

# CREDIT EQUALITY COMES TO WOMEN: AN ANALYSIS OF THE EQUAL CREDIT OPPORTUNITY ACT

## INTRODUCTION

Traditionally, American society has confined women to an inferior status. Although in the past such discrimination was accepted almost without question,<sup>1</sup> there has recently been an increasingly widespread effort to change this attitude. Indeed, advocates of women's rights are seeking to establish equality for women in all aspects of life.

Consumer credit is an important area in which extensive sex discrimination has existed.<sup>2</sup> It is essential that all people be accorded

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1. See, e.g., Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis For Equal Rights For Women*, 80 *YALE L.J.* 871, 872 (1971).

2. "Consumer credit" means credit offered or extended to an individual in which the money, property, or service which is the subject of the transaction is primarily for personal, family, or household purposes. 12 C.F.R. § 202.3(f) (1976). As one commentator stated: "This [is] a national problem—and systematic discrimination against women was built into the system." Lilliston, *Pushing For a Federal Equal Credit Law*, *L.A. Times*, Oct. 19, 1973, pt. IV, at 10, col. 1. The following example is typical of creditors' discriminatory attitudes:

A man and a woman with virtually identical qualifications applied for a \$600 loan to finance a used car without the signature of the other spouse. Each applicant was the wage earner, and the spouse was in school. Eleven of the banks visited by the woman "either strictly required the husband's signature or stated it was their preference although they would accept an application and possibly make an exception to the general policy." When the same banks, plus two additional banks that would make no commitment to the female applicant, were visited by the male interviewer, six said that they would prefer both signatures but would make an exception for him; one insisted on both signatures; and "six told the male interviewer that he, as a married man, could obtain the loan without his wife's signature."

NATIONAL COMMISSION ON CONSUMER FINANCE, *CONSUMER CREDIT IN THE UNITED STATES* 1, 153 (1972) [hereinafter cited as *CONSUMER CREDIT*]. See SENATE COMM. ON BANKING, HOUSING & URBAN AFFAIRS, *REPORT ON TRUTH IN LENDING ACT AMENDMENTS*, S. Rep. No. 278, 93d Cong., 1st Sess. (1973) [hereinafter cited as *TIL ACT AMENDMENTS*].

an equal opportunity to obtain credit,<sup>3</sup> for credit partially determines access to items such as home ownership,<sup>4</sup> education,<sup>5</sup> and consumer goods.<sup>6</sup> Because many families function on the extension of credit, any denial of credit to women deprives them of equal purchasing power and lessens their ability to provide for the needs of themselves and their families.<sup>7</sup> Nevertheless, creditors engaged in numerous discriminatory acts against women applicants. Although some aspects of this discrimination depended solely on marital status, other forms were common to all women.<sup>8</sup>

A recently enacted federal statute, the Equal Credit Opportunity Act (ECOA),<sup>9</sup> is designed to eliminate much of the sex discrimination existing in the area of credit. The Act, which becomes fully effective this year,<sup>10</sup> provides that:

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3. See Statement of Arline Lotman, *Hearings on the Economic Problems of Women Before the Joint Economic Committee*, 93d Cong., 1st Sess., at 482 (1973). [*Hearings* are hereinafter cited as *Economic Problems of Women*]. This is especially important now, for consumer reliance on credit has grown drastically in the last thirty years. Indeed, the total amount of outstanding consumer credit has increased from \$21.5 billion in 1950 to over \$137 billion in 1971. CONSUMER CREDIT 5.

4. See Comment, *Discrimination Against Women in Home Mortgage Financing*, 3 YALE J.L. & Soc. ACTION 186 (1973); San Diego Union, June 6, 1976, § A, at 1, col. 1. Act of Aug. 22, 1974, Pub. L. No. 93-383, tit. VIII, § 808(b)(2), 88 Stat. 729, amended the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* (1970), to prohibit sex discrimination in the financing of housing. Thus, this legislation forbids a creditor from setting less favorable loan terms for women than are set for men. 42 U.S.C. § 3605 (Supp. IV, 1974).

5. A recent study shows that women obtain fewer loans for the purpose of education than do men. For example, in California in 1972, the distribution of people participating in the Federal Guaranteed Student Loan Program was approximately seventy men for every thirty women. Gates, *Credit Discrimination Against Women: Causes and Solutions*, 27 VAND. L. REV. 409, 410 n.3 (1974), *citing* HEW, REPORT OF THE GUARANTEED STUDENT LOAN PROGRAM, DISTRIBUTION OF CUMULATIVE LOANS AS OF JUNE 30, 1972 (1973).

6. See CONSUMER CREDIT 5.

7. See Statement of Arline Lotman, *Economic Problems of Women*, *supra* note 3, at 482; CONSUMER CREDIT 5-7.

8. For the purposes of the Equal Credit Opportunity Act, the term *unmarried* includes a person who is divorced or widowed. 12 C.F.R. § 202.3 (n) (1976).

9. 12 C.F.R. § 202 *et seq.* (1976). This statute amends the Consumer Credit Protection portion of the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* (1968). For a brief synopsis of the legislative history of the Equal Credit Opportunity Act, see Gates, *supra* note 5, at 425.

10. For the date when each section becomes effective, see 12 C.F.R. § 202.14 (1976).

A creditor shall not discriminate against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction.<sup>11</sup>

The language of the ECOA is broad enough to include regulation of virtually all creditors<sup>12</sup> and permits injured parties to invoke federal enforcement sanctions against creditors that illegally discriminate.<sup>13</sup>

#### DISCRIMINATORY CREDIT PRACTICES

Like the language of some state statutes,<sup>14</sup> the ECOA explicitly prohibits creditors from using any criteria to determine creditworthiness that favor one sex over the other.<sup>15</sup> However, because

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11. 12 C.F.R. § 202.2 (1976). "Discriminate against" means to treat an applicant or prospective applicant less favorably than others on the basis of sex or marital status. 12 C.F.R. § 202.3(p) (1976).

12. 12 C.F.R. § 202.1 (1976) provides:

This Part applies to *all persons* who regularly extend, offer to extend, arrange for or offer to arrange for the extension of credit *for any purpose whatsoever and in any amount.* (emphasis added)

See also 12 C.F.R. § 202.10 (1976), which includes within the Act's provisions those credit transactions "subject to regulation under section 7 of the Securities Exchange Act of 1934." But see 12 C.F.R. §§ 202.3(e), (j) (1976), which exempt from the Act's provisions certain transactions involving credit cards; and 12 C.F.R. § 202.3(o) (1976), which exempts "negotiated advances under an open end real estate mortgage or a letter of credit."

13. 12 C.F.R. § 202.13(c) (1976) provides:

Without regard to the amount in controversy, any action under this Title may be brought in any United States district court or in any other court of competent jurisdiction, within one year of the date of the occurrence of the violation.

See Lilliston, *supra* note 2, at 9, col. 1.

14. See, e.g., CAL. CIV. CODE § 1812.30 (West Supp. 1976). This statute contains not only general prohibitions against sex or marital status discrimination regarding creditworthiness based on property and earnings, *id.* §§ 1812.30(a), (b), (c), (d), but also an express provision that creditors, in "utilizing any other relevant factors or methods in determining whether to extend credit to an applicant," may use such factors only if they "are applicable to all applicants without regard to their sex or marital status." *Id.*, § 1812.30(h). See generally Comment, *Credit For Women in California*, 22 U.C.L.A. L. REV. 873, 886-88 (1975) [hereinafter cited as *Credit For Women*].

15. 12 C.F.R. § 202.2 (1976), provides:

A creditor shall not discriminate against *any* applicant on the basis of *sex or marital status* with respect to *any* aspect of a credit transaction. (emphasis added)

But see text accompanying notes 33 to 36 *infra*. The most significant weakness in the language of the ECOA is the provision that permits creditors to retain in their files information obtained prior to June 30, 1976, even if such information would otherwise be prohibited under the Act. Although the ECOA prohibits creditors from using this information in evaluating applications, insufficient safeguards exist to assure that creditors are not in fact using this information as a basis for denying credit to an applicant. See 12 C.F.R. § 202.5(k) (1976).

creditors' rights must be protected through maintenance of credit standards,<sup>16</sup> the ECOA permits creditors to request information in an application that is not sexually discriminatory.<sup>17</sup>

### *Discriminatory Practices Against All Women*

Most creditors employ a credit scoring system to determine the creditworthiness of each individual applicant.<sup>18</sup> Under this system, credit points are often granted on the basis of factors such as the applicant's profession or length of employment. In the past, many creditors discriminated against women applicants by refusing to extend credit to them unless the women satisfied higher evaluation standards than were required of men.<sup>19</sup> The ECOA, however, expressly prohibits any such differential treatment based on the sex or marital status of an applicant.<sup>20</sup> This provision thus does much to completely eliminate discrimination based on marital status or sex.

Although creditors have asserted that they do not discriminate on the basis of sex, the following statement, made by one creditor

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16. Because it is not the ECOA's purpose to require creditors to extend credit to people not deemed creditworthy, TIL ACT AMENDMENTS 20, the law does permit creditors to consider various factors, such as education, salary, and years on the job, in determining whether to grant the applicant credit. Cf. Lilliston, *supra* note 2, at 9, col. 1. See generally CONSUMER CREDIT 152.

17. See 12 C.F.R. §§ 202.2, 202.3(l) (1976).

18. See B. ETTINGER & D. GOLIEB, CREDITS AND COLLECTIONS 11-17 (5th ed. 1962). Such a scoring system usually includes essential elements such as income, employment, and payment habits, as well as other less crucial factors, such as residence, age, and reserve assets. R. COLE, CONSUMER AND COMMERCIAL CREDIT MANAGEMENT 291 (4th ed. 1972).

19. Women were often required to meet higher standards in areas such as length of employment, educational level, time at present residence, and minimum salary; or credit would be denied. See Kellog, *Giving Credit Where Credit is Long Overdue*, WOMAN'S DAY, Feb. 1973, at 52. Using different and stricter standards as a basis for granting credit to women is a prominent example of the discriminatory creditor practices discussed in TIL ACT AMENDMENTS 16.

20. 12 C.F.R. § 202.2 (1976). Furthermore, creditors cannot take "sex or marital status into account in a credit scoring system or other method of evaluating applications." 12 C.F.R. § 202.5(f) (1976). See Statement of the National Organization for Women (NOW), *Oversight Hearings on 15 U.S.C. §§ 1601-81(t) Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 93d Cong., 1st Sess. (1973), and TIL ACT AMENDMENTS 16-17, referring to numerous unsolicited complaints to various women's groups.

regarding the creditworthiness of a woman, betrays their prejudices:

Betting on her to be able to work every day for the next four years isn't the same as betting on a man. It is impossible to put a man and a woman on the same level completely as far as extending credit is concerned.<sup>21</sup>

Although creditors have offered many justifications for these discriminatory practices, they have not been shown to be valid.<sup>22</sup> Indeed, despite the facts that women are more often unemployed than men,<sup>23</sup> are paid less for equivalent work,<sup>24</sup> and are often relegated to jobs with little opportunity for advancement,<sup>25</sup> studies have

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21. Hyatt, *Creditors Say Ability to Pay—Not Sex—Is First Consideration*, Wall Street Journal, July 18, 1972, at 24, col. 3 (east. ed.). Congressperson Martha Griffiths of Michigan has noted:

Banks, savings and loan associations, credit card companies, finance companies, insurance companies, retail stores, and even the federal government discriminate against women in extending credit. And they discriminate against women in all stages of life—whether single, married, divorced or widowed; with or without children, rich or poor, young or old.

*Id.*, at 1, col. 6. See also Adams, *Bankers Urged to Reconsider Assumptions Regarding Women and Credit*, AMERICAN BANKER, June 25, 1973, at 12, col. 3, in which the President of the American Banker's Association admitted that "banks, along with the rest of the credit industry, do in fact discriminate against women when it comes to granting credit."

22. The reasons include not only the outdated belief that a woman's legal status is inferior to a man's, see Hyatt, *supra* note 21, at 24, col. 7, but also the groundless belief that women are inherently less stable and responsible than men. See Comment, *Women and Credit*, 12 DUQ. L. REV. 863, 875-76 (1974) [hereinafter cited as *Women and Credit*]. Another commonly advanced reason is that women will become pregnant and unable to work and will therefore default on credit payments. See text accompanying notes 27 to 36 *infra*. For a fifty-state study of laws that identifies possible statutory origins of sex and marital status discrimination, see *Hearings on Credit Discrimination Before the Subcomm. on Consumer Affairs of the Comm. on Banking and Currency*, 93d Cong., 2d Sess., pt. 3, App. at 725-1301 (1974).

23. A table of the national labor force participation rates for workers twenty years and over shows that in 1972, 5.4 percent of the women were unemployed as compared to 4.0 percent of the men. In 1971, the ratio was 5.7 percent to 4.4 percent; in 1970, 4.8 percent to 3.5 percent; and in 1969 3.7 percent to 2.1 percent. U.S. DEP'T OF LABOR, MANPOWER REPORT OF THE PRESIDENT 65-66 (1973). See also Statement of Congressperson Griffiths, *Economic Problems of Women*, *supra* note 3, at 2-3.

24. According to a report of the President's Council of Economic Advisors, in 1971, the average full-time female worker grossed \$5,593, only 59.5 percent as much as the gross for the average full-time male worker, whose earnings were \$9,399. TIME, Feb. 12, 1973, at 69. In 1973, a woman's earnings averaged only 57 percent of a man's. *Economic Problems of Women*, *supra* note 3, at 2, 73. See also EMPLOYMENT STANDARDS ADMINISTRATION, WOMEN'S BUREAU, U.S. DEP'T OF LABOR, WOMEN WORKERS TODAY 6 (1973).

25. Women are more apt than men to be white-collar workers, but the jobs they hold are usually less skilled and pay less than those

shown that women are better credit risks than men.<sup>26</sup>

Before the passage of the ECOA, women of child-bearing age were particularly subject to discrimination. Creditors, believing that women in this age group were unlikely to remain long in the work force,<sup>27</sup> would request information regarding the woman's choice of birth control method.<sup>28</sup> Indeed, prior to the enactment of the ECOA, some creditors demanded that women applicants swear by affidavit that they would not endanger their ability to repay their debts by having children.<sup>29</sup>

Prompted by a belief that this practice was both unfair<sup>30</sup> and un-

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of men. Women professional workers are most likely to be teachers, nurses, and other health workers, while men are most frequently employed in professions other than teaching and health. Women are less likely than men to be managers and officials, and are far more likely to be clerical workers.

WOMEN WORKERS TODAY, *supra* note 24, at 5. See also *Economic Problems of Women*, *supra* note 3, at 73.

26. Several studies have indicated that single women are better credit risks than men. See, e.g., D. DURAND, RISK ELEMENTS IN CONSUMER INSTALLMENT FINANCING 74-77 (1941); Smith, *Measuring Risk on Installment Credit*, 11 MANAGEMENT SCIENCE 327-40 (1964). See also Statement of Margaret J. Gates and Jane R. Chapman, Co-directors, Center for Women Policy Studies, *Economic Problems of Women*, *supra* note 3, at 206.

27. The assumption seemed to be that single women would marry and voluntarily quit their jobs and that married women would be forced to quit because of pregnancy and child care. Consequently, these women were thought to be poorer credit risks than men in the same age group. See Gates, *supra* note 5, at 409; *Credit For Women in California*, *supra* note 14, at 877; Littlefield, *Sex-Based Discrimination and Credit Granting Practices*, 5 CONN. L. REV. 575, 588-90 (1973). However, studies indicate that, contrary to this assumption, women of childbearing age do work. For example, in 1972, the following percentages of single women worked in the following age groups: 20-24, 69.9 percent; 25-34, 84.7 percent; 35-44, 71.5 percent. The percentage of married women who worked in the same age groups was: 20-24, 48.5 percent; 25-34, 41.3 percent; 35-44, 48.6 percent. The percentage of divorced, separated, or widowed women in these age groups was even higher: 20-24, 57.6 percent; 25-34, 62.1 percent; 35-44, 71.7 percent. *Economic Problems of Women*, *supra* note 3, at 7. See also TIL ACT AMENDMENTS 19, which indicates that in 1970, 44 percent of working-age women were in the labor force.

28. See, e.g., Hyatt, *supra* note 21, at 1, col. 6.

29. Littlefield, *supra* note 27, at 589. See also Hyatt, *supra* note 21, at 1, col. 6.

30. There is no evidence that a woman who has a child will permanently terminate her employment by failing to return to the work force. See WOMEN WORKERS TODAY, *supra* note 24, at 4; Littlefield, *supra* note 27, at 590-91. Even if the mother chooses to quit working outside the home, no indication exists that she will default on her obligations. Indeed, because

necessary,<sup>31</sup> the authors of the ECOA expressly forbid creditors from requesting any information from women applicants concerning "birth control practices or childbearing intentions or capabilities."<sup>32</sup> The Act does permit creditors to "request and consider any information concerning the probable continuity of an applicant's ability to repay . . ."<sup>33</sup>

Initially the language of the ECOA did not include any restrictions on questions concerning child-bearing intent. Thus, under the language that was originally proposed, creditors were not prohibited from asking a woman applicant if she intended to have children.<sup>34</sup> Because such plans might very well affect her ability to repay—at least in a creditor's mind—the creditor would have been within its rights to ask this question.<sup>35</sup> Yet if a woman is required to disclose her attitude toward having children, she is impliedly disclosing her birth control practices. Thus, under the initial language of the ECOA, a creditor would have been able to indirectly inquire into an applicant's method of birth control. However, this weakness in the Act was eliminated by changing the language to permit creditors to question applicants about factors affecting their ability to repay only if such factors are considered "without regard to sex or marital status."<sup>36</sup>

#### *Discrimination Against Married Women*

Many creditors assume that a man is a better credit risk if he

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well over one-half of the women of childbearing age in the United States worked in 1972, there does not seem to be any significant correlation between a woman's being of childbearing age and being creditworthy. See Littlefield, *supra* note 27, at 591-92.

31. Reports indicate that women are showing "far greater propensity to work and to avoid interruption in their careers." Adams, *supra* note 21, at 12, col. 3. This attitude, coupled with a trend toward smaller families and mothers who are gainfully employed, suggests that questions regarding birth control methods, even if they were not discriminatory, are not actually necessary for a creditor to validly decide whether to extend credit to an applicant. See *id.*, at col. 1, indicating that between 1947 and 1971 the female labor force increased almost 100 percent, while the population increased only 40 percent and that the number of women in the labor force is projected to increase by 70 percent during the next ten years. See also U.S. DEP'T OF LABOR, MANPOWER REPORT OF THE PRESIDENT 64-66 (1973).

32. 12 C.F.R. § 202.5 (h) (1976).

33. *Id.* at (a).

34. See 40 Fed. Reg. 42031 (1975), which provided:

A creditor shall not request information about birth control practices or childbearing capability. However, a creditor may request and consider information concerning the probable continuity of an applicant's ability to repay.

35. See text accompanying notes 28 to 30 *supra*.

36. 12 C.F.R. § 202.5 (h) (1976).

is married.<sup>37</sup> Yet married women have greater difficulty in obtaining credit than do any other women.<sup>38</sup> This problem stems not only from discriminatory statutory laws<sup>39</sup> but also from archaic social attitudes.<sup>40</sup> These attitudes continue despite the enactment in every state of statutes nullifying many common law disabilities of

37. "Presumably, the assumption is made that marriage indicates a stability of character which relates to creditworthiness." Littlefield, *supra* note 27, at 580. See also Gates, *supra* note 5, at 427.

38. Creditors are often unwilling either to extend credit to a married woman in her own name or to issue her credit for which she would be eligible if she were single. See TIL ACT AMENDMENTS 16-17; CONSUMER CREDIT 152-53.

39. See, e.g., former CAL. CIV. CODE §§ 5116, 5121 (West 1970), as amended CAL. CIV. CODE §§ 5116, 5121 (West Supp. 1976). The result of this type of legal restriction was that many creditors "[told] women that they [could] not give them credit in their own names because it [was] against the law." Pollard, *Credit Discrimination, State Women Fighting*, Sacramento Sun-Telegram, Feb. 26, 1973, § B, at 1, col. 3. See also Gates, *supra* note 5, at 413; Comment, *The Discredited American Woman: Sex Discrimination in Consumer Credit*, 6 U.C.D. L. REV. 61, 70-71 (1973); Getze, *Getting Credit: It All Adds Up to Numbers Game in Money*, L.A. Times, Oct. 20, 1973, pt. I, at 23, col. 2.

40. This attitude possibly flows from the invalid presumptions that a wife is always dependent on her husband and that this dependency affects her creditworthiness. See TIL ACT AMENDMENTS 19. In 1872, the United States Supreme Court stated the then generally accepted view of women in *Bradwell v. the State*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring):

The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . . The paramount destiny and mission of women are to fulfill the noble and benign office of wife and mother.

Congressperson Martha Griffiths has stated that "the reasoning used to deny women credit is often a cobweb of myths and suppositions unsupported by research." Hyatt, *supra* note 21, at 1, col. 6. Compare E. FLEXNER, CENTURY OF STRUGGLE 9 (1968):

When the country was being settled, women participated with men in plowing the land and fending off the Indians, as well as in their traditional roles of potter, weaver, spinner, cook, teacher, and nurse; such participation helped to weaken the traditional European patriarchal values and democratize the family. Strong and determined women worked side by side with men and achieved practical equality, for the brutal frontier conditions established a certain rough egalitarianism which challenged other, long-established concepts of propriety.

Despite this, however, creditors believed that state laws prevented them from dealing with women on the same basis as men. See, e.g., Gates, *supra* note 5, at 413, citing Testimony of Matthew Hale, Counsel for the American Banker's Association, *Hearings on the Availability of Credit to Women Before the National Commission on Consumer Finance* (1972).



married women.<sup>41</sup> The ECOA also does much to eliminate many of these problems.

Before the enactment of the ECOA, many creditors evaluated applicable credit standards more strictly if the wife, rather than the husband, was the primary wage earner.<sup>42</sup> In addition, a woman applicant frequently had to rely on the creditworthiness of her husband in order to obtain credit, even if she was to have exclusive use of the account and was the more creditworthy of the two.<sup>43</sup> The Act, however, changes these long-established creditor practices. While it does permit the creditor to ascertain whether an applicant's spouse will use the account,<sup>44</sup> it limits the use of this information.<sup>45</sup> However, because creditors' rights must also be protected, the ECOA permits creditors to request and consider information about an applicant's spouse when the application indicates the spouse either will be using the account or will be contractually liable on it.<sup>46</sup>

Creditors have also discriminated against married women by refusing to permit them to maintain their separate credit standing after marriage. Many creditors customarily discontinued a woman's credit accounts after her marriage and compelled her to reapply in her husband's name.<sup>47</sup> Thus, the woman was subjected to a re-evaluation of creditworthiness based on her husband's credit status.<sup>48</sup> Furthermore, once credit was issued in her husband's name, all subsequent credit transactions in which she was involved be-

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41. These statutes are usually entitled Married Women's Property Acts. See L. KANOWITZ, *WOMEN AND THE LAW, THE UNFINISHED REVOLUTION* 40 (1969).

42. TIL ACT AMENDMENTS 16-17. Although such conduct is now obviously in violation of the ECOA, prior to its passage the creditor practice regarding credit cards and accounts was to issue them in the husband's name. CONSUMER CREDIT 152.

43. CONSUMER CREDIT 152.

44. 12 C.F.R. § 202.5(b)(1)(i) (1976).

45. 12 C.F.R. § 202.5(b)(1)(i)-(iv) (1976). The ECOA also provides that if a creditor asks the applicant's marital status, only the terms "married," "unmarried," or "separated" may be used. 12 C.F.R. § 202.4(c)(2) (1976). Furthermore, if the application asks the applicant to designate a title such as Mr., Mrs., Ms., or Miss, it must "state conspicuously that the designation of such title is optional." 12 C.F.R. § 202.4(c)(4) (1976).

46. 12 C.F.R. § 202.5(b)(1)(i), (ii) (1976).

47. See CONSUMER CREDIT 152; TIL ACT AMENDMENTS 16-17. See generally *Women and Credit* 866-67.

48. Even if the wife had been considered creditworthy when she was single, she was re-evaluated because she was considered to be dependent on her new husband for support. See CONSUMER CREDIT 152; TIL ACT AMENDMENTS 16-17.

came a part of her husband's credit file.<sup>49</sup> This practice prevented the wife from building any credit standing of her own.

Despite creditor arguments advanced in support of these requirements,<sup>50</sup> the ECOA expressly forbids creditors from terminating an existing credit account or requiring reapplication in a spouse's name solely on the basis of a change in name or marital status.<sup>51</sup> The Act also requires creditors to consider the credit history of an applicant's prior accounts if the applicant can show that it accurately reflects her "willingness or ability to repay."<sup>52</sup> Therefore, creditors must consider the credit rating an applicant had when she was single in evaluating her subsequent applications.<sup>53</sup>

Another example of discrimination against married women is the long-established creditor practice of refusing to include all a wife's income in determining whether a married couple earns enough money to be eligible for a loan or mortgage.<sup>54</sup> One spokesperson,

49. See TIL ACT AMENDMENTS 16-17; *Women and Credit* 866-67.

50. The major justification for this practice, offered even by creditors who claimed to be unbiased, was that requiring a spouse to reapply was economically motivated. Because the opening and maintenance of two credit accounts per family is costly, it was simply "good business" to maintain only one account per family. See Hyatt, *supra* note 21, at 24, col. 3; Pollard, *supra* note 39, at 3, col. 3. For a discussion of why this reasoning is invalid, see *Credit For Women*, *supra* note 14, at 884-85. See also Gates, *supra* note 5, at 414-15, indicating that creditors generally prefer to keep the one account in the husband's name.

51. 12 C.F.R. § 202.5(i)(1) (1976):

[I]n the absence of evidence of inability or unwillingness to repay, a creditor shall not take any of the following actions with respect to a person who is contractually liable on an existing open end account on the basis of a change of name or marital status:

- (i) Require a reapplication; or
- (ii) Require a change in the terms of the account; or
- (iii) Terminate the account.

52. 12 C.F.R. § 202.5(j)(2) (1976). Another section of the ECOA requires creditors, when furnishing information to consumer reporting agencies, to furnish all information regarding an account which both spouses use in the names of both spouses. A wife is thus able to continue building a credit standing independent of her husband's. See 12 C.F.R. §§ 202.6(a), (b) (1976). The ECOA also provides that a creditor shall not prohibit an applicant from "opening or maintaining an account in a birth-given first name and surname or a birth-given first name and a combined surname." A married woman is thus permitted to retain her maiden name if she so desires. See 12 C.F.R. § 202.4(e) (1976).

53. See 12 C.F.R. §§ 202.6(a), (b) (1976).

54. See, e.g., *Women Win More Credit*, BUS. WEEK, Jan. 12, 1974, at 76; CONSUMER CREDIT 153.

in referring to this practice, indicated it had long been bank policy to discount all or part of a working wife's salary.<sup>55</sup> However, the ECOA prohibits the practice of discounting an applicant's income on the basis of sex or marital status.<sup>56</sup>

Discriminatory credit practices abounded in both common law and community property states prior to the passage of the ECOA. However, because of the special limitations imposed on wives by the community property system, women domiciled in community property states often found it more difficult to obtain credit than did their counterparts in common law states.

Generally, liability for debts in community property states is based on management and control of the community property.<sup>57</sup> In states that grant the husband sole management and control, his signature binds both his separate property and the marriage's community property.<sup>58</sup> In these jurisdictions the wife's signature, while binding her separate property or earnings, is not sufficient to bind community property.<sup>59</sup> Therefore, unless a married woman has substantial separate property, creditors can protect their interests only by obtaining the husband's signature on credit applications. This situation naturally hinders the wife's ability to obtain credit<sup>60</sup> and to deal responsibly in our credit-oriented society.<sup>61</sup>

The ECOA allows a creditor to require the signature of an applicant's spouse only if such requirement is imposed on all applicants, regardless of their sex or marital status.<sup>62</sup> Because marriage cre-

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55. *Women and Credit* 868 n.12. See CONSUMER CREDIT 152-53.

56. 12 C.F.R. § 202.5(e) (1976), states:

A creditor shall not discount the income of an applicant or an applicant's spouse on the basis of sex or marital status.

57. See, e.g., H. VERRALL & A. SAMIS, *CASES AND MATERIALS ON CALIFORNIA COMMUNITY PROPERTY* 284-89 (2d ed. 1971). See generally W. DE FUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* (2d ed. 1971).

58. See, e.g., LA. CIV. CODE ANN. arts. 2403, 2404 (West 1971). See generally DE FUNIAK & VAUGHN, *supra* note 57, at 374-80.

59. In some community property states, the rule is still that management and control of the community property is with the husband. See, e.g., LA. CIV. CODE ANN. art. 2404 (West 1971). See generally DE FUNIAK & VAUGHN, *supra* note 57, at 276-78.

60. See, e.g., *Grolemund v. Cafferata*, 17 Cal. 2d 679, 111 P.2d 641 (1941).

61. See Comment, *Credit Equality For the California Woman*, 3 U. SAN FERNANDO V. L. REV. 125, 128 (1974).

62. 12 C.F.R. § 202.7(a) (1976). This provision, like the Act itself, is designed to ensure the non-discriminatory extension of credit while giving recognition to each state's system of law. See TIL ACT AMENDMENTS 20. Thus, the Act expressly provides that:

Consideration or application of State property laws directly or indirectly affecting creditworthiness shall not constitute discrimination for purposes of this Part.

12 C.F.R. § 202.5(l) (1976).

ates certain legal relationships between spouses that creditors must be permitted to take into account,<sup>63</sup> the Act lists certain situations in which the creditor may require the signature of an applicant's spouse.<sup>64</sup> However, these situations arise only in jurisdictions that limit the amount of control granted to the wife.<sup>65</sup>

The recent passage of legislation in California extending equal management and control of community property to both spouses<sup>66</sup> should eliminate many of these problems. This legislation implicitly confers on the wife equal credit standing<sup>67</sup> by making the property of the marital community liable for the contracts of either spouse.<sup>68</sup> Because her signature will now bind all community assets,<sup>69</sup> creditors may require her husband's signature only under certain circumstances.<sup>70</sup>

63. For example, knowledge of a person's marital status is sometimes necessary to comply with certain state laws and protect a creditor's interest in collateral to which a spouse may have a right. Gates, *supra* note 5, at 427-30.

64. 12 C.F.R. §§ 202.7(b), (c) (1976), provides:

Where a married applicant applies for unsecured credit in a community property State, a creditor may request or require the signature of a non-applicant spouse if:

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

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

(C) *Signatures on certain instruments.* Where a married or separated applicant applies for secured credit, the creditor may require the signature of the applicant's spouse on such instruments as are necessary, under the applicable statutory or decisional law of a State, or are reasonably believed by the creditor to be so necessary, to create a valid lien, pass clear title, waive inchoate rights to property or assign earnings.

65. See, e.g., *Economic Problems of Women*, *supra* note 3, at 456-57.

66. See, e.g., CAL. CIV. CODE §§ 5105, 5116, 5125, 5127 (West Supp. 1976).

67. The foundation on which this concept of community property is based is the view that marriage is a union that, like a partnership, gives each party a right to manage and conduct the partnership business. See W. WINTER, *THE NEW CALIFORNIA DIVORCE LAW* 98 (1969); Grant, *How Much of a Partnership is Marriage? Community Property Rights Under the California Family Law Act of 1969*, 23 HASTINGS L.J. 249 (1971).

68. CAL. CIV. CODE §§ 5116, 5125 (West Supp. 1976).

69. See CAL. CIV. CODE § 5116 (West Supp. 1976). See also *id.* § 5125 for certain limitations imposed on this rule.

70. See note 64 *supra*.

## *Discrimination Against Separated or Divorced Women*

Women who have recently been separated or divorced also suffer extensive credit discrimination. Because creditors feel that "divorced and separated persons, as a group, are bigger credit risks [and] . . . don't, as a group, pay their bills as well as singles and married people,"<sup>71</sup> women in these former categories have experienced great difficulty in obtaining credit.<sup>72</sup>

A married woman generally relied solely on credit issued in her husband's name whenever she needed credit.<sup>73</sup> If she became separated or divorced and desired to acquire credit in her own name, she frequently found that obtaining such credit was difficult.<sup>74</sup> Because a separated woman more often has to establish new credit than does a man, she more frequently faces creditor prejudice against separated people.<sup>75</sup> For example, creditors often unduly delayed consideration of a recently separated person's credit application.<sup>76</sup> The justification offered by creditors for this practice was that a sudden change in marital status temporarily rendered the applicant less stable and reliable.<sup>77</sup> But there is no requirement that a newly separated man notify his creditors of his changed marital status: Thus, only women were actually subjected to this delay.<sup>78</sup>

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71. Getze, *supra* note 39, at 23, col. 2. See also Smith, *supra* note 26, at 335.

72. Divorced women experience greater difficulty in obtaining credit than do divorced men for the simple reason that upon separation the woman more often has to subject herself to creditor prejudice against divorced people by reapplying for credit. See text accompanying notes 73-75 *infra*. To a lesser extent, widowed women suffer from similar types of creditor-imposed credit disabilities. See, e.g., CONSUMER CREDIT 153; Lilliston, *supra* note 2, at 1, col. 4.

73. See, e.g., Gates, *supra* note 5, at 417.

74. Even if the wife had been deemed creditworthy prior to marriage, her divorce might create problems in re-establishing credit in her own name. CONSUMER CREDIT 152-53.

75. Most married couples' credit is issued in the husband's name. Therefore, upon separation or divorce, he need do nothing more than maintain his existing accounts, while his wife must apply for new accounts. See *Women and Credit* 867; Lilliston, *supra* note 2, at 1, col. 2-3.

76. These delays sometimes extended for as long as twelve months. *Women and Credit* 866-67.

77. See Gates, *supra* note 5, at 427; *Women and Credit* 866.

78. Even when the woman's application was finally considered, she was often penalized for the poor credit ratings of her ex-spouse. Indeed, an employee of one credit bureau indicated that even if a divorced woman requested a new credit file in her own name, only *detrimental* information was transferred to it. Kellog, *supra* note 19, at 152. Similarly, widows often found it so difficult to establish credit in their own names that they continued to use their deceased husband's credit accounts. *Women Now*

The ECOA does much to eliminate these discriminatory practices. It prohibits creditors from making any statements based on an applicant's marital status which would discourage the applicant from applying for credit.<sup>79</sup> More importantly, the Act requires a creditor to consider the credit history of any account which both spouses had used or for which both had been contractually liable in evaluating an applicant's creditworthiness.<sup>80</sup> Thus, creditors must consider a separated woman's joint marital accounts in evaluating her creditworthiness.<sup>81</sup> Finally, the ECOA expressly requires a creditor, within a reasonable time after receiving an application, to notify the applicant of any action taken upon the application.<sup>82</sup>

Divorced or separated women suffered additional discrimination if they were recipients of support payments. These women frequently found that creditors would not readily extend credit on the basis of income derived from alimony, child support, or other form of maintenance payment,<sup>83</sup> for creditors feared that these payments were not reliable sources of income.<sup>84</sup>

Prior to the passage of the ECOA, creditors frequently denied credit to an applicant whose income was based in whole or in part on support payments.<sup>85</sup> Realizing that the creditors' fears might be justified,<sup>86</sup> the legislature permitted creditors to continue to ask

*Want Credit Liberated*, BUS. WEEK, May 6, 1972, at 36; Hyatt, *supra* note 21, at 1, col. 6.

79. 12 C.F.R. § 202.4(a) (1976).

80. 12 C.F.R. § 202.5(j) (1), (2) (1976).

81. See text accompanying note 52 *supra*.

82. 12 C.F.R. § 202.5(m) (1) (1976). Furthermore, if an applicant who is denied credit so requests, the creditor must provide the applicant with the reasons for the denial. *Id.* (m) (2).

83. See, e.g., Statement of Arline Lotman, *Economic Problems of Women*, *supra* note 3, at 484.

84. However, the Citizen's Advisory Council on the Status of Women, in its January 1972, memorandum, *The Equal Rights Amendment and Alimony and Child Support Laws*, mentioned one study which showed that within one year after the decree of divorce, 38 percent of the husbands were in full compliance with the support order. The figure dropped to 28 percent for the second year; 26 percent for the third; 22 percent for the fourth; 19 percent for the fifth; and 17 percent for the sixth through the ninth years. Such figures indicate that those husbands who continue support payments for six years after the divorce decree will probably continue to pay for the next few years. Gates, *supra* note 5, at 417 n.37.

85. See, e.g., Gates, *supra* note 5, at 411, 417.

86. See *Credit For Women*, *supra* note 14, at 878-79.

whether any income stated in an application is derived from support payments.<sup>87</sup> However, the ECOA prohibits creditors from arbitrarily excluding income from consideration merely because it is a support payment.<sup>88</sup> Creditors must now consider support payments as income "to the extent that such payments are likely to be consistently made."<sup>89</sup> Thus, support payments that have been regularly received over a substantial period of time should be included in the evaluation of an applicant's creditworthiness.<sup>90</sup> The ECOA also permits creditors to consider information regarding the party who is obligated to pay the support if the application indicates reliance upon such payments as a basis for repayment of the credit requested.<sup>91</sup>

#### REMEDIES AVAILABLE UNDER THE ECOA

In attempting to eliminate sex and marital status credit discrimination, the ECOA provides numerous sanctions for violations of its provisions. The Act is designed to inform consumers of their credit rights,<sup>92</sup> to enlist their aid in obtaining enforcement, and to compel compliance by creditors through consumer actions.<sup>93</sup>

The provisions which require a creditor to inform a consumer of his or her rights under the Act are clear: Creditors must include

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87. 12 C.F.R. § 202.5(d) (1) (1976). Before a creditor can make such an inquiry, however, it must first disclose to the applicant that such income need not be revealed. *Id.* This Act also permits the creditor to consider whether an applicant is obligated to make support payments in evaluating creditworthiness. *Id.* § 202.5(c).

88. 12 C.F.R. § 202.5(d) (2) (1976).

89. *Id.*

90. *Id.* This section specifically provides:

Factors which a creditor may consider in determining the likelihood of consistent payments include, but are not limited to, whether the payments are received pursuant to a written agreement or court decree; the length of time the payments have been received; the regularity of receipt; the availability of procedures to compel payment; and the creditworthiness of the payor, including the credit history of the payor, where available to the creditor under the Fair Credit Reporting Act or other applicable laws.

The importance of support payments as a credit indicator is arguably minimal, for the majority of divorced women are employed or seeking employment. For example, in 1972, over one-half of all divorcees and widows between the ages of twenty and sixty-five were looking for work, and a woman who is divorced or widowed at thirty-five can be expected to work for at least twenty-five more years. See Adams, *supra* note 21, at 22, col. 1.

91. 12 C.F.R. § 202.5(b) (iv) (1976).

92. Consumer knowledge of the law is sometimes more effective in protecting consumers than is strict enforcement by supervisory agencies. See CONSUMER CREDIT 193-200.

93. See text accompanying notes 99-106 *infra*.

on all application forms a prominent notice regarding the Act's non-discriminatory policy.<sup>94</sup> Because this notice must state the name and address of the government agency responsible for enforcing the ECOA,<sup>95</sup> it serves to encourage anyone who has suffered discrimination to seek enforcement of the Act's provisions.

Moreover, the Act encourages consumer enforcement by permitting a successful plaintiff to recover attorney's fees and court costs.<sup>96</sup> In addition, to ensure that possible plaintiffs have access to pertinent information, the Act requires creditors to maintain for fifteen months records of any written information used in evaluating an applicant's creditworthiness.<sup>97</sup> These provisions, coupled with the fact that, regardless of the amount in controversy, a consumer is entitled to sue in federal court,<sup>98</sup> encourage consumer enforcement of the ECOA.

The ECOA was also designed to compensate injured parties and to punish creditors that violate its provisions. However, creditor liability is not absolute, for the Act exempts from liability those creditors that have made a good faith attempt to comply with its terms.<sup>99</sup> Nevertheless, a party found in violation of the ECOA is

94. 12 C.F.R. § 202.4(d) (1976). See also *id.* § 202.6(b)(ii) (1976), regarding a similar notice which is required to be sent to married couples on accounts established prior to November 1, 1976.

95. *Id.* § 202.4(d) (1976).

96. *Id.* § 202.13(a) (1976). Some state statutes also contain provisions permitting the recovery of court costs and attorney fees if the action is successful. See, e.g., CAL. CIV. CODE § 1812.34 (West Supp. 1976).

97. 12 C.F.R. § 202.9(a)(1) (1976). In addition, if a creditor has notice that it is under investigation for a violation of the ECOA, it must retain such information until final disposition of the investigation. *Id.* § 202.9(c).

98. *Id.* § 202.13(c). This provision thus gives a plaintiff broad discretion in determining whether to bring a claim in state or federal court.

99. *Id.* § 202.11(a) provides:

[I]t shall not be a violation of the [aforementioned] section if the creditor shows by a preponderance of the evidence that at the time of the noncompliance the creditor had established and was maintaining suitable procedures to assure compliance with the section.

See also *id.* § 202.13(b) which contains a similar exemption. This is an important provision because an ambiguous portion of a statute will sometimes leave a party with several reasonable alternatives. The problem is that taking one specific course might cause the party to violate another requirement when looked at from another reasonable viewpoint. A court may prefer one of the other reasonable viewpoints, and this judicial interpretation could result in the creditor being found liable, even though he attempted in good faith to comply with the ambiguous provision. See TIL ACT AMENDMENTS 45-46.



liable for both actual and punitive damages.<sup>100</sup> Although the Act limits to \$10,000 the amount of punitive damages an individual plaintiff can recover,<sup>101</sup> it does permit an injured party to obtain equitable relief against the creditor.<sup>102</sup>

Probably the most important remedial provision contained in the ECOA is the one permitting class actions<sup>103</sup> to be brought by injured parties.<sup>104</sup> Because such suits permit a party who has suffered discrimination to seek legal redress even if a lack of knowledge or funds would otherwise have prevented her from obtaining

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100. 12 C.F.R. § 202.1(a) (1976). The purpose of including a civil penalties section in the Truth in Lending Act was to provide creditors with a "meaningful incentive to comply with the law without relying upon an extensive new bureaucracy." TIL ACT AMENDMENTS 14-15. The ECOA also provides for administrative enforcement of its provisions by government agencies such as the Comptroller of the Currency, Board of Governors of the Federal Reserve System, and others. 12 C.F.R. § 202.12(a) (1976). See also 15 U.S.C. § 1607 (1968).

101. The ECOA also limits creditors' class action liability for punitive damages to either \$100,000 or 1 percent of the creditors' net worth, whichever is less. 12 C.F.R. § 202.13(a) (1976).

102. *Id.* The equitable relief sought can be "in the nature of a permanent or temporary injunction, restraining order or other action" (emphasis added). *Id.* Cf. CAL. CIV. CODE § 1812.32 (West Supp. 1976), which permits either the injured party, or "the Attorney General or any district attorney," to prosecute an action for an injunction.

103. See FED. R. CIV. P. 23.

[O]ne or more members of a class may sue or be sued as representative parties on behalf of all, only if (1) the class is so numerous that the joinder of all members is impractical . . . . (2) There are questions of law or fact common to the class . . . . (3) The Claims or defenses of the representative parties are typical of the claims of [sic] defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Statement of Representative Bob Eckhardt, *Hearings on Class Actions and Other Consumer Protection Procedures Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. (1970). See also Miller, *Class Action Primer*, L.A. Daily Journal Report, Oct. 17, 1973, at 4. The policy considerations underlying class actions have been stated to be the fashioning of an "effective and inclusive group remedy" for persons exposed to "group injuries." *Vasquez v. Superior Court*, 4 Cal. 3d 800, 807, 94 Cal. Rptr. 796, 803, 484 P.2d 964, 971 (1971).

104. 12 C.F.R. § 202.13(a) (1976). The Truth in Lending Act permits an injured party to recover a minimum of \$100 for violations of its provisions. 15 U.S.C. § 1640(a) (1969). This provision has caused many courts to totally deny class actions rather than to require businesses to pay \$100 to each member of a large class and thus subject the business to possible ruin for technical violations of the law. See, e.g., *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972). Therefore, the ECOA amends this Truth in Lending Act provision to allow a maximum recovery in class actions of \$100,000 or 1 percent of the violator's net worth, whichever is less. 12 C.F.R. § 202.13(a) (1976). See also 15 U.S.C. § 1640(a) (Supp. IV, 1974).

relief,<sup>105</sup> class actions protect consumers' interests better than do conventional law suits. The mere threat of a class action is sometimes effective in enforcing compliance with a statute.<sup>106</sup>

#### CONCLUSION

The Equal Credit Opportunity Act is an effort to eliminate credit discrimination based on sex or marital status. Because it specifically prohibits virtually all discriminatory creditor practices, the ECOA essentially eliminates the problems that prompted its enactment. However, the ECOA does more than merely protect the rights of women: It also requires creditors to educate women concerning those rights.<sup>107</sup> Thus, creditors must be certain that any differentiations they make among consumers regarding credit standing "are based on sound, *provable* experience or actuarial statistics."<sup>108</sup> The denial of credit to a woman who, by all objective criteria, is as qualified as a man will no longer be tolerated under the Equal Credit Opportunity Act.

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105. See *Dolgow v. Anderson*, 43 F.R.D. 472, 485 (E.D.N.Y. 1968). Furthermore, as one commentator stated:

When women are denied credit in violation of the law, they have suffered a "group injury" and the denial of an effective group remedy appears to raise Fourteenth Amendment issues of due process.

Comment, *Credit Equality For the California Woman*, 3 U. SAN FERNANDO V. L. REV. 125, 138 (1974).

106. See Kalven & Rosenfield, *The Contemporary Function of Class Suit*, 8 U. CHI. L. REV. 684, 711 (1941). Compare CAL. CIV. CODE § 1812.31(b) (West Supp. 1976), which permits an aggrieved person to recover punitive damages "only in an individual capacity and not as a representative of a class."

107. 12 C.F.R. § 202.4(d) (1976).

108. CONSUMER CREDIT 160.