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A REVIEW OF THE FEDERAL EQUAL CREDIT OPPORTUNITY ACT

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I. INTRODUCTION

The Equal Credit Opportunity Act[1] (hereinafter referred to as ECOA) was originally enacted in 1974, in response to testimony in the House of Representatives which described discrimination against credit applicants on the basis of characteristics, such as sex or marital status, which were unrelated to creditworthiness.[2] Pursuant to section 503 of the ECOA[3], the Federal Reserve Board promulgated Regulation B to implement the congressional intent underlying the ECOA.[4] In early 1976, certain amendments to the ECOA were enacted by Congress, some of which became effective during 1976 and others of which became effective on March 23,

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1. Equal Credit Opportunity Act, Pub. L. No. 93-495, §§ 501-503, 88 Stat. 1521 (1974) (current version at 15 U.S.C. §§ 1691-1691f (Supp. VI 1976)).

2. S. REP. No. 589, 94th Cong., 2d Sess. 2, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 403, 404.

3. Equal Credit Opportunity Act, Pub. L. No. 93-495, § 503, 88 Stat. 1521 (1974) (current version at 15 U.S.C. § 1691b (Supp. VI 1976)).

4. 12 C.F.R. §§ 202.001-.14 (1977) (no longer in force as of March 23, 1977).

1977.[5] On January 6, 1977, the Federal Reserve Board published final regulations to implement the amendments to the ECOA, which also became effective on March 23, 1977.[6] The purpose of this Article is to bring to the attention of practitioners that amendments to the ECOA have been enacted and that new regulations have been promulgated and to explain how these statutory and regulatory provisions might affect the interests of a client or prospective client. Although sections of the ECOA itself will be considered as well, the Article will emphasize the new implementing regulations because it is these which add substance to the bare outline contained in the statute.

As originally enacted, the ECOA prohibited discrimination in any aspect of a credit transaction, but only on the prohibited basis of sex or marital status.[7] Effective March 23, 1977, ECOA prohibits discrimination on the following prohibited bases:

(1) "On the basis of the applicant's race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);"[8]

(2) On the basis that "all or part of the applicant's income is derived from any public assistance program," such as Aid to Families with Dependent Children, Social Security, and unemployment compensation;[9] or

(3) On the basis that the applicant has in good faith exercised any rights under the Consumer Credit Protection Act, which includes the ECOA, Truth-In-Lending Act, and the Fair Credit Reporting Act.[10]

The new regulations implement these modifications in the ECOA and also serve to clarify the prior regulations with respect to discrimination based on sex or marital status. The most significant changes are reflected in the prohibitions against discrimination on the new prohibited bases,[11] publication of model application forms,[12] requirements of notification to applicants of action taken concerning their credit application or existing account,[13] and the requirement that creditors inquire concerning certain compliance "monitoring" information.[14]

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5. Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, 90 Stat. 251.

6. 42 Fed. Reg. 1251 (1977) (to be codified in 12 C.F.R. §§ 202.1-.13).

7. Equal Credit Opportunity Act, Pub. L. No. 93-495, § 503, 88 Stat. 1521 (1974) (current version at 15 U.S.C. § 1691(a) (Supp. VI 1976)).

8. 15 U.S.C. § 1691(a)(1) (Supp. VI 1976).

9. *Id.* § 1691(a)(2); 42 Fed. Reg. 1251, 1253 (1977) (to be codified in 12 C.F.R. § 202.2 (aa)).

10. 15 U.S.C. § 1691(a)(3) (Supp. VI 1976).

11. 42 Fed. Reg. 1251, 1253-54 (1977) (to be codified in 12 C.F.R. §§ 202.2(z), .4).

12. *Id.* at 1255 (12 C.F.R. at § 202.5(e)); *id.* at 1262 (12 C.F.R. at Appendix B); 42 Fed. Reg. 5679 (1977) (supplementing the provisions of Regulation B which were published at 42 Fed. Reg. 1251 (1977)).

13. 42 Fed. Reg. 1251, 1257-60 (1977) (to be codified in 12 C.F.R. § 202.9).

14. *Id.* at 1261 (12 C.F.R. at § 202.13).

It must be carefully noted that the coverage of the ECOA is somewhat limited by the special treatment afforded by the regulations to five classes of credit transactions.[15] These five classes are public utilities credit,[16] securities credit,[17] incidental consumer credit,[18] business or commercial credit,[19] and credit extended to governmental units.[20] As to these five classes, the regulations contain detailed provisions which declare

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15. *Id.* at 1253-54 (12 C.F.R. at § 202.3). This is done pursuant to 15 U.S.C. § 1691(a) (Supp. VI 1976), which provides that the regulations

> may exempt from one or more of the provisions of [the ECOA] any class of transactions not primarily for personal, family, or household purposes, if the [Federal Reserve] Board makes an express finding that the application of such provision or provisions would not contribute substantially to carrying out the purpose of [the ECOA].

16. 42 Fed. Reg. 1251, 1253-54 (1977) (to be codified in 12 C.F.R. § 202.3(a)(1)) (defined as

> [e]xtensions of credit relating to transactions under public utility tariffs involving services provided through pipe, wire, or other connected facilities if the charges for such public utility services, the charges for delayed payment, and any discount allowed for early payment are filed with, or reviewed or regulated by, an agency of the Federal Government, a State, or a political subdivision thereof. . . .).

17. *Id.* at 1254 (12 C.F.R. at § 202.3(a)(2)) (defined as "[e]xtensions of credit subject to regulations 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. . . .").

18. *Id.* at 1254 (12 C.F.R. at § 202.3(a)(3) (defined as

> [e]xtensions of incidental consumer credit, other than of the types described in paragraph (a)(1) [public utility credit] and (2) [securities credit] of this section
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> (i) That are not made pursuant to the terms of a credit card account;
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> (ii) On which no finance charge as defined in 226.4 of this Title (Regulation Z, 12 CFR 226.4) is or may be imposed; and
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> (iii) That are not payable by agreement in more than four installments. . . .).

19. *Id.* at 1254 (12 C.F.R. at § 202.3(a)(4)) (defined as "[e]xtensions of credit primarily for business or commercial purposes, including extensions of credit primarily for agricultural purposes, but excluding extensions of credit of the types described in paragraphs (a)(1) [public utility credit] and (2) [securities credit] of this section. . . .").

There is substantial question as to the distinction between credit which is for "consumer" purposes and credit which is for "business or commercial" purposes. "Consumer credit" is defined as "credit extended to a natural person in which the money, property, or service that is the subject of the transaction is primarily for personal, family, or household purposes." *Id.* at 1252 (12 C.F.R. at § 202.2(h)). There has been no clear definition of "business or commercial" credit. For instance, it is not clear whether a loan for the purpose of acquisition of a four-family building by an individual who is not in the real estate business is for "business or commercial" purposes or for "consumer" purposes. It arguably could be "consumer" in nature because it is an investment which is of a "personal" nature and which is customary for individuals even if they are not in the real estate business. Because consumer credit is subject to more restrictions than business or commercial credit, if a creditor is in doubt as to which characterization applies, it is suggested that the provisions regarding consumer credit be applied out of caution.

20. *Id.* at 1254 (12 C.F.R. at § 202.3(a)(5)) (defined as "[e]xtensions of credit made to governments or governmental subdivisions, agencies or instrumentalities").

which of the regulations do not apply.[21] For example, one provision states that the set of regulations which require a statement of specific reasons for action taken by a creditor to be sent to an applicant does not apply where the transaction was one for business or commercial credit, unless the applicant requests in writing the reasons for the action within thirty days after oral or written notification that adverse action has been taken.[22] Because different detailed rules exist for each class of transactions, a practitioner concerned with a credit transaction falling within one of these classes should examine the particular applicable regulation. This Article will consider the ECOA and the regulations in its broadest scope—as it relates to consumer credit. However, an emphasis will be placed on ECOA's effect on residential real estate lending.[23]

Because the ECOA significantly affects both creditors and credit applicants, it is important that both lawyers who represent lending and other credit institutions and lawyers who represent potential borrowers be aware of the provisions in the ECOA and its implementing regulations. Therefore, this Article is intended to inform creditors of their responsibilities and potential liabilities as well as to inform credit applicants of their rights and privileges.

II. Liability of Creditors Under the ECOA

Some general principles regarding a creditor's potential liability for violations of the ECOA or its regulations should first be noted. A creditor violating the ECOA is liable to individual credit applicants or classes of credit applicants for any actual damages which were sustained as a result of the violation.[24] In addition, the creditor may be liable for punitive damages in an amount not to exceed $10,000 per credit applicant.[25] However, a different maximum is imposed on the amount of punitive damages for which a creditor may be liable in the case of class actions. In such actions, the total amount of punitive damages which may be recovered against a creditor cannot exceed the lesser of $500,000 or one per cent of the creditor's net worth.[26]

The ECOA also sets forth factors which are to be considered by the court in determining the amount of punitive damages to be awarded. These factors are: (1) the amount of actual damages which were awarded, (2) the frequency and persistence in which the creditor violated the provisions of the ECOA, (3) the creditor's financial resources, (4) the number of

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21. *Id.* at 1254 (12 C.F.R. at § 202.3(b)-(f)).
22. *Id.* at 1254 (12 C.F.R. at § 202.3(e)(2)).
23. Because this Article will not discuss the effect of ECOA on business or commercial credit transactions, it will also not consider its effect on commercial real estate lending.
24. 15 U.S.C. § 1691e(a) (Supp. VI 1976).
25. *Id.* § 1691e(b).
26. *Id.*

persons adversely affected by the creditor's actions, and (5) the extent to which the violations were intentional.[27] However, any other relevant factor can be considered as well.[28]

Provision is also made in the ECOA for the granting of any equitable and declaratory relief which is necessary for the enforcement of the provisions of the ECOA.[29] In the event of a successful action for such relief, as well as in the event of a successful action for actual and punitive damages, the creditor is also liable for the costs of the credit applicant's legal action and the credit applicant's reasonable attorney's fees.[30]

The ECOA itself has also created one defense to liability which is generally applicable to all actions alleging a violation of the ECOA. This provision states that a creditor will not be liable if he in good faith acts or fails to act (1) in conformity with an official rule, regulation, or interpretation by the Federal Reserve Board of a rule or regulation, or (2) in conformity with an interpretation or approval rendered by a member of the staff of the Federal Reserve System who is duly authorized under Federal Reserve Board procedures to issue such interpretations or approvals.[31] This principle applies even though the advice of the Board or staff is later found to be invalid or the rule or regulation is amended, rescinded, or found invalid.[32]

However, it should be carefully noted by creditors that there are two types of staff interpretations, an "official staff interpretation" and an "unofficial staff interpretation,"[33] and that it is doubtful that good faith reliance on an unofficial staff interpretation will constitute a valid defense.[34] The regulations state the criteria to be considered by the Federal Reserve Board staff in determining which type of staff interpretation should be issued. An official staff interpretation is required to be issued when the request for a staff interpretation is one which, in the

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27. *Id.*

28. *Id.*

29. *Id.* § 1691e(c).

30. *Id.* § 1691e(d).

31. *Id.* § 1691e(e); 42 Fed. Reg. 1251, 1251 (1977) (to be codified in 12 C.F.R. § 202.1(c)(2)).

32. 15 U.S.C. § 1691e(e) (Supp. VI 1976); 42 Fed. Reg. 1251, 1251 (1977) (to be codified in 12 C.F.R. § 202.1(c)(2)).

33. 42 Fed. Reg. 1251, 1252 (1977) (to be codified in 12 C.F.R. § 202.1(d)(4)).

34. This conclusion is implied by the fact that the particular provision of the ECOA creating this defense states that the creditor's act must have been done or omitted "in good faith in conformity with any *official* rule, regulation, or interpretation thereof by the Board . . . ," 15 U.S.C. § 1691e(e) (Supp. VI 1976) (emphasis added), and by the fact that the ECOA regulation implementing this provision differentiates between official and unofficial interpretations. 42 Fed. Reg. 1251, 1252 (1977) (to be codified in 12 C.F.R. § 202.1(d)). Also supportive of this conclusion is the provision in the regulations which states that unofficial staff interpretations are to be issued where the protection of the ECOA provision creating the "good faith reliance defense" is neither requested by the party seeking the interpretation nor required. *Id.* at 1252 (12 C.F.R. at § 202.1(d)(4)(iii)). This implies that unofficial staff interpretations do not provide this protection.

opinion of the designated officials, "require[s] clarification of technical ambiguities in [the regulations] or [has] no significant policy implications."[35] On the other hand, an unofficial staff interpretation will be issued where an official Board or staff interpretation is neither requested nor required, or where a rapid response is required as a result of time limitations.[36] Because these criteria are so vague and uncertain in application, it is important that a creditor clearly ascertain whether the staff intepretation or approval he receives is an official one and one upon which he can rely.

Another potential liability to which creditors might be subjected are sanctions imposed by federal regulatory agencies. Although the Federal Reserve Board is authorized to interpret and generally administer the ECOA,[37] several other federal agencies are also given the authority to enforce the ECOA with respect to the lending institutions which they regulate.[38] Of principal interest: the Comptroller of the Currency is to enforce the ECOA as to national banks,[39] the Federal Reserve Board will enforce the ECOA for state members of the Federal Reserve System,[40] the Federal Deposit Insurance Corporation enforces the ECOA as to insured banks which are not members of the Federal Reserve System,[41] the Federal Home Loan Bank Board enforces as to federal and FSLIC-insured savings associations,[42] and the Federal Trade Commission is authorized to enforce the provisions as to most mortgage bankers.[43] Of course, the respective federal regulatory agencies presumably could impose penalties or sanctions for violations of the ECOA, as they would for other comparable violations, including the initiation of court actions to obtain compliance in some actions. This is indicated by 15 U.S.C. section 1691c(b), which provides that "each of the agencies [given the responsibility for enforcement of the ECOA] may exercise for the purpose of enforcing compliance with any requirement imposed under [the ECOA], any other authority conferred on it by law."[44]

III. Basic Definitions and Concepts under ECOA

Before proceeding to consider specific provisions of the ECOA and the regulations, certain concepts and definitions which in effect establish

35. 42 Fed. Reg. 1251, 1252 (1977) (to be codified in 12 C.F.R. § 202.1(d)(4)(ii)). Official staff interpretations should be distinguished from official Board interpretations. The latter are issued upon requests involving potentially controversial issues of general applicability dealing with "substantial ambiguities" in the regulations and that raise "significant policy questions." *Id.* at 1252 (12 C.F.R. at § 202.1(d)(4)(i)).

36. 42 Fed. Reg. 1251, 1252 (1977) (to be codified in 12 C.F.R. § 202.1(d)(4)(iii)).

37. 15 U.S.C. § 1691b(a) (Supp. VI 1976).

38. *Id.* § 1691c.

39. *Id.* § 1691c(a)(1)(A).

40. *Id.* § 1691c(a)(1)(B).

41. *Id.* § 1691c(a)(1)(C).

42. *Id.* § 1691c(a)(2).

43. *Id.* § 1691c(c).

44. *Id.* § 1691c(b).

the scope of the ECOA must be discussed. One of the most important of these definitions is that of a "creditor." This is a significant definition because it is the creditor who is prohibited under the ECOA from discriminating with respect to a credit transaction.[45]

A creditor is defined in the new regulations[46] as "a person who, in the ordinary course of business, regularly participates in the decision of whether or not to extend credit."[47] By virtue of this broad definition, not only the lender, but also other participants in the credit decision, would be subject to the provisions of the ECOA. This definition is by necessity broad and its exact scope must be left to be developed through rulings and interpretations. For instance, under certain circumstances purchasers of mortgages in the secondary market might be deemed to be "creditors" subject to the ECOA by their participation in either establishing underwriting guidelines for the originator or by approving applicants for loans prior to origination. Whether a purchaser is a creditor, under these or other circumstances, should be considered by institutions active in the secondary market.

The term creditor is also defined as including an assignee, transferee or subrogee of an original creditor who participates in the credit decision.[48] However, these persons are not deemed to be creditors with respect to any violation of the ECOA committed by the original creditor unless they knew or had reasonable notice of the act, policy or practice constituting the ECOA violation before their involvement in the credit

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45. *Id.* § 1691c(a).

46. This definition in the new regulations is somewhat broader than the definition contained in the original regulations. This latter definition stated that a creditor was "any person who regularly extends, renews or continues credit or arranges for the extension, renewal or continuation of credit." 12 C.F.R. § 202.2(l) (1977).

47. 42 Fed. Reg. 1251, 1252 (1977) (to be codified in 12 C.F.R. § 202.2(l)).

It should be noted that the definitions of "creditors" contained in the ECOA itself, at 15 U.S.C. § 1691a(e) (Supp. VI 1976), and in the regulations implementing the ECOA are not the same. Section 1691a(e) 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." However, § 202.2(l) of Regulation B defines it in the manner indicated in the body of this Article. It is not at all clear whether this difference in the definition of the term will have any significance. This would seem to be an issue which might at some point be the subject of litigation.

One facet of this issue which will be raised if it someday is litigated is the question of which definition is to control in the event of a conflict. Such a conflict is a possibility. It is stated in 15 U.S.C. § 1691a(a) (Supp. VI 1976) that the definitions included therein are applicable for the purposes of the ECOA. A plausible interpretation of this section would be that these definitions apply as well to the accompanying regulations. However, § 202.2 of the regulations states that the definitions which it presents are to be applied in the interpretation of the regulations. 42 Fed. Reg. 1251, 1252 (1977) (to be codified in 12 C.F.R. § 202.2)). In a particular factual situation, these provisions might create a conflict between definitions which will have a significant effect on the creditor's duties under the ECOA.

48. 42 Fed. Reg. 1251, 1252 (1977) (to be codified in 12 C.F.R. § 202.2(l)).

transaction.[49] This definition will be of special importance in secondary market transactions and in business relationships between investors and mortgage bankers.

Another important definition contained in the regulations is that of a "credit transaction." This is defined as "every aspect of an applicant's dealings with a creditor regarding an application for or an existing extension of credit, including, but not limited to, information requirements; investigation procedures; standards of creditworthiness; terms of credit; furnishing of credit information; revocation, alteration or termination of credit; and collection procedures."[50] This covers a large segment of a creditor's activities and therefore gives the general rule prohibiting discrimination—that a "creditor shall not discriminate against an applicant on a prohibited basis regarding any aspect of a credit transaction"[51]—a wide scope of application.

Also evidencing an intent that the ECOA is to have a wide scope is the definition of "applicant." It is defined in the regulations as "any person who requests or who has received an extension of credit from a creditor. . . ."[52] Therefore, it includes not only an applicant in the proper sense of the word, but one already receiving credit as well.

Also defined in the regulations is the term "application." This is defined as "an oral or written request for an extension of credit that is made in accordance with procedures established by a creditor for the type of credit requested."[53] Thus, depending upon the general procedures for application established by the creditor, in some instances a face-to-face conference between a lender and potential borrower may be necessary to constitute an "application" whereas in other instances a mere telephone request for credit by a person could constitute an application.[54] Consequently, it is important that creditors carefully define in

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49. *Id.*

50. *Id.* at 1252-53 (12 C.F.R. at § 202.2(m)).

51. *Id.* at 1254 (12 C.F.R. at § 202.4).

52. *Id.* at 1252 (12 C.F.R. at § 202.2(e)).

53. *Id.* at 1252 (12 C.F.R. at § 202.2(f)).

54. Applying the general rule set forth in the definition of "application," the Federal Reserve Board staff has indicated in an unofficial staff interpretation that whether a telephone inquiry constitutes an "application" depends upon the application procedure established by the creditor. Federal Reserve Board letter of June 22, 1977, No. 6, [1977] 4 CONS. CRED. GUIDE (CCH) ¶ 42,089 (unofficial staff interpretation). Some creditors may have a practice of not accepting oral applications; in other words, these creditors will not make a decision on the extension of credit in the absence of a written application. A telephone inquiry to this type of creditor would not constitute an "application." On the other hand, if the creditor has a practice of making a credit decision merely upon information furnished by telephone and if sufficient information is received to make a credit decision, an "application" will be considered to have been received and appropriate notification requirements under the regulations will become applicable. *See* text accompanying notes 168-213 *infra*. However, a general inquiry concerning availability of funds, prevailing interest rates or credit policies will probably not trigger the notification requirements since the creditor has not received, in

writing their procedures for the submission of applications and abide by these procedures.

It is not clear whether an application is submitted merely upon a general inquiry as to the availability of credit by a potential borrower, such as by telephone calls, or whether an application is received for ECOA purposes only upon submission of some type of formalized request for credit. Because of this uncertainty creditors have been required to ascertain for themselves the point at which an application is received. Some creditors have taken the conservative position that any such general inquiries do constitute applications and, consequently, refuse to answer such inquiries. On the other hand, creditors might take a greater risk under the ECOA and treat such inquiries as being merely "preliminary," and respond with a likewise "preliminary" decision. Because the response is expressed as being merely preliminary in nature, these creditors can then also recommend to the inquiring party that a formal written application be submitted, even if the preliminary response is negative. In this manner, the creditor can substantiate the position that the response was merely preliminary and thereby avoid a potential liability under the ECOA, and can also avoid discouraging the submission of applications. Creditors should consider these and other alternatives with counsel. Hopefully, the Federal Reserve Board will soon provide interpretations or guidelines as to what constitutes an "application."

Because the essence of the ECOA is the prohibition of discrimination in the granting of credit, a significant definition is that of "discrimination against an applicant." This is defined as "treat[ing] an applicant less favorably than other applicants."[55] As is indicated by the unrestrictive language employed in the definition, the ECOA was intended to prohibit discrimination at all stages of the credit transaction. Therefore, the context in which "discrimination" can occur is not limited to the denial of an application but also encompasses any less favorable credit terms granted an applicant. However, it should be noted that the ECOA only prohibits discrimination on a "prohibited basis."[56] In other words, the ECOA is only violated when the creditor treats an applicant less favorably as a result of the applicant's sex, marital status, race, age and the like.[57]

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accordance with the procedures he usually follows in such a situation, sufficient information on which to base a credit decision.

Even though a telephone inquiry or some other communication by a party with the creditor does not properly constitute an "application," one particular provision in the ECOA regulations will nonetheless apply to the creditor's actions. This is § 205.5(a) of the regulations, which prohibits the making of any oral or written statements to either an applicant or prospective applicant "that would discourage on a prohibited basis a reasonable person from making or pursuing an application" and which applies regardless of whether an application was made. 42 Fed. Reg. 1251, 1254 (1977) (to be codified in 12 C.F.R. § 202.5(a)).

55. *Id.* at 1253 (12 C.F.R. at § 202.2(n)).

56. *Id.* at 1254 (12 C.F.R. at § 202.4).

57. 15 U.S.C. § 1691(a) (Supp. VI 1976).

Because it is one of the bases which cannot be used by a creditor in making a credit decision,[58] one of the most important definitions under the ECOA is that of "marital status." It is defined in the regulations as "the state of being unmarried, married, or separated as defined by applicable State law."[59] The regulation further defines "unmarried" as including "persons who are single, divorced or widowed."[60] As a result of these definitions, every person falls within one of these three categories and even when information regarding marital status may be properly requested under the ECOA,[61] no other terms—such as "single," "divorced," and "widowed"—may be used.[62]

This Article will now consider how specific aspects of the credit transaction are affected by the ECOA and its regulations.

IV. Applications for Credit

One particular aspect of the credit transaction directly affected by the ECOA is the application process. This effect is felt in one manner as a result of the provision in the regulations which prohibits a creditor from making any statement to applicants or prospective applicants which "would discourage on a prohibited basis a reasonable person from making or pursuing an application."[63] However, it is in relation to the information which may be requested in the application process that the regulations have their greatest effect.

These regulations are designed to effectuate the prohibition against discrimination on a prohibited basis in the credit transaction by denying to a creditor the information which could be employed for such a purpose.[64] To this end, the regulations initially state a general rule: that "[e]xcept as otherwise provided in this section, a creditor may request any information in connection with an application;"[65] however, the regulations then specify such exceptions to this general rule so as to prohibit

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58. *Id.* § 1691(a)(1).

59. 42 Fed. Reg. 1251, 1253 (1977) (to be codified in 12 C.F.R. § 202.2(u)).

One point must be emphasized: while a divorce proceeding is pending, but before the divorce is final, the parties remain married and, unless state law defines their status as legally "separated" (which is unlikely), they must be classified as still married even though they may be living apart. This determination is important in determining the validity of mortgage liens, the rights of mortgage creditors, and the scope of permitted actions under ECOA. Creditors should consult counsel in the event of uncertainty as to the determination of marital status under local law.

60. *Id.*

61. *See, e.g., id.* at 1254-55 (12 C.F.R. at § 202.5(d)(1)), discussed in text accompanying notes 72-76 *infra*, which permits a creditor to inquire as to an applicant's marital status where the application is for other than individual, unsecured credit.

62. *See, e.g.*, 42 Fed. Reg. 1251, 1254-55 (1977) (to be codified in 12 C.F.R. § 202.5(d)(1)).

63. *Id.* at 1254 (12 C.F.R. at § 202.5(a)).

64. S. Rep. No. 589, 94th Cong., 2d Sess. 3-4, *reprinted in* [1976] U.S. Code Cong. & Ad. News 403, 405-06.

65. 42 Fed. Reg. 1251, 1254 (1977) (to be codified in 12 C.F.R. § 202.5(b)(1)).

the requesting of information of which the sole utility would be to assist in discrimination.[66]

One prohibition on information which may be sought in the application process states that a creditor generally may not request information concerning the applicant's spouse or former spouse.[67] However, as an exception to this prohibition, any information concerning the applicant's spouse can be requested by the creditor if such information could have been requested about the applicant[68] and if:

> (i) The spouse will be permitted to use the account; or
> (ii) The spouse will be contractually liable upon the account; or
> (iii) The applicant is relying on the spouse's income as a basis for repayment of the credit requested; or
> (iv) The applicant resides in a community property State or property upon which the applicant is relying as a basis for repayment of the credit requested are located in such a State; or
> (v) The applicant is relying on . . . child support or separate maintenance payments from a spouse . . . as a basis for repayment of the credit requested.[69]

As another exception to the prohibition, any information concerning the applicant's *former* spouse can be requested by a creditor if such information could have been requested about the applicant[70] and if "[t]he applicant is relying on alimony, child support, or separate maintenance payments from a . . . former spouse as a basis for repayment of the credit requested."[71]

Another prohibition on the requesting of information in the application process states that where an applicant is seeking individual, unsecured credit, a creditor may request the applicant's marital status[72] under two circumstances only: (1) where the applicant resides in a community property state, or (2) where property being relied upon by the ap-

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66. *See id.* at 1254-55 (12 C.F.R. at § 202.5(c) and (d)); 42 Fed. Reg. 1242, 1245 (1977) (Federal Reserve Board's official comments on § 202.5(c) and (d) of Regulation B).

67. 42 Fed. Reg. 1251, 1254 (1977) (to be codified in 12 C.F.R. § 202.5(c)(1)).

68. This provision apparently requires that the information must also be permitted to be requested under the other subsections of § 202.5 of Regulation B, 42 Fed. Reg. 1251, 1254-55 (1977) (to be codified in 12 C.F.R. § 202.5), the regulation which governs what information may be sought by a creditor.

69. *Id.* at 1254 (12 C.F.R. at § 202.5(c)(2)). The term "use of the account" referred to in this section of the regulations has a specific meaning and applicability. It refers only to open end credit. *Id.* at 1252 (12 C.F.R. at § 202.2(a)). For purposes of the regulations, "open end credit," in turn, is defined as credit extended to make purchases or obtain loans from time to time by use of credit card, check or other device. It does not include negotiated advances under an open end real estate mortgage or letter of credit. *Id.* at 1253 (12 C.F.R. at § 202.2(w)).

70. *See* note 68 *supra.*

71. 42 Fed. Reg. 1251, 1254 (1977) (to be codified in 12 C.F.R. § 202.5(c)(2)(v)).

72. Even when marital status may be requested by a creditor, only the categories of "unmarried," "married," and "separated" may be used. *Id.* at 1254-55 (12 C.F.R. at § 202.5(d)(1)).

plicant as a basis for repayment of the credit requested is located in a community property state.[73] However, the regulations also point out that this provision is not to be construed as prohibiting the requesting of information which might only indirectly disclose marital status, such as information concerning liability to pay alimony, child support or separate maintenance, or information concerning the source of income which will be relied upon as a basis for the repayment of the requested credit.[74]

In any situation, however, where the application is seeking any type of credit other than individual, unsecured credit—such as secured credit—the creditor may request the applicant's marital status.[75] Even so, only the categories of "married," "unmarried" and "separated" are to be used for this purpose.[76]

The new regulations also provide that information concerning whether any income stated in an application is derived from alimony, child support or separate maintenance payments can be requested by a creditor only if the creditor first informs the applicant that such income does not have to be revealed if the applicant does not desire such income to be considered by the creditor in determining the applicant's creditworthiness.[77] Furthermore, the new regulations state that, since a general inquiry about income may indirectly cause an applicant to list alimony, support or maintenance income, a creditor must either first provide the notice that such income need not be revealed if the applicant does not desire such income to be considered in a determination of creditworthiness, or limit the inquiry concerning income in such a manner that it tends to preclude the accidental disclosure of such income.[78] The comments to the regulations indicate that this latter avenue can be accomplished by phrasing the inquiry in terms of salary, wages or similarly specified income, as opposed to general inquiries about income.[79] It should be noted, however, that there is no regulation which prohibits a creditor from requesting information concerning the liabilities of an applicant for the payment of alimony, child support or separate maintenance and that therefore, under the general rule which permits the requesting of any information that is not the subject of a specific prohibition,[80] this information may be sought by the creditor.

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73. *Id.* at 1254 (12 C.F.R. at § 202.5(d)(1)).

74. *Id.* at 1255 n.5 (12 C.F.R. at § 202.5(d)(1)n.5). This seems to reject application of the "effects test," as discussed in the text accompanying notes 112-15 *infra*, in this context.

75. 42 Fed. Reg. 1251, 1254 (1977) (to be codified in 12 C.F.R. § 202.5(d)(1)).

76. *Id.* at 1254-55 (12 C.F.R. at § 202.5(d)(1)). *See also* text accompanying notes 58-62 *supra*.

77. 42 Fed. Reg. 1251, 1255 (1977) (to be codified in 12 C.F.R. § 202.5(d)(2)).

78. *Id.*

79. 42 Fed. Reg. 1242, 1245 (1977) (Federal Reserve Board's official comments on § 202.5(d) of Regulation B).

80. 42 Fed. Reg. 1251, 1254 (1977) (to be codified in 12 C.F.R. § 202.5(b)(1)). Furthermore, as was noted in the text accompanying note 74 *supra*, requesting this information is

Another regulation concerning the information which may be sought of an applicant states that a creditor cannot request the sex of an applicant.[81] The only information in this regard which can be requested is the designation on the application form of a title, such as Ms., Miss, Mr., or Mrs., and this can be done only if the application form conspicuously states that such designation is optional.[82]

A creditor may also not inquire concerning childbearing capability or intentions or birth control practices.[83] Under the new regulations, however, it is clear that a creditor may inquire concerning the number and ages of an applicant's dependents or about financial obligations and expenditures which are dependent-related, but only if this information "is requested without regard to sex, marital status, or any other prohibited basis."[84] What this latter requirement means, as indicated by the comments to the regulations which were promulgated by the Federal Reserve Board, is that such information relating to dependents may be sought only if the creditor asks such questions of all applicants.[85]

The new regulations also provide that a creditor cannot request information on the race, color, religion or national origin of an applicant or any other person in connection with a credit transaction.[86] As an exception to this prohibition, the creditor is nevertheless permitted to ask about an applicant's permanent residence and immigration status.[87]

Apparently a creditor is permitted to make inquiry concerning the age of an applicant. This is indicated by the absence of any provision which prohibits the request for such information.[88] However, as will be indicated below, the evaluation and use of this information is expressly restricted in order to limit the opportunity for discrimination.[89] Notwithstanding these prohibitions on the inquiry concerning the applicant's race, religion, marital status, sex and similar matters, information on cer-

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not prohibited as well by the regulation which precludes requesting an applicant's marital status. *Id.* at 1255 n.5 (12 C.F.R. at § 202.5(d)(1)n.5).

81. *Id.* at 1255 (12 C.F.R. at § 202.5(d)(3)).

82. *Id.* In addition, this provision of the regulations states that with the exception of this designation, the application form must use only terms that are neutral as to sex. *Id.*

83. *Id.* at 1255 (12 C.F.R. at § 202.5(d)(4)). It should also be noted that the regulations also prohibit the consideration by the creditor, in his evaluation of the applicant's creditworthiness, of aggregate statistics or assumptions relating to the likelihood that any group of persons will bear or rear children or the likelihood that future income will be diminished or interrupted as a result of the bearing or rearing of children. *Id.* at 1255 (12 C.F.R. at § 202.6(b)(3)).

84. *Id.* at 1255 (12 C.F.R. at § 202.5(d)(4)).

85. 42 Fed. Reg. 1242, 1245 (1977) (Federal Reserve Board's official comments on § 202.5(d) of Regulation B).

86. 42 Fed. Reg. 1251, 1255 (1977) (to be codified in 12 C.F.R. § 202.5(d)(5)).

87. *Id.*

88. *See id.* at 1254 (12 C.F.R. at § 202.5(b)(1)); *cf.* text accompanying note 80 *supra* (concluding that if there is no specific prohibition, the information can be requested under the general rule which permits inquiry as to all information not specifically prohibited).

89. *See* text accompanying notes 120-29 *infra.*

tain of these matters are required by the Federal Reserve Board to be requested by the creditor under certain circumstances.[90] This is for the purpose of monitoring compliance by the creditor with the provisions of the ECOA and the regulations.[91] The regulations require that the creditor request the applicant and the joint applicant, if there is one, to supply information regarding (1) race/national origin,[92] using the categories American Indian or Alaskan Native, Asian or Pacific Islander; Black, White, Hispanic, or Other (Specify); (2) sex; (3) marital status, using only the categories married, unmarried, and separated; and (4) age.[93] However, this monitoring information is to be requested only where the applicant is seeking credit for the purpose of purchasing "residential real property,"[94] defined in the regulations as "improved real property used or intended to be used for residential purchases, including single family homes, dwellings for from two to four families, and individual units of condominiums and cooperatives,"[95] and where the extension of the credit will be secured by a lien on the residential real property.[96] The effect of this requirement is that this monitoring information will not have to be requested in some instances where consumer credit is extended—for example, in the case of a loan to finance home improvements—but will in many others, such as where an application is made for a second purchase mortgage on improved residential real property. The reason for this differentiation is stated in the comments to the regulations:

> The Board believes this limitation is appropriate for several reasons. First, a home is in most cases the single most important purchase a consumer makes, and access to mortgage credit has a profound impact on the quality of life. Second, there have been frequent and serious allegations of discrimination in this area of credit. Third, the per unit cost of notation [in other words, of obtaining this information] will be small in relation to the dollar amount of applications for mortgage credit.[97]

The inquiry as to this monitoring information must be set forth on either the application form itself or on a separate form that refers to the

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90. 42 Fed. Reg. 1251, 1254 (1977) (to be codified in 12 C.F.R. § 202.5(b)(2)); *id.* at 1261 (12 C.F.R. at § 202.13). In addition, the regulation which requires the request of certain information by the creditor preempts any state laws which prohibit a creditor from requesting an applicant's race, national origin, sex and marital status. *Id.* at 1260 (12 C.F.R. at § 202.11(a) and (b)(1)(iii)); 42 Fed. Reg. 1242, 1244 (1977) (Federal Reserve Board's official comments on § 202.5(b) of Regulation B).

91. 42 Fed. Reg. 1251, 1261 (1977) (to be codified in 12 C.F.R. § 202.13).

92. The comments to the new regulations explain that the term "race/national origin" is used in place of "race" because a number of the categories used describe national origin rather than race. 42 Fed. Reg. 1242, 1251 (1977) (Federal Reserve Board's official comments on § 202.13 of Regulation B).

93. 42 Fed. Reg. 1251, 1261 (1977) (to be codified in 12 C.F.R. § 202.13(a)).

94. *Id.*; 42 Fed. Reg. 1242, 1250 (1977) (Federal Reserve Board's official comments on § 202.13 of Regulation B).

95. 42 Fed. Reg. 1251, 1261 (1977) (to be codified in 12 C.F.R. § 202.13(a)(2)).

96. *Id.* at 1261 (12 C.F.R. at § 202.13(a)(1)).

97. 42 Fed. Reg. 1242, 1250 (1977) (Federal Reserve Board's official comments on § 202.13 of Regulation B).

application.[98] The creditor must inform the applicant that the monitoring information is being requested by the federal government in order to monitor the creditor's compliance with anti-discrimination statutes and that creditors are prohibited under those statutes from discriminating on the bases of race, national origin, sex, marital status and age.[99] The applicants must be asked to supply the requested information, but they cannot be required to do so.[100] However, if the applicant refuses to provide the information, that fact must be stated on the form used to obtain the information.[101]

There are other circumstances in which information which could not be otherwise requested under the ECOA will be required to be obtained by creditors. One provision of the new regulations state that notwithstanding any prohibitions on information which can be sought, creditors may request such information as is required by any regulations, orders or agreements issued by or entered into with a court or an enforcement agency for the purpose of monitoring or enforcing compliance with the ECOA, its regulations or any other federal or state statutes or regulations.[102] As an example of this, it should be noted that the Federal Home Loan Bank Board (FHLBB) recently agreed, in settling a lawsuit commenced by various civil rights groups against the FHLBB for its alleged failure to adequately enforce federal housing laws, to consider requiring lenders to compile data concerning race, religion and other characteristics.[103]

With respect to the credit application form itself, the Federal Reserve Board has prescribed a number of model forms for use in applications for various types of credit, including residential mortgage loans, which are included in the appendix to the new regulations. This application form is intended to comply with all of the various prohibitions and limitations referred to above. By using the model form, or a form modified to the extent permitted, a creditor will be deemed to have complied with the requirements described in the text above[104] and will be provided with a degree of confidence in the propriety of this form, which is not available from other sources.

Nevertheless, despite the fact that model forms are prescribed, a creditor need not use a written form,[105] although obviously for mortgage lending, written applications are an advisable practice. Also, the model forms may be modified to delete information requested or to ask for additional non-prohibited information.[106] Of course, a creditor may also use his

98. 42 Fed. Reg. 1251, 1261 (1977) (to be codified in 12 C.F.R. § 202.13(b)).
99. *Id.* at 1261 (12 C.F.R. at § 202.13(c)).
100. *Id.*
101. *Id.*
102. *Id.* at 1254 (12 C.F.R. at § 202.5(b)(2)).
103. Wall Street Journal, March 24, 1977, at 42, col. 4.
104. 42 Fed. Reg. 1251, 1255 (1977) (to be codified in 12 C.F.R. § 202.5(e)).
105. *Id.*
106. *Id.*

own forms,[107] but this would seem an unnecessary and inadvisable action in light of the availability of a model form. In addition, the Federal Home Loan Mortgage Corporation (FHLMC) and the Federal National Mortgage Corporation (FNMA) have adopted a credit application form which is substantially similar to the Federal Reserve Board model form. The FHLMC/FNMA form is one which many lenders may wish to use, especially in order to substantiate the creditor's compliance with the ECOA for secondary market transactions.

The lender also has the option of continuing to use credit application forms which were in compliance with the previous set of ECOA regulations until his present supply is exhausted or until March 23, 1978, whichever event occurs first.[108] However, this alternative obviously presents a risky course of action which creditors should generally avoid.

V. Evaluation of Applications

As is the case with the regulations relating to the requesting of information on an application form, the new regulations governing the creditor's evaluation of credit applications first set out a general rule and then create qualifications to it.[109] This general rule is that in evaluating an application, a creditor may generally consider any information which he has obtained.[110]

The first exception to this rule is that information may not be used "to discriminate against an applicant on a prohibited basis."[111] The significance of this provision is explained in the Federal Reserve Board's comments to its regulations. The comments state that the words "to discriminate" were used in order to emphasize that the ECOA may be interpreted as extending beyond a mere proscription of intentional acts of discrimination to also prohibit acts that have the effect of discriminating against credit applicants on any prohibited basis.[112] The Federal Reserve Board had concluded, and it so noted in the regulations, that the legislative history of the ECOA indicates that it had been intended by Congress that an "effects test," similar to that which had been enun-

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107. *Id.*

108. *Id.* at 1255 n.6 (12 C.F.R. at § 202.5(e)n.6).

109. 42 Fed. Reg. 1242, 1246 (1977) (Federal Reserve Board's official comments on § 202.6(a) of Regulation B).

110. 42 Fed. Reg. 1251, 1255 (1977) (to be codified in 12 C.F.R. § 202.6(a)). Even the general rule itself creates what amounts to a qualification, since the rule itself permits evaluation only of that information which has been obtained by the creditor, and other regulations in turn place limits on what information can be obtained. *See* text accompanying notes 64-108 *supra.*

111. 42 Fed. Reg. 1251, 1255 (1977) (to be codified in 12 C.F.R. § 202.6(a)).

112. 42 Fed. Reg. 1242, 1246 (1977) (Federal Reserve Board's official comments on § 202.6(a) of Regulation B).

ciated by the United States Supreme Court in the employment area,[113] was to be used in determining whether discrimination in the extension of credit had occurred.[114] However, it was concluded by the Federal Reserve Board that the effects test was not well-suited to regulatory implementation because its application will differ depending on varying factual situations.[115] As a result, no detailed guidelines concerning it were included in the regulations and instead the congressional intent was implemented by the Federal Reserve Board through this provision.

The second qualification to the general rule that any information can be used by a creditor in evaluating an application is that a creditor's use of information is limited by the specific prohibitions found in the regulations.[116] One such prohibition is that a creditor, in his evaluation of the creditworthiness of applicants, cannot take into account a "prohibited basis"—for example, the applicant's race, sex, marital status or age—unless it is specifically permitted under the ECOA or the regulations.[117]

One prohibited basis which the regulations specifically permit to be considered to a small extent is the applicant's marital status. A footnote to the regulations provides that the provision prohibiting the consideration of a prohibited basis in a creditor's evaluation of an applicant's creditworthiness does not preclude the consideration of the applicant's marital status for the limited purpose of ascertaining the creditor's rights and remedies as to the particular extension of credit, if such information is not used "to discriminate" in a determination of creditworthiness.[118] The same is true of another prohibited basis, that all or part of the applicant's income is derived from a public assistance program. This same footnote provides that the source of an applicant's income may nevertheless be considered by a creditor for a similar limited purpose.[119]

Another prohibited basis which is specifically permitted by the regulations to be considered to a limited degree is the applicant's age. The regulations provide that age can be included in the creditor's evaluation under three circumstances:

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113. Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

114. 42 Fed. Reg. 1251, 1255 n.7 (1977) (to be codified in 12 C.F.R. § 202.6(a)n.7).

115. 42 Fed. Reg. 1242, 1246 (1977) (Federal Reserve Board's official comments on § 202.6(a) of Regulation B).

116. 42 Fed. Reg. 1251, 1255 (1977) (to be codified in 12 C.F.R. § 202.6(a)) (where it is said that *"[e]xcept as otherwise provided in the Act and this Part [in other words, the regulations]* a creditor may consider in evaluating an application any information that the creditor obtains. . . ." (emphasis added)); 42 Fed. Reg. 1242, 1246 (1977) (Federal Reserve Board's comments on § 202.6(a) of Regulation B).

117. 42 Fed. Reg. 1251, 1255 (1977) (to be codified in 12 C.F.R. § 202.6(b)(1)).

118. *Id.* at 1255 n.8 (12 C.F.R. at § 202.6(b)(1)n.8); *see* text accompanying notes 111-14 *supra.*

119. 42 Fed. Reg. 1251, 1255 n.8 (1977) (to be codified in 12 C.F.R. § 202.6(b)(1)n.8).

(1) The creditor is allowed to use the applicant's age as a predictive variable "[i]n a demonstrably and statistically sound, empirically derived credit system . . . provided that the age of an elderly applicant [defined as one sixty-two years of age or older][120] is not assigned a negative factor or value."[121] The circumstances under which such a system will exist is defined in great detail by the regulations[122] and is considerably beyond the scope of the present discussion. However, it can be said that what the regulations require in this regard is a scoring system which will be predictive of the creditworthiness of an applicant on the basis of an assignment of points to key attributes which describe the applicant and the other aspects of the credit transaction.[123] Because of the strict requirements which must be satisfied in order to establish such a valid credit system, it is unlikely that most mortgage lenders will use this type of system.

(2) If the creditor employs a "judgmental system of evaluating applicants," which is defined in the regulations as any system used to judge an applicant's creditworthiness other than a "demonstrably and statistically sound, empirically derived credit system,"[124] the creditor can take the applicant's age into account but "only for the purpose of determining a pertinent element of creditworthiness."[125] Because this latter phrase is defined as "information . . . that has a demonstrable relationship to a determination of creditworthiness,"[126] the creditor can apparently consider only those age-related criteria which he could establish as bearing on the average applicant's creditworthiness. Some examples of such criteria are given in the regulations:

> Concerning age, a creditor may consider, for example, the occupation and length of time to retirement of an applicant to ascertain whether the applicant's income (including retirement income, as applicable) will support the extension of credit until its maturity; or the adequacy of any security offered if the duration of the credit extension will exceed the life expectancy of the applicant. An elderly applicant might not qualify for a five-percent down, 30-year mortgage loan because the duration of the loan exceeds the applicant's life expectancy and the cost of realizing on the collateral might exceed the applicant's equity. The same applicant might qualify with a larger downpayment and a shorter loan maturity. A creditor could also consider an applicant's age, for example, to assess the significance of the applicant's length of employment or residence (a young

120. *Id.* at 1253 (12 C.F.R. at § 202.2(o)).

121. *Id.* at 1255 (12 C.F.R. at § 202.6(b)(2)(ii)).

122. *Id.* at 1253 (12 C.F.R. at § 202.2(p)).

123. *Id.*

124. *Id.* at 1253 (12 C.F.R. at § 202.2(t)). Because most creditors do not use a "demonstrably and statistically sound, empirically derived credit system," it therefore logically follows that most creditors use a judgmental evaluation system.

125. *Id.* at 1255 (12 C.F.R. at § 202.6(b)(2)(iii)).

126. *Id.* at 1253 (12 C.F.R. at § 202.2(y)).

> applicant may have just entered the job market; an elderly applicant may recently have retired and moved from a long-time residence).[127]

(3) The regulations also provide that the applicant's age may be considered in any system of evaluating creditworthiness if the applicant is elderly, which is defined as sixty-two years of age or older,[128] and if the age will be used to favor the applicant in the extension of credit.[129]

A second prohibited basis which the regulations specifically permit to be considered by a creditor to a limited extent is that an applicant's income is, in part or in whole, derived from any public assistance program. The regulations provide that a creditor may consider this circumstance if he employs a judgmental system of evaluating creditworthiness but, as in the case of the applicant's age, "only for the purpose of determining a pertinent element of creditworthiness."[130] As was stated earlier, this imposes a condition that the prohibited basis-related information must have some demonstrable relationship to the question of creditworthiness before it can be used by a creditor in his evaluation.[131] The regulations set forth the following as examples of information which is related to the fact that an applicant receives public assistance and bears a relationship to creditworthiness:

> Concerning income derived from a public assistance program, a creditor may consider, for example, the length of time an applicant has been receiving such income; whether an applicant intends to continue to reside in the jurisdiction in relation to residency requirements for benefits; and the status of an applicant's dependents to ascertain whether benefits that the applicant is presently receiving will continue.[132]

In addition to the provision which prohibits the consideration of a prohibited basis, another specific prohibition limiting the general use of information by a creditor is the regulation which proscribes the use of assumptions or aggregate statistics bearing on the probability that any particular group of persons will bear or rear children or the probability that future income will be diminished or interrupted as a result of the bearing or rearing of children.[133] However, the regulation clearly states that this prohibition only applies to the creditor's evaluation of an applicant's creditworthiness and therefore will not prohibit the consideration of childbearing or childrearing statistics or assumptions in connection with other matters such as marketing research.[134]

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127. *Id.* at 1255 n.9 (12 C.F.R. at 202.6(b)(2)(iii)n.9).
128. *Id.* at 1253 (12 C.F.R. at § 202.2(o)).
129. *Id.* at 1255 (12 C.F.R. at § 202.6(b)(2)(iv)).
130. *Id.* at 1255 (12 C.F.R. at § 202.6(b)(2)(iii)).
131. *See* text accompanying notes 125-26 *supra*.
132. 42 Fed. Reg. 1251, 1255 n.9 (1977) (to be codified in 12 C.F.R. § 202.6(b)(2)(iii)n.9).
133. *Id.* at 1255 (12 C.F.R. at § 202.6(b)(3)).
134. 42 Fed. Reg. 1242, 1246 (1977) (Federal Reserve Board's official comments on § 202.6(b) of Regulation B).

A third specific prohibition limiting the use of information by a creditor provides that a creditor cannot take into consideration whether there is a telephone listing in the applicant's name, although the existence of a telephone in the applicant's residence can be taken into account.[135]

Another specific prohibition in the ECOA regulations relates to what type of income may be considered by a creditor in evaluating an applicant's creditworthiness. This regulation contains three separate provisions on this question. One provision permits a creditor to take into consideration the amount and probable continuance of any income in his determination of creditworthiness.[136] This provision is partly qualified by a second provision which *requires* a creditor to consider certain income. Under this section, the creditor must consider as income any alimony, child support or separate maintenance payments "to the extent that they are likely to be consistently made," if the applicant is relying on such payments in his application for credit.[137] Included as factors in determining the likelihood that the payments will be consistently made are whether there is a legal decree or written agreement requiring payment, whether there are procedures for the compelling of payments available, and whether the payments have been made regularly and for an extended period of time.[138]

A third section of the ECOA regulation governing the creditor's consideration of income also creates a limitation on the creditor's freedom to consider or to disregard certain information. This provision forbids a creditor from discounting or excluding from consideration any income of an applicant or an applicant's spouse because it was derived from part-time employment, an annuity, pension, or other retirement benefit or because of a prohibited basis.[139] Apparently the effect of this section is not to require that the creditor consider such income in its evaluation of creditworthiness but instead it only seems to state that the creditor cannot avoid the consideration of income solely upon these grounds.

Another ECOA regulation relating to the creditor's use of information in the evaluation of an applicant's creditworthiness specifically permits the consideration of the applicant's immigration status, whether the applicant is a permanent resident of the United States, and "such additional information as may be necessary to ascertain its rights and remedies regarding repayment."[140] The regulations also provide that the creditor's consideration or application of state property laws which may

135. 42 Fed. Reg. 1251, 1255 (1977) (to be codified in 12 C.F.R. § 202.6(b)(4)).
136. *Id.* at 1255-56 (12 C.F.R. at § 202.6(b)(5)).
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 1256 (12 C.F.R. at § 202.6(b)(7)).

directly or indirectly affect creditworthiness will not constitute unlawful discrimination against an applicant.[141]

One last provision which restricts the creditor's use of information sets forth regulations concerning the use of credit history by the creditor. This provision establishes the requirement that the creditor must consider, to the extent that he takes into consideration credit history "in evaluating creditworthiness of similarly qualified applicants for a similar type and amount of credit," the following elements:

(1) The credit history of those accounts which are shared by the applicant and the applicant's spouse in the sense that it is designated as an account which both are permitted to use or for which both are contractually liable, if such credit history is available to the creditor;[142]

(2) Upon the applicant's request, any information which may be presented by the applicant which tends to show that the applicant's creditworthiness is not accurately reflected by the credit history which the creditor has under consideration;[143] and

(3) Upon the applicant's request, the credit history of any account which is in the name of the applicant's spouse or former spouse that can be shown to be accurately indicative of the applicant's creditworthiness, if such credit history is available to the creditor.[144]

However, this ECOA regulation also establishes what is termed as the "inadvertent error defense."[145] Under this concept, a creditor is not required to consider these three credit history elements if his failure to do so was the result of an inadvertent error.[146] This creates a valid legal defense for a creditor who is the subject of a civil liability action based upon a violation of this ECOA regulation.

VI. ECOA AND THE EXTENSION OF CREDIT

The next major section of the ECOA regulations contain certain rules which the Federal Reserve Board has promulgated concerning the actual extension of credit by a creditor. By the general tenor of this section of the regulation, it is apparent that the major purpose behind it is the prevention of discrimination against a credit applicant on the basis of sex or marital status.[147]

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141. *Id.* at 1256 (12 C.F.R. at § 202.6(c)).

142. *Id.* at 1256 (12 C.F.R. at § 202.6(b)(6)(i)); 42 Fed. Reg. 1242, 1246 (Federal Reserve Board's official comments on § 202.6(b) of Regulation B). For a definition of "use" of an account, *see* note 69 *supra*.

143. 42 Fed. Reg. 1251, 1256 (1977) (to be codified in 12 C.F.R. § 202.6(b)(6)(ii)).

144. *Id.* at 1256 (12 C.F.R. at § 202.6(b)(6)(iii)).

145. 42 Fed. Reg. 1242, 1246 (1977) (Federal Reserve Board's official comments on § 202.6(b)(6) of Regulation B).

146. 42 Fed. Reg. 1251, 1256 (1977) (to be codified in 12 C.F.R. § 202.6(b)(6)).

147. That the major concern of the Federal Reserve Board in promulgating these regulations was the applicant who would be treated less favorably as a result of his sex or marital status is also demonstrated by the first provision in this section of the regulations

The first provision of this regulation forbids the refusal by a creditor "to grant an individual account to a creditworthy applicant on the basis of the applicant's sex, marital status or any other prohibited basis."[148]

The regulation also forbids the creditor from imposing a requirement that an applicant open and maintain his account in a spouse's name, although this name may be used by the applicant if it is so desired.[149] The applicant must be allowed to use a birth-given first name with a birth-given surname, the spouse's surname, or a combined or hyphenated surname.[150] However, the Federal Reserve Board's comments create an exception to this provision. It states that this provision is "not to be interpreted as requiring creditors to redesign systems in order to handle occasional requests for combined names or other names that contain more than the usual number of characters."[151] Furthermore, a Federal Reserve Board unofficial staff interpretation has stated that a creditor may limit changes in names on accounts to reasonable intervals and may require that at any given time all accounts be carried in the same name.[152] It was believed that this practice is consistent with the purpose of the ECOA, which is to permit a married woman to open an account and create her own credit history.

The regulations also contain a provision relating to actions which a creditor may take concerning an existing open account. This provision forbids the taking of certain actions by a creditor regarding an applicant who is contractually liable on an existing open end account on the ground that the applicant has retired, attained a certain age or has changed names or marital status. The forbidden actions are (1) requiring a reapplication, (2) changing the terms of the account, or (3) terminating the account.[153] However, the creditor may take any of these actions if there is evidence of an inability or unwillingness to repay.[154] Furthermore, the creditor is permitted to require a reapplication in the event of a change in marital status if the credit originally granted was based on income which was earned by the applicant's spouse and if the applicant's income

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which, while prohibiting the refusal to allow an applicant to maintain an individual account on a prohibited basis, specifically mentions only two particular prohibited bases, sex and marital status. *Id.* at 1256 (12 C.F.R. at § 202.7(a)).

148. *Id.*

149. *Id.* at 1256 (12 C.F.R. at § 202.7(b)); 42 Fed. Reg. 1242, 1246 (Federal Reserve Board's official comments on § 202.7(b) of Regulation B).

150. 42 Fed. Reg. 1251, 1256 (1977) (to be codified in 12 C.F.R. § 202.7(b)); 42 Fed. Reg. 1242, 1246 (1977) (Federal Reserve Board's official comments on § 202.7(b) of Regulation B).

151. 42 Fed. Reg. 1242, 1246 (1977) (Federal Reserve Board's official comments on § 202.7(b) of Regulation B).

152. Federal Reserve Board letter of May 10, 1976, No. 3, [1977] 4 CONS. CRED. GUIDE (CCH) ¶ 42,082 (unofficial staff interpretation of 12 C.F.R. § 202.4(e) (1977), the predecessor provision to 42 Fed. Reg. 1251, 1256 (1977) (to be codified in 12 C.F.R. § 202.7(b)).

153. 42 Fed. Reg. 1251, 1256 (1977) (to be codified in 12 C.F.R. § 202.7(c)(1)).

154. *Id.*

at the time of the original application would not by itself support the amount of credit which is currently being extended.[155]

The next provision in this section of the regulations relates to whose signature is required on the credit instruments.[156] In effect, the ECOA regulation distinguishes between two distinct aspects of the credit transaction: (1) execution of the document by which the party becomes personally liable to the creditor, *i.e.*, the promissory note and (2) execution of any instruments necessary to make the property relied upon to establish creditworthiness available for satisfaction of the debt—for example, foreclosure in the event of a default on a loan. This can be seen by an examination of the different provisions in this section of the regulations.

The regulation first sets forth the general rule that where the applicant qualifies as creditworthy for the amount and terms of the credit requested, the creditor cannot require the signature of the applicant's spouse or other person,[157] other than a joint applicant,[158] on any credit instrument.[159] The regulation then provides exceptions to this general rule which, in effect, require the signature of the applicant's spouse or other person on any instruments which are necessary to make property available for satisfaction of the debt.

One such exception provides that where the applicant does not individually satisfy the creditor's standards of creditworthiness so that the personal liability of an additional party is necessary in order to support an extension of the requested credit, the creditor is permitted to ask the applicant to obtain a co-signer, guarantor or the like.[160] It is also provided that the additional party may be the applicant's spouse, but the creditor cannot so require.[161]

Another exception states that where the applicant requests unsecured credit and is relying in part upon property to establish creditworthiness, the creditor is permitted to 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

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155. *Id.* at 1256 (12 C.F.R. at § 202.7(c)(2)).

156. *Id.* at 1256 (12 C.F.R. at § 202.7(d)).

157. The Federal Reserve Board's comments to this regulation explain the significance of this phrase as one of making it clear that creditors cannot discriminate in requiring signatures of persons other than the applicant, whether or not the additional signature being required is that of the applicant's spouse. 42 Fed. Reg. 1241, 1247 (1977) (Federal Reserve Board's official comments on § 202.7(d) of Regulation B).

158. The purpose of the inclusion of this phrase is stated by the comments to the regulations to be to emphasize that a creditor may require the joint applicant's signature where two persons voluntarily apply jointly for credit. 42 Fed. Reg. 1242, 1247 (1977) (Federal Reserve Board's official comments on § 202.7(d) of Regulation B).

159. 42 Fed. Reg. 1251, 1256 (1977) (to be codified in 12 C.F.R. § 202.7(d)(1)).

160. *Id.* at 1256 (12 C.F.R. at § 202.7(d)(5)).

161. *Id.*

State law to make the property relied upon available to satisfy the debt in the event of default" if it is necessary to meet the creditor's creditworthiness standards.[162] An example given in the comments to the regulations of such an instrument would be a waiver of dower rights.[163]

A third exception applies where a married applicant is requesting unsecured credit and resides in a community property state or when the property being relied upon by the applicant is located in such a state. In such a situation, the spouse's signature may be required "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 two conditions exist: (1) if the applicant is denied the power under state law to manage or control sufficient community property to satisfy the creditor's creditworthiness standards; and (2) if the applicant does not have sufficient separate property to qualify under the creditor's creditworthiness standards for the amount of credit which was requested without regard to community property.[164]

A fourth exception relates to the situation where the applicant is requesting secured credit. In such an event, the signature of the applicant's spouse or other person may be required by the creditor "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. . . ."[165]

On a separate subject, the new regulations expressly state that differentiation in availability, rates and terms on which credit-related casualty insurance or credit life, health, accident or disability insurance is offered is not a violation of ECOA.[166] However, credit may not be refused because credit life, health, accident or disability insurance is not available on the basis of the applicant's age.[167]

VII. Notification to Applicants Under the ECOA

A. *When Notice Required*

Probably the most important new provision in the ECOA regulations concerns the procedures for notification by creditors of applicants concern-

162. *Id.* at 1256 (12 C.F.R. at § 202.7(d)(2)). This provision also sets forth factors which a creditor may consider in evaluating property being relied upon to establish the applicant's creditworthiness where unsecured credit is being sought. These factors include the form of the ownership of the property, state property law, the property's susceptibility to attachment, execution, severance, and partition, and any other factors which could affect the value of the property to the creditor. *Id.*; 42 Fed. Reg. 1242, 1247 (1977) (Federal Reserve Board's official comments on § 202.7(d)(2) of Regulation B).

163. 42 Fed. Reg. 1242, 1247 (1977) (Federal Reserve Board's official comments on § 202.7(d) of Regulation B).

164. 42 Fed. Reg. 1251, 1256 (1977) (to be codified in 12 C.F.R. § 202.7(d)(3)).

165. *Id.* at 1256 (12 C.F.R. at § 202.7(d)(4)).

166. *Id.* at 1256 (12 C.F.R. at § 202.7(e)).

167. *Id.*

ing actions taken by a creditor on an application. These regulations were promulgated by the Federal Reserve Board to implement the expanded notification requirements contained in the new version of the ECOA, which provide that an applicant is entitled to notification of action taken by a creditor on an application and to a written statement of reasons for any adverse action taken.[168] The procedures created by the new regulations, which are substantially different from those contained in the previous regulations,[169] are designed to inform applicants of actions taken by a creditor and to provide them with the information necessary for asserting their rights under the ECOA.

The first section of the notification regulations declare when the notice is required to be given to the applicant. With respect to a "completed" application, a creditor must notify an applicant of approval or of "adverse action" taken in regard to the application within thirty days after receipt of the "completed" application.[170] An application is deemed completed for purposes of this regulation only when a creditor has received all the information which he regularly obtains and considers in evaluating an application (including, for instance, approval by private mortgage insurers, credit report and the like).[171] However, a creditor must have exercised "reasonable diligence" to obtain the necessary information, to make it complete.[172]

The regulation also defines "adverse action" for the purposes of this regulation. Adverse action is defined as including:

(1) A refusal to grant credit in substantially the amount or on substantially the terms requested by the applicant unless the creditor offers to grant credit in a different amount or on different terms—in other words, a counter-offer—and the applicant uses or expressly accepts this offered credit.[173] If, for example, an applicant requests a mortgage loan of $40,000 for a term of thirty years at an eight per cent interest rate and instead the creditor offers only a $30,000 loan for a term of twenty-five years at a nine per cent rate, it would appear that the creditor has offered credit in a different amount or on different terms than requested. In this situation the creditor would have taken adverse action. However, if the applicant were to accept the loan on the terms offered by the creditor, no adverse action would have occurred.

(2) The termination of an account or an unfavorable change in the terms of an account with a creditor that does not affect all or a substan-

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168. 15 U.S.C. § 1691(d) (Supp. VI 1976).

169. *Compare* 12 C.F.R. § 202.5(m) (1977) *with* 42 Fed. Reg. 1251, 1257-60 (1977) (to be codified in 12 C.F.R. § 202.9).

170. 42 Fed. Reg. 1251, 1257 (1977) (to be codified in 12 C.F.R. § 202.9(a)(1)(i)).

171. *Id.* at 1252 (12 C.F.R. at § 202.2(f)).

172. *Id.*

173. *Id.* at 1252 (12 C.F.R. at § 202.2(c)(1)(i)).

tial portion of the creditor's accounts.[174] For example, if the creditor instituted a change which unfavorably affected only the applicant's account or only a small portion of the accounts maintained with the creditor, adverse action would have resulted. However, if a change affected all or nearly all of the credit accounts maintained with the creditor, there would not have been adverse action taken by the creditor.

(3) The refusal by a creditor to increase the amount of credit which is available in an account when the request for the increase has been properly applied for under the creditor's applicable procedures.[175]

However, even if the action taken by the creditor satisfies the requirements of one of these categories, it is not deemed adverse action if it constitutes one of the following:

(1) A change in the terms of an account which the applicant explicitly agreed to;[176]

(2) Any action or forbearance from action which a creditor took regarding the inactivity, delinquency or default of an account;[177]

(3) A refusal to extend credit in a point of sale or loan transaction that would exceed the applicant's existing credit limit, unless the refusal was for some reason other than the fact that the pre-existing credit limit would be exceeded;[178]

(4) A refusal to extend the credit requested because the creditor is prohibited from doing so under applicable law;[179]

(5) A refusal to extend credit because the creditor does not offer the "type" of credit requested.[180] This is a somewhat difficult exclusion to apply. The comments to the regulations indicate that this exclusion would include a situation where, for instance, an applicant requests a credit card from a creditor who does not issue credit cards. On the other hand, according to the comments to the regulations, a refusal of a request for a loan at two per cent interest rate which is only offered at eighteen per cent would not fall within this exclusion.[181] The distinction is one of "type" versus "terms."

The notification regulation next provides that a creditor must give notice of the action it has taken within thirty days after taking adverse action on an "uncompleted application."[182] As to what is an uncompleted

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174. *Id.* at 1252 (12 C.F.R. at § 202.2(c)(1)(ii)).

175. *Id.* at 1252 (12 C.F.R. at § 202.2(c)(1)(iii)).

176. *Id.* at 1252 (12 C.F.R. at § 202.2(c)(2)(i)).

177. *Id.* at 1252 (12 C.F.R. at § 202.2(c)(2)(ii)).

178. *Id.* at 1252 (12 C.F.R. at § 202.2(c)(2)(iii)); 42 Fed. Reg. 1242, 1242 (1977) (Federal Reserve Board's official comments on § 202.2(c) of Regulation B).

179. 42 Fed. Reg. 1251, 1252 (1977) (to be codified in 12 C.F.R. at § 202.2(c)(2)(iv)).

180. *Id.* at 1252 (12 C.F.R. at § 202.2(c)(2)(v)).

181. 42 Fed. Reg. 1242, 1242 (1977) (Federal Reserve Board's official comments on § 202.2(c) of Regulation B).

182. 42 Fed. Reg. 1251, 1257 (1977) (to be codified in 12 C.F.R. § 202.9(a)(1)(ii)).

application, it seems that this term must encompass all applications which are not deemed "completed" within the definition set forth in the regulations. The regulations make a further requirement in the event an application is incomplete as to matters which the applicant could complete, requiring the creditor in such a situation to make a reasonable effort to notify the applicant of the incompleteness and to allow a reasonable opportunity to the applicant to complete the application.[183] As a result of this provision, it seems that a creditor who did not make such reasonable efforts cannot reject an application on the ground that it was incomplete. This is so, because in order to reject the application, it would be necessary under the ECOA notification regulations to state the reasons for denial—for example, insufficient income—and be able to substantiate that decision. However, until the creditor makes an effort to advise the applicant that he has yet to complete the application, the creditor may not have accumulated what amounts to the information which he needs to substantiate a denial of credit on the ground of an incomplete application. Therefore, a creditor will generally want to exercise reasonable efforts in order to obtain the information required to substantiate denial on the ground of failure to complete the application.

The ECOA notification regulation also requires notification of an applicant within thirty days after the taking of adverse action as to an existing account.[184] Notification is also required in the situation where the creditor transmitted to the applicant an offer to extend credit other than in substantially the amount or on substantially the terms requested by the applicant—in other words, a counter-offer—if the applicant did not expressly accept or use the credit offered during the ninety days following the notification of the applicant of the counter-offer.[185] The creditor is allowed ninety days, however, in which to notify the applicant of the action taken in this situation.[186]

B. *Content of Notification*

The new ECOA regulations also contain provisions which require the notification which must be sent to an applicant to be of a specific content. However, these content requirements apparently apply only to notifications sent to applicants against whom adverse action is taken.[187] For example, where the applicant is to be informed of an approval of an applica-

183. *Id.* at 1242 (12 C.F.R. at § 202.2(f)).

184. *Id.* at 1257 (12 C.F.R. at § 202.9(a)(1)(iii)).

185. *Id.* at 1257 (12 C.F.R. at § 202.9(a)(1)(iv)). Of course, the creditor's offer presumably could extend for less than that period—for example, a 30 day commitment given to the applicant.

186. *Id.*

187. *Id.* at 1257 (12 C.F.R. at § 202.9(a)(2)); *see* 42 Fed. Reg. 1242, 1248 (1977) (Federal Reserve Board's official comments on § 202.9(a)).

tion for an extension of credit, notification in a form other than that required under the regulations would be sufficient.

The regulations first require that the notification be in writing.[188] However, this is subject to the exception that oral notification will suffice in the case of creditors who did not receive more than 150 credit applications during the calendar year preceding the year in which notification of adverse action is required.[189]

A second content requirement is that the notification contain a statement of the action taken—for example, a denial of a credit application or an unaccepted counter-offer of credit.[190] Furthermore, in order to inform the applicant of the basis for adverse action taken, the notification must also contain either a statement of specific reasons for the action taken or a disclosure of the applicant's right to receive such a statement within thirty days after the creditor receives a request for a statement of specific reasons.[191] However, despite this choice, it is anticipated that most lenders will provide written statements of reasons rather than the mere disclosure of rights to such a statement.

The regulations also contain guidelines as to the content of the statement of specific reasons for the taking of adverse action. It is provided that the statement will be sufficient if it indicates the principal reasons for the adverse action and if it is specific.[192] Furthermore, the regulation specifically states that this requirement will not be satisfied if the statement of reasons only indicates that the adverse action was a result of the creditor's internal standards or policies, or that the applicant did not achieve the qualifying score on the creditor's scoring system.[193] The reason for this is indicated by the Federal Reserve Board's comments to

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188. 42 Fed. Reg. 1251, 1257 (1977) (to be codified in 12 C.F.R. § 202.9(a)(2)).

189. *Id.* at 1259 (12 C.F.R. at § 202.9(c)).

190. *Id.* at 1257 (12 C.F.R. at § 202.9(a)(2)).

191. *Id.* at 1257 (12 C.F.R. at § 202.9(a)(2)(i) and (ii)). However, in order for the applicant to have the right to receive a statement of reasons within 30 days, the creditor must have received a request from the applicant for the reasons for the adverse action taken within 60 days after notification of adverse action. If the creditor chooses to include a disclosure of the applicant's right to a statement of reasons rather than the statement of reasons itself, this fact must be included as well. *Id.* at 1259 (12 C.F.R. at § 202.9(a)(2)(ii)).

The regulations also provide that if the notification contains a disclosure of the right to a statement of reasons rather than a statement of reasons, the disclosure must also contain the name, address and telephone number of the person or office from which the applicant can obtain the statement of reasons. *Id.*

Furthermore, if the statement of reasons is given orally, in those situations where notification of action taken can be orally made, *see* text accompanying note 189 *supra*, the regulations require that the applicant must also be told in the notification of his right to have an oral statement of reasons confirmed in writing within 30 days after the creditor receives a written request for confirmation. 42 Fed. Reg. 1251, 1257 (1977) (to be codified in 12 C.F.R. § 202.9(a)(2)(ii)).

192. 42 Fed. Reg. 1251, 1257 (1977) (to be codified in 12 C.F.R. § 202.9(b)(2)).

193. *Id.*

the regulation. It was the Board's conclusion that the intent of Congress in requiring the furnishing of specific reasons for adverse action was to enhance the awareness on the part of consumers of the factors considered important by creditors so that consumers would be able to supply all relevant information when applying for credit. Permitting the use of such a general explanation as a failure to achieve a scoring system's qualifying score would not advance this purpose.[194] An awareness of the congressional purpose may also be of assistance in a close case in deciding whether a statement of reasons is sufficiently specific.

However, there is no need to risk a possibility that the statement of reasons will not be sufficiently specific because the regulations provide that a creditor may formulate his own statement of reasons in letter or checklist form, or he may instead use a sample form included in the regulations which, if properly completed, satisfies the requirement that a statement of specific reasons be given.[195]

A third content requirement is that the notification must contain a statement of the provisions of section 701(a) of the Equal Credit Opportunity Act, 15 U.S.C. section 1691(a) (Supp. VI 1976), which in substance makes it unlawful to discriminate on a prohibited basis.[196] This statement is referred to as the "ECOA notice." Its purpose is to inform the applicant of his ECOA rights. Under the original ECOA regulations, the ECOA notice was required to be included in the application form. Although it may still be included in the application under the new regulations, it is only required to be contained in the notification of adverse action.[197]

A fourth content requirement is that the notification must contain the name and address of the federal agency administering compliance with the notification requirement.[198]

The regulations also provide a form statement which will satisfy the requirements that the notification contain an ECOA notice and information on the administering federal agency.[199] However, unlike the prior regulations which required that the form statement be used verbatim, it is sufficient under the new regulations if the notice given is only substantially similar to the form statement,[200] which reads as follows:

> The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color,

194. 42 Fed. Reg. 1242, 1248-49 (1977) (Federal Reserve Board's official comments on § 202.9(b) of Regulation B).

195. 42 Fed. Reg. 1251, 1257 (1977) (to be codified in 12 C.F.R. § 202.9(b)(2)).

196. *Id.* at 1257 (12 C.F.R. at § 202.9(a)(2)).

197. 42 Fed. Reg. 1242, 1248 (1977) (Federal Reserve Board's official comments on § 202.9(a) of Regulation B).

198. 42 Fed. Reg. 1251, 1257 (1977) (to be codified in 12 C.F.R. § 202.9(a)(2)).

199. *Id.* at 1257 (12 C.F.R. at § 202.9(b)(1)).

200. *Id.* 42 Fed. Reg. 1242, 1248 (1977) (Federal Reserve Board's official comments on § 202.9(b) of Regulation B).

> religion, national origin, sex, marital status, age, (provided that 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).[201]

In addition, the regulations specifically allow a creditor to modify this form statement by including, immediately following the references to the federal act and the enforcement agency, any references which are required by state law to be made concerning any similar state law or regulation or to any state enforcement agencies.[202]

C. *Special Notification Rules*

The regulations also contain several special provisions concerning the notification requirements. One such provision defines notification, stating that an applicant is notified by a creditor "when a writing addressed to the applicant is delivered or mailed to the applicant's last known address or, in the case of an oral notification, when the creditor communicates with the applicant."[203] This implies that as long as the letter of notification is properly mailed to the applicant, notification will be deemed to have occurred regardless of whether the notification is actually received.

A second provision relates to the situation in which an applicant submits a credit application and then does not inquire concerning the application for an extended period of time. In this situation, the creditor can treat the application as withdrawn and will not be required to notify the applicant of action taken if three conditions exist:

(1) If the parties contemplate that the applicant will inquire about its status;

(2) If the creditor approves the application; and

(3) If the applicant has not inquired about the application within thirty days after applying.[204]

Because these three conditions must all exist, an application which is the subject of adverse action cannot be deemed to be withdrawn under this provision.

Another special provision indicates which applicant is to receive the notification when there are multiple applicants. In such a case, it is sufficient if only one of the applicants receives the notification, but where it is readily apparent which applicant is the primary one, the notification must be given to him.[205]

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201. 42 Fed. Reg. 1251, 1257 (1977) (to be codified in 12 C.F.R. § 202.9(b)(1)).
202. *Id.*
203. *Id.* at 1260 (12 C.F.R. at § 202.9(f)).
204. *Id.* at 1259 (12 C.F.R. at § 202.9(d)).
205. *Id.* at 1257 (12 C.F.R. at § 202.9(a)(3)).

There also are special provisions concerning notification when there is more than one creditor. These special provisions could apply where, for instance, several lenders are involved in a credit decision involving extension of credit by one of them to the applicant. Under the regulations, each creditor may provide the prescribed notice directly to the applicant or may provide notification in accordance with the following rules:

(1) If the applicant accepts or uses the credit offered, no notice of adverse action is required by any creditor, even if one of the creditors involved has taken adverse action;

(2) If either no credit is offered or the applicant does not accept or use any credit which is offered, then each creditor taking adverse action must notify the applicant.[206] This notification may be provided directly by the creditor or indirectly through a third party, which may be, and usually is, one of the creditors. However, if notification is given through a third party, the identity of the creditor which took adverse action must be disclosed.[207] In addition, the regulation provides that in the situation where notification is provided through a third party, the creditor will not be liable for any acts of the third party which constitute violations of the notification requirements "if the creditor accurately and in a timely manner provided the third party with the information necessary for the notification and was maintaining procedures reasonably adapted to avoid any such violation."[208]

The ECOA regulations also contain a special notification provision which permits the notification to include other information not required under the notification content requirements if it will not detract from the required content.[209] This provision also specifically permits a notification under the ECOA to be combined with any other disclosures or notices required under the Consumer Credit Protection Act[210] or any other law, as long as all requirements for clarity and placement are met.[211]

The regulations also include a notification provision which in effect creates a special defense to an action based on violations of the notification requirements. This provision states that where a failure to comply with a notification requirement was the result of "inadvertent error," it will not constitute a violation of the notification regulations.[212] However, this defense will be valid only if the creditor, upon discovery of the error, immediately corrects it and commences compliance with the notification requirements.[213]

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206. *Id.* at 1257 (12 C.F.R. at § 202.9(a)(4)).
207. *Id.*
208. *Id.*
209. *Id.* at 1259 (12 C.F.R. at § 202.9(b)(3)).
210. 15 U.S.C. §§ 1601-1691f (1970 & Supp. I-VI 1971-1976).
211. 42 Fed. Reg. 1251, 1259 (1977) (to be codified in 12 C.F.R. § 202.9(b)(3)).
212. *Id.* at 1259 (12 C.F.R. at § 202.9(e)).
213. *Id.*

VIII. Furnishings of Credit Information

A primary purpose of the ECOA was to create a procedure whereby a spouse, primarily a wife, who did not have a credit history, but who was liable on an account or debt, would have the opportunity to develop such a history. Therefore, for accounts established on or after June 1, 1977, a creditor who furnishes credit information to other potential creditors of the applicant or the applicant's spouse must determine whether the applicant's spouse is permitted to use or would be contractually liable on the account other than as a guarantor, surety or the like, and must designate the account in the names of both spouses to reflect such fact of participation.[214] Furthermore, in order to assist the development of a credit history in the name of each spouse, the creditor is required, (1) when furnishing credit information about such a designated account to a consumer reporting agency, to furnish the credit information in such a manner that the agency will be able to provide access to the information to potential creditors in the name of each spouse, (2) when furnishing credit information about such a designated account in response to a specific request for credit information about a specific applicant, to furnish the information in the name of the spouse about whom the information was requested, and (3) when furnishing credit information about such a designated account to a consumer reporting agency in response to a specific request for credit information about a specific applicant, to furnish the information in the name of the spouse whose credit history was requested.[215]

In addition, the regulations require somewhat similar action by a creditor in regard to accounts established prior to and in existence on June 1, 1977. For such accounts, a creditor who furnishes credit information to other potential creditors of the applicant or the applicant's spouse must take either of two actions:

(1) The creditor must determine whether the applicant's spouse is permitted to use or would be contractually liable on the account other than as guarantor, surety or the like, and must designate the account in the names of both spouses to reflect such fact of participation;[216] or

(2) The creditor must have delivered or mailed by October 1, 1977, to either all applicants or all married applicants—in other words, to at least all married applicants—in whose name an account is contained in the creditor's records a copy of the notice set forth in the regulations, which informs the applicant of his right to have credit information relating to the account reported in the names of both spouses.[217] However, such notices

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214. *Id.* at 1260 (12 C.F.R. at § 202.10(a)(1)). For a definition of "use" of an account, *see* note 69 *supra.*

215. *Id.* at 1260 (12 C.F.R. at § 202.10(a)(2) and (3)); 42 Fed. Reg. 1242, 1249 (1977) (Federal Reserve Board's official comments on § 202.10(a) of Regulation B).

216. 42 Fed. Reg. 1251, 1260 (1977) (to be codified in 12 C.F.R. § 202.10(b)(1)).

217. *Id.* at 1260 (12 C.F.R. at § 202.10(b)(2)).

need have been sent only as to those accounts on which the creditor lacked the information necessary to designate participation or contractual liability.[218] Upon receipt of a request to have credit information reported in the names of both spouses, the creditor is then required to designate the account to reflect the fact of participation of both spouses.[219]

Furthermore, when furnishing information about an account established prior to and in existence on June 1, 1977, the creditor is required to comply with the same standards which govern the furnishing of credit information about accounts established on or after June 1, 1977, as outlined above.[220]

As in the case of many other requirements imposed under the ECOA regulations, an "inadvertent error defense" can be relied upon to defeat an action based upon a violation of a credit information-furnishing provision. Under this "defense," a failure to comply with the requirements outlined above will not be deemed to constitute a violation of the ECOA if it was the result of inadvertant error, if the error was corrected by the creditor upon its discovery as soon as possible and if compliance with the requirements for furnishing credit information was commenced.[221]

IX. Special Purpose Credit Programs

In some instances, a creditor may desire to participate in "special purpose credit programs," which are programs intended to benefit certain economically and socially disadvantaged classes.[222] These programs may restrict participation to persons of a given race, national origin, age, or income status, or to other persons with similar characteristics. Although such a practice would generally expose creditors to charges of credit discrimination, the regulations expressly provide that a creditor's refusal to extend credit to non-qualifying applicants under these programs will not constitute discrimination.[223] Nevertheless, there are a number of limitations and conditions on a creditor's participation in these programs which a creditor should review before relying on the exceptional treatment afforded "special purpose credit programs."

The major limitation is that the creditor's participation in such a program will not be deemed a violation of the ECOA only if the program is one of the following types:

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218. *Id.*

219. *Id.* at 1260 (12 C.F.R. at § 202.10(c)).

220. *Id. see* text accompanying note 215 *supra.*

221. 42 Fed. Reg. 1251, 1260 (1977) (to be codified in 12 C.F.R. § 202.10(d)).

222. *See* 15 U.S.C. § 1691(c) (Supp. VI 1976); 42 Fed. Reg. 1251, 1256-57 (1977) (to be codified in 12 C.F.R. § 202.8(a)).

223. 42 Fed. Reg. 1251, 1256 (1977) (to be codified in 12 C.F.R. § 202.8(a)).

(1) Any credit assistance program which is authorized by law and which is for the benefit of an economically disadvantaged class of persons;[224] or

(2) Any credit assistance program which is offered by a non-profit organization and which is offered for the benefit of its members or for the benefit of an economically disadvantaged class of persons;[225] or

(3) Any special purpose credit program which is offered by a profit-seeking organization or in which a profit-seeking organization participates to meet special social needs, if the program satisfies these further qualifications:

> (a) That the program is created and operated according to a written plan that identifies the classes of persons that are to be benefited by the program and which states the procedures and standards to be followed in extending credit under the program; and
> (b) That the program is created and operated for the purpose of extending credit to classes of persons who, under the creditor's customary standards of creditworthiness, would either probably not receive credit or probably receive it on less favorable terms than are usually provided to other applicants of similar credit.[226]

The regulations impose an additional requirement which programs offered by non-profit or profit-seeking organizations must satisfy. This requirement provides that the creditor's participation in the special program will not constitute a violation of the ECOA only if the program was established and is administered so as not to discriminate against an applicant on a prohibited basis, except that a creditor may require all program participants to share one or more of those characteristics.[227] This rather confusing and seemingly contradictory provision is well explained in the Federal Reserve Board's comments to the regulation. It explains that under this provision, eligibility for a special purpose credit program may be determined by a creditor by using one or more of the prohibited bases, but once the eligibility characteristics of the class of beneficiaries have been established, the creditor cannot discriminate among potential beneficiaries on a prohibited basis.[228] The comments give this example to explain the provision:

> For example, a creditor might establish a credit program for impoverished American Indians. If the program met the requirements [imposed on special purpose credit programs under the ECOA], the creditor could refuse credit to non-Indians but [nevertheless] could not discriminate among Indian applicants on the basis of sex or marital status.[229]

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224. *Id.* at 1256 (12 C.F.R. at § 202.8(a)(1)).
225. *Id.* at 1256 (12 C.F.R. at § 202.8(a)(2)).
226. *Id.* at 1256-57 (12 C.F.R. at § 202.8(a)(3)).
227. *Id.* at 1257 (12 C.F.R. at § 202.8(b)(2)).
228. 42 Fed. Reg. 1242, 1248 (1977) (Federal Reserve Board's official comments on § 202.8(b) of Regulation B).
229. *Id.*

If the program in which the creditor is participating satisfies all of the applicable requirements as was discussed above, the creditor, for the limited purpose of determining the eligibility of applicants for such programs, is then permitted to request of an applicant and consider information regarding the common characteristics required for eligibility, notwithstanding the ECOA regulations governing the solicitation of information in applications and the evaluation of applications.[230] In addition, notwithstanding these same provisions, where one of the criteria for the extension of credit under a qualifying special purpose credit program is financial need, the creditor may request and consider, for the limited purpose of determining the eligibility of applicants for such programs, information as to the applicant's marital status, an applicant's income from alimony, child support, or separate maintenance, and the spouse's financial resources.[231] Furthermore, in such a situation, the creditor is permitted to obtain the signature of the applicant's spouse or other person on a credit instrument or application used in a special purpose credit program if it is required by state or federal law, notwithstanding the ECOA regulation otherwise governing this matter.[232] In all three circumstances, the regulations expressly declare that conduct permitted in the case of special purpose credit programs as a result of these provisions will therefore not constitute unlawful discrimination for purposes of the ECOA.[233]

X. Record Retention

The ECOA regulations also contain a provision relating to the preservation of certain records by creditors. Upon review of this provision, it is apparent that its purpose is to aid those who may allege a violation of the ECOA or its regulations by a creditor.[234]

The regulation first requires that for twenty-five months[235] after the date on which a creditor notified an applicant of action taken on an application, the creditor must retain, in original or copied form, as to the application:

(1) Any application form received, any monitoring information required to be obtained, and all other written or recorded information

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230. 42 Fed. Reg. 1251, 1257 (1977) (to be codified in 12 C.F.R. § 202.8(c)).

231. *Id.* at 1257 (12 C.F.R. at § 202.8(d)).

232. *Id.*

233. *Id.* at 1257 (12 C.F.R. at § 202.8(c)); *id.* at 1257 (12 C.F.R. at § 202.8(d)).

234. *See id.* at 1261 (12 C.F.R. at § 202.12(b)).

235. Significantly, the required retention period has been extended in the new regulations from 15 to 25 months. *Compare* 12 C.F.R. § 202.9(a) and (b) (1977) *with* 42 Fed. Reg. 1251, 1261 (1977) (to be codified in 12 C.F.R. § 202.12(b)(1) and (2)). This change reflects the extension of the statute of limitations applicable to civil actions under the ECOA from one year to two years. *Compare* 15 U.S.C. § 1691e(g) (Supp. IV 1974) *with* 15 U.S.C. § 1691e(f) (Supp. VI 1976).

which the creditor used in its evaluation of the application and which was not returned to the applicant at his request;[236]

(2) A copy of the notification of action taken and the statement of specific reasons for adverse action, either in written form, if it was so furnished to the applicant, or in the form of any memorandum or notations made by the creditor, if it was furnished orally to the applicant;[237] and

(3) Any written statements submitted by the applicant to the creditor charging a violation of the ECOA or its regulations.[238]

In addition to these records, the creditor is required to retain, for a period of twenty-five months after the date on which the creditor notified an applicant concerning adverse action taken regarding an account other than in connection with an application, (1) any written or recorded information concerning the adverse action and (2) any written statements submitted by the applicant to the creditor charging a violation of the ECOA or its regulations.[239]

Another provision of the record retention regulation causes the time period for which the materials must be retained by the creditor to be altered. This provision states that where a creditor (1) has actual notice that he is under investigation or is currently the subject of an enforcement proceeding for a violation of the ECOA by a federal enforcement agency, or (2) has been served with notice of a civil action based upon a violation of the ECOA, the creditor must retain the documents previously enumerated until final disposition of the matter has occurred, unless the agency or court sets an earlier time, rather than the twenty-five month period normally applicable.[240]

Acknowledgement should also be made of the provision in the record retention regulation which excuses a failure to comply with the regulation if it was the result of an inadvertent error.[241]

XI. State Laws and the ECOA

In order to resolve any potential conflicts between the ECOA and any state laws, the ECOA and its regulations contain provisions which are addressed to this possibility. As a whole, these provisions demonstrate an intent that borrowers should be entitled to the minimum level of protection in their credit transactions guaranteed under the ECOA but that

236. 42 Fed. Reg. 1251, 1261 (1977) (to be codified in 12 C.F.R. § 202.12(b)(1)(i)).
237. *Id.* at 1261 (12 C.F.R. at § 202.12(b)(1)(ii)).
238. *Id.* at 1261 (12 C.F.R. at § 202.12(b)(1)(iii)).
239. *Id.* at 1261 (12 C.F.R. at § 202.12(b)(2)).
240. *Id.* at 1261 (12 C.F.R. at § 202.12(b)(3)).
241. *Id.* at 1261 (12 C.F.R. at § 202.12(c)).

borrowers should also receive the benefits of any greater protections afforded by any state law.[242]

Section 705(f) of the Equal Credit Opportunity Act[243] is the major statutory provision regarding the relationship between the ECOA and state law. This provision declares that

> [The ECOA] does not annul, alter, or affect, or exempt any person subject to the provisions of [the ECOA], from complying with the laws of any State with respect to credit discrimination, except to the extent that those laws are inconsistent with any provision of [the ECOA], and then only to the extent of the inconsistency. The [Federal Reserve] Board is authorized to determine whether such inconsistencies exist.[244]

To implement this statutory provision, the Federal Reserve Board promulgated a regulation which lists five situations in which a state law will be deemed to be inconsistent with the ECOA and so will be preempted to the extent of the inconsistency.[245] These five situations are:

(1) Where the state law requires or permits conduct prohibited by the ECOA or its regulations;[246]

(2) Where both spouses individually and voluntarily apply for an extension of consumer credit but state law prohibits an individual extension of consumer credit to both parties to a marriage;[247]

(3) Where the state law prohibits inquiries about or collection of information by creditors that is required under the ECOA or its regulations, such as monitoring information;[248]

(4) Where the state prohibits a creditor from asking the applicant's age or considering age in a demonstrably and statistically sound, empirically derived credit system, for the purpose of determining a pertinent element of creditworthiness or in order to favor an elderly applicant;[249] or

(5) Where state law prohibits inquiries which are necessary in order to establish or administer a special purpose credit program.[250]

In addition, the regulations also provide a procedure for requesting a

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242. *See* 15 U.S.C. § 1691d(f) (Supp. VI 1976); 42 Fed. Reg. 1251, 1260 (1977) (to be codified in 12 C.F.R. § 202.11(a)); S. REP. No. 589, 94th Cong., 2d Sess. 12, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 403, 414.

243. 15 U.S.C. § 1691d(f) (Supp. VI 1976).

244. *Id.*

245. 42 Fed. Reg. 1251, 1260 (1977) (to be codified in 12 C.F.R. § 202.11(b)(1)). Of course, the instances in which a state law is inconsistent with the ECOA is not limited to these five situations and the Federal Reserve Board may from time to time determine other types of state laws to be inconsistent.

246. *Id.* at 1260 (12 C.F.R. at § 202.11(b)(1)(i)).

247. *Id.* at 1260 (12 C.F.R. at § 202.11(b)(1)(ii)).

248. *Id.* at 1260 (12 C.F.R. at § 202.11(b)(1)(iii)).

249. *Id.* at 1260 (12 C.F.R. at § 202.11(b)(1)(iv)).

250. *Id.* at 1260 (12 C.F.R. at § 202.11(b)(1)(v)).

formal Federal Reserve Board interpretation as to the inconsistency of a state law.[251]

The regulations also contain several provisions concerning the application of specific state laws. One such provision, which closely resembles a provision in the ECOA itself,[252] states that where married applicants voluntarily obtain individual accounts with the same creditor, the creditor may not aggregate or otherwise combine the accounts for the purposes of ascertaining permissible loan ceilings or finance charges under state or federal law.[253] Furthermore, in such a situation federal and state permissible loan ceiling laws must be applied by creditors in such a manner that each spouse is permitted to become individually liable up to the amount of the loan ceiling, less the amount for which the applicant is jointly liable.[254] Therefore, in a state where the permissible loan ceiling is $1000, if a married couple was jointly liable for a $250 debt, each spouse would be permitted to become individually liable for $750.[255]

The regulations also include a provision which, pursuant to section 705(g) of the ECOA,[256] creates a procedure whereby a state may apply to the Federal Reserve Board for an exemption from certain requirements imposed under the ECOA and its regulations for any class of credit transactions within the state.[257] This exemption extends only to sections 701[258] and 702[259] of the ECOA and the corresponding provisions of the regulations. These are the substantive provisions of the statutory and regulatory materials—for example, the provision which prohibits discrimination on a prohibited basis in the evaluation of applications[260] and the notification requirements[261]—and does not include such provisions as the civil liability provisions of section 706[262] or the administrative enforcement provisions of section 704[263] of the ECOA. As a result of the limited scope of the exemption, the concurrent jurisdiction of federal and state courts created under section 706(f)[264] of the ECOA remains intact and the authority of federal enforcement agencies to enforce those provi-

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251. *Id.* at 1260 (12 C.F.R. at § 202.11(b)(2)).
252. 15 U.S.C. § 1691d(d) (Supp. VI 1976).
253. 42 Fed. Reg. 1251, 1260-61 (1977) (to be codified in 12 C.F.R. § 202.11(c)).
254. *Id.*
255. *Id.* at 1261 n.16 (12 C.F.R. at § 202.11(c)n.16).
256. 15 U.S.C. § 1691d(g) (Supp. VI 1976).
257. 42 Fed. Reg. 1251, 1261 (1977) (to be codified in 12 C.F.R. § 202.11(e)).
258. 15 U.S.C. § 1691 (Supp. VI 1976).
259. *Id.* § 1691a.
260. *Id.* § 1691(a); 42 Fed. Reg. 1251, 1255 (1977) (to be codified in 12 C.F.R. § 202.6(a)).
260. 15 U.S.C. § 1691(d) (Supp. VI 1976); 42 Fed. Reg. 1251, 1257-60 (1977) (to be codified in 12 C.F.R. § 202.9).
262. 15 U.S.C. § 1691e (Supp. VI 1976).
263. *Id.* § 1691c.
264. *Id.* § 1691e(f).

sions of the ECOA and its regulations which still apply in spite of the exemption still exists.[265]

In order to acquire this exemption, it must first be determined by the Federal Reserve Board that state law imposes upon the class of credit transactions in question, requirements which either are substantially similar to those imposed under sections 701 and 702 of the ECOA and its corresponding sections of the regulations or in fact afford a greater extent of protection than these provisions of the ECOA and regulations.[266] In addition, it must also be shown that there is adequate provision made in the state law for state enforcement.[267]

There are also a number of provisions in the ECOA itself which relate to the continued applicability of particular state laws. One such provision declares that a request for the signatures of both spouses in order to create a valid lien, pass clear title, waive inchoate rights to property or assign earnings, will not constitute discrimination for the purposes of the ECOA.[268] In addition, another provision states that a creditor's consideration or application of state property laws which directly or indirectly affect creditworthiness will not constitute discrimination as well.[269] A third provision states that a person aggrieved by conduct which constitutes a violation of both the ECOA and state law may bring a legal action under either law.[270] However, if monetary damages are being sought in the action, the aggrieved person must make a choice as to under which law he wishes to sue.[271] Furthermore, the aggrieved person may recover only one damage award.[272] On the other hand, no such election of remedies must be made if an administrative action or a legal action in which monetary damages are not requested is the relief sought, so that an aggrieved person may pursue administrative, injunctive or declaratory relief under both state and federal law at the same time without the necessity of making an election of remedies.[273]

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265. 42 Fed. Reg. 1251, 1261 (1977) (to be codified in 12 C.F.R. § 202.11(e)(2)). It should also be noted that as a result of the provision in the regulations which state that "after an exemption has been granted, the requirements of the applicable state law shall constitute the requirements of the [ECOA] and [the regulations], except to the extent such State law imposes requirements not imposed by the [ECOA] or [the regulations]," *id.* at 1261 (12 C.F.R. at § 202.11(e)(2)(ii)), the federal courts or federal enforcement agencies can be resorted to for what would at first glance appear to be a violation of state law. In this manner, a remedy at the federal level will always exist.

266. *Id.* at 1261 (12 C.F.R. at § 202.11(e)(1)(i)).

267. *Id.* at 1261 (12 C.F.R. at § 202.11(e)(1)(ii)).

268. 15 U.S.C. § 1691d(a) (Supp. VI 1976).

269. *Id.* § 1691d(b).

270. *Id.* § 1691d(e).

271. *Id.*; S. REP. No. 589, 94th Cong., 2d Sess. 12, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 403, 414.

272. 15 U.S.C. § 1691d(e) (Supp. VI 1976); S. REP. No. 589, 94th Cong., 2d Sess. 12, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 403, 414.

273. 15 U.S.C. § 1691d(e) (Supp. VI 1976); S. REP. No. 589, 94th Cong., 2d Sess. 12, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 403, 414.

XII. CONCLUSION

Because the ECOA, and its implementing regulations, have been a factor in credit transactions for such a short period, it is not yet possible to gauge its effectiveness in achieving its purposes, or to discern the specific provisions which have created the greatest amount of difficulty or ambiguity in application. These determinations will come only with time.

However, it is possible at this point to summarize and explain the apparent significance of the various provisions. This has been the purpose of this Article. Of course, a number of provisions have not been discussed and, because of limitations of space, exceptions from general rules and further explanation have sometimes been omitted. Accordingly, the reader is encouraged to review directly the regulations for further information. Also, it can be anticipated that from time to time, and particularly in the next few months, the Federal Reserve Board will be asked to clarify a number of the important issues raised by the new regulations. Counsel for lenders and creditors should carefully monitor these interpretations in order to comply with ECOA requirements.