextricably tied to the need being addressed.

It is precisely for this reason that Regulation B states that a program may be considered a special purpose credit program "only if it was established and is administered so as not to discriminate against an applicant on the basis of race, color, religion, national origin, sex, marital status, [or] age . . . except that all program participants may be required to share one or more of those characteristics so long as the program was not established and is not administered with the purpose of evading the requirements of the Act or this part." § 202.8(b)(2).

are different because of race, sex or marital status, they are not told that, if they demand it, they have a choice of immediate or deferred shipment.

The explanatory notes to the 1977 revision of Regulation B, § 202.8(b)(2), point out that

once the characteristics of the class of beneficiaries are established, a creditor may not discriminate among potential beneficiaries on a prohibited basis. For example, a creditor might establish a credit program for impoverished American Indians. If the program met the requirements of § 202.8(a), the creditor could refuse credit to non-Indians but could not discriminate among Indian applicants on the basis of sex or marital status.

42 Fed.Reg. 1248 (1977) (emphasis added).

This example closely parallels the pertinent facts of this case. Here the social need is defined as extending credit to persons between the ages of 18 and 21 excluded from the customary credit market. The sole otherwise prohibited factor used in defining that need is age. Thus, a creditor could refuse to extend credit to persons based on the otherwise prohibited basis of age. However, just as the explanatory note example prohibits discrimination among American Indian applicants on the basis of sex or marital status in a credit program for impoverished American Indians, so too should AFS be prohibited from discriminating on the basis of race, sex or marital status in a credit program designed to extend credit to the group of persons between the ages of 18 and 21.

[6] In this case, AFS identified one broad class of persons excluded from the customary credit market: the 18 to 21 year old age group. The district court found that each person in this age group irrespective of race, sex or marital status shared the same credit disability. In our view, where each person in the class shares the same special need but does not receive the same credit terms solely because of the individual's sex, race or marital status the program in question violates the ECOA.

The significance of AFS's discrimination on the basis of race can be illustrated by the following hypothetical and with a brief historical perspective of gender discrimina-

tion. Assume AFS had two prospective customers, Sarah and Jane, both were juniors attending the same university. Assume further that Sarah and Jane both earned the same level of income and both shared the same credit disability and that credit disability was their age category. Assume finally that Sarah was different from Jane in only one respect. Sarah was white, and Jane was black. Based on this difference alone, under AFS winter credit program, Sarah would receive immediate credit and immediate shipment of goods. Jane, on the other hand, would not receive immediate credit. First, she would be required to make three consecutive monthly payments; only then would she be entitled to credit as demonstrated by AFS's shipment of goods to her. In differentiating its treatment of Sarah and Jane based on race in this situation, AFS discriminates on a prohibited factor such as race which is not inextricably tied to the social need being addressed—age. Thus, AFS breaches the cardinal commandment of the ECOA, of which Congressman Annunzio spoke. He stated:

The essential concept of nondiscrimination in the extension of credit is that each individual has a right when he applies for credit to be evaluated as an individual: to be evaluated on his individual creditworthiness, rather than based on some generalization or stereotype about people who are similar to him in race, color, national origin, religion, age, sex, or marital status.

121 Cong.Rec. 16, 740 (1975).

As the district court correctly noted, [s]uch distinctions are not responsive and remedial of a special social need of the disadvantaged but relate solely to defendants' conscious marketing decision to maximize profits by excluding, or severely restricting, the socially disadvantaged from its credit market.

571 F.Supp. at 561-62.

There is a particular irony in AFS's approach where it singles out white women as a "disadvantaged" group and gives them a special advantage that it unhesitat-

ingly denies to black and other minority women. Certainly we recognize that this country has a tragic history in gender discrimination in that women have not been, and still today are often not, treated as equals. As Professor Herma Kay notes in her magnificent treatise, *Sex-Based Discrimination*:

The notion that men and women stand as equals before the law was not the original understanding. Thomas Jefferson put it this way:

Were our state a pure democracy there would still be excluded from our deliberations women, who, to prevent depravation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men.

Alexis de Tocqueville, some years later, included this observation among his commentaries on life in the young United States:

In no country has such constant care been taken as in America to trace two clearly distinct lines of action for the two sexes, and to make them keep pace one with the other, but in two pathways which are always different. American women never manage the outward concerns of the family, or conduct a business, or take a part in political life.

During the long debate over women's suffrage the prevailing view of the natural subordination of women to men was rehearsed frequently in the press and in legislative chambers.

For more than a century after the adoption of the fourteenth amendment, the judiciary, with rare exceptions, demonstrated utmost deference to sex lines drawn by the legislature.

8. For an analysis of the disparities regarding race, see generally Derrick A. Bell, Jr., *Race, Racism and American Law*, 2nd Edition (1980); Mary Frances Berry, *Black Resistance/White Law*, (1971); John Hope Franklin, *From Slavery to Freedom: A History of Negro Americans*, 5th edition, Vintage Books (1980); A. Leon Higginbotham, Jr., *In The Matter Of Color: Race and the American Legal Process, The Colonial Period* (1978); Gunnar Myrdal, *An American Dilemma*,

H. Kay, *Sex-Based Discrimination* 1-2 (1981). See also M. Gruber, *Women in American Politics* (1968).

The Supreme Court has noted, in a slightly different context that "[t]here can be no dispute that the financial difficulties confronting the . . . woman . . . exceed those facing the man" and that these difficulties have occurred from either "overdiscrimination or from the socialization process of a male dominated culture." *Kahn v. Shevin*, 416 U.S. 351, 353, 94 S.Ct. 1734, 1736, 40 L.Ed.2d 189 (1974). In *Frontiero v. Richardson*, 411 U.S. 677, 681, 684, 93 S.Ct. 1764, 1767, 1769, 36 L.Ed.2d 583 (1973), the Supreme Court stated:

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage.

(footnote omitted).

Despite all of the disadvantages that women have had, historically and at present, the significant disadvantages suffered by white women have been far less than those disadvantages black women, Native American women (Indians), Hispanic and other minority American women have had to endure for centuries.⁸ Yet, the paradox of AFS's plan is that it perpetuates the past disparities between white and minority women and rather than helping all women it aids only white women and slams the door of equal credit opportunity in the faces of minority women.

To return to our hypothetical, AFS helps the Janes and rejects the Sarahs solely on the basis of race. We do not believe that it

The Negro Problem in a Modern Democracy (1944). For an analysis of the disparities regarding Native Americans, see generally Vine Deloria, Jr., and Clifford M. Lytle, *American Indians, American Justice* (1983); Elizabeth A. Fenn and Peter H. Wood, *Natives and Newcomers* (1983); Sarah M. Sneed, "Against Persons Differing in Color from Themselves: The American Indian in Colonial North Carolina and Georgia" (unpublished paper, Harvard Law School, 1984).

was the intention of Congress to accentuate the disparities among disadvantaged groups by helping those women who have been the *least* deprived while denying equal opportunity to those women who have been the *most* deprived.

[7] In short, we find that the district court correctly held that AFS, FNAC and Edward Satell were creditors under the ECOA. AFS admits that it intended to differentiate among its credit applicants aged 18 to 21 on the basis of race, sex, and marital status, yet the social need sought to be addressed by the AFS credit programs was unrelated to those factors. Each person in the 18 to 21 age group shared the same credit disability. The district court found and we agree that the credit terms offered to minorities, married persons and males were less favorable than those credit terms offered to single white females. Thus, AFS, FNAC and Satell violated the ECOA in designing and administering credit programs which discriminated on prohibited bases such as race, sex and marital status which were not related to the social need those programs sought to address.

[8] We will also affirm the district court's order enjoining certain AFS marketing and hiring practices. The scope of the order extends only to those aspects of AFS's business practices that further AFS's illegal discrimination on the basis of race, sex and marital status in the extension of credit.



PENNSYLVANIA ALLIANCE FOR JOBS AND ENERGY, Theresa J. Crimone, Phillip Schuller, Jr., Miriam Imblum, and Scott D. Hustead, Appellants,

v.

COUNCIL OF the BOROUGH OF MUNHALL, Chief of Police James Coyne, Mayor William Knight, and Police Officers Thomas Hilla and Richard Facchiano; Board of Supervisors of the Township of Moon, Township Manager William P. Walsh, and Chief of Police H. Thomas Krance; Town Council of the Town of McCandless, Secretary Mary Kovacsics, Chief of Police Patrick McCabe, and Patrolman William Fertig; Board of Supervisors of Richland Township, Secretary Dean Bastianini, Chief of Police James Hopper, and Police Lt. Richard Nalepa, Appellees.

Nos. 83-5510, 83-5759.

United States Court of Appeals,
Third Circuit.

Argued March 5, 1984.

Decided Sept. 10, 1984.

Rehearing Denied Oct. 16, 1984.

Charitable organization brought action challenging ordinances restricting door-to-door canvassing. The United States District Court for the Western District of Pennsylvania, Alan N. Bloch, J., entered summary judgment upholding the constitutionality of the ordinances, and organization appealed. The Court of Appeals, James Hunter, III, Circuit Judge, held that: (1) restrictions were not subject to least restrictive alternative standard for determining their constitutionality, and (2) ordinances were not unconstitutional where restrictions were precisely drawn to serve substantial governmental interest in preventing crime and protecting privacy of residents.

Affirmed.

Becker, Circuit Judge, filed a dissenting opinion.

1. Constitutional Law ¶90.1(1.1)

Door-to-door canvassing for political and charitable purposes, while protected by the First Amendment guarantee of freedom of speech, is subject to reasonable time, place, and manner restrictions. U.S. C.A. Const.Amend. 1.

2. Constitutional Law ¶90.1(1.1)

Ordinances restricting door-to-door canvassing were not rendered content-based in the sense that triggered least restrictive alternative standard for determining their constitutionality under the First Amendment by prohibiting political and charitable canvassing at times when some commercial canvassing was permitted where exemptions were clearly viewpoint-neutral. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ¶90.1(1.1)

Door-to-door canvassing of private homes was plainly not public forum such that ordinances restricting time, place, and manner of canvassing were required to satisfy least restrictive alternative standard for determining their constitutionality. U.S.C.A. Const.Amend. 1.

4. Constitutional Law ¶90.1(1.1)

Time, place, and manner restrictions on door-to-door canvassing did not violate First Amendment where the restrictions were precisely drawn to serve towns' interests in preventing crime and protecting privacy of residents. U.S.C.A. Const.Amend. 1.

5. Constitutional Law ¶90.1(1.1)

Ordinances restricting door-to-door canvassing to daylight hours did not violate First Amendment by failing to leave open alternative channels of communication where ordinances permitted canvassing during the day on Saturday and did not prohibit conducting solicitation in other forums. U.S.C.A. Const.Amend. 1.

6. Municipal Corporations ¶594(2)

Ordinances restricting door-to-door canvassing were not unconstitutionally vague even though they did not make express mention of charitable or political canvassing in the definitional provisions where the ordinances were made expressly applicable to solicitation and where charitable organization challenging the ordinances had been given advance notice of the application of the ordinances to its canvassing. U.S.C.A. Const.Amend. 14.

7. Licenses ¶7(1)

Licensing provision of ordinances restricting door-to-door canvassing were not substantially overbroad by empowering police officials to withhold or revoke canvassing permits on grounds of public health, safety, or morals where charitable organization challenging the ordinances had not been denied canvassing permits and there was no realistic danger that the ordinances would substantially compromise First Amendment protections of parties not before the court. U.S.C.A. Const.Amend. 1, 14.

Thomas R. Asher (argued), Ira R. Nerken, Washington, D.C., Thomas J. Kennedy, John Kissane Associates, St. Albans, Vt., Jon Pushinsky, Pittsburgh, Pa., for appellants; Thomas M. Cooley, II, Pittsburgh, Pa., of counsel.

David Kairys, Kairys, Rudovsky & Mauguigan, Philadelphia, Pa., for amici.

Peter J. Taylor (argued), Arthur J. Murphy, Jr., Arthur J. Murphy, Jr. & Associates, P.C., Pittsburgh, Pa., for Council of Munhall, Richland Township, McCandless Township and Moon Township.

Gene E. Arnold, Weaver, Willman & Arnold, Pittsburgh, Pa., for Township of Richland.

James W. Dunn, Jr., Pittsburgh, Pa., for Township of McCandless, Kovacsics, McCabe, Fertig.

Louis Silverhart, Pittsburgh, Pa., for Council of the Borough of Munhall, Chief

U.S. Questions Legality of Virginia Loan Policy

Associated Press

Several federal agencies are questioning the legality of the Virginia Housing Development Authority's decision to deny low-interest home loans to unmarried couples, including homosexuals.

The housing authority's board of commissioners voted last month to return to a former policy of making loans only to people related by marriage, blood or adoption. That policy was effective from 1981 to 1994, when unrelated couples became eligible to borrow.

The decision, requested by Gov. George Allen in a letter to the commission last year, was criticized by gay rights advocates and civil libertarians who said it makes Virginia

one of the nation's most discriminatory states.

Lloyd A. Jones, state director for the federal Rural Economic and Community Development Service, said his agency is likely to stop guaranteeing the housing authority's loans if it finds the policy violates federal laws.

The Department of Housing and Urban Development, the Federal Trade Commission and the Federal Reserve Board also are checking whether the VHDA's lending rules comply with federal regulations.

Jones wrote the housing authority's commissioners recently, expressing concern that the new regulations violate the Fair Housing Act of 1988, the Equal Credit Opportunity Act and various civil rights laws.

If they do, Jones said, "we would have to terminate participation" with the Virginia Housing Development Authority.

Mike Anderson, a spokesman for the housing authority, said the new regulations comply with all federal laws regarding housing and credit.

"We are responding when HUD and the FTC calls," Anderson said. "Our attorney feels we have a legal opinion that allows us to proceed."

The Rural Economic and Community Development Service last year guaranteed more than \$40 million worth of the \$906 million in loans made by the housing authority. It was one of several federal agencies including the Federal Housing Administration that guaranteed about 60 percent of the VHDA loans.