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In Search of a Uniform Policy— State and Federal Sources of Consumer Financial Services Law

By FRED H. MILLER* and RALPH J. ROHNER**

Any effort to project the vectors of development in the law affecting consumer financial services for the 1980s must take into account the sources from which the legal ground rules will emanate. Those sources are in one sense bifurcated—i.e., the states have long had a significant role in regulating consumer credit and related consumer transactions, and, since 1968, the federal government has been substantially and increasingly involved in standard setting for consumer financial transactions.

At these two levels of government there is further fragmentation of the lawmaking function. Each of the fifty states, and countless local government entities, enact laws without reference to the lawmaking in neighboring jurisdictions or in Washington; attempts to generate uniform state laws have had limited success. At the federal level, it is tempting to think that congressional legislation is perforce of uniform applicability across the nation, and that friction between federal and state initiatives (posed in terms of the preemption of state and local laws by federal standards) can be kept to a minimum. Yet a cursory examination reveals that standards explicitly set by Congress are barely the tip of the federal lawmaking iceberg. The most voluminous federal regulations are generated from federal administrative agencies, among whom there is as much balkanization as among the states.

This article reviews these complex sources of law, and suggests the possible courses of evolution over the next decade.

I. BEFORE 1970—PRIMARILY A STATE REGULATORY CONCERN

A. Mostly Local Markets

As little as a decade ago, in a discussion concerning consumer credit in the 1970s, it was postulated that “consumer credit is preponderantly small and local in both its nature and operation.”¹ That view was confirmed by the National Commission on Consumer Finance, which stated that “for the most part there is no national market for consumer credit. Consumers seldom shop for credit outside their town or city, although there is some mail order

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1. Malcolm, *Consumer Credit—Probings into the Future*, 26 Bus. Law. 899, 900 (1971).

business. . . . But generally, the market for consumer credit is fairly restricted geographically."²

Accordingly, prior to about 1970 substantially all of the control in this field rested with the states. Compared to the range and complexity of federal and state regulation in 1982, of course, the pre-1970 coverage of state laws was limited in scope to usury, licensing of certain lenders, some disclosure through retail installment sales acts, limitations on a few creditor remedies, but not much more.³

B. Emerging National Trends

In May 1968, Congress passed the Truth in Lending Act.⁴ In the minds of most observers it represented a massive shift of control from the states to the federal level. Predictions abounded, of course, that there would be further federal intrusion because, once started, such developments have their own momentum and, in that consumer era, it was politically attractive for Congress to display its interest.⁵

But there were more significant reasons for the federal incursion. In its 1972 report, the National Commission on Consumer Finance perceived that even then the primarily local picture it was painting was subject to change. For example, it recognized that open-end credit was surely the trend of the future; it observed that a majority of credit card banks already were linked in nationwide interchanges that continued to expand; and it predicted the link among this development, credit information systems, and future electronic funds transfer systems. The commission noted that "the mobility of the population and the growth of credit cards demand a nationwide system of credit information," and that "a uniform EFTS will ultimately be necessary to make it workable."⁶ Clearly nonlocal matters demanded uniform rules, and thus it was not by accident that the Fair Credit Reporting⁷ and Electronic Fund Transfer Acts⁸ are federal laws.

There was another factor. The states had quantities of what could be called consumer credit legislation, but its content and scope varied from state to state and from industry to industry. In part this was due to local considerations, to historical progression, and to lobbying efforts of uneven success. Only undue charity would allow a description of state law at the time as other than a hodgepodge.⁹ As long as credit remained local and small in nature and

2. National Commission on Consumer Finance, *Consumer Credit in the United States* 11 (1972).

3. Malcolm, *supra* note 1, at 900. *See generally*, B. Curran, *Trends in Consumer Credit Legislation* (1965).

4. 15 U.S.C. §§ 1601-1613, 1631-1644, 1661-1665 (1976), *as amended*.

5. *See, e.g.*, Malcolm, *supra* note 1, at 899-900.

6. Nat'l Commission, *supra* note 2, at 207, 213.

7. 15 U.S.C. §§ 1681-1681t (1976).

8. 15 U.S.C. §§ 1693-1693r (Supp. 1978).

9. Malcolm, *supra* note 1, at 899-900.

operation, this was perhaps not a critical problem. But as the National Commission further observed:

[D]epository institutions now having dual chartering often grant credit to business firms and consumers far removed from the locale where they obtain their savings. As depository institutions and credit grantors operating on a fairly wide geographical scale, commercial banks and savings and loan associations are endowed with a large measure of national interest.¹⁰

The consumer credit marketplace of 1970, in other words, was increasingly becoming an interstate and even nationwide market.

C. Quests for Uniformity

The dawning of a national market for consumer credit generated activity to draft uniform laws to regulate it. A proposal by the body most involved with uniform state laws, the National Conference of Commissioners on Uniform State Laws, was the Uniform Consumer Credit Code.¹¹ It was immediately enacted by Oklahoma and Utah, and later by a number of other states so that today about twenty percent of the states have a version of it.¹² In addition, portions of it were picked up by other jurisdictions.¹³

On the federal level, legislation which put in place uniform rules across the United States also was quickly and continually enacted from 1968 onward, in those areas where rapid action was considered desirable. First was the Truth in Lending Act,¹⁴ aimed at providing accurate information about credit costs and terms, essential if the credit market was to function rationally on the basis of informed consumer choice. Other enactments emphasizing the disclosure or informational function were the Consumer Leasing Act¹⁵ and, in part, the Electronic Fund Transfer Act.¹⁶ To assure the availability of accurate information about consumers, equally necessary for a rational market, the Fair Credit Reporting Act¹⁷ was passed, and to preclude irrational bias, the Equal Credit Opportunity Act¹⁸ was also enacted. Other laws aimed at improving the efficiency and fairness of the credit market were the Fair Credit Billing Act,¹⁹ restrictions on garnishment,²⁰ the Fair Debt Collection Practices Act²¹

10. Nat'l Commission, *supra* note 2, at 164.

11. Uniform Consumer Credit Code (1969 and 1974 official texts with comments) in Handbook of the National Conference of Commissioners on Uniform State Laws (1970 and 1974).

12. The states are Colorado, Idaho, Indiana, Iowa, Kansas, Maine, Oklahoma, South Carolina, Utah, and Wyoming.

13. For example, the Wisconsin Consumer Act.

14. *Supra* note 4.

15. U.S.C. §§ 1687-1687e (1976).

16. *Supra* note 8.

17. *Supra* note 7.

18. 15 U.S.C. §§ 1691-1691e (1976).

19. 15 U.S.C. §§ 1666-1666j (1976).

and, again in part, the Electronic Fund Transfer Act.²² Further in this respect, the Federal Trade Commission promulgated uniform rules on door-to-door sales²³ and holder in due course,²⁴ and has other proposals in the pipeline.

II. THE 1970s—SHARED FEDERAL AND STATE CONCERNS

A. Lack of Uniformity

During the decade of the 1970s both federal and state governments increased their respective involvements in regulating the consumer financial services marketplace, but consistent or uniform approaches were not achieved at either level.

1. STATE LEVEL

The Uniform Consumer Credit Code did not achieve the uniformity of consumer credit laws it sought. The states initially enacting it did not enact it in its uniform version; for example, Oklahoma made over 200 nonuniform amendments. Some of the substantive ones, and other changes, then were used in a rewrite of the code adopted by later states. Hardly any states have actively considered the code as a whole in recent years.²⁵ But the true failure of the code lay in the fact it was too visionary in its rate structure and in its perception of the unitary nature of the consumer credit market, and not visionary enough in working out the progression of future change and in defining the scope of the subject.²⁶ Accordingly, many of the same forces and interest groups that had created the hodgepodge the code sought to replace opted to keep the comfortable, but outmoded, system in a majority of the states. This is not to say that state law remained stagnant during the 1970s. Far from it, in fact, for laws dealing with all aspects of the consumer financial services market gushed from the state legislatures during the decade. The vast but fragmented nature of state law is apparent to anyone browsing through the state law volumes of the CCH Consumer Credit Guide; successful attempts to synthesize or organize this material are nonexistent or outdated.

2. FEDERAL LEVEL

Uniformity hardly was achieved on the federal level either. Despite the nationwide applicability of the many pieces of federal legislation during the 1970s, true uniformity of law was frustrated for several reasons. One was the policy of limited preemption of state laws, discussed in more detail below. Another arose from the fact that the real federal lawmaking was embodied

20. 15 U.S.C. §§ 1671-1677 (1976).

21. 15 U.S.C. §§ 1692-1692o (Supp. 1978).

22. *Supra* note 8.

23. 16 C.F.R. § 429 (1981).

24. 16 C.F.R. § 433 (1981), *as proposed to be amended*, 44 Fed. Reg. 65,711 (1979).

25. The last state to enact the code was South Carolina, in 1976. Only Minnesota has given it serious consideration since then.

26. *See, e.g.*, Prefatory Note to 1974 Uniform Consumer Credit Code.

less in the congressional statutes than in the multi-faceted regulatory activities of the federal agencies charged with implementing federal legislation. While we do not suggest that the federal agencies' role is necessarily more significant than that of the state governments, the interplay among those federal agencies is more complex and the implications more subtle.

The structure through which Congress and the federal agencies set nationwide standards for the consumer credit marketplace is a reflection of a series of historical accidents more than of a rational plan. Rulemaking and enforcement by the various agencies have created conflicts, overlaps, and gaps in the applicable standards; uneven compliance burdens for creditors; and lack of uniformity in the administration of consumer protections.²⁷ *USLife Credit Corp. v. FTC*²⁸ is an example. There the Fifth Circuit overturned an FTC administrative final order, issued in an enforcement proceeding, as going beyond the literal requirements of the Federal Reserve Board's Regulation Z²⁹ in connection with the disclosure of consumer credit insurance.³⁰ This brief example cannot alone convey the full extent of the problem, however.

The present federal rulemaking structure developed through a series of largely unrelated and uncoordinated events. It involves more than a half a dozen agencies engaged in standard setting through formal regulations that implement legislation, rulemaking for unfair and deceptive practices, ad hoc regulations on particular matters, informal guides and policies, and enforcement activity.

Congress has assigned regulatory responsibilities in different ways to different agencies. Typically, federal legislation states rather broad policy goals, and Congress delegates extensive rulemaking power to supervisory agencies. Congress may delegate rulemaking authority (a) by an explicit mandate to an agency to flesh out statutory details (e.g., the Truth in Lending Act);³¹ (b) by stating a general standard that an agency is to enforce (e.g., unfair or deceptive acts or practices);³² or (c) by implicitly authorizing rulemaking by an agency as an incident to its chartering or supervisory responsibilities for a class of institutions (e.g., the Comptroller of the Currency for national banks, or the Federal Home Loan Bank Board for federally

27. See Rohner, "For Lack of a National Policy on Consumer Credit . . .": Preliminary Thoughts on the Need for Unified Federal Agency Rulemaking, 35 Bus. Law. 135 (1979).

28. 599 F.2d 1387 (5th Cir. 1979).

29. 12 C.F.R. § 226 (1981). Regulation Z is the implementing regulation under the Truth in Lending Act.

30. The FTC is a regulatory agency charged with enforcement of the Truth in Lending Act for certain types of creditors. The board of governors of the federal reserve system is likewise an enforcement body for other creditors but also was delegated overall regulation authority pursuant to the act.

31. 15 U.S.C. § 1604 (1976).

32. 15 U.S.C. § 45(a) (1976) (§5 of the FTC Act).

chartered or insured savings and loan associations).³³ Congress has in fact delegated all three types of authority in the consumer credit area.

(a) *Direct Regulation*

No less than seven agencies have issued formal regulations and rules directly affecting the consumer credit market. The Federal Reserve Board has exclusive regulation writing authority for all creditors under the Truth in Lending Act, including consumer leasing³⁴ (regulations Z and M);³⁵ equal credit opportunity³⁶ (Regulation B);³⁷ and electronic fund transfers³⁸ (Regulation E).³⁹ No agency is authorized to issue regulations under the Fair Credit Reporting⁴⁰ and Fair Debt Collection Practices⁴¹ Acts.

The Federal Trade Commission (FTC), the Federal Reserve Board (FRB), and the Federal Home Loan Bank Board (FHLBB) have statutory authority to issue rules that define "with specificity" unfair or deceptive acts or practices.⁴² The FTC has promulgated two rules that have an impact on consumer credit transactions: the preservation of consumer claims and defenses⁴³ rule (holder rule); and the door-to-door sales rule.⁴⁴ A rule on the sale of used motor vehicles has been issued,⁴⁵ but at this writing awaits congressional review and possible legislative veto. Two others have been pending since 1975: an extension of the holder rule (approved in principle by the FTC in 1979),⁴⁶ and the credit practices rule.⁴⁷ Neither the Federal Reserve Board nor the Federal Home Loan Bank Board has as yet issued any independent rules under this authority. However, if the FTC does issue a rule, both the Federal Reserve Board and the Federal Home Loan Bank Board are required to issue substantially similar rules within sixty days, unless the FRB or FHLBB determine that the practices of banks and savings and loan associations are not unfair or deceptive, or unless a companion rule would interfere with essential policies of those agencies. Thus FTC rulemaking may trigger rulemaking by the other agencies.

33. Agency rulemaking in this area has generally been sustained as a proper exercise of broad enabling powers. *See, e.g.*, *Conference of Federal Savings and Loan Associations v. Stein*, 604 F.2d 1256 (9th Cir. 1979), *aff'd mem.* 445 U.S. 921 (1980).

34. *Supra* notes 4 and 15.

35. 12 C.F.R. §§ 213, 226 (1981).

36. *Supra* note 18.

37. 12 C.F.R. § 202 (1981).

38. *Supra* note 8.

39. 12 C.F.R. § 205 (1981).

40. *Supra* note 7.

41. *Supra* note 21.

42. The authority of all three agencies is provided in section 18(f) of the FTC Act, 15 U.S.C. § 57a(f) (1976), *as amended*.

43. *Supra* note 24.

44. *Supra* note 23.

45. 46 Fed. Reg. 41,328 (1981) (to be codified at 12 C.F.R. § 455).

46. 44 Fed. Reg. 65,771 (1979).

47. 40 Fed. Reg. 16,347 (1975).

A number of agencies have issued regulations pursuant to specific statutes or under their inherent powers. The Federal Reserve Board, through its Regulation C,⁴⁸ dictates the compilation and disclosure of mortgage investment data by all mortgage lenders under the Home Mortgage Disclosure Act.⁴⁹ Each of the agencies having responsibility under the Community Reinvestment Act⁵⁰ (Federal Reserve Board, Federal Deposit Insurance Corporation, Comptroller of the Currency, and Federal Home Loan Bank Board) has issued regulations to implement that act.⁵¹ The Department of Housing and Urban Development (HUD) implements the Real Estate Settlement Procedures Act⁵² disclosure scheme for all mortgage lenders through its Regulation X.⁵³ The Federal Home Loan Bank Board has issued regulations⁵⁴ for the residential mortgage preemption provisions of title V of the Depository Institutions Deregulation and Monetary Control Act (DIDMCA),⁵⁵ applicable to all creditors. Finally, three agencies have issued regulations authorizing variable or adjustable rate mortgages or loans for institutions they supervise, on the authority of the agencies' organic acts.⁵⁶

(b) Indirect Standard-Setting

In addition to rulemaking, each agency can, and most do, set compliance standards for institutions they supervise without formal regulations. Line agencies may issue unofficial interpretations of statutes, whether or not that agency or another agency has issued formal regulations on the subject. Examples are FTC interpretations of the Fair Credit Reporting Act,⁵⁷ Comptroller of the Currency letters construing the Equal Credit Opportunity Act,⁵⁸ Federal Deposit Insurance Corporation, Federal Home Loan Bank Board, and National Credit Union Administration interpretations of the most favored lender provisions of DIDMCA.⁵⁹

Agencies may adopt policy statements of general applicability. An example is the policy statement on disposition of income from the sale of credit life insurance adopted by the Federal Reserve Board, the Federal Deposit Insur-

48. 12 C.F.R. § 203 (1981).

49. 12 U.S.C. §§ 2801-2809 (1976).

50. 12 U.S.C. §§ 2901-2905 (Supp. 1979).

51. 43 Fed. Reg. 47,144-62 (1978).

52. 12 U.S.C. §§ 2601-2617 (1976).

53. 24 C.F.R. § 3500 (1981).

54. 12 C.F.R. § 590 (1981).

55. Pub. L. No. 96-221, 94 Stat. 161 (1980).

56. They are: Comptroller of the Currency (12 C.F.R. § 29); Federal Home Loan Bank Board (12 C.F.R. § 545 subchapter C); and National Credit Union Administration (12 C.F.R. § 701.21-6B).

57. 16 C.F.R. § 600, subchapter F.

58. See, e.g., those reprinted at 5 Cons. Cred. Guide (CCH) ¶¶ 42,091-42,096.

59. FHLBB: 12 C.F.R. § 570.11; NCUA: 12 C.F.R. § 741 (1981). The FDIC interpretation is in the form of an unofficial, unpublished letter from its general counsel.

ance Corporation, and the Comptroller of the Currency, but rejected by FHLBB and NCUA.⁶⁰

Agencies also may promulgate informal ground rules to guide their enforcement practices. Examples are examination policies set by the Federal Financial Institutions Examination Council (comprising all five financial institutions regulators) for compliance with the Truth in Lending,⁶¹ Equal Credit Opportunity,⁶² Electronic Fund Transfer,⁶³ and Community Reinvestment⁶⁴ Acts.

(c) Standard-Setting Through Enforcement

Finally, as the *USLife* case⁶⁵ illustrates, through ad hoc cease and desist proceedings, agencies create a body of quasi precedent. Such a pattern has been particularly discernible in the activity of the Federal Trade Commission. The FTC has issued a number of orders (consent and litigated) under the Fair Credit Reporting Act and the Fair Debt Collection Practices Act, neither of which has implementing regulations. Seven agencies have entered cease and desist orders in cases under the Truth in Lending and Equal Credit Opportunity Acts, where the controlling regulations are issued by the Federal Reserve Board.

As the foregoing demonstrates, the present federal regulatory structure creates frictions among agencies and produces inconsistent, overlapping, and at times contradictory rules.

(d) Blurred Jurisdictional Lines

The agencies' regulatory roles often do not align with the agencies' supervisory responsibilities for discrete segments of the credit industry. For example, Federal Reserve Board regulations B, C, E, M, and Z are applicable to all creditors or financial institutions, even though the Board supervises only about 1,000 commercial banks. The FHLBB's regulation on usury preemption applies to all mortgage lenders, even though the agency supervises only savings and loan associations. Some of the more obvious problems thus generated include: (a) the agency writing plenary regulations may have no first-hand experience, through examinations or the like, with the practices of institutions affected by the regulation. For example, the Federal Reserve Board has no institutional experience with retailer credit; (b) input from line supervisory agencies to the regulator agency tends to be limited and at arm's length (Thus, the FTC routinely provides reports and written submissions to the Federal Reserve Board on truth in lending and equal credit opportunity

60. As reported in Wash. Credit Letter, June 8, 1981, at 5.

61. 44 Fed. Reg. 1222 (1979), supplanted by a joint statement of enforcement policy, 45 Fed. Reg. 48,712 (1980).

62. 46 Fed. Reg. 56,500 (1981).

63. Unpublished (reported in Wash. Credit Letter, July 21, 1980, at 4).

64. 45 Fed. Reg. 63,133 (1980).

65. *Supra* note 27.

but regular staff consultation is absent); and (c) where one agency's regulation is enforced by other agencies, it is nearly impossible to assure consistent application of regulatory standards.

Moreover, where several agencies are authorized to regulate comparable transactions for their respective constituencies, the resulting regulatory schemes can be inconsistent. This creates different ground rules for transactions that are functionally identical, depending on which agency's rule is applicable. Thus, three federal agencies (the Comptroller of the Currency, the Federal Home Loan Bank Board, and the National Credit Union Administration) have issued regulations authorizing variable or adjustable rate mortgages. All three regulations can have significant impact on the overall mortgage market, yet each regulation establishes substantively different rules on maximum rate adjustments, maximum repayment schedules, negative amortization, and disclosure, among other matters.⁶⁶ Further, two of the three adjustable-rate mortgage regulations just noted (OCC and FHLBB) call for disclosure at different times, in different terminology, and in different levels of detail, from the general credit-cost disclosure rules of the Federal Reserve Board embodied in its Regulation Z.

(e) Spillover Effect

Even where an agency's regulation is directly applicable only to creditors or institutions supervised by that agency, the regulation can have direct and significant impact on segments of the market outside the regulator's jurisdiction. The OCC and FHLBB regulations on variable rate mortgages affect the acceptability of those instruments in the secondary mortgage market. The major public investors (Fannie Mae and Freddie Mac) have adopted quite different policies toward the instruments approved by the two regulatory agencies; thus those agency regulations influence the overall intermediation of mortgage money. In further illustration, the FTC holder rule imposes compliance burdens exclusively on sellers, who are subject to FTC jurisdiction. But much of the paper bearing the FTC holder legend (exposing the holder to consumer claims and defenses) is assigned to banks, over whom the FTC has no jurisdiction. Thus the FTC effectively regulates the banks' risk. Except through informal consultation during the rulemaking process, the bank regulators are powerless to influence this allocation.

Also, at least in theory, when the FTC issues a trade regulation rule applicable to FTC-supervised institutions, the Federal Reserve Board and the FHLBB will issue "substantially similar" rules for banks and savings and loans, respectively. But no such companion rule may ever materialize if there are fundamental differences of outlook or policy among the agencies.⁶⁷ The

66. See note 56, *supra*.

67. An example occurred in 1980 when Chairman Volcker of the Federal Reserve Board wrote Chairman Pertschuk of the FTC suggesting withdrawal of the commission's pending credit practices rule. Letter, Volcker to Pertschuk, Dec. 22, 1980.

result would be imbalance in the compliance burdens and consumer protections in comparable transactions in different sectors of the marketplace.

Of course, the same kind of inconsistency or imbalance results when, at an informal or policy level, one agency's position differs from another agency's when both are addressing the same issue. Further, although transactions across the marketplace may be subject to identical standards by statute or by a plenary regulation (such as Regulation Z, applicable to all creditors), in fact different and inconsistent standards may be applied by individual supervisory agencies through their interpretations of what those fixed standards mean. Examples include: (a) the most-favored-lender interpretations under title V of the Depository Institutions Deregulation and Monetary Control Act of 1980 (That statute accords federally insured state banks, savings and loan associations, and credit unions the same preferential interest rate policy as national banks have enjoyed for years.⁶⁸ But the respective supervisory agencies, FDIC, FHLBB, and NCUA, have each construed the statutory policy differently. Thus, NCUA interprets the policy as not applicable to federally chartered credit unions,⁶⁹ while the FHLBB would subject savings and loan associations to *all* consumer protection provisions in the "borrowed" rate law);⁷⁰ (b) despite uniform enforcement guidelines for TIL reimbursement provisions,⁷¹ there are indications that the separate examiner corps of each agency are producing quite different numbers and amounts of restitution orders; and (c) the FTC seems to expect greater specificity in reasons for adverse action under Regulation B than the regulation literally requires.⁷²

(f) Attitudinal Differences

Finally, each agency's position on consumer protection matters is influenced by the agency's tradition and overall supervisory responsibilities. As these differ from agency to agency, it is not surprising that the agency decision makers reflect those conventions differently in their handling of consumer credit regulatory matters.

Since 1938 the FTC has operated under a broad mandate to police unfair or deceptive acts or practices in the market place, primarily through prosecutorial cease and desist proceedings, and only more recently through rule writing. Under a broad mandate like the FTC's, the commission believes it is necessary at times to insist on compliance procedures that may go somewhat beyond the letter of the law, in order to obviate possible future

68. Sections 521-523 of Pub. L. No. 96-221, 94 Stat. 161 (1980). Cf. Arnold & Rohner, *The "Most Favored Lender" Doctrine for Federally Insured Financial Institutions—What Are Its Boundaries?*, 31 Cath. U.L. Rev. 1 (1981).

69. 12 C.F.R. § 741 (1981).

70. 12 C.F.R. § 570.11.

71. *Supra* note 61.

72. See *U.S. v. Montgomery Ward & Co.*, [1974-1980 Decisions Transfer Binder] Cons. Cred. Guide (CCH) ¶ 97,732 (D.D.C. 1979) (consent judgment imposing on creditor a specific formula for determining and disclosing reasons for adverse action under regulation B).

violations. Problems arise when this policy is applied to assure compliance with precise and detailed regulations like the Truth in Lending or Equal Credit Opportunity Acts. For broad standard setting, however, the FTC rulemaking process is long and complex,⁷³ and any final rules are subject to legislative veto and therefore are politically vulnerable. A recent federal court of appeals decision, on the other hand, has held that the FTC may not use individual cease and desist proceedings to create new standards of general application.⁷⁴ This may effectively create a vacuum in which the FTC is unable to pursue its mandate aggressively either through rulemaking or case-by-case prosecutions.

In contrast, each of the five financial institution supervisory agencies is charged to protect the safety and soundness of its constituent depository institutions; that is, to assure the survival of the institution for the benefit of investors and depositors. This concern can cause friction with consumer protection goals. Some would even argue there is an open conflict of interest. Some evidence would be the Federal Reserve Board's general reluctance to take on consumer protection responsibilities and the banking agencies' lack of vigorous enforcement (at least prior to 1977). And, of course, each agency is subject to many pulls and tugs which may distract it from an objective assessment of proper consumer protection policies.⁷⁵

3. OTHER OBSTACLES TO UNIFORMITY

Beyond these regulatory problems exist still other difficulties in the quest for uniformity. Many of the federal laws permit enforcement by private action. Given the sometimes imprecise and often open-ended nature of some of these laws, like the Truth in Lending Act, and the liberal remedy structure that has invited consumers to inject a truth in lending claim in virtually every credit dispute,⁷⁶ it is not surprising that significant nonuniform case law development has occurred. Perhaps the best, or worst, example is the litigation concerning disclosure of the right of acceleration and its consequences, an issue that neither the statute nor the regulation specifically contemplated.⁷⁷ Not until 1980 did the Supreme Court finally resolve this issue in *Ford Motor Credit Company v. Milhollin*.⁷⁸ Its opinion also marked out the standard for judicial handling of similar issues in the future by indicating that the view of the regulatory agency should control unless "demonstrably irrational," and

73. See Smith, *Standards for FTC Rulemaking*, in *Recent Developments, Annual Survey of Consumer Financial Services Law*, 36 Bus. Law. 1248 (1981).

74. *Ford Motor Co. v. FTC*, 654 F.2d 599 (9th Cir. 1981) *withdrawn pending rehearing*.

75. For example, NCUA's institutions are concerned with the unique "common bond" among depositors, borrowers, and management; FHLBB has current worries over thrift survival; the FRB's dominant concern is monetary policy.

76. See, e.g., Willenzik & Leymaster, *Annual Survey—Recent Trends in Truth-in-Lending Litigation*, 35 Bus. Law. 1197 (1980).

77. *Id.* at 1204.

78. 444 U.S. 555 (1980).

that if the regulatory agency is silent on the matter, the courts should hesitate to fill a gap that might have been intentional.⁷⁹

In some ways, perhaps the most significant lack of uniformity on the federal level stems from the failure of Congress to exercise fully the authority upon which all of its actions so far described are predicated.⁸⁰ Quite clearly in deference to the long-standing interest of the states in the area of consumer credit, Congress determined to preserve a role for the states. It has retained a measure of federalism in three ways.

First, several of the federal acts permit transactions that are subject to substantially similar state laws and to adequate state enforcement to be exempted from coverage under the federal law.⁸¹ For example, through this process creditors in Oklahoma are governed by Oklahoma law and not by the Truth in Lending Act.⁸² Even though in practical experience the state law must be virtually "the same as" the federal law rather than "substantially similar," over time there is an all but inevitable divergence because federal amendments less protective of the consumer need not be picked up by the state, nor is the state precluded from enacting more protective changes.⁸³

Second, only "inconsistent" state laws are preempted, and then only to the extent of inconsistency. The definition of inconsistency varies among the several federal acts, but generally it does not preclude state laws that are different from the federal, including those that are "more protective," whatever that means.⁸⁴ Clearly, uniformity is not inherent in this system except for a basic core, and that core might at best be only "quasi-uniform,"

79. The *Milhollin* case is extensively discussed in Willenzik and Schmelzer, *Annual Survey—Truth in Lending Activities During 1980*, 36 Bus. Law. 1133, 1134-41 (1981). See also, Fischer & Abbott, *Supreme Court Truth in Lending Decisions: Historical Footnotes or Precedents for Judicial Sanity*, J. Retail Banking, Vol. III, No. 4 (Dec. 1981), at 64.

80. All authority in this area emanates from the commerce or currency powers of Congress under the Constitution. Federal law being paramount, Congress could have preempted the entire area. See, e.g., Miller, *The Problem of Preemption in Consumer Credit Regulation*, 3 Okla. City U.L. Rev. 529, 531 (1979).

81. This is true, for example, for restrictions on garnishment, the Truth in Lending, Fair Credit Billing, Consumer Leasing, Equal Credit Opportunity, Fair Debt Collection Practices, and Electronic Fund Transfers Acts. However, it is not true in the case of the Fair Credit Reporting Act of the Bankruptcy Code.

82. 12 C.F.R. § 226.12, Supp. III, Par. (c) (1981).

83. A discussion of the Oklahoma experience appears in Miller, *Living with Both the UCCC and Regulation Z*, 26 Okla. L. Rev. 1 (1973). See also Note, *Consumer Protection: Amendments to Truth in Lending Act*, 28 Okla. L. Rev. 567 (1975).

84. Compare § 111(a) (1) of the Truth in Lending Act (state laws relating to the disclosure of information in connection with credit transactions are preempted to the extent those laws are inconsistent but only to the extent of the inconsistency) with section 705(f) of Equal Credit Opportunity Act (similar language to the Truth in Lending Act but adding that a state law is not inconsistent if the law gives greater protection to a protected person). Regulatory provisions may elaborate on these statutory standards. See, e.g., 12 C.F.R. § 226.6(b) (old Regulation Z) and 12 C.F.R. § 202.11 (regulation B).

as in the case of the Truth in Lending Act where even inconsistent state disclosures may be made so long as they are “separated.”⁸⁵

Third, and by far the leading spoiler of uniformity, is the mechanism invented by Congress, sometimes called reverse preemption, where the federal enactment provides that a specific state statute can override the federal preemption and reinstate state law no matter how dissimilar it may be to the federal enactment.⁸⁶

B. Failures Associated with Nonuniformity

1. POLICY DISSONANCE

Unfortunately, the limited preemption posture of some federal laws, while preserving as much state policy as possible, often operates to create a new hybrid policy which either does not make sense or represents a position not desired by either level of government. The first situation is illustrated by the current state of affairs with respect to truth in lending in Oklahoma. Because transactions involving federally chartered lenders are not covered by the Oklahoma exemption,⁸⁷ a national bank may begin to comply with the simplified federal truth in lending rules immediately,⁸⁸ but since the state disclosure rules are not preempted, the bank must also comply with the present older version of the Truth in Lending Act which still is Oklahoma law.⁸⁹ There is obviously no gain in that, and no sense.

An example of the second situation occurred in a case involving the federal restrictions on garnishment and the Ohio statute regulating garnishment.⁹⁰ Essentially, the federal statute was found to preempt state law in part but not in whole, which produced a rule not in accord with the views of either the federal or state officials and a policy arguably more restrictive as to garnishment than either Congress or the Ohio legislature had intended.⁹¹

Somewhat less inadvertent but no less deleterious is the vicious circle Congress created with respect to truth in lending simplification. Concerned with the problems of inconsistent state disclosure rules and excessively

85. 12 C.F.R. § 226.6(c) (1981). Under new Regulation Z, the rule is less clear but arguably the same—at least until the Federal Reserve Board determines that state law is in fact inconsistent. 12 C.F.R. § 226.28(a)(4).

86. This method has been used in the preemption of state usury laws contained in title V of the Depository Institutions Deregulation and Monetary Control Act of 1980. See §§ 501(b)(2), 512(2), 525. It also finds limited use in the Bankruptcy Code in § 522(b)(1) dealing with exemptions.

87. 12 C.F.R. § 226.12, Supp. III, Par. (c)(1) (1981).

88. Although the simplification amendments to the Truth in Lending Act are generally not mandatory until October 1, 1982, creditors may comply with revised Regulation Z any time after April 1, 1981. A discussion of this matter appears in Willenzik & Schmelzer, *supra* note 79, at 1158.

89. The problem lies with the state law, which is ironic as it was this state law that had to be substantially similar to obtain an exemption from federal law in the first place.

90. *Hodgson v. Cleveland Municipal Court*, 326 F. Supp. 419 (N.D. Ohio, 1971).

91. A more extensive discussion appears in Leonard & Tidwell, *Consumer Credit Regulation: Is Federal Preemption Necessary?*, 35 Bus. Law. 1291, 1297 (1980).

detailed disclosures resulting in "information overload" for consumers,⁹² Congress addressed these problems by authorizing the Federal Reserve Board to make determinations relating to state-law inconsistency that carried insulation from liability both under the federal law and under state law.⁹³ Rather than dehorn the problem by preemptive amputation, Congress simply bucked it to the Federal Reserve Board. To date, however, at least with respect to closed-end disclosure, there has been no rush for determinations. Rather, creditors are adding all the required state, and any additional, information to their credit contracts, often resulting in longer forms and probably even more confusion from inconsistency and massive information overload than was the case previously.

The hands-down winner for poor policy is unquestionably the method that lets reenacted state law override the federal, as it not only leads to non-uniformity but allows a state to veto the federal policy.⁹⁴ Perhaps the prime example is section 522 of the Bankruptcy Code. It was widely recognized that under the old bankruptcy law, which allowed the bankrupt only the exemptions permitted by the state, people in Texas and some other states survived bankruptcy better than debtors in more parsimonious jurisdictions.⁹⁵ A national law should have uniform national application, and for that reason section 522 of the new code created a set of federal exemptions. But section 522(b)(1) allows a state to opt out. More than thirty states have done so, thus destroying uniformity and making a mockery of the federal policy embodied in both the Bankruptcy Code and the equal protection clause of the federal constitution.⁹⁶

These examples point up the difficulty of trying to construct uniform policy on a federal model, with the states and the national government acting independently and often seemingly at odds with each other.

2. COST AND LIABILITY

The complexity and lack of certainty generated by multiple sources of law obviously increase the cost of consumer credit protection, to the real benefit of no one if the complexity and uncertainty are not objectively warranted.

92. See O'Connor, *Annual Survey—Truth in Lending Simplification*, 36 Bus. Law. 1161 (1981) and S. Rep. No. 73, 96th Cong., 1st Sess. 3 (1979), reprinted in [1980] U.S. Code Cong. & Ad. News 281-82.

93. Section 111(a)(1) of the Truth in Lending Act, as amended. A discussion of the liability problem appears in Miller, *supra* note 80, at 533.

94. The counterargument is that it allows variance for local conditions. Somehow that seems more an argument against the fact of federal action than one in support of the form it takes.

95. See, e.g., Prefatory Note to Uniform Exemptions Act in Handbook of the National Conference of Commissioners on Uniform State Laws (1976). Ironically, this uniform state act was promulgated in an attempt to alleviate through state action the contemplated lack of uniformity.

96. Court manufactured limitations, such as in *Cheeseman v. Nachman*, 656 F.2d 60 (4th Cir. 1981), requiring any state exemption law to offer at least *some* exemptions comparable to those in § 522, do not seriously qualify this observation.

Reliable cost-benefit analyses are lacking in this area, but limited studies have indicated that the compliance costs for consumer protection laws are considerable.⁹⁷ In addition, complexity and uncertainty that carry with them significant potential liability may operate to pervert the purpose of the law. It is no secret, for example, that truth in lending serves less to inform consumers than as a litigation tool to permit consumers leverage on issues where they otherwise would have none.⁹⁸ While perhaps no law or set of laws can ever strike a perfect balance in this regard, there seems little debate that the dual structure of consumer credit regulation that prevailed through most of the 1970s was substantially imperfect.

3. RELATIONSHIP OF CONGRESS AND THE FEDERAL AGENCIES

On the federal level itself, it is clear that uneven compliance burdens, uneven consumer protections, and conflicting agency roles are all undesirable. The fragmented structure that produces these results derives from the piecemeal handling of consumer issues by Congress. One could argue then that the answer is obvious:

Congress should exercise much closer and more detailed supervision, and leave less of the law making to federal agencies. However, the credit marketplace may be in such a constant state of flux that it would be unwise for Congress to attempt to regulate that market comprehensively and systematically by statute. The legislative process is too imprecise, and changes occur too fast, to carve the ground rules in statutory stone. Moreover, although there is no overall federal consumer credit code, Congress has in fact made major value judgments about the credit marketplace: full disclosure, nondiscrimination, no unfair or deceptive practices, access to personal information (fair credit reporting), and so on. The recent and pending usury preemptions embody other policies: competitive pricing without credit subsidization or allocation. Ideally, it may be that administrative agencies, operating under properly circumscribed grants of authority, are in a better position to perform those functions that create and maintain consistent policy from the federal level: monitoring and appraisal of marketplace activity on a routine basis; and adoption, modification, or repeal of specific standards through interpretations and enforcement activity. It is hoped that agency accountability can be maintained through regular and rigorous Congressional oversight. The federal agencies are prone, however, to uncoordinated—and hence nonuniform—law making, as described above, so that the problem of inconsistency at the federal level remains. Just as Congress has been unwilling to come seriously to

97. See, e.g., Board of Governors of the Federal Reserve System, *Exercise of Consumer Rights Under the Equal Credit Opportunity and Fair Credit Billing Acts*, 64 Fed. Res. Bull. 363 (1978); Peterson, *The Costs of Consumer Credit Regulation*, Issues in Bank Regulation (Winter 1979) (available as Reprint No. 13, Credit Research Center, Purdue Univ.).

98. See Landers, *Some Reflections on Truth in Lending*, 1977 U. Ill. L.F. 669, 684.

grips with the problems of inconsistent state laws, so too has it failed to keep the federal agencies' roles aligned.

One tends to think of the fragmented federal agency regulatory structure as the *result* of Congress' piecemeal approach to consumer protection laws. While this is no doubt true, in the sense that Congress put that structure in place, it may be more accurate to think of that structure as the *cause* of federal-level nonuniformity. That is, if it be conceded that Congress cannot and should not attempt to control every facet, and all the detail, of the consumer marketplace by explicit federal statute, then the overall implementation of consistent federal policy (through regulations, interpretations, and enforcement strategies) can only be done consistently and with balance by the regulatory agencies acting in concert. And this they have not done.

III. PROSPECTS FOR THE 1980s

Despite the policies of the current administration, there is no basis whatsoever either for a complete federal takeover of the regulation of consumer financial services, or for a complete federal abdication of that role in favor of the states. If neither of these drastic restructurings is likely, what then is possible to improve the current state of affairs? The answers lie in efforts to produce better coordination at both levels of government and between them.

A. State Action

A number of advantages adhere to state action:

1. EXPERIMENTATION

Generally, an individual state can experiment more easily than when a national policy is involved, as there are fewer interests to balance and the risk is less if the experiment misfires. For example, out of three or four different ways to address the problem, perhaps the flat eradication of holder-in-due-course in consumer transactions was the crudest instrument.⁹⁹ Nonetheless, the FTC rule¹⁰⁰ chose that technique, depriving the states of their chance to try more surgical methods.

2. DIVERSITY

In many cases, a core of uniformity is all that is called for; differences for local conditions or views beyond that are not harmful and are indeed desirable. For example, the fact that the Equal Credit Opportunity Act does not prohibit consideration of an applicant's age should not preclude a state

99. For example, one might treat the problem as one of unconscionability. One might use a notice concept as the 1969 version of the Uniform Consumer Credit Code did. One might allow holder in due course status in return for other benefits, such as a lower interest rate.

100. *Supra* note 24.

that perceives that older persons are subject to discrimination from forbidding inquiries as to age if it believes the benefit offsets the detriment.¹⁰¹

3. RESPONSIVENESS

If for no other reason than scale, state regulation and enforcement of consumer credit regulations is likely to be more effective and more responsive to particular circumstances. Perhaps it is simply that state legislators and bureaucrats are more reachable and are spread less thinly. Certainly it is true that many state legislatures have responded to the interest-rate crunch by adjusting rate ceilings upward to maintain the market, or have adopted widespread reforms (such as through the Uniform Consumer Credit Code [UCCC] or comparable legislation), with the approval of the voters. Similarly, state agencies have at times been aggressive enforcers of the consumer protection laws, also with apparent public approbation.¹⁰² In any event, overall this sort of local government involvement seems more efficient and perhaps more beneficial than widespread private litigation, a perspective evinced by the emphasis on restitution and the deemphasis on private action in the Truth in Lending Simplification Act.¹⁰³

4. BALANCE

Perhaps because the initial involvement in this area was at the state level, federal intrusion has tended to be piecemeal. For example, the Truth in Lending Act was not designed to have an impact on state law apart from disclosure.¹⁰⁴ Nonetheless, it soon became obvious that the policy involved in disclosure of cash discounts¹⁰⁵ was being frustrated when state law characterized the discount as a finance charge. The federal law was then amended to cure the difficulty.¹⁰⁶ The point is, consumer credit is a unitary whole and not just a series of parts. As the National Commission on Consumer Finance observed in its report, considerations involving remedies are inextricably interwoven with rates and availability.¹⁰⁷ Thus for Congress to preempt state rate ceilings without giving attention to consumer protection provisions would

101. 12 C.F.R. § 202.11(b)(1)(iv) (1981) nonetheless preempts such a state determination.

102. One of us concedes that the hypothesis in the preceding sentences can be advanced for purposes of argument, but has grave doubts whether more than a small handful of states are capable or prepared to undertake the systematic policing of consumer markets. In the worst case, state legislators and bureaucrats may be "reachable" in the wrong sense of the word.

103. Sections 108(e) and 130 of the Truth in Lending Act, *as amended*.

104. Section 111 of the Truth in Lending Act makes this clear.

105. Under section 167 of the Fair Credit Billing Act, 15 U.S.C. § 1666f, a discount offered by a seller to induce payment by cash or other means not involving the use of a credit card is not a finance charge to be disclosed and no card issuer may prohibit a seller from offering such a discount.

106. Section 171(c) of the Fair Credit Billing Act, 15 U.S.C. § 1666j.

107. *Supra* note 2, at 24.

certainly unbalance the market.¹⁰⁸ Continuous state involvement can then be justified to maintain desirable equilibrium.

Obviously, in matters affecting the conduct of business on a nationwide scale, efficient state government can be conducted only under uniform state laws. Notwithstanding this truth and the cited benefits of actions at the state level, the quest for uniformity within a reasonable period at the state level has not gone well. To cite merely two examples, even though a substantial number of states have availed themselves of the opportunity afforded by section 522(b)(1) of the Bankruptcy Code, none has chosen to enact the Uniform Exemptions Act. And, with the exception of Minnesota, which is considering the Uniform Consumer Credit Code, none of the states opting out of the federal preemption of usury laws has done so by enacting the balance of a realistic rate structure and consumer protections that constitutes the UCCC, although several states opting out, like Colorado and Maine, were already UCCC states. While it is undoubtedly both foolish and presumptuous to predict, this past history would seem to bode ill for action on the state level alone. As state diversity, bred by limited preemption and reverse preemption, increases and the attendant complexity and uncertainty lead to more substantial costs and impinge on policy goals, it is likely the federal level will not play a diminishing role.

B. Balanced Dual Action

What the federal role will be is still largely unformulated. It is reasonably clear that, overall, the limited approach that was tried in the 1970s out of deference to our federal system has not worked well. It is less clear what will replace it. Full federal preemption is at best a theoretical possibility. Nothing at present indicates the likelihood of such a major shift and there is still much evidence to the contrary, including S. 1720, which in one part would broadly preempt state usury laws but which still contains an opt-out feature, and which in another part would broadly preempt state laws within the scope of the Truth in Lending Act but again allows a state to override the preemption. Nor can one read bills like S. 1720 as contemplating a full-scale revival of state control.¹⁰⁹

As further thought is devoted to these issues, it must become obvious the old methods will not suffice. Rather, other ideas are needed.

108. Congress provided linkage between rates and contract protections only in connection with usury preemption in transactions involving residential manufactured housing under section 501 (c) of the Depository Institutions Deregulation and Monetary Control Act of 1980.

109. Some measure of retrenchment at the federal level may occur in the name of "deregulation," but this will be more like the simplification of the Truth in Lending Act than a wholesale reallocation of law-making and enforcement authority to the states. The credit industry itself, engaged in or poised for interstate operations, wants no return to the pre-1970 state law hodgepodge.

1. LIMITED PREEMPTION AND CONTROLLED EXPANSION

One possibility has already been used by Congress in Section 111(b)(2) of the Magnuson-Moss Warranty Act.¹¹⁰ It is to allow the federal level to establish a preemptive core of rules but to allow the states to create a penumbra of additional protective rules provided that they furnish significantly increased benefits and do not unduly burden interstate commerce. A federal regulatory agency, presumably the Federal Reserve Board, would be charged with making the determinations.¹¹¹ This approach would permit the diversity for local conditions that is said to be the virtue of the reserve preemption method but would not allow the overturn of a minimum federal standard.

2. FEDERAL CONTRACT

A somewhat simpler concept than the one just described but one which is also based on a variation of the reverse preemption approach is the idea of an optional federal standard. This concept would have Congress enact the body of rules it determined was fair for consumer credit transactions; e.g., it would write a sort of “federal contract” and the boundaries into which it would fit.¹¹² The product might not be greatly different from an updated and expanded Uniform Consumer Credit Code. Then creditors, not states, would be allowed to opt out. They could gain the advantages, say, of a higher rate under the federal law by also incorporating into their transactions certain consumer protections specified in that federal law, e.g., no attorney’s fees on collection. In theory, this would allow a multistate creditor to choose a uniform law and leave intrastate creditors, familiar with their own laws, to choose that law rather than the uniform federal terms if they wished.

3. FEDERAL LEVEL UNIFORMITY

It is also unlikely that the old ways of operation at the federal level alone will suffice in the 1980s and beyond.

By one view, the present fragmented system is the best we can do. We more or less understand it, and there may be some value in having different agencies bring different approaches to consumer protection. Status quo, however, connotes an unchanging system, and the pattern in recent years is toward more and more splintering of regulatory roles. Regulatory chaos may lie along this path.

An alternative would be to assign all regulation writing for consumer credit to one existing agency. This would tend to eliminate multiagency frictions and overlaps with respect to rulemaking, but would not remove the problems of

110. 15 U.S.C. §§ 2301-2313 (1975).

111. A more detailed explanation appears in Leonard & Tidwell, *Consumer Credit Regulation: Is Federal Preemption Necessary?*, 35 Bus. Law. 1291, 1308-1309 (1980).

112. This approach is the idea of Nathaniel E. Butler, former associate director of the division of consumer and community affairs at the Federal Reserve Board.

inconsistent interpretation and application of those rules, especially through enforcement actions. To the extent all the existing agencies have special constituencies, and ingrained attitudes and track records, none is ideally situated to take on the larger policy function; the assignment of all rulemaking to one such agency could compound those institutional conflicts. It could also be viewed as a "victory" of one agency's philosophy over another's.

Still, some measure of rulemaking consolidation into an existing agency could be a useful intermediate step toward more comprehensive realignment. The most obvious candidates would be the Federal Trade Commission (because of its longstanding jurisdiction over unfair or deceptive acts or practices) or the Federal Reserve Board (because of its extensive regulation writing experience under various statutes like the Truth in Lending Act).¹¹³

A more far-reaching proposal would be a new bureaucratic unit with a structure derived from recommendations of the National Commission on Consumer Finance.¹¹⁴ With changed circumstances and much new law, however, the entity would have a somewhat different configuration than the "Bureau of Consumer Credit" proposed by NCCF.

Regulatory responsibility for the consumer credit market would be vested in this new bureaucratic entity, with the following features:

(a) the new regulatory entity would be autonomous and free standing, or perhaps allied generally with all the existing agencies having supervisory roles for the consumer credit market; in any event it would not be subservient to any existing agency's dictates. Examples of the kind of stature this entity should enjoy are found in the Securities and Exchange Commission, or the Consumer Product Safety Commission;

(b) the new regulatory body would have exclusive authority to issue regulations and rules (and interpretations) in several areas—it would issue all regulations necessary to implement federal consumer credit legislation, i.e., it would assume the functions now performed by the Federal Reserve Board, FHLBB, and HUD (with respect to RESPA) and it would be the exclusive source of rules proscribing unlawful practices in consumer credit transactions, replacing the present FTC, Federal Reserve Board, and FHLBB authority in that area;

(c) all the agencies exercising line supervisory responsibilities for segments of the consumer credit industry would continue to function under their traditional mandates—e.g., to assure the safety and soundness of depository institutions. Where those agencies acted to authorize new forms of customer services, the new centralized entity would have limited authority to regulate the consumer protection aspects of those transactions. For example, the bureau should have the last word on disclosure requirements for adjustable rate mortgages authorized by the OCC, FHLBB, or NCUA;

113. See note 108, *supra*.

114. *Supra* note 2, at 58-59.

(d) existing agencies with enforcement responsibility (and enforcement apparatus, such as bank examinations) would continue to perform that function. But to assure that the laws and regulations were applied consistently and evenly, the new regulatory entity would perform a coordinating and supervisory role with respect to the enforcement efforts of the line agencies (comparable to the functions of the present Federal Financial Institutions Examination Council).

Centralized standard setting accomplished in this manner could eliminate or reduce the undesirable effects of the present regulatory fragmentation; the centralized regulator would be less susceptible to the ingrained and at times conflicting concerns of the line agencies for safety and soundness; the bureau would be a central repository of knowledge and expertise about the entire consumer credit marketplace; the entity should be able to reflect a balanced sensitivity to all consumers and all parts of the industry; and the centralized entity could more efficiently deal with common concerns such as complaint handling, consumer education, and coordination with state officials.

On the negative side, the creation of a new entity could be perceived as a new layer of bureaucracy in an era of deregulation, or as the first step toward consolidating all bank regulatory functions. In fact, by displacing separate consumer credit shops in a number of existing agencies the new entity could result in a net reduction in the bureaucracy; but the issue of a single bank regulator is far beyond the scope of this suggestion. More substantively, the creation of a strong new entity could be frustrated by the logistics of relocating personnel from existing agencies (with attendant rivalries and desire to retain their best people), or of staffing up from scratch; lacking its own enforcement arm, or examination powers, the agency might suffer from lack of in-house expertise on marketplace practices; and centralization could preclude healthy regulatory competition.

Whatever the merits of these views, before centralization or rulemaking can occur, a number of matters need further analysis. This analysis could be conducted by Congress directly (through hearings, with or without draft enabling legislations), by an independent study commission, or even by a task force of representatives from the existing agencies. Open issues include, but are not necessarily limited to:

(a) should the agency's area of responsibility be limited to consumer credit, narrowly defined? What of electronic fund transfer services, or the nonconsumer aspects of ECOA? Should the scope include deposit services, or all financial services for consumers? At what point would the regulatory responsibility of the new entity stop and the organic supervisory powers of the existing agencies continue, e.g., who would issue regulations authorizing and dictating the substance of variable rate mortgages?

(b) would the agency be altogether free standing, or could it function properly as a component of some larger structure—e.g., might it be put on a basis comparable to the FFIEC but with broader membership? How would it

be funded, through Congressional appropriations, "user" fees, or assessments against existing agencies? Would its work be directed by a single administrator, or by a board or commission, and if the latter, with how many members, selected on what basis?

(c) what agency powers would be necessary to carry out its mandate? The power to require reports from other agencies, state and federal? To subpoena documents and testimony from witnesses? To intervene in other agency proceedings, either in connection with the enforcement of existing rules, or with respect to corporate mergers or acquisitions which might affect competition in consumer markets? Should the agency operate under the Administrative Procedure Act or otherwise?

(d) to what extent, and how, would existing agencies be assured of input into the decision making of the new agency affecting institutions supervised by those existing agencies?

IV. CONCLUSION

Fragmented federal rulemaking in the consumer credit area has led to uneven application of standards, conflicting and inconsistent rules, and anomalous overlaps and gaps in regulatory coverage. Dual sources of law between federal and state levels, with limited preemption of state legislation and in many cases even state preemption of federal law, has led to uncertainty, complexity, and other undesirable consequences. As the volume of legislation and other standard-setting activity increases in this area, these undesirable consequences multiply. What will prove workable to replace a structure that has largely outlived its feasibility is undetermined as the 1980s begin. While this article has made several suggestions, perhaps all that can be safely concluded is that the 1980s are not likely to see markedly fewer sources of consumer financial services law but are likely to see more consistency and uniformity in the sources that survive.