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A SUGGESTED ANALYSIS FOR REGULATION OF EQUAL CREDIT OPPORTUNITY

Linda S. Hume*

I. THE PROBLEM

In its 1972 report to the President and Congress, the National Commission on Consumer Finance called for legislation to insure that every consumer would have equal access to the credit market and "that credit should never be denied solely because of characteristics such as race, creed, color, occupation or sex."¹ This call reflected both a recognition of the growing economic importance of the ability to make credit purchases² and a concern that many consumers were denied credit because of their membership in a class, rather than because of any individual lack of credit worthiness.³ As part of this broader investigation of the special problems of availability of credit, the Commission identified difficulties women in particular faced in obtaining consumer as well as mortgage credit.⁴

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1. NAT'L COMM'N ON CONSUMER FINANCE, CONSUMER CREDIT IN THE UNITED STATES 151 (1972).

2. See *id.* at 5-21. Creditor representatives, whose testimony in congressional hearings included the presentation of data on the credit volume in their own industry, underscored the significant increase in the volume of credit since World War II—from \$5.7 billion to \$157.5 billion. See *Credit Discrimination: Hearings on H.R. 14856 and H.R. 14908 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 93d Cong., 2d Sess., pt. 1, at 306 (1974) (statement of Evan H. Housworth, Sr., Vice-President, Citizens & Southern Nat'l Bank) [hereinafter cited as *1974 Credit Discrimination Hearings*].

3. These problems first received nationwide attention after a hearing held by the Commission in May 1972. See NAT'L COMM'N ON CONSUMER FINANCE, *supra* note 1, at 151-60. Congressional committees reporting later on proposed legislation voiced similar concerns. See, e.g., S. REP. NO. 93-278, 93d Cong., 1st Sess. 19 (1973).

4. The problems of women identified by the Commission included the following:

- (a) Single women had more trouble obtaining credit than single men.
- (b) Married women were required to reapply for credit.
- (c) Married women were unable to establish credit in their own names.
- (d) The wife's income would not be counted when a married couple applied for credit.
- (e) Divorced, separated and widowed women were unable to establish credit because prior accounts were in the husband's name.

See NAT'L COMM'N ON CONSUMER FINANCE, *supra* note 1, at 152-53.

The Commission's report triggered a flurry of activity in the Congress⁵ and in a number of states.⁶ Investigative hearings held by advisory committees to the United States Civil Rights Commission⁷ and various state committees⁸ on the status of women specifically explored credit problems of women as part of their larger investigations of the economic problems of women.⁹ These investigations consistently produced evidence that creditors were applying different standards to evaluate similarly situated men and women and that married women faced additional difficulty in obtaining, keeping, or re-establishing credit during a transition from one marital status to another.¹⁰

Creditors asserted that various state property laws that inhibit credit grantors were primarily responsible for credit practices that disadvantaged women.¹¹ Consequently, the National Commission on

5. 1974 *Credit Discrimination Hearings*, *supra* note 2, pt. 1, at 13-14 (opening statement of Hon. Leonor K. Sullivan). Numerous bills were introduced in the Ninety-Third Congress. See Holcomb, *Equal Credit Legislation in the 93rd Congress, Analysis of the Major Bills*, in *Economic Problems of Women: Hearings Before the Joint Economic Comm.*, 93d Cong., 1st Sess., pt. 3, at 446-65 (1973) [hereinafter cited as *1973 Hearings on Economic Problems of Women*].

6. The drive for equal credit opportunity for women was spearheaded by women's groups throughout the country. 1974 *Credit Discrimination Hearings*, *supra* note 2, pt. 1, at 13. See, e.g., Gates, *Credit Discrimination Against Women: Causes and Solutions*, 27 *VAND. L. REV.* 409, 418 (1974), citing Campbell, *Women and Credit*, in *MANUAL OF THE NATIONAL ORGANIZATION FOR WOMEN 1* (1973).

7. See, e.g., KANSAS ADVISORY COMM., U.S. COMM'N ON CIVIL RIGHTS, *THE AVAILABILITY OF CREDIT TO KANSAS WOMEN* (1975); UTAH ADVISORY COMM., U.S. COMM'N ON CIVIL RIGHTS, *CREDIT AVAILABILITY TO WOMEN IN UTAH* (1975) [hereinafter cited as *UTAH STUDY*].

8. See, e.g., CALIFORNIA COMM'N ON STATUS OF WOMEN, *TRANSCRIPT OF PUBLIC HEARING ON THE STATUS OF WOMEN 146* (1973); PENNSYLVANIA COMM'N ON THE STATUS OF WOMEN, *CREDIT REPORT* (1973); MISSOURI DEP'T OF LABOR AND INDUSTRIAL RELATIONS COMM'N ON THE STATUS OF WOMEN, *CREDIT STUDY* (1973). See also OREGON STUDENT PUBLIC INTEREST RESEARCH GROUP, *NO CREDIT FOR WOMEN* (1973); Center for Women Policy Studies, *Women and Credit: A Listing of Activities in the Public and Private Sectors Relating to Women and Credit* (undated) (on file in University of Washington Law Library). For citations of other investigations, see Gates, *supra* note 6 at 412 n.9; Comment, *Credit for Women in California*, 22 *U.C.L.A. L. REV.* 873 (1975).

9. 1973 *Hearings on Economic Problems of Women*, *supra* note 5, at 151-53, 191-210, 213-17.

10. Similar problems were documented in consumer credit of every type. e.g., credit cards, secured or unsecured loans, mortgage loans, and credit accounts. See, e.g., *id.*

The author has tentatively concluded that a thorough analysis of the creditor's needs should include consideration of problems peculiar to the type of credit being extended. The problem, however, is not explored in this article.

11. Gates, *supra* note 6, at 413.

The later testimony of credit industry representatives on pending congressional legislation reflects a similar position regarding the inhibitory effect of state laws. See, e.g., 1974 *Credit Discrimination Hearings*, *supra* note 2, at 303, 434-36 (state-

Consumer Finance urged state legislatures to review and, where appropriate, amend state laws that adversely affected the eligibility of women for credit.¹² The actual extent of the inhibitory effect of state laws was disputed,¹³ however, and pressure continued for the passage of state and federal laws aimed specifically at discrimination because of sex and marital status in credit transactions.

II. THE LEGISLATIVE RESPONSE

The State of Washington was a leader in this area of regulation. In early 1973, it passed one of the most comprehensive and detailed state statutes to assure equal opportunity in credit transactions.¹⁴ The Washington statute prohibits discrimination in credit transactions on the basis of race, creed, color, and national origin as well as sex and marital status by specifying that certain practices are unfair. Thus, under the statute, it is an unfair practice for a person¹⁵ to deny credit, restrict the amount and use of credit, impose different terms and conditions for credit, increase charges for credit, or require increased collateral to secure credit if these acts are based on membership in the groups identified above.¹⁶ These practices are forbidden "in connection with any credit transaction,"¹⁷ a term that is broadly defined by the statute to cover nearly every imaginable credit situation.¹⁸

The existence of state anti-discrimination legislation such as Washington's did not significantly lessen pressure for federal equal credit opportunity legislation for several reasons: a number of states did not

ments of Homer L. Stewart, Jr. on behalf of the American Bankers Association, and Richard F. Kerr on behalf of the National Retail Merchants Association).

12. See NAT'L COMM'N ON CONSUMER FINANCE, *supra* note 1, at 153.

13. See, e.g., Gates, *supra* note 6, at 412-18. See also Littlefield, *Sex-Biased Discrimination and Credit Granting Practices*, 5 CONN. L. REV. 575 (1973); Comment, *Women and Credit*, 12 DUQ. L. REV. 863 (1974).

14. Ch. 141, 1973 Wash. Laws, Reg. Sess. 418, amending WASH. REV. CODE ch. 49.60. House Bill No. 404, sponsored by the Washington State Women's Council, was introduced in the House of Representatives in January 1973. H.R. JOUR., 43d Wash. Legis., Reg. Sess. 270 (1973). By March, it had been passed by both houses of the legislature. *Id.* at 859; S. JOUR., 43d Wash. Legis., Reg. Sess. 696-97 (1973).

15. As defined by the statute, "person" includes: "one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees and receivers or any group of persons . . ." WASH. REV. CODE § 49.60.040 (1976).

16. *Id.* § 49.60.176. It is also an unfair practice to attempt to do any of the practices defined in the section. *Id.* § 49.60.176(1).

17. *Id.*

18. See *id.* § 49.60.040.

enact such legislation,¹⁹ there was active criticism of the state statutes that did exist,²⁰ and Congress appeared to be strongly committed to enactment of this type of consumer protection legislation.²¹ Therefore, in 1974, Congress passed the Equal Credit Opportunity Act²² and amended the Act in 1976 to broaden its coverage and clarify its meaning.²³

The 1974 Act contains only one short prohibitory section: it is now

19. By the time of the 1974 *Credit Discrimination Hearings*, 14 states and the District of Columbia had enacted some form of legislation to regulate credit discrimination on the basis of sex and marital status. See generally 2-4 CONS. CRED. GUIDE (CCH).

20. Most of the state statutes were simply "layered" over existing state property laws and had no real effect on them, or at least on creditors' perception of their requirements. See, e.g., UTAH STUDY, *supra* note 7, at 25-26. Women repeatedly testified before the Advisory Committee that credit managers erroneously told them that the state law required a husband's signature on a joint open-end account because "the husband is solely liable . . . for a joint account." *Id.* at 25. In addition, state legislation did not reach those federal agencies whose discriminatory policies influenced lenders. See, e.g., 1973 *Hearings on Economic Problems of Women*, *supra* note 5, at 195-202 (statement of William L. Taylor, Director, Center for National Policy Review, School of Law, Catholic University). At that time the FHA Mortgage Credit Analysis Handbook contained the following statement: "The mortgagor who is married and has a family generally evidences more stability than a mortgagor who is single because, among other things, he has responsibilities holding him to his obligations." *Id.* at 198.

21. "The question . . . is no longer whether discrimination in credit should be banned, but whether our bill as drafted meets the issue head on, without destroying the creditor's right to make business judgments based on the individual applicant's creditworthiness." 1974 *Credit Discrimination Hearings*, *supra* note 2, at 2 (statement of Hon. Leonor K. Sullivan opening the 1974 Hearings). Apparently, disagreement over the form and content of the legislation caused the delay in congressional action. See generally *id.* at 14-16. In September 1973, Ms. Sullivan had also requested that the Congressional Research Service of the Library of Congress undertake several studies to aid in development of the federal legislation. See 1974 *Credit Discrimination Hearings*, *supra* note 2, pt. 2, at 509-612, 613-31, 633-724, & pt. 3, at 727-1301. The preparation of these materials also delayed committee action. See generally Schober, *A Second Look at the Equal Credit Opportunity Act*, 9 U.C.C.L.J. 5 (1976).

22. Equal Credit Opportunity Act, Pub. L. No. 93-495, Tit. VII, §§ 701-06, 88 Stat. 1521 (codified at 15 U.S.C. §§ 1691-91e (Supp. V 1975)), amending Consumer Credit Protection Act, Pub. L. No. 90-321, 88 Stat. 1511 (codified at 15 U.S.C. §§ 1601 *et seq.* (Supp. V 1975)). Actually neither of the bills under consideration in the summer of 1974 was passed: H.R. 14856 would have prohibited creditors from discriminating on the basis of race, color, religion, national origin, age, sex or marital status, and H.R. 14908 would have prohibited discrimination in credit transactions on the basis of sex or marital status only. H.R. 14856, 14908, 93d Cong. 2d Sess. (1974). The new title in the Consumer Credit Protection Act was added as part of another bill regulating depository institutions. The peculiar legislative history of the Equal Credit Opportunity Act accounts for the need to rely on committee reports and committee hearings on similar legislation.

23. Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, 90 Stat. 251 (to be codified in 15 U.S.C. §§ 1691-91e). The amendments add race, color, religion, national origin, age and income derivation from any public assistance program to the forbidden basis of discrimination. The amendments become effective in March 1977. For a discussion of the 1976 amendments, see Schober, *supra* note 21, at 20-26.

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unlawful for a creditor to discriminate against an applicant for credit because of the sex or marital status of the applicant "with respect to any aspect of a credit transaction."²⁴ Congress deliberately used brief, general language of prohibition; detailed implementation of the statute was delegated to the Federal Reserve Board.²⁵ The Federal Reserve Board issued regulations to implement the 1974 Equal Credit Opportunity Act on October 16, 1975,²⁶ and the Washington State Human Rights Commission recently completed adoption of its own regulations designed to implement the state statute it administers.²⁷

Both the federal and state regulations necessarily reflect serious tension in the statutory scheme selected to alleviate problems of equal availability of credit. The tension is between the general statutory directive to remove sex and marital status as discriminatory factors in the creditworthiness determination,²⁸ and the statutory exemptions that permit the creditor to inquire about marital status "for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit"²⁹ and to consider and apply "[s]tate

24. 15 U.S.C. § 1691 (Supp. V 1975). The Act also provides that an aggrieved credit applicant may recover actual damages, punitive damages, costs, and attorney's fees. *Id.* § 1691e.

25. *Id.* § 1691b. The Federal Reserve Board was assigned the task of promulgating regulations under the Act apparently because some members of Congress were impressed with its success in administering the Truth in Lending Act. See *1974 Credit Discrimination Hearings, supra* note 2, at 54.

The 1974 Act required the Federal Reserve Board to prescribe regulations not later than the effective date of the Act. 15 U.S.C. § 1691b (Supp. V 1975). This article focuses almost exclusively on selected sections of the regulations now in effect and does not discuss all facets of the current regulations or the regulations that are now under consideration to implement the 1976 amendments. See 41 Fed. Reg. 29,870 (1976), *as revised*, 41 Fed. Reg. 49,123 (1976) (to be codified at 12 C.F.R. pt. 202).

26. See 12 C.F.R. pt. 202 (1976), *as revised*, 41 Fed. Reg. 20,576 (1976). See also proposed revisions and additions to Regulation B in 41 Fed. Reg. 29,870 (1976), *as revised*, 41 Fed. Reg. 49,123 (1976) (to be codified at 12 C.F.R. pt. 202). For a section-by-section analysis of the regulations now in effect, see Geary, *Equal Credit Opportunity—An Analysis of Regulation B*, 31 BUS. LAW. 1641 (1976). See also Comment, *Equal Credit; Promise or Reality?*, 11 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 186 (1976).

27. See WASH. ADMIN. CODE §§ 162-40-010, -410 (1976). The Washington State Human Rights Commission administers the Washington State Law Against Discrimination. An aggrieved party may file a complaint with the Commission, which will investigate the complaint and attempt conciliation. See WASH. REV. CODE §§ 49.60.230-.240 (1976). There may be a full administrative hearing after a reasonable cause finding if conciliation is unsuccessful. *Id.* § 49.60.250. The administrative hearing tribunal has broad remedial powers. *Id.* An individual may also bring a civil action directly in a court of competent jurisdiction to redress an act in violation of *id.* ch. 49.60. *Id.* § 49.60.030(2).

28. See 15 U.S.C. § 1691(a) (Supp. V 1975).

29. *Id.* § 1691(b).

property laws directly or indirectly affecting creditworthiness.”³⁰ The source of the tension between the prohibition and the exemptions can be traced to two strong policies: a policy that credit applications “should be treated individually and without regard to the sex or marital status of the applicant”³¹ and an equally strong policy that “the credit industry who bear the risk of extending credit” may use “valid and reasonable criteria” to evaluate creditworthiness.³² These policies may be in sharp conflict for two reasons: (1) sex and marital status do have some statistical correlation to creditworthiness,³³ and (2) state laws that affect the rights and remedies of creditors themselves refer to sex and marital status.

Similar tension is present in the Washington anti-discrimination statute. Although the state statute gives guidance beyond the federal statutory directive not to discriminate,³⁴ other provisions indicate that individual creditworthiness may be considered,³⁵ and that the creditor may consider “the application of the community property law to the individual case” and to take “reasonable action thereon.”³⁶

30. *Id.* § 1691d(b).

31. S. REP. NO. 93-278, 93d Cong., 1st Sess. 18 (1973). See also S. REP. NO. 94-589, 94th Cong., 2d Sess. 3 (1976).

32. S. REP. NO. 93-278, 93d Cong., 1st Sess. 18 (1973).

33. There is little published information on the correlation of sex and marital status to creditworthiness. This lack of information is more pronounced in the case of sex discrimination, although the information available appears to suggest that single women are better credit risks than single men. See, e.g., UTAH STUDY, *supra* note 7, at 6, citing D. DURAND, RISK ELEMENTS IN CONSUMER INSTALMENT FINANCING 74-77 (1941); Comment, *Credit Equality Comes to Women: An Analysis of the Equal Credit Opportunity Act*, 13 S. DIEGO L. REV. 960, 965 (1976). See also 1974 *Credit Discrimination Hearings*, *supra* note 2, at 440-41; Gates, *supra* note 6, at 412 n.11. The significance of marital status in predicting creditworthiness is more problematic. Studies indicate that “there [is] no demonstrable relationship between marital status and mortgage loan risk.” 1973 *Hearing on Economic Problems of Women*, *supra* note 5, at 193 (statement of Steven Rohde, staff member, Center for National Policy Review, Catholic University School of Law). Trade literature also suggests that borrower characteristics other than marital status are more closely related to risk. See Buell & Lewis, *Credit Scoring and Beyond*, BANKING, Feb. 1969, at 42; Boggess, *Screen Test Your Credit Risk*, 45 HARV. BUS. REV. 113 (1967). But see Brandel, *New Dangers Arise in Point Scoring, But You Can't Afford to be Without It*, BANKING, March 1976, at 86 (suggesting that both sex and marital status are valid risk indicators in combination with other factors). Creditors can, however, point to a definite correlation between certain marital status groups and bad debt losses. The data on marital status groups, such as “divorced,” is not further broken down by sex. See, e.g., 1974 *Credit Discrimination Hearings*, *supra* note 2, at 440-41 (exhibit of Richard F. Kerr on behalf of National Retail Merchants Association).

34. See text accompanying notes 15-18 *supra*.

35. WASH. REV. CODE § 49.60.176(2) (1976).

36. The statute states in pertinent part: “Further, nothing in this section shall prohibit any party to a credit transaction from considering the application of the community property law to the individual case or from taking reasonable action thereon.” *Id.* § 49.60.176(3).

Neither the regulations promulgated by the Federal Reserve Board nor the Washington state regulations directly address the problem of resolving the tension between the two statutory policies. Both sets of regulations simply restate the policy of non-discrimination³⁷ and only indirectly recognize the creditor's need to evaluate risk meaningfully.³⁸ Instead, the regulations focus on specific credit practices already identified as disadvantageous to women or persons of a particular marital status.³⁹ Such a "practice-by-practice" approach to problems involving fair availability of credit does not furnish adequate guidelines for credit practices not now identified as disadvantageous and will not assist creditors, state regulatory agencies, or courts in integrating equal credit opportunity with state laws affecting creditworthiness.

An additional problem with both state and federal equal credit legislation is the failure to distinguish problems of sex discrimination from problems of marital status discrimination. Although the two are admittedly difficult to separate, largely because marital status discrimination so often falls on women, the distinction should be made because it is crucial to balancing effectively the two major statutory policies.

III. A BASIC APPROACH TO CONSTRUCTION OF THE EQUAL CREDIT OPPORTUNITY STATUTE

The primary purpose of regulation should be to minimize the ten-

37. Compare 12 C.F.R. § 202.2 (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.") with WASH. ADMIN. CODE § 162-40-030 (1976) (race, creed, color, and national origin included as bases of discrimination). This reflects the broader coverage of the Washington statute. See WASH. REV. CODE § 49.60.176 (1976).

38. Compare 12 C.F.R. § 202.5(a) (1976) ("Except as otherwise provided in this section, a creditor may request and consider any information concerning the probable continuity of an applicant's ability to repay if such information is requested and considered without regard to sex or marital status.") with WASH. ADMIN. CODE § 162-40-210 (1976). The creditor is thus free to use any information to evaluate creditworthiness in a manner of his or her own choosing, provided that the acquisition or use of such information is not barred by a specific regulation. If, however, such an acquisition or use, though not now specifically barred, does in fact discriminate on the basis of sex or marital status, it would be unlawful under the general proviso.

39. The federal statute contains no definition of marital status. The regulations define marital status as "the state of being unmarried, married or separated, as defined by applicable State law" and further provide that "unmarried" includes divorced or widowed. 12 C.F.R. § 202.3(n) (1976). For the comparable state provision, see WASH. ADMIN. CODE 162-40-040(14) (1976).

sion between the two policies of the legislation. That is, credit applications should be evaluated without undue or unjustified emphasis on the group membership of an applicant for credit while still permitting the creditor to give maximum attention to factors that demonstrably affect credit risk. Satisfying this dual purpose requires a two-step regulatory analysis. First, a precise identification of the group affected by a specific credit practice must be made. This identification should be coupled with an analysis of the components of creditworthiness. Once this analysis is made, the regulatory agency is then in a position to ascertain the actual characteristics of the affected group, assess the impact of the practice on the group, and measure the reliability of the practice as an indicator of risk.

The most difficult portion of this analysis is the second step: to pinpoint the elements of creditworthiness which neither the federal regulations nor the Washington regulations define. Creditworthiness is generally agreed to be a function of the ability and willingness to pay debts.⁴⁰ Although not frequently articulated, creditworthiness is also a function of the creditor's rights and remedies with respect to property available for the payment of debts, a matter usually governed by state law.⁴¹

Judging the ability and willingness to pay is a subjective process, and it is heavily based on the personal characteristics of the applicant for credit. Historically, the personal characteristics of sex and marital status have been used to make this judgment. At one level, evaluation of these factors is simply the businessman's good judgment, "based on experience gained through previous credit decisions, either his own or those of business associates."⁴² Recently, more "objective" credit scoring systems have been developed that give an assigned weight to those personal characteristics of a credit applicant that have a de-

40. See, e.g., *1974 Credit Discrimination Hearings*, *supra* note 2, at 110 (statement of Thomas A. Haeussler for the National Consumer Finance Ass'n). See Littlefield, *supra* note 13, at 579, *citing* R. ETINGER & D. GOLIEB, CREDITS AND COLLECTIONS 59 (5th ed. 1972).

Some business literature also divides creditworthiness into more than two elements. Some representatives of the credit industry also identify stability as a factor in the creditworthiness determination. See, e.g., *1974 Credit Discrimination Hearings*, *supra* note 2, at 412 (statement of Richard F. Kerr for the National Retail Merchants Association). Stability appears to be an element of the willingness to pay rather than an independent factor and will be so treated here.

41. Cf. PREFATORY NOTE, UNIFORM CONSUMER CREDIT CODE (1969 version).

42. Myers & Forgy. *The Development of Numerical Credit Evaluation Systems*, 58 AM. STATISTICAL ASS'N J. 799 (1963).

monstrable relationship to risk.⁴³ Regardless of the credit evaluation system a particular creditor employs or the subjective factors present in that system, it is possible to ascertain either the reason why a personal characteristic such as sex or marital status is thought to measure the ability or willingness to pay, or the statistical correlation between groups possessing that personal characteristic and risk. Once the underlying rationale for a credit practice is pinpointed, it can be scrutinized to determine how effective the practice is as an indicator of risk.

Interestingly, the underlying rationale for many of the credit practices that are now the subject of regulation is some generalization that credit granters make about a sex or marital status group to which the credit applicant belongs. Creditors then assume that each member of the group will act in accordance with the generalization and use that assumption as a criterion to grant credit. Thus, for example, a credit grantor may deny credit to a pregnant woman because it assumes that she will leave the work force after the birth of the child, or may revoke the credit of a divorced person because it assumes that persons in that category are unstable. The obvious vice in credit practices based on such assumptions is that they may not be uniformly accurate as to the conduct of the individual members of the group which they purport to characterize.⁴⁴ Another problem, which is not a weakness in the same sense, is that the assumption may simply not be one on which society wishes to permit its institutions to act. Regulatory conduct might be based on either of these conclusions about the operative effect of a group generalization.

In order to assess accurately the operative effect, or impact, of the generalization on the group, the regulatory agency must first determine exactly which group is the subject of a generalization and then obtain accurate information about the characteristics of the group vis-à-vis the use of credit. In other words, for effective regulation it is necessary to know how many group members actually behave in accordance with a particular generalization. If the generalization is in fact

43. See generally Boggess, *supra* note 33.

44. For example, the fact that some, or even many women leave the labor market when they have children, does not control whether a particular woman will do so. Comparative data from the United States Department of Labor illustrates the declining statistical validity of this assumption: "In 1940 the labor force participation rate of mothers was only a small fraction of that for all women (9 percent versus 28 percent) but in 1974 the rate for mothers was slightly higher than that for all women—46 and 45 percent, respectively." U.S. DEP'T OF LABOR, 1975 HANDBOOK ON WOMEN WORKERS 26 (1975).

100% accurate, that is, every group member behaves in accordance with it, then, presumably, the generalization is a highly reliable indicator of risk and the creditor grantor should be permitted to act on it. The only exception to this conclusion would be where the generalization, although accurate, is one on which society does not wish credit institutions to act. At the other extreme, if the generalization is 100% inaccurate, it does not reliably predict the conduct of group members, does not indicate risk, and should not be used as a credit granting criterion.

Obviously, generalizations are rarely either 100% accurate or inaccurate. More commonly, they properly characterize the conduct of at least some members of the group. Faced with partial statistical accuracy, a regulatory body, if it respects both statutory policies, must seek a method to preserve the risk evaluative features of a credit practice while enabling group members not properly characterized by the generalization to obtain credit. Often this can be accomplished by requiring the creditor to focus on personal characteristics other than the broad categories of sex or marital status that will produce the same or a similar measure of risk.

Creditors engage in still other practices, such as regularly obtaining the signature of both spouses on credit instruments, because they believe these practices are vital to the maximum preservation of their rights and remedies under state laws. Such creditor requirements fall into two major categories vis-à-vis the actual operation of state laws: those that are based on an erroneous view of the ability of members of particular groups to bind resources for the repayment of debts, and those that actually have a relationship to the assets available for the repayment of debts. When a practice is based on an erroneous view of the operation of state laws, use of the practice is similar to use of a group generalization that is 100% inaccurate—the practice has no relationship to risk and unfairly prevents group members from obtaining credit. Consequently, it is an appropriate subject for prohibitory regulation. But when the practice accurately reflects the needs of the creditor pursuant to state laws governing assets available for debt repayment, the regulatory agency must seek methods to preserve the creditor's rights while maximizing the ability of members of the groups protected by equal credit legislation to obtain credit. This is a difficult and tedious task because it involves careful study of the operation of fifty state property law systems and subtle judgments about

the extent to which members of protected groups may be disadvantaged by the operation of such laws.

A few credit practices now prohibited by regulation did not involve risk evaluation at all and were used simply for the convenience of the creditor.⁴⁵ In such instances the disadvantage to the protected group is the primary consideration of the regulatory agency because the policy of non-discrimination is of greater importance than non-risk related convenience.

IV. EVALUATING EXISTING EQUAL CREDIT OPPORTUNITY REGULATIONS IN TERMS OF A BASIC APPROACH

An examination of selected regulations in the context of the suggested basic approach illustrates the way in which a more detailed analysis of the components of the two statutory policies could lead to effective resolution of the tensions present in the statute. This examination demonstrates the critical importance of defining the group affected by a credit practice and explores the need for sound evaluation of the underlying rationale for credit practices that affect groups protected by equal credit opportunity legislation. In addition, this analysis graphically reveals the critical need for state-by-state examination of laws which may affect creditors' rights and remedies thereby relating to creditworthiness.

A. Identifying the Group Affected by a Credit Practice and Examining the Value of the Practice as a Risk Indicator

1. Inability to maintain a separate account

Prior to regulation, several prevalent credit practices prevented a female spouse from establishing a credit identity apart from her husband. These practices, as identified in the testimony of women throughout the country, included cancelling the accounts of women who married and requiring them to reapply in their new husbands' names,⁴⁶ refusing to open separate accounts for married women,⁴⁷

45. See, e.g., note 50 and accompanying text *infra*.

46. See NAT'L COMM'N ON CONSUMER FINANCE, *supra* note 1, at 153; S. REP. NO. 93-278, 93d Cong., 1st Sess. 17 (1973); UTAH STUDY, *supra* note 7, at 15.

47. See UTAH STUDY, *supra* note 7, at 15; S. REP. NO. 93-278, 93d Cong., 1st Sess. 17 (1973).

and using more stringent requirements to evaluate married women.⁴⁸ As a practical matter such practices, though burdensome, are not seriously disadvantageous to women while the marriage continues because wives are generally free to obtain and use an account in their husbands' names. Women who later divorced, separated, or became widowed, however, frequently could not establish credit in their own name because they lacked a credit history to demonstrate willingness to pay.⁴⁹

The credit industry justified these practices primarily on the grounds that it was too expensive for a creditor to open accounts in the wife's name, or that it was more convenient to deal only with the husband.⁵⁰ Some creditors also believed that the wife lacked authority to make credit purchases without the husband's signature.⁵¹ Some of the more candid industry spokesmen admitted, however, that creditors did not wish to do business with wives because they regarded the husband as the real source of support for the family.⁵² This attitude was based on the assumption that married women worked for "pin money" or would have children and leave the labor force to care for them.

The current regulations, by prohibiting the practices mentioned above, take the position that such practices are seriously disadvantageous to women and, by implication, not sufficiently risk-related to be necessary for creditor protection. Accordingly, a creditor cannot refuse to grant a separate account to a creditworthy applicant,⁵³ take into account the existence of a telephone listing in the applicant's name,⁵⁴ or use sex as a factor in a credit scoring system "or other

48. Creditors frequently required a married woman to obtain her husband's signature on a joint account, but did not require the wife's signature. The credit history of the husband was routinely evaluated when a married woman applied for credit, but the wife's credit history was seldom checked. See UTAH STUDY, *supra* note 7, at 21-26.

49. See UTAH STUDY, *supra* note 7, at 75-85; S. REP. NO. 93-278. 93d Cong., 1st Sess. 17 (1973).

50. See UTAH STUDY, *supra* note 7, at 29. See also Gates, *supra* note 6, at 415 (statement of spokesperson for Sears, Roebuck and Company).

51. See, e.g., UTAH STUDY, *supra* note 7, at 25-26.

52. See 1974 *Credit Discrimination Hearings*, *supra* note 2, at 311 (statement of Eugene H. Adams before the Florida Bankers Association). Mr. Adams recognized the danger of group assumptions and pointed out that presumptions that women of childbearing age will leave the labor force are often false. *Id.* at 310-11. See also UTAH STUDY, *supra* note 7, at 23-25; Comment, *Credit Equality Comes to Women: An Analysis of the Equal Credit Opportunity Act*, 13 S. DIEGO L. REV. 960. 965 (1976).

53. See 12 C.F.R. § 202.4(b) (1976); WASH. ADMIN. CODE § 162-40-060 (1976).

54. See 12 C.F.R. § 202.5(g) (1976); WASH. ADMIN. CODE § 162-40-200 (1976).

method of evaluating applications.⁵⁵ The ability to open a separate account in her own name means that a married woman with independent income can maintain an account that will be reported regularly to the credit bureau thereby generating an all-important credit history. Several companion provisions insure that the participation of the female spouse in a joint account will be noted on the account and reported to the credit bureaus,⁵⁶ and require that a creditor include in any evaluation of creditworthiness the credit history of accounts which both spouses use or for which both spouses are contractually liable.⁵⁷

The more detailed analysis of these regulations according to the suggested basic approach fully supports this regulatory position. The identified practices disadvantage the female spouse exclusively and therefore have their principal impact on a sex group, not a marital-status group. The underlying rationale for these practices was either a generalization about women as a group that did not apply to significant numbers of women, an erroneous view of the law, the convenience of the creditor, or a combination of the three.

None of these justifications can withstand even cursory scrutiny, and, therefore, the credit practices based on them have minimal value as risk indicators. Commentator after commentator, backed by hard government statistics, has pointed to the expanded role of women,

Creditors consider the existence of a telephone in the applicant's name a strong indicator of willingness to pay. Boggess, *supra* note 33, at 116. This practice often operates to the disadvantage of married women whose telephone listings are usually in the husband's name. Under the regulations cited above, the creditor may consider the existence of a telephone in the applicant's *home*.

55. 12 C.F.R. § 202.5(f) (1976). See also WASH. ADMIN. CODE § 162-40-190 (1976).

56. For accounts established on or after November 1, 1976, the creditor must determine whether an account is one which both spouses will use or on which both will be contractually liable. If so, the creditor must "designate any such account to reflect the fact of participation of both spouses" and report information concerning the account "to consumer reporting agencies in a manner which will enable such agencies to provide access to information about the account in the name of each spouse." 12 C.F.R. § 202.6(a) (1976). A parallel provision requires creditors either to treat joint accounts already in existence on November 1 in the same manner as accounts opened on or after November 1, or to deliver a notice to such account holders that they may have credit information on the account reported in both spouse's names if they so request. *Id.* § 202.6(b).

Compare WASH. ADMIN. CODE § 162-40-260 (1976) with 12 C.F.R. § 202.6(a) (1976). The state regulation requires that the creditor designate joint accounts to reflect the participation of both spouses. In addition, such designation must provide access to the account in the name of *each* participating spouse.

57. See 12 C.F.R. § 202.5(j) (1976); WASH. ADMIN. CODE § 162-40-230 (1976).

particularly married women, in the labor force.⁵⁸ This data reveals that large numbers of married women enter and remain in the labor force. Many of these women contribute substantially to family income, or actually support the family rather than merely earn "pin money." Thus, the creditor's assumptions are simply incorrect in many cases. Similarly, creditor's perceptions that state laws required them to deal with the husband frequently proved to be the result of incorrect or incomplete information,⁵⁹ and finally, the "cost" to open separate accounts for married women was not substantiated.⁶⁰ Therefore, only the convenience of the creditor remains to be considered against the large numbers of married women denied credit and a credit history by the universal insistence on dealing only with the husband or in the husband's name. Because convenience is not a risk factor, the policy of non-discrimination is the principal policy to be furthered by regulation.

2. "Change of name or marital status"

When analyzed in terms of the basic approach, the above regulations further the credit needs of women without causing creditors any undue hardship. In contrast, the so-called "change of name or marital status" regulation⁶¹ fails to survive the more detailed analysis. Although this regulation has the same general purpose as the prior ex-

58. The most recent data available from the United States Department of Labor thoroughly analyzes the role of women in the national labor force based on 1974 data. See generally U.S. DEP'T OF LABOR, 1975 HANDBOOK ON WOMEN WORKERS (1975). One of the most prevalent trends is an increase in the number of married women in the labor force. Married women comprise 58% of a work force of 33 million women who constitute over 39% of the entire work force. In addition, the national labor force increased by 1.5 million workers in 1975, with adult women accounting for 1.1 million of this increase. See NAT'L COMM'N ON THE OBSERVANCE OF INT'L WOMEN'S YEAR, ". . . TO FORM A MORE PERFECT UNION . . .": JUSTICE FOR AMERICAN WOMEN 57 (1976). See also 1973 Hearings on Economic Problems of Women, *supra* note 5, pt. 1, at 4-35; 1974 Credit Discrimination Hearings, *supra* note 2, at 311.

59. See UTAH STUDY, *supra* note 7 at 23-25; 1974 Credit Discrimination Hearings, *supra* note 2, at 360-94.

60. No real data on the cost to a creditor to open and maintain separate accounts for each spouse was presented in connection with the equal credit opportunity legislation. Common sense, however, indicates that it would be more expensive if each spouse has his or her own account with each creditor, although creditors themselves appear to disagree on this matter. See UTAH STUDY, *supra* note 7, at 29. Creditors would incur such costs primarily in connection with open end accounts and small loans. Of course, "cost" does not explain the refusal of creditors to use the wife's name on an account.

61. 12 C.F.R. § 202.5(i)(1) (1976); WASH. ADMIN. CODE § 162-40-220(1) (1976).

amples—to protect the female spouse from the loss of her credit identity—it fails to separate the sex group impact from the effect of the credit practice on various marital status groups. Consequently, the credit characteristics of these affected marital status groups have not been examined independently or carefully and the statutory policy of protecting the creditors' needs may not have been properly implemented.

Under the change of name or marital status regulation, a creditor may not require a reapplication, nor may it terminate or alter the terms of an existing open end account when it learns of a change of name or marital status unless it has evidence of inability or unwillingness to pay.⁶² As previously pointed out, the practice of closing or requiring a reapplication for the accounts of women who get married, or become divorced, widowed, or separated is primarily sex discrimination because the creditor only takes action when it learns of a change of the woman's name. Of course, a marital status change usually accompanies the name change, but the creditor learns of the former only as an incident to the latter. Most importantly, the creditor rarely learns of similar changes in the marital status of males simply because men do not change their names when changing marital status.

This regulation could have eliminated the burden on women by forbidding the creditor from taking action on an account when it learns of a change of name. It goes beyond this, however, and precludes the specified actions when the creditor learns of a change in marital status. It is unclear whether this regulation represents the judgment that creditors only take such actions against women who change their marital status. If so, it is consistent with the change of name portion of the regulation and is aimed primarily at sex discrimination. Such a regulatory position would appear to be sound because there is no justification for terminating or re-evaluating women's accounts only.

The confusion results from language in the regulation that is broad enough to preclude the creditor from re-evaluating the accounts of anyone, male or female, who changes marital status. This language fails to separate the groups affected by a name change from those affected by marital status changes, and therefore it never focuses on how creditors' rights are altered by a change in marital status. Even

62. 12 C.F.R. § 202.5(i)(1) (1976); WASH. ADMIN. CODE § 162-40-220(1) (1976).

the limited information available suggests that risk may be significantly related to marital status and that this correlation, as well as relevant statutes, should be explored further.⁶³

In order to implement properly both statutory policies in the context of marital status discrimination, the regulatory agency should first identify and separate particular marital status changes such as single to married, married to separated, etc. The operation of laws controlling changes in asset or debt status, and data concerning the nature and extent of changes in risk that accompany particular marital status changes should then be examined. This analysis would enable the regulatory agency to determine how significant the correlation between a particular marital status change and an increase in creditor risk actually is. If there is a significant correlation, the inquiry should be extended to data that will assess the impact of the practice on the group. As previously suggested, if the impact is severe, the regulation can seek alternative methods to focus on risk evaluation as well as to minimize the impact on the marital status group.

Despite the failure of this regulation to separate clearly the sex discriminatory aspects of the credit practice from those based on marital status or to examine the components of creditworthiness, needs of creditors are in fact recognized and protected. A creditor may take action if it has evidence of inability or unwillingness to pay or if the account were granted solely on the basis of income earned by the spouse of the account holder.⁶⁴ These exceptions indirectly acknowledge some of the potential economic consequences of a change in marital status. They also may represent a judgment that, given the prejudicial assumptions that sometimes accompany changes in marital status, *e.g.*, that all divorced persons are unstable,⁶⁵ it is better to pre-

63. For example, if the transition is from married to either divorced or separated, assets previously available for the payment of debts may no longer be accessible to the creditor, or an account holder may have greater debt obligations by virtue of the divorce or separation. *See, e.g.*, ORE. REV. STAT. § 108.040(2) (1975). For a compilation of the statutes of all 50 states that deal with divorce, support, dower, and curtesy, see Beckey, *Women and Credit: A 50-State Study of Laws in the Area of Married Women's Property Rights, Support Laws, Divorce, Exemption, Homestead, Dower and Curtesy for Purposes of Identifying Possible Statutory Origins of Discrimination in the Granting of Credit When Such Treatment Is Based Primarily on Sex or Marital Status*, in *1974 Credit Discrimination Hearings*, *supra* note 2, at 727-1301. Similarly, if the transition is from single to married, the assets of the single person will become liable for debts incurred by the spouse under the family expense statutes existing in 22 states. *See, e.g.*, ORE. REV. STAT. § 108.040 (1975).

64. *See* 12 C.F.R. § 202.5(i)(2) (1976); WASH. ADMIN. CODE § 162-40-220(2) (1976).

65. *See, e.g.*, *1974 Credit Discrimination Hearings*, *supra* note 2, at 412.

clude the specified creditor actions on the ground of marital status in addition to curing the sex-based discrimination of this credit practice.

3. *Devaluation of the female spouse's income*

The elusiveness of the line between sex discrimination and marital status discrimination is well demonstrated in examining the regulation dealing with the credit practice of devaluing the income of the female spouse. Investigations into the credit problems of women documented that creditors either refused to count or discounted the wife's income.⁶⁶ This often meant that families with both spouses working were unable to qualify for loans, particularly mortgage loans, based on the actual disposable income available to the family. This difficulty was compounded if the wife were the sole or principal wage earner, or if her income were produced by part-time work. Frustrated by this devaluation, many couples resorted to signing the notorious "baby letter" to satisfy creditors that the wife was "on the pill" or would have an abortion if she became pregnant.⁶⁷

The only justification for this practice was the sex-based assumption that women of child-bearing age would get pregnant and leave the labor market, thus making the wife's income unreliable. This practice is primarily discrimination based on marital status, however, because married persons are most disadvantaged by it. Regardless of the nature of the discrimination, the assumption itself is not highly reliable.⁶⁸ In accordance with the policy of non-discrimination, the regulations preclude the discounting of income because of sex or marital status⁶⁹ or because it is derived from part-time employment.⁷⁰

66. See 1973 *Hearings on Economic Problems of Women*, *supra* note 5, at 192-95. One Veterans Administration official is reported as stating: "It is un-American to count a woman's income . . . the only way to count it would be if she were to have a hysterectomy." *Id.* See also S. REP. NO. 93-278, 93d Cong., 1st Sess. 17 (1973); 1974 *Credit Discrimination Hearings*, *supra* note 2, at 211-75 (statistics supplied by the United States Commission on Civil Rights). See generally U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, *WOMEN AND HOUSING, A REPORT ON SEX DISCRIMINATION IN FIVE AMERICAN CITIES* (1975).

67. A couple normally assured the creditor in writing that the wife was "on the pill," that she would have an abortion if she became pregnant, or that one of the spouses was sterile. U.S. COMMISSION ON CIVIL RIGHTS, *MORTGAGE MONEY: WHO GETS IT?* (1974), in 1974 *Credit Discrimination Hearings*, *supra* note 2, at 213, 256.

68. See note 58 *supra*.

69. 12 C.F.R. § 202.5(e) (1976); WASH. ADMIN. CODE § 162-40-180 (1976).

70. 12 C.F.R. § 202.5(e) (1976); WASH. ADMIN. CODE § 162-40-180 (1976).

B. *Methods to Accommodate Conflicting Statutory Policies*

Numerous regulations that control the kind of information that a creditor can seek on an application form complement the provisions governing the creditor's method of evaluating applicants. These regulations further the policy of non-discrimination by limiting access to information that might prompt a creditor to act on one of the prejudicial group assumptions previously mentioned. At the same time the policy of protecting the creditor from unwarranted risk is furthered by forcing a creditor to obtain information that more accurately indicates ability and willingness to pay than questionable assumptions about persons of a particular sex or marital status.

The statutory policies are balanced via several different methods. The creditor is precluded from acquiring information with high prejudicial potential and slight predictive value. Where the information facilitates an evaluation of creditworthiness, however, the creditor is allowed to ask for such data, although the extent of the inquiry or the way in which it must be made is regulated to minimize discrimination.

In Washington, a creditor cannot ask the applicant's sex directly⁷¹ or indirectly by requiring the applicant to select a sex-specific title in prefix to his or her name,⁷² or using sex-specific terminology, such as "wife's name," on the application form.⁷³ This represents a judgment that the sex of the applicant is largely irrelevant in the creditworthiness determination,⁷⁴ yet has a significant prejudicial impact because of assumptions that are often made about the sex group of the applicant. Consequently, in order to direct its attention to more significant indicia of creditworthiness, the creditor is totally precluded from acquiring information that might lead to an unreliable assumption.

The balance is struck in a slightly different way with information that is prejudicial, yet still contains some factor that is genuinely related to ability or willingness to pay. Here the creditor is prevented from directly acquiring the information that leads to a prejudicial as-

71. WASH. ADMIN. CODE § 162-40-080 (1976). That section provides that a creditor may not ask an applicant's sex, race, creed, color, or national origin unless so required by an enforcement agency in order to monitor compliance. There is currently no similar provision in the federal regulations. *But see* proposed revision of 12 C.F.R. § 202.5 in 41 Fed. Reg. 49,123 (1976).

72. 12 C.F.R. § 202.4(c)(4) (1976); WASH. ADMIN. CODE § 162-40-090(1) (1976).

73. 12 C.F.R. § 202.4(c)(4) (1976); WASH. ADMIN. CODE § 162-40-090(2) (1976).

74. *See* note 33 *supra*.

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sumption, and is required instead to seek information directly about the factor that is genuinely related to creditworthiness. For example, the creditor may not directly inquire about birth control or family plans⁷⁵ because such inquiries are based on the two-part assumption that women of childbearing age will have children and then leave the labor force. The creditor may still evaluate creditworthiness, however, in terms of continuity of income and continued ability to repay.⁷⁶

A similar approach is employed in inquiries about marital status. In general, the creditor is permitted to ascertain an applicant's marital status because this information is necessary to determine what property is available to repay any debt incurred by the applicant.⁷⁷ The way in which this inquiry may be made is restricted in order to minimize prejudicial assumptions. Thus, the creditor may ascertain whether an applicant is married, unmarried, or separated,⁷⁸ because the spouses of married or separated persons may have rights to the assets of the applicant under the laws of a particular state. The creditor may not ask if an applicant is divorced, however, because creditors so often assume that all divorced persons are "unstable."⁷⁹ In addition, once the creditor has learned that an applicant is married or separated, direct inquiry about the spouse or former spouse is con-

75. 12 C.F.R. § 202.5(h) (1976). The creditor is precluded both from inquiring about birth control practices, childbearing intentions or capabilities, and from considering group statistics in connection therewith. *See also* WASH. ADMIN. CODE § 162-40-210(2) to (3) (1976).

76. *See* 12 C.F.R. § 202.5(a), (e) (1976); WASH. ADMIN. CODE § 162-40-210 (1976). *See also* text accompanying notes 66-68 *supra*.

77. The federal regulations provide that a creditor may not ask the applicant's marital status "if the applicant applies for an unsecured separate account." 12 C.F.R. § 202.4(c)(1) (1976). Thus, by inference, the creditor may request information about marital status when the application is for a secured loan because the spouse's signature may be necessary on the security agreement under the relevant provisions of state law.

The federal regulation contains specific exemptions for creditors in community property states and for creditors operating under small loan laws. The latter exception is based on a statutory provision that preempts state and federal small loan laws that require certain creditors to aggregate loans to spouses for purposes of determining permissible finance charges or loan ceilings. *See* 15 U.S.C. § 1691(d) (Supp. V 1975). *See also* [1976] 1 CONS. CRED. GUIDE (CCH) ¶ 540 (chart indicating that some form of small loan law exists in nearly every state). This category of creditor may always have to ask about marital status in a state which has a provision in its small loan law concerning separate loans to spouses. In Washington, the creditor may always ascertain the applicant's marital status. WASH. ADMIN. CODE § 162-40-070 (1976).

78. The creditor may ask only whether the applicant is married, unmarried, or separated. 12 C.F.R. § 202.4(c)(2) (1976). In Washington, the status "unmarried" may be followed by the parenthetical "includes single, divorced and widowed" in order to assist the applicant in determining which status to designate on the application form. WASH. ADMIN. CODE § 162-40-070 (1976).

79. *See* text accompanying note 64 *supra*.

fined to specific situations in which the rights or assets of the spouse or former spouse will have a significant impact on the creditworthiness of the applicant.⁸⁰

The regulation of inquiries about alimony, child support, and maintenance payments utilizes all the methods mentioned previously and is perhaps the best example of the way the two statutory policies may be accommodated.⁸¹ It has been consistently documented that creditors refused to count alimony, child support, and maintenance payments as income to the recipient, primarily because such payments were regarded as unreliable.⁸² Moreover, the fact that such payments were being received often detracted from the recipient's other credit qualifications by confirming the applicant's "unstable" divorced status, serving as an entry to a former spouse's poor credit rating, or creating the potential for the recipient to "overextend" monetary resources by foolishly relying on income that might disappear at any time. Ironically, although such payments were seldom counted as income to the recipient-applicant, they were nearly always deducted from the income of the spouse obligated to make them.⁸³

The regulations do acknowledge the propriety of inquiring to what extent an applicant for credit may be obligated to make child support, alimony, or maintenance payments because this obligation is like any other debt that might be owed by an applicant.⁸⁴ The creditor may not ask whether income is derived from such sources, however, without first disclosing that an applicant need not report this income if he or she does not wish to rely on it to establish creditworthiness.⁸⁵ Finally, the creditor must treat alimony, child support, or mainte-

80. See 12 C.F.R. § 202.5(b) (1976); WASH. ADMIN. CODE § 162-40-150 (1976).

The creditor may acquire information about a spouse's assets indirectly, however, in the process of evaluating ownership of jointly owned assets. [1976] 5 CONS. CRED. GUIDE (CCH) ¶ 42.037; or verifying the income of a self-employed person via inspection of his or her most recent income tax return. *id.* ¶ 42.046; or checking the credit history of an account listed in the name of a spouse or former spouse if the applicant relies on such an account to establish creditworthiness. *Id.* ¶ 42.006.

Presumably such information could not be used in a detrimental manner by the creditor without violating the general prohibition against discrimination in 12 C.F.R. § 202.2 (1976). See also WASH. ADMIN. CODE § 162-40-030 (1976).

81. 12 C.F.R. § 202.5(c), (d) (1976); WASH. ADMIN. CODE § 162-40-110 (1976).

82. See 1973 *Hearings on Economic Problems of Women*, *supra* note 5, at 553-54; 1974 *Credit Discrimination Hearings*, *supra* note 2, at 272, 312; S. REP. NO. 93-278, 93d Cong., 1st Sess. 17 (1973); UTAH STUDY, *supra* note 7, at 44.

83. UTAH STUDY, *supra* note 7, at 45.

84. 12 C.F.R. § 202.5(c) (1976).

85. 12 C.F.R. § 202.5(d)(1) (1976); WASH. ADMIN. CODE § 162-40-110(1) (1976).

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nance payments as income to the extent that such payments are likely to be consistently made.⁸⁶ Thus, a balancing of all concerns previously outlined is reflected in a single regulation: information with prejudicial potential cannot be obtained where it does not affect creditworthiness at all; the creditor is required to evaluate subfactors that genuinely relate to creditworthiness and the creditor is permitted to inquire directly about an outstanding obligation that would have an impact on ability to pay.⁸⁷

C. *Integrating State Property Laws and Equal Credit Opportunity*

The most complex problem presented by equal credit opportunity is to overlay its requirements on existing state property systems that are themselves varied and well established. This task will fall primarily to the individual states because neither the federal statute nor the federal regulations make any attempt to deal specifically with this problem. Both purport to exempt a creditor who makes distinctions on the basis of sex or marital status in consideration of "state property laws directly or indirectly affecting creditworthiness."⁸⁸ The federal regulations therefore deal with state laws indirectly, usually by exempting acts required by state law from certain regulatory provisions.⁸⁹

86. Suggested factors for evaluating the reliability of alimony, child support, or maintenance payments include "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." 12 C.F.R. § 202.5(d)(2) (1976).

87. The Washington regulations go one step further than the federal regulations and place an affirmative duty on the creditor to leave space on an application form for an applicant to provide information that creditors have either treated as irrelevant to creditworthiness or failed to evaluate simply because it was not requested. Space must be provided for the spouse's first and last name, WASH. ADMIN. CODE § 162-40-120 (1976), any other names in which credit references or credit history may be obtained, *id.* § 162-40-130, and, under "other income," any income derived from alimony, child support, or maintenance payments. *Id.* § 162-40-110(2).

The regulation allowing an applicant to indicate other names in which credit references may be obtained exists because a credit history usually cannot be verified without a name and an account number. Therefore, women who listed only the account numbers of joint accounts in the husband's name frequently were treated as lacking a credit history.

88. See U.S.C. § 1691(b) (Supp. V 1975); 12 C.F.R. § 202.5(1) (1976).

89. For example, a creditor may require the signature of the spouse of a married or separated applicant where necessary or where reasonably believed by the creditor to be necessary to create a valid lien, pass clear title, waive inchoate rights to property or assign earnings. 12 C.F.R. § 202.7(c) (1976). Similarly, a spouse's signature may be required in a community property state where the applicant lacks the power to manage or control community property unless the applicant has sufficient separate property to qualify for the amount of credit requested. See 12 C.F.R. § 202.7(b) (1976).

One obvious difficulty is to decide what is or is not a "state property law." The potential breadth of the term "property" creates the possibility that a myriad of state statutes fall within the statutory exception. Moreover, this definitional problem is compounded by the addition of the words "directly or indirectly affecting creditworthiness." First, this presents the possibility that whether a law is indeed a property law will be decided simply by reference to whether it has an effect on creditworthiness. Second, the term "creditworthiness" is itself elusive, both because the statute and the regulations do not define it, and because there is no agreement in the industry concerning its meaning.⁹⁰ Consequently, there is a very real likelihood that the exception will swallow the rule of non-discrimination, at least on the federal level.

The enforcement experience with equal credit opportunity in Washington prior to 1976 illustrates the dangers of such general exceptions and underscores the need for a basic approach to equal credit opportunity problems. Although the statute in Washington is fairly specific about forbidden credit practices, it, too, contains a general exception permitting creditors to consider the application of the community property law.⁹¹ The state exception for "community property" laws is clearly narrower than the exception in the federal statute for "property laws." In practice, however, creditors have cited "community property" law as the justification for ignoring the marital status provisions of the discrimination law.⁹²

Thus, the effective implementation of equal credit opportunity requires much more than the simple exemption of state property statutes. Each law, whether community property or otherwise, must be examined to determine its relationship to creditworthiness and the extent to which it has an adverse impact because of sex or marital status. Where a conflict is evident, a decision must be made whether creditworthiness or other policies outweigh the adverse impact on a protected group or whether a compromise can lessen that impact while preserving creditors' rights.

Although the federal regulations do not provide general guidelines for determining which state property laws may be considered or ap-

90. See text accompanying notes 40-43 *supra*.

91. See WASH. REV. CODE § 49.60.176(3) (1976).

92. Conversation with Karen Fox, Staff Representative, Washington State Human Rights Commission, August 18, 1976.

plied without discriminating, they do preempt inconsistent state credit discrimination laws to the extent of the inconsistency.⁹³ Therefore a state that adopts regulations to implement its own equal credit opportunity statute must deal with problems exempted under the "state property laws" provision of the federal statute while avoiding inconsistency with the "practice by practice" regulations already adopted by the Federal Reserve Board. The Washington regulations attempt, with some success, to make adjustments between the Washington marital property system and equal credit opportunity. In the process, however, the state regulations do not altogether avoid inconsistency with federal standards.⁹⁴ This inconsistency results in part from the fact that the federal statute and regulations simply do not address that element of the creditworthiness determination covered by state laws. In addition, the state regulations, by relying heavily on the federal "practice" model, simply fail to examine the Washington marital property laws in terms of the competing statutory policies.

1. *Compatibility of Washington's community property system with equal credit opportunity standards*

Consideration of Washington community property law in terms of the equal credit opportunity model previously suggested provides examples of the subtle analytical distinctions needed to distinguish differential treatment that is primarily sex-based from that which can be attributed to a particular marital status. By careful analysis, it is also possible to separate instances where special treatment of the marital unit can be justified by policies underlying the community property laws from instances where the community property laws are unjustifiably used to burden the female spouse or the marital unit.

The philosophy of community property law has always been one of spousal equality. "Each spouse is regarded as contributing equally to and sharing equally in the economic well-being of the marital enterprise."⁹⁵ This recognition is the cornerstone of rules that vest rights in

93. 12 C.F.R. § 202.11(b) (1976). The 1976 amendments to the Act add a similar provision to the statute itself. Equal Credit Opportunity Act Amendments of 1976 § 5, Pub. L. No. 94-239, 90 Stat. 251 (to be codified in 15 U.S.C. §§ 1691-91e). This new statutory provision makes it clear that state laws are not inconsistent if they are more protective. See also WASH. ADMIN. CODE § 162-40-020 (1976).

94. See text accompanying notes 116-29 *infra*.

95. See Cross, *Community Property Law in Washington*, 49 WASH. L. REV. 729,

marital property in both spouses regardless of the *form* of the economic contribution made by the particular spouse. Thus, in a community property state, the husband and wife may be regarded as an economic unit.⁹⁶

The philosophy of the community property system thus closely parallels a general theory of the equality of the female spouse. To the extent that the acquisition of credit is an acquisition by the marital unit, the principles of equal credit opportunity for the female spouse and the community property system are compatible and mutually supportive.

There is, however, a thin line between failing to treat the female spouse equally in the extension of credit, and imposing special requirements on a spouse of either sex because they are members of a marital economic unit. Under the basic approach presented earlier, the failure to treat the female spouse equally was analyzed as sex-based discrimination, objectionable on equal credit opportunity grounds. It is likewise incompatible with the spousal equality principle of community property. Imposing special requirements on married persons, however, indulges marital status distinctions which may or may not be justified by the policies underlying the state law that results in the distinction. Therefore, exact identification of the group affected is as important in evaluating a state law as it is in evaluating other credit practices.

The Washington equal credit opportunity law recognizes the strong presumption that acquisitions made during marriage are community property,⁹⁷ and permits a creditor to assume that a married applicant

734 (1974). For a fascinating discussion of the historical origin and philosophy of the community property system, see W. DEFUNIACK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* §§ 1-53 (2d ed. 1971).

96. By contrast, the common law system submerges both the "wife's juridical personality" and her economic existence into that of her husband at the time of marriage. See Cross, *supra* note 95, at 733. For a discussion of the status at common law of the married woman and the effect of Married Women's Property Acts, see L. KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* 40-41 (1969).

Although certain selected disabilities have been removed from the wife in common law states following the adoption of Married Women's Property Acts, the underlying philosophy of the system remains the same. Thus, in a common law state, although the wife may now control her own property, she is not affirmatively vested with rights in acquisitions by the husband. This means that uncompensated contributions to the marital enterprise such as childcare, housekeeping, etc., are not recognized as economically productive of the tangible marital assets. Thus, the husband and the wife in common law states can be regarded as independent economic entities except where a specific law attaches some special rights or responsibility to the marital unit. See *generally* 4A POWELL ON REAL PROPERTY ¶¶ 623, 624, 624.1 (Supp. 1975).

97. WASH. REV. CODE § 26.16.030 (1976).

is incurring a community obligation and will be relying on community property for repayment.⁹⁸ Further, the creditor is permitted to ascertain an applicant's marital status and to acquire information about the applicant's spouse whenever community property is relied on as a basis for repayment of the credit requested.⁹⁹

By placing burdens of additional disclosure on those who are married the regulations make distinctions on the basis of marital status. These burdens, however, are justified by the rights and responsibilities placed on the marital unit by the community property law which precludes a married applicant from standing alone as an independent economic unit. In order to evaluate the creditworthiness of an applicant who is married, the creditor must have an understanding of the economic picture of the marital unit, including an economic profile of the applicant's spouse. In addition, such disclosure burdens are relatively slight when compared to the protections provided by joint spousal interest in assets acquired during marriage. Under the Washington regulations, a married applicant can avoid disclosure of financial information about his or her spouse by demonstrating that he or she relies on separate property to repay the credit requested, *e.g.*, by producing a separate property agreement.¹⁰⁰ In the case of a separate property agreement, this difference in treatment is justified because each spouse does operate as an independent economic unit.¹⁰¹

When the credit reporting system in Washington fails to recognize the identity and economic contribution of the female spouse, however, the resultant discrimination is based on sex rather than marital status. Because the wife has a vested one-half interest in all community assets and is equally responsible for all community debts,¹⁰² the credit history of an account in the husband's name is truly the credit history of the marital unit to which each spouse is fully entitled. A failure to evaluate the creditworthiness of a female spouse by reference to such histories is a burden placed on females, not on the marital unit. Similarly, insisting that an account must be opened and maintained in the

98. WASH. ADMIN. CODE § 162-40-140 (1976).

99. *Id.* § 162-40-150.

100. *Id.* § 162-40-140.

101. See, *e.g.*, *Piles v. Bovee*, 168 Wash. 538, 12 P.2d 914 (1932); *Union Sec. Co. v. Smith*, 93 Wash. 115, 160 P. 304 (1916); *Gage v. Gage*, 78 Wash. 262, 138 P. 886 (1914).

102. WASH. REV. CODE § 26.16.030 (1976). See generally *W. DEFUNIAK & M. VAUGHN*, *supra* note 95, at 114-16. See also *Stockard v. Bartlett*, 4 Wash. 730, 31 P. 24 (1892); *Aichlmayr v. Lynch*, 6 Wn. App. 434, 493 P.2d 1026 (1972).

name of the husband places a burden on females alone. Consequently, the position taken by both the federal regulations and the Washington regulations regarding credit history and separate accounts¹⁰³ is fully supported by the community property laws.

It is clear that where federal regulatory provisions are aimed primarily at sex discrimination, the Washington marital property system is fully supportive. In such instances, the adoption by the state of a regulation similar to the federal regulation will not conflict with the community property laws or the established federal standards. Placing additional disclosure burdens on married credit applicants recognizes the requirements of the Washington community property system without conflicting with federal standards. The federal regulations permit inquiries about a spouse if the applicant relies on community property for repayment of the credit requested, and allows the creditor to determine the applicant's marital status in a community property state.¹⁰⁴

The potential for conflict with federal standards is greatest in regulatory provisions that contain elements of both sex discrimination and marital status discrimination. Resolution of such a conflict should initially involve separation of elements of sex discrimination from elements of marital status discrimination. Because the community property laws do not justify sex-based discrimination, such sex-based elements could be readily eliminated.¹⁰⁵ On the other hand, if burdens are based on marital status, the community property law must be more closely examined to determine whether it actually requires such burdens. Finally, the burden imposed by the community property system must be compared with the burden imposed by other marital property systems to see if it really differs. If not, there is no reason to deviate from the federal standard, unless the federal regulation itself has failed to take account of a "state property law."

In addition to providing a useful way to accommodate the Washington community property laws with equal credit opportunity, the suggested basic approach gives insight into the way equal credit op-

103. See notes 55-56 and accompanying text *supra*.

104. See 12 C.F.R. §§ 202.4(c)(1), 202.5(b)(1)(iii) (1976).

105. In addition, following passage of the Equal Rights Amendment and remedial legislation occasioned thereby, there should be no Washington laws that require creditors to make distinctions between men and women. See WASH. CONST. art. XXXI: ch. 154, 1973 Wash. Laws, 1st Ex. Sess. 1118.

portunity, with its two statutory policies, actually functions in a particular state property system. The precise dimensions of a problem are much clearer when examined in this context and the ability to reconcile properly the two statutory policies is greatly enhanced.

2. *Methods of resolving credit discrimination problems in Washington*

As previously discussed, the federal regulation does not permit routine cancellation, reapplication, or alteration of the terms of an open-end account when the creditor learns of a change in marital status.¹⁰⁶ The regulation contains elements of both sex and marital status discrimination.¹⁰⁷ The sex-based discrimination in the credit practice governed by that regulation—that linked to change of name—can be treated in Washington in the same manner as it is treated elsewhere.

With respect to the marital status aspects of the problem, however, an examination of the impact of a change in marital status on the creditor's rights in Washington illuminates some deficiencies in the federal regulation due to improper evaluation of the creditor's needs. The salary of an account-holder is the principal collateral on an open-end account.¹⁰⁸ When a single person marries in Washington, his or her salary becomes community property in the absence of a separate property agreement.¹⁰⁹ Consequently, it is liable for community debts and accessible to the new spouse's creditors as well as the account-holder's creditors. Similarly, on separation or divorce, the salary becomes the separate property of the earning spouse and is not liable for community debts.¹¹⁰ Thus, it is clear that marriage, separation, and divorce have a direct impact on the principal asset available for repayment of any debts incurred on the account. For this reason a creditor

106. See text accompanying notes 61–65 *supra*.

107. *Id.*

108. At least creditor representatives repeatedly so assert. Oral testimony of James C. Middlebrooks on behalf of Allied Stores, at Washington hearings on proposed regulations, meeting of Washington State Human Rights Commission, April 15, 1976.

109. See WASH. REV. CODE § 26.16.030 (1976). Earnings are onerously acquired assets. See Cross, *supra* note 95, at 746.

110. See WASH. REV. CODE § 26.16.140 (1976). It should be noted, however, that if a community debt is incurred before separation or divorce, the creditor of the debt may seek enforcement against the separate property of either former spouse which had been community property during the marriage. See *Dizard & Getty v. Damson*, 63 Wn. 2d 526, 387 P.2d 964 (1964); *McLean v. Buringer*, 100 Wash. 570, 171 P. 518 (1918).

arguably should be able to reassess its position when it learns of a marital status change.¹¹¹

The community property law, however, does not call for any different treatment under the federal standards than that required by the property laws of common law states. In a common law state with a family expense statute, a single person who marries likewise becomes liable for all family expense items incurred by the account-holder's spouse.¹¹² Upon separation or divorce, the creditor may still exert control over the salary of the account-holding spouse; however, family expense liability is lost when the marriage is ended.¹¹³ Thus, in both the common law state and in the Washington community property system, changes in marital status have an economic impact differing only in degree. If the creditor should be able to reassess its position at the time of a marital status change in Washington, it should be able to reassess its position in any other state as well.

In another regulation which deals with the creditor practice of requiring the signature of the non-applicant spouse on credit agreements, the Washington regulation may conflict with the federal standard because the state regulation erroneously assumes that community property laws require protective creditor action, in the form of the signature of the non-applicant spouse, beyond that required in common law states. Both the federal and state regulations provide that creditors who impose signature requirements must do so without regard to sex on all similarly qualified applicants.¹¹⁴ The provision is designed to eliminate the credit practice of requiring wives to procure the husband's signature on a credit agreement or loan in order to receive the credit requested.¹¹⁵ Although the practice contained elements of both sex and marital status discrimination, it was primarily sex-based because creditors did not impose similar signature requirements on the male spouse. Therefore, if the creditor now requires the

111. See text accompanying notes 61-65 *supra*.

112. See, e.g., ILL. ANN. STAT. ch. 68. § 15 (Smith-Hurd 1959). See generally H. CLARK, LAW OF DOMESTIC RELATIONS 186-87 (1968). For a compilation of the support and family expense statutes, see Beckey, *supra* note 63.

113. See, e.g., ORE. REV. STAT. § 108.070 (1975). See also note 112 *supra*.

114. See 12 C.F.R. § 202.7(a) (1976); WASH. ADMIN. CODE § 162-40-280 (1976).

115. See, e.g., 1973 *Hearings on Economic Problems of Women*, *supra* note 5, at 552 (statement of Frankie M. Freeman, Commissioner, United States Commission on Civil Rights) (because of the myth that a woman needs male protection, creditors often require a male co-signer, usually the husband or father). See also UTAH STUDY, *supra* note 7, at 26, 40 (creditors require the husband to co-sign more often than the wife).

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husband to sign when the wife applies for credit, then it must also require the wife to sign when the husband applies. The federal regulation provides that signature requirements must be imposed without regard either to sex or to marital status.¹¹⁶ In regard to the marital status aspect of this regulation, a creditor cannot routinely require the spouse of a married applicant to sign a debt instrument and thereby become liable on the debt because this unfairly burdens persons who are married.¹¹⁷ In effect, this practice forces a spouse to be a guarantor of the debt although a similar requirement is not imposed on unmarried persons, particularly in unsecured or open-end transactions.¹¹⁸

The needs of the creditor due to the requirements of state property laws are recognized in two exceptions to the signature regulation. First, the creditor may obtain the spouse's signature in a community property state where the applicant for credit lacks the power to manage community property and does not have sufficient separate property to qualify for the credit requested.¹¹⁹ Second, the creditor may obtain the spouse's signature when it is necessary to "create a valid lien, pass clear title, waive inchoate rights to property or assign earnings."¹²⁰ Under current Federal Reserve Board interpretations, the spouse's signature may also be obtained when the spouse's assets are relied on to obtain credit.¹²¹

The Washington regulation takes the same general position as the federal regulation on the marital status discrimination aspects of creditor signature requirements.¹²² In an exception to the federal standard, however, the Washington regulations permit the creditor routinely to require a spouse's signature "where the applicant is relying on the spouse's existing income to qualify for the amount of credit requested."¹²³

116. See 12 C.F.R. § 202.7 (1976); WASH. ADMIN. CODE § 162-40-280 (1976).

117. See Federal Reserve Board letter of December 23, 1975, [1976] 5 CONS. CRED. GUIDE (CCH) ¶ 42,021.

118. A creditor may require all borrowers to obtain a guarantor or co-signer but it may not require that the co-signer or guarantor be the spouse of the applicant for credit. See Federal Reserve Board letter of January 9, 1975, [1976] 5 CONS. CRED. GUIDE (CCH) ¶ 42,031.

119. See 12 C.F.R. § 202.7(b) (1976).

120. See *id.* § 202.7(c).

121. Federal Reserve Board letter of November 26, 1975, [1976] 5 CONS. CRED. GUIDE (CCH) ¶ 42,007.

122. See WASH. ADMIN. CODE §§ 162-40-280, -290, -300 (1976).

123. *Id.* § 162-40-290.

If this exception is interpreted to mean that a creditor can require the signature of a spouse when the applicant spouse's own income or other assets are not sufficient by themselves to qualify for the amount and kind of credit requested, the Washington regulation is consistent with the federal regulation. The creditor would be relying on the joint assets and incomes of both spouses to establish creditworthiness, and, as in other states, could obtain the signatures of both spouses.¹²⁴

But if this exception is construed to permit a creditor to require a married applicant to obtain the spouse's signature whenever the spouse's income is reported and may be "relied on" by the creditor, it is inconsistent with the federal standard. The inconsistency results from the fact that the only thing the creditor gains by requiring the additional signature is the separate liability of the non-applicant spouse.¹²⁵ This in effect forces the non-applicant spouse to guarantee with his or her separate property, debts incurred on the account and is the very disadvantage to married persons that the federal regulation prohibits.

Creditors readily acknowledge that in Washington the signature of either spouse is sufficient to commit all of the community property for ordinary community debts.¹²⁶ This includes the ability to commit the earnings of the non-applicant spouse if such earnings are community property. Creditors also acknowledge that if the debt is for a family expense, the non-signing spouse is separately liable for the debt.¹²⁷ Creditors assert a need for the signature not to gain three-way liability in an ongoing marriage, but to assure that debts can be collected from either spouse in the event a separation or divorce converts community property salary into the separate property of the earning spouse.¹²⁸ This feature of the Washington community property system, it is claimed, creates the need for the Washington creditor to obtain both signatures.

124. Unless, of course, one takes the position that spouses relying on community property simply cannot be evaluated independently.

125. See *Northern Bank & Trust Co. v. Graves*, 79 Wash. 411, 140 P. 328 (1914).

126. WASH. REV. CODE § 26.16.030 (1976). A spouse may not purchase or contract to purchase community real property without the other spouse's joining in the transaction. Therefore the signature of one spouse is insufficient to commit community property for the purchase of real estate.

127. *Id.* § 26.16.205.

128. The earnings of a husband and wife while living separate and apart are the separate property of each. *Id.* § 26.16.140.

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What this argument misses is the creditor's ability to make an evaluation of the married applicant for a separate credit account in Washington apart from his or her spouse. If the applicant's own salary, which creditors assert is the principal asset relied on for repayment of the credit extended, is sufficient to qualify for the amount and kind of credit requested, the creditor should extend the credit without imposing the burden of separate liability on the non-applicant spouse. During the continuance of the marriage, the creditor has the account-holder's salary as well as the spouse's community property salary available for payment of the credit.

In the event of separation or divorce, the creditor still has the account-holder's salary available for repayment of debts although it is now classified as separate rather than community property. Thus the creditor actually obtains a guarantee beyond separation or divorce in addition to the separate guarantee during marriage.¹²⁹ Under the above analysis, the Washington creditor has no greater need to obtain the non-applicant spouse's signature than a creditor in a common law state. What it seeks, therefore, is the same guarantor protection that has been disapproved in the federal regulations.

The foregoing examples illustrate the value of examining a credit discrimination problem in the context of a particular state property system. When the disadvantageous practice is viewed in light of the actual operation of an individual state's legal requirements, it is easier to separate sex discrimination from marital status discrimination, and to examine the necessity for treating individuals in a different manner because of marital status.

IV. CONCLUSION

Both Congress and the Washington Legislature responded to problems of equal availability of credit by producing statutes that are potentially broad in scope and general in nature. Consequently, the task

129. It is arguable that the creditor has gained nothing by the additional signature after a separation or divorce. If the account is separate, during marriage the debts incurred would probably be community debts. By his or her signature on the credit agreement, it is possible that the non-account-holding spouse is agreeing only to commit his or her separate property for payment of community debts. After separation or divorce, debts incurred on the account would be the separate debts of the account holder and the spouse who had previously signed could argue that his or her agreement did not extend to those debts.

of implementing the statutes has fallen to the regulatory agencies administering them. Underlying these statutes are two major policies that are potentially in hopeless conflict—one to maximize the availability of credit to applicants without undue emphasis on their membership in protected groups, and the other to permit creditors to evaluate effectively the risk of extending credit to such group members.

The Federal Reserve Board and the Washington State Human Rights Commission, relying on the federal model, have used a practice-by-practice or piecemeal approach to regulatory implementation of these statutes. Such an approach does not furnish adequate guidelines for the future. Therefore, it is suggested that a more detailed regulatory analysis be employed in order to give appropriate recognition to both statutory policies. This analysis would first identify with some precision the group that is affected by a credit practice or a law upon which a credit practice is based. The effectiveness of the credit practice as a risk-measuring device, or the legal necessity for the practice should then be evaluated based on either the characteristics of the group vis-à-vis the use of credit or the policies underlying the law which occasions the credit practice. This analysis enables the regulatory agency to make meaningful judgments about the extent to which credit practices measure risk and the extent to which group members are affected by the practice or law. In instances where practices that in fact measure risk are found to have a severe adverse impact on group members, the regulatory agency would be put on notice to search for compromise solutions.

The suggested approach is, of course, not without problems of its own. The most critical need is for hard data concerning protected groups, including how many group members are adversely affected by credit practices as well as the credit behavior of group members. Additionally, creditors themselves should generate more precise information concerning the actual risk factors in consumer credit so that the need to rely on the generalized personal characteristics of an applicant can be minimized. Finally, sensible implementation of equal credit opportunity requires individual attention to each of the fifty state law systems governing creditors' rights and remedies. So far, the federal statutory and regulatory mechanisms, by simply exempting state property laws, have pretended that federal standards can be superimposed without such analysis. These state laws, however, may be so intimately connected with risk that analysis of the Washington state system sug-

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gests that further pursuit of the federal policy invites confusion and conflict. Consequently, the federal system should either rely more heavily on state implementation of equal credit opportunity, or at least develop guidelines beyond simple exemption of state property laws.

There is agreement between creditors and applicants that credit is an important commodity in the modern United States. Thus, there should likewise be mutual effort to see that credit is in fact available on an equal basis for all who would use it wisely and responsibly.