No. 10-56177

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

UNION AUTO SALES, INC., *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS APPELLANT

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STATEMENT OF JURISDICTION

The United States brought this suit to enforce provisions of the Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691 *et seq.* The district court had jurisdiction under 28 U.S.C. 1345 and 15 U.S.C. 1691e(h). The district court entered an order on May 28, 2010, granting defendants Union Auto Sales, Inc.'s (Union) and Han Kook Enterprise, Inc.'s (HKE) motions to dismiss the First

Amended Complaint. R.E. 142-144.[1] A notice of appeal was timely filed on July 26, 2010. R.E. 145-146. This Court has jurisdiction under 28 U.S.C. 1291.[2]

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[1] Citations to "R.E. __" refer to pages in the Record Excerpts filed by the United States in this appeal.

[2] We note that, as relevant here, the First Amended Complaint named five defendants – Union, HKE, Han Kook Imports, Inc. (HKI), Vermont Chevrolet, Inc. (VC), and Han Kook Motors, Inc. (HKM). R.E. 60-71(the remaining defendant, Nara Bank, settled the case pursuant to a consent decree; see R.E. 15-18, 19-45). The latter three defendants are automobile dealerships affiliated with HKE. The First Amended Complaint referred to these four defendants collectively as HKE, and asserted identical claims against them. See, *e.g.*, R.E. 62, 67-69. Neither HKI, VC, nor HKM filed an answer or a motion to dismiss in response to the First Amended Complaint. We initially read the district court's order granting Union's and HKE's motions to dismiss as dismissing the complaint in its entirety, and therefore filed a notice of appeal of the district court's May 28, 2010, judgment on July 26, 2010. See, *e.g.*, R.E. 144 ("Plaintiff's claims must be dismissed").

Nevertheless, because the district court's May 28, 2010, order might be read to address the dismissal of the First Amended Complaint only as it applies to Union and HKE (and not to the other three defendants), on September 3, 2010, the United States filed a Motion for Entry of Final Judgment Pursuant to Federal Rule of Civil Procedure 54(b) with respect to Union and HKE. R.E. 147-153; see also R.E. 74 at n.1 (HKE stated that its motion to dismiss was filed solely on behalf of HKE, and not the three affiliated dealerships). The United States sought to ensure, in case there was any doubt, that the May 28, 2010, dismissal of the First Amended Complaint was an appealable order. The United States also noted that with regard to the three additional defendants, VC had filed a notice of bankruptcy, HKM has never been located or served, and HKI's counsel represented that it does not intend to appear or make any filings in this case. R.E. 149.

On November 2, 2010, the district court denied the United States' Rule 54(b) motion without any discussion of the issue or clarification of the reach of its order granting the motions to dismiss. R.E. 158. Next, on November 22, 2010, the district court entered an order, after a pretrial conference at which no party

(continued…)

STATEMENT OF THE ISSUE

Whether the district court erred in dismissing the First Amended Complaint alleging a pattern and practice of discrimination against non-Asians in automobile lending interest rates because the complaint failed to allege sufficient facts to make a plausible claim of discrimination.

RELEVANT STATUTES AND REGULATIONS

The following statute relevant to the disposition of the case is set forth in the Addendum attached to this brief: 15 U.S.C. 1691 *et seq.* (Equal Credit Opportunity Act (ECOA)).

(…continued)
appeared, removing the case from the court's "active caseload" and noting that the case was stayed as to "the only remaining defendant," VC (because of the bankruptcy proceedings). R.E. 159. The docket entry also stated "Case Terminated." R.E. 159. That order suggests that the district court intended its May 28, 2010, dismissal order to apply to all defendants *except* VC, against which the court previously stayed this proceeding.

As a result, on December 9, 2010, the United States filed, pursuant to Federal Rule of Civil Procedure 41(a)(1), a motion for voluntary dismissal of its claim against VC. R.E. 160-162. The United States did so to remove any doubt that this Court has jurisdiction of this appeal of the district court's May 28, 2010, order granting Union's and HKE's motions to dismiss the complaint for failure to state a claim.

STATEMENT OF THE CASE

On September 30, 2009, the United States filed suit against Nara Bank, Union Auto Sales, Inc. (Union), and Han Kook Enterprise, Inc. (HKE) alleging that they engaged in a pattern or practice of discrimination on the basis of race or national origin in violation of the Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691 *et seq.*, and its implementing regulations, 12 C.F.R. 202.4 & 202.6(b)(9), by charging non-Asian customers higher automobile loan interest rates than Asian customers. R.E. 1-14.[3] The claim against Nara Bank was settled in a consent decree. R.E. 15-18, 19-45. Subsequently, HKE filed a motion to dismiss, arguing, in part, that the complaint failed to state a claim. R.E. 46-56.

On March 3, 2010, the district court granted the motion, with 15 days leave to amend the complaint. R.E. 57-59. On March 18, 2010, the United States filed the First Amended Complaint, which included additional factual allegations against Union and HKE, and added three additional defendants – Han Kook Imports, Inc. (HKI), Vermont Chevrolet, Inc. (VC), and Han Kook Motors, Inc.

[3] 15 U.S.C. 1691(a)(1) states that "[i]t shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction * * * on the basis of race, color, religion, national origin, sex or marital status, or age." 15 U.S.C. 1691e(h) authorizes the Attorney General to bring a civil action in federal district court "whenever he has reason to believe that one or more creditors are engaged in a pattern or practice in violation of this subchapter." See Addendum at 1, 12.

(HKM) – automobile dealerships affiliated with HKE. R.E. 60-71.[4] With regard to the additional defendants, HKM could not be located and therefore has not been served with the complaint; the district court stayed the proceeding as to VC because it filed for bankruptcy; and HKI has not appeared or made a filing in the case. See generally R.E. 141, 149, 159. Therefore, none of these three defendants responded to the First Amended Complaint.

In April 2010, Union and HKE filed motions to dismiss the First Amended Complaint under Federal Rule of Civil Procedure 12(b)(6). R.E. 72-82, 88-99. On May 28, 2010, the district court granted the motions, finding that the additional allegations were insufficient to make a claim of disparate impact discrimination plausible. R.E. 142-144.

On July 26, 2010, the United States filed a notice of appeal of the May 28, 2010, order. R.E. 145-146.[5]

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[4] In the original complaint, HKI, VC, and HKM were named as "d/b/a's" of the HKE. See R.E. 3. They were added as defendants in the amended complaint after we learned that they were separate entities.

[5] See note 2, *supra*, addressing district court filings and orders subsequent to the filing of the notice of appeal.

STATEMENT OF THE FACTS

1. Background

Defendants Union and HKE owned car dealerships in California that facilitated automobile loans for their customers through agreements with defendant Nara Bank and other lenders. R.E. 61-62. The lenders communicated loan product terms and rates to the dealerships through "rate sheets," underwriting standards, and pricing policies. R.E. 65. The loan rates that the automobile dealerships charge their customers have two components. The first is the "buy rate," which is set by the lender. The buy rate is an objective component that is generally based on the applicant's credit and communicated by the lender to the dealership, but not to the customer. R.E. 64-65. The second component of the loan rate is the "dealer mark-up" or "overage," which is a non-risk related finance charge that the dealership adds to the buy rate. R.E. 65. The dealership offers the customer the "contract rate," which is the buy rate plus the dealer mark-up. R.E. 64-65.[6]

The agreements between the dealerships and the lender permit the dealerships to establish and charge the dealer mark-ups, which are shared by a dealership and a lender according to terms set forth on the rate sheets and in the

[6] As reflected in many of the ECOA cases discussed below, this two stage loan rate setting process – involving a risk-related buy rate and a non-risk-related dealer mark-up added by the retail seller to arrive at the buyer's total interest rate – is common in automobile loans.

contracts between the dealerships and the lenders. R.E. 65-66. The dealerships do not use formal, written, uniform underwriting guidelines and procedures to set the dealer mark-up. Instead, the dealerships' employees are given the discretion to engage in subjective decision-making and set the dealer mark-ups within broad parameters. R.E. 66-67.

In 2006, Federal Reserve Board (Board) bank examiners conducted an evaluation of Nara Bank's compliance with fair lending laws, including its lending program through automobile dealerships. R.E. 63. The Board found reason to believe that Nara Bank was engaged in a pattern or practice of discrimination because non-Asian borrowers, many of whom were Hispanic, were charged overages with more frequency and in greater amounts than Asian borrowers. R.E. 63. As a result, the Board referred the matter to the Attorney General for enforcement. The Board did not make any findings with respect to Union and HKE, which were not subject to its supervisory authority. See generally R.E. 63.

2. The United States Files Suit Challenging Defendants' Lending Practices

On September 30, 2009, the United States filed suit against Nara Bank, Union, and HKE alleging that they engaged in a pattern or practice of discrimination on the basis of race or national origin in violation of the ECOA by charging non-Asian customers higher loan rates than Asian customers. R.E. 1-14.

The claim against Nara Bank was settled in a consent decree. R.E. 15-45.[7] Subsequently, HKE filed a motion to dismiss, arguing, in part, that the complaint failed to state a claim. R.E. 46-56.

On March 3, 2010, the district court granted the motion, concluding that the complaint was factually deficient and did not give defendants fair notice of the claim against them. R.E. 59. The court stated that the allegations in the complaint were based on the bank examiners' investigation and the Board's conclusion that it found "reason to believe" that defendants engaged in a pattern or practice of discrimination. R.E. 59. The court also stated that the complaint "gives no other details regarding the investigation that would make its claims plausible and give Defendant a chance to formulate a response. For example, it is unclear how the [bank examiners] distinguished between Asian and non-Asian borrowers without meeting the borrowers in person, * * * who discriminated against whom, how the alleged disparate impact was calculated, and what the magnitude of the alleged disparate impact actually was." R.E. 59. The United States was given leave to amend the complaint within 15 days. R.E. 59.

On March 18, 2010, the United States filed the First Amended Complaint, which included additional factual allegations against Union and HKE, and added

[7] See http://www.justice.gov/crt/housing/fairhousing/caseslist.htm#lending.

three additional defendants – automobile dealerships affiliated with HKE. R.E. 60-71.[8] The First Amended Complaint noted that the Board did not make any findings with respect to Union and HKE, and that the United States conducted its own investigation of the dealerships. R.E. 63. With respect to Union, the First Amended Complaint stated that between 2004 and 2006, Union originated more than 1400 automobile loans, and that "[r]eview of names and driver's license photographs contained in the loan files and data * * * reveals at least 200 borrowers as Asian and at least 1200 borrowers as non-Asian, many of whom were Hispanic." R.E. 66. The First Amended Complaint further stated that "[s]tatistical analysis of the automobile loans * * * demonstrates that Union['s] * * * non-Asian borrowers were charged mean overages approximately 35 to 155 basis points higher than Asian borrowers.[9] More than 600 non-Asian customers of Union were charged overages higher than the mean overage charged to Asian borrowers during the covered time-period." R.E. 66-67.

The First Amended Complaint made similar allegations against HKE, stating that during the relevant time period, HKE originated more than 3000 loans and that

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[8] See note 2, *supra* (addressing the status of these defendants). The amended complaint referred to HKE and the three affiliated automobile dealerships (HKI, VC, and HKM) collectively as HKE. See R.E. 62.

[9] The amended complaint refers to the "mean overages" as falling within a range of numbers because the United States reviewed multiple sets of data.

the data showed "at least 1600 borrowers as Asian and at least 1300 borrowers as non-Asian, many of whom were Hispanic." R.E. 67. The First Amended Complaint stated that statistical analysis showed that "non-Asian borrowers were charged mean overages approximately 20 to 90 basis points higher than Asian borrowers" and that, similarly, "[m]ore than 600 non-Asian customers of HKE dealerships were charged overages higher than the mean overage charged to Asian borrowers during the covered time-period." R.E. 67-68.

The First Amended Complaint alleged that in both cases the differences in the overages in the loans to non-Asian customers compared to Asian customers "cannot be explained fully by factors unrelated to race or national origin such as the customers' creditworthiness," and that "these differences are statistically significant." R.E. 67-68. Similarly, it stated that the dealerships "did not use formal, written, or uniform underwriting guidelines and procedures to set interest rate markups. Instead, employees of the * * * dealerships were granted the discretion to engage in subjective decision-making and set overages within broad parameters. This discretion was exercised in a manner that discriminated against non-Asian borrowers." R.E. 66-67. Based on these allegations, the First Amended Complaint alleged that defendants "engaged in a pattern or practice of discrimination on the basis of race or national origin, as defined in ECOA, 15 U.S.C. § 1691(e)(h), and Regulation B, 12 C.F.R. 202.2(n), 202.4, and

202.6(b)(9)." R.E. 68. The First Amended Complaint sought declaratory and injunctive relief, as well as money damages for the victims of the discriminatory practices. R.E. 69-70.

3. Defendants' Motions To Dismiss The First Amended Complaint

Union and HKE filed motions to dismiss the First Amended Complaint under Federal Rule of Civil Procedure 12(b)(6). R.E. 72-82, 88-99. Union asserted that the complaint does not identify any discriminatory policy or practice, as required in a disparate impact case. R.E. 92. Union also argued that the statistical assertions of adverse impact were "meaningless on their face." R.E. 94. Union asserted, for example, that to say that more than 600 of the 1200 non-Asian customers were charged overages higher than the mean overages charged to Asian customers is simply to say that half of one group is above average, which means that the other half is below average, and therefore the claim is "devoid of content." R.E. 94-96. In addition, Union argued that the United States has no basis for its racial identification and classification of customers because, for example, names are an "uncertain method for racial identification" and it is not clear what constitutes an Asian versus non-Asian. Moreover, because the Asian category was only approximately 14 percent of the whole (200 of the 1400), "it is quite plausible that some other subgroup of the broad non-Asian category * * * actually received even more favorable treatment than the small Asian group," raising the question of

"who is in the alleged affected group[] and who is seeking monetary and other relief." R.E. 98-99.

In its motion, HKE stated that it was unclear whether the action was being brought as a disparate treatment or disparate impact case. R.E. 78. HKE argued that, if it was a disparate impact case, the First Amended Complaint did not identify a policy or practice used to discriminate against the non-Asian customers. R.E. 79. HKE further argued that the statistical analysis of the loan terms was faulty because it did not consider other factors that affect loan rates, including the price of the automobile, the length of the loan, and whether there was a trade-in. R.E. 80. Finally, HKE argued that if the United States was trying to establish a disparate treatment claim, the United States did not allege facts showing that borrowers in the two groups were otherwise similarly situated. R.E. 81.

The United States responded that the First Amended Complaint met the pleading requirements of Federal Rule of Civil Procedure 8(a)(2) and alleged sufficient facts to state a claim that defendants engaged in a pattern or practice of discrimination. R.E. 117-127. The United States asserted that the complaint adequately alleged a specific discriminatory policy – the "subjective decision-making authority" given to employees "in the setting of the * * * dealer markups" – and that this policy "resulted in non-Asian customers being charged higher overages or dealer markups than Asian customers." R.E. 125. The United States

further asserted that the issue of whether it was bringing a disparate impact or disparate treatment case was not relevant to the legal sufficiency of the complaint, but is appropriately addressed through discovery and trial. R.E. 122-126. "In a pattern or practice case, the United States can present evidence on and pursue disparate impact, disparate treatment, or both as methods of proving its claims. The United States needs to identify its claims, not the legal theories on which they are premised[,] in its complaint[,] and the amended complaint meets that standard." R.E. 126 (footnote omitted).

The United States also noted that courts in other cases brought under the EOCA have found that complaints challenging nearly identical subjective policies, and presenting less specific statistical evidence, were sufficient to support a disparate impact claim. R.E. 123-125. The United States further asserted that the First Amended Complaint identified two methods by which Asian and non-Asian borrowers can be distinguished (by their names and photographs) and "provide[d] estimates of the mean disparities in overages charged to non-Asian customers," which were "statistically significant." R.E. 121. With regard to the adequacy of the factual allegations concerning the statistical analysis, the United States again asserted that those allegations were sufficient to satisfy the pleading requirements

and that the defendants' challenges were appropriate for discovery and trial, not the legal sufficiency of the complaint. R.E. 122-126.[10]

4. The Decision Below

On May 28, 2010, the district court granted the motions to dismiss, finding that the additional assertions did not contain sufficient facts to make a disparate impact claim "plausible." R.E. 143. First, the court stated that the classification of Asians and non-Asians is "vague at best and meaningless at worst," noting, for example, that it was unclear who was considered Asian. R.E. 143. The court also stated that the theory behind the classification was vague; *i.e.*, "it is unclear why the sales-reps would give lower rates to 'Asians.'" R.E. 144. Second, the court concluded that the statistics did not create a plausible claim of discrimination because they "do not show any discrimination." R.E. 144. The court stated that "[a]ll that Plaintiff says is that half of the non-Asians were treated worse than the Asians. The other half, of course, might have been treated better. So to say that half of the non-Asians were treated worse than the average Asian is not to say much at all." R.E. 144. Therefore, the court concluded, "Plaintiff has failed to make a plausible disparate impact claim. The racial classification is unhelpful

[10] See also R.E. 129-132, 133-140 (replies of HKE and Union, respectively).

* * *[,] the statistics do not, even if accepted as true, make a disparate impact plausible * * *[, and] there is nothing else, besides the statistics, that makes Plaintiff's claims plausible." R.E. 144.

SUMMARY OF THE ARGUMENT

The district court's decision dismissing the amended complaint misapplies the Supreme Court's recent decisions in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), and *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009); draws inferences in favor of the defendants rather than the plaintiff; sets the bar too high for pleading discrimination cases; and undermines the notion that the filing of a complaint is the starting point for notice pleading that relies on discovery rules and summary judgment motions to define the issues and dispose of unmeritorious claims. The district court's decision should be reversed.

The standard for notice pleading under Federal Rule of Civil Procedure 8(a)(2) requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." This standard is not onerous, and the "heightened" pleading standard applicable to some claims, see Federal Rule of Civil Procedure 9, is not applicable to civil rights actions. The complaint need only contain sufficient factual allegations that, accepted as true, state a claim for relief that is "plausible," *i.e.*, that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct.

at 1949. The complaint need not include detailed factual allegations, as long as the alleged facts are sufficient to state a claim to relief above the speculative level and give the defendant fair notice of what the claim is and the grounds upon which it rests.

The district court dismissed the First Amended Complaint for two reasons: (1) the statistics alleged in the complaint "do not show any discrimination," and (2) the classification of "Asians and non-Asians is vague at best and meaningless at worst." R.E. 143-144. Drawing all reasonable inferences in favor of the United States, however, the complaint alleged sufficient facts to state a plausible claim of discrimination. The First Amended Complaint alleges that the defendants discriminated on the basis of race or national origin in violations of the ECOA. The amended Complaint identifies defendants' specific lending practice that is being challenged (the policy to allow dealership employees to use their subjective judgment to determine the dealer mark-up), and presents statistical evidence that as a result of this policy non-Asian borrowers were charged higher loan rates than Asian borrowers. The amended complaint also asserts that the employees' discretion "was exercised in a manner that discriminated against non-Asian borrowers." R.E. 66-67. As such, the amended complaint is consistent with Rule 8(a), and therefore the district court erred in granting defendants' motions to dismiss.

ARGUMENT

THE FIRST AMENDED COMPLAINT ALLEGED SUFFICIENT FACTS TO SUPPORT A PLAUSIBLE CLAIM OF DISCRIMINATION AGAINST NON-ASIANS IN AUTOMOBILE LENDING RATES, AND THEREFORE THE DISTRICT COURT ERRED IN DISMISSING THE COMPLAINT FOR FAILURE TO STATE A CLAIM

A. Standard Of Review

This Court reviews *de novo* a district court's dismissal of a complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Mendiondo* v. *Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1102 (9th Cir. 2008). In so doing, the Court accepts "all factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party," here the United States. *Knievel* v. *ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005); see also *Ta Chong Bank Ltd.* v. *Hitachi High Techs. America, Inc.*, 610 F.3d 1063, 1066 (9th Cir. 2010).

B. The Pleading Requirements Under Federal Rule Of Civil Procedure 8(a) Are Not Onerous

Federal Rule of Civil Procedure 8(a)(2) requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." In several recent cases, the Supreme Court addressed the standards for deciding motions to dismiss a complaint for failure to state a claim.

First, in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), the Court held that facts alleging that companies engaged in parallel business conduct, but not

indicating the existence of an actual agreement, did not state a claim under the Sherman Act. The Court stated that in an antitrust action the complaint must contain "enough factual matter (taken as true) to suggest that an agreement was made," explaining that "[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* at 556. The Court also explained, more generally, that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," a plaintiff's obligation to provide grounds for entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. The allegations "must be enough to raise a right to relief above the speculative level" and give the defendant fair notice of what the claim is and the grounds upon which it rests. *Ibid.* In other words, plaintiff must allege "enough facts to state a claim to relief that is plausible on its face" and to "nudge[] the[] claims[] across the line from conceivable to plausible." *Id.* at 570.

Subsequently, in *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009), the Court elaborated. There, the Court held that a pretrial detainee alleging various unconstitutional actions in connection with his confinement failed to plead sufficient facts to state a claim of unlawful discrimination. The Court stated that

the claim for relief must be "plausible on its face," *i.e.*, the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949. In this regard, determining whether a complaint states a plausible claim for relief is necessarily "a context-specific task." *Id.* at 1950. The Court also explained that "[t]wo working principles underlie [its] decision in *Twombly*." *Ibid.* "First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ibid.* "Second, only a complaint that states a plausible claim for relief survives a motion to dismiss," and this determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 1950.

In addition, the heightened pleading standard of Fed. R. Civ. P 9(b) does not apply to discrimination cases.[11] See *Iqbal*, 129 S. Ct. at 1954 (elevated pleading standard does not apply to discriminatory intent); *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506 (2002) (Title VII case); *Leatherman* v. *Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (heightened pleading

[11] Federal Rule of Civil Procedure 9(b) states: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

standard does not apply to civil rights cases alleging municipal liability under 42 U.S.C. 1983). Therefore, if a complaint alleges enough facts to state a claim for relief that is plausible on its face, a complaint may not be dismissed for failing to allege additional facts that the plaintiff would need to prevail at trial. *Twombly*, 550 U.S. at 570; see also *Erickson* v. *Pardus*, 551 U.S. 89, 93 (2007) (per curiam) (plaintiff need not allege specific facts, the facts alleged must be accepted as true, and the facts need only give defendant "fair notice of what the * * * claim is and the grounds upon which it rests" (quoting *Twombly*, 550 U.S. at 555).

At the same time, "a claim just shy of plausible entitlement to relief" cannot be saved by the discovery process and case management. *Twombly*, 550 U.S. at 559; see also *Iqbal*, 129 S. Ct. at 1953 ("the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed on the discovery process"). But where the requirements of Rule 8(a) are satisfied, "claims lacking merit may be dealt with through summary judgment." *Swierkiewicz*, 534 U.S. at 514. In this regard, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (internal quotation marks and citation omitted).

Following these cases, this Court has summarized that "for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable

inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss* v. *United States Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009); see also *Mendiondo*, 521 F.3d at 1104 ("dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory"); *Shroyer* v. *New Cingular Wireless Servs., Inc*., 622 F.3d 1035, 1041 (9th Cir. 2010). At the same time, this Court has noted that "the motion to dismiss is not a procedure for resolving a contest between the parties about the facts or the substantive merits of the plaintiff's case." *Chavez* v. *Blue Sky Natural Beverage Co.*, 340 F. App'x. 359, 360 (9th Cir. 2009) (unpublished) (internal quotation marks and brackets omitted).[12]

In this regard, the Seventh Circuit, addressing *Twombly* and *Iqbal*, recently stated that "[c]ritically, * * * the Court * * * [did not] cast any doubt on the validity of Rule 8" or its "broad principles," and that under the plausibility standard "the plaintiff must give enough details about the subject-matter of the case to present a story that holds together. In other words, the court will ask itself

[12] Other decisions of this Court, although pre-dating *Twombly* and *Iqbal*¸ emphasized that the Rule 8 standard contains "a powerful presumption against rejecting pleadings for failure to state a claim," *Auster Oil & Gas, Inc.* v. *Stream*, 764 F.2d 381, 386 (9th Cir. 1985), and that motions to dismiss for failure to state a claim are "viewed with disfavor and * * * rarely granted," *Hall* v. *City of Santa Barbara*, 833 F.2d 1279, 1274 (9th Cir. 1986), cert. denied, 485 U.S. 940 (1988). See also *Gilligan* v. *Jamco Dev. Corp.*, 108 F.3d 246 (9th Cir. 1997).

could these things have happened, not *did* they happen." *Swanson* v. *Citibank*, 614 F.3d 400, 403-404 (7th Cir. 2010). The court added that "in many straightforward cases[] it will not be any more difficult today for a plaintiff to meet that burden than it was before the Court's recent decisions. * * * [M]ore "complex case[s]," however, "will require more detail, both to give the opposing party notice of what the case is all about and to show how, in plaintiff's mind at least, the dots should be connected." *Id.* at 404-405. Therefore, the issue here is whether the United States has stated a claim on which relief can be granted, and therefore should have an opportunity to present evidence in support of its allegations, regardless of the likelihood that it will ultimately prevail.

C. The First Amended Complaint Alleged Sufficient Facts To Plausibly State A Claim Of Discrimination In Violation Of The ECOA

The district court dismissed the First Amended Complaint for failure to state a claim for two reasons: (1) the statistics alleged in the complaint "do not show any discrimination," and (2) the classification of "Asians and non-Asians is vague at best and meaningless at worst." R.E. 143-144.[13] Drawing all reasonable

[13] The district court also stated that the "theory behind the classification" was "equally vague," *e.g.*, it is "unclear why the sales-reps would give lower loan rates to 'Asians.'" R.E. 144. The reason the defendants may have given non-Asians less favorable loan rates, or Asians better loan rates, is not relevant to whether the complaint alleges facts sufficient to withstand a motion to dismiss for

(continued…)

inferences in favor of the United States, however, the complaint alleges sufficient facts to state a plausible claim of discrimination. Therefore, the district court's decision should be reversed.

1. The Statistics Alleged In The Complaint Are Sufficient To Support A Plausible Claim Of Discrimination Under Both Disparate Treatment And Disparate Impact Theories

Based on a review of the automobile dealership loan files, and statistical analysis of the data from those files, the First Amended Complaint alleges, first, that the defendants charged non-Asian borrowers statistically significantly higher mean overages (mark-ups) than Asian borrowers. R.E. 66-67. These allegations support the plausible inference that defendants, through their discretionary pricing policy, discriminated against those non-Asian borrowers.[14] Second, the amended complaint alleges that the statistics show that approximately half of the non-Asian customers were charged overages greater than the mean overages charged to Asian

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(…continued)
failure to state a claim. Moreover, as we note below, discrimination against non-Asians is discrimination on the basis of race or national origin.

[14] Union argued below that the United States' reference to "mean overages" as a range of numbers was meaningless because an average of a set of numbers cannot be a range of numbers. See R.E. 94. As we note above (note 9), the amended complaint refers to the "mean overages" as falling within a range of numbers because the United States reviewed multiple sets of data. Although analysis of each set revealed a disparity, the disparity varied based on the data set.

customers. R.E. 66-67. These allegations also support the plausible inference that defendants, through the discretionary pricing policy, generally charged non-Asians higher discretionary mark-up rates, and therefore discriminated against them, whether intentionally or by causing an unjustified disparate impact.

Courts have long recognized that statistics, properly analyzed, can support a showing of either disparate impact or discriminatory intent.[15] See *Reno* v. *Bossier Parish Sch.*, 520 U.S. 471, 487 (1997) (the "impact of official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions"); *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Co.*, 429 U.S. 252, 266 (1977) (the "impact of official action" may provide "an important starting point" in "[d]etermining whether invidious discriminatory purpose was a motivating factor"); *Committee Concerning Cmty. Improvement* v. *City of Modesto*, 583 F.3d 690, 703 (9th Cir.

[15] In a disparate impact case, the plaintiff must identify a specific policy or practice and offer statistical evidence showing that the practice in question has caused an adverse effect. See generally *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642, 657 (1989) (Title VII); *Watson* v. *Fort Worth Bank and Trust*, 487 U.S. 977, 990-995 (1988) (Title VII); see also *Smith* v. *City of Jackson, Mississippi*, 544 U.S. 228 (2005) (ADEA). As this Court has summarized, to establish a prima facie case of disparate impact, the plaintiff must: "(1) identify the specific * * * practice challenged; (2) show disparate impact; and (3) prove causation." *Rose* v. *Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990) (ADEA); see also *Pottenger* v. *Potlatch Corp.*, 329 F.3d 740, 749 (9th Cir. 2003) (ADEA).

2009) (noting that evidence of statistical disparities is relevant to establishing discriminatory intent). Moreover, a pattern or practice of disparate treatment discrimination can be established by showing, "typically through statistics and anecdotes, that the course of action was chosen at least in part because of its adverse effects on an identifiable group." *Davis* v. *Valley Hospitality Servs., LLC*, 214 F. App'x 877, 879 (11th Cir. 2006), cert. denied, 549 U.S. 1341 (2007); see also *EEOC* v. *Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1273-1274 (11th Cir. 2000).

Therefore, it cannot be said that the complaint "lacks a cognizable legal theory or sufficient facts to support a cognizable theory." *Mendiondo*, 521 F.3d at 1104. Further, the complaint does not contain only blanket assertions or "formulaic recitation" of the elements of a cause of action. *Iqbal*, 129 S. Ct. at 1949. The cause of action is clear and not complex – defendants discriminated against non-Asians by charging them, through their discretionary pricing policy, higher loan rates, which the statistics demonstrate, or at least "plausibly" assert. These statistics and the related allegations are the starting point of the United States' claim. With respect to intentional discrimination, adjudication of that claim will "demand[] a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights*, 429 U.S. at 564. Similarly, with respect to disparate impact, the United States' claim will demand inquiry into whether the defendants have carried their burden to rebut the statistics

"or demonstrate a legally sufficient, nondiscriminatory reason for the practice causing the disparate impact." *Ojo* v. *Farmers Group, Inc.*, 600 F.3d 1205, 1207 (9th Cir. 2010) (internal quotation marks omitted). Dismissal is inappropriate at this stage of the case; to the extent defendants disagree with the statistics, or believe that they are insufficient to show discrimination, those issues can be addressed through summary judgment. See generally *Pryor* v. *National Collegiate Athletic Ass'n*, 288 F.3d 548, 563 (3rd Cir. 2002) ("Owing perhaps to the principle that questions of intent and state of mind are ordinarily not amenable to summary adjudication, * * * courts have only reluctantly upheld the Rule 12(b)(6) dismissal of a claim alleging unlawful discrimination in the adoption of an otherwise facially neutral policy.").

Further, the fact that the complaint alleges that approximately half of the non-Asians were charged more than the Asians (*i.e.*, more than 600 out of 1200 in one case, and more than 600 out of 1300 in the other) does not mean that the complaint fails to sufficiently allege a claim of discrimination. The district court stated that because this data suggests that half of the non-Asians may have been treated *better* than the Asians, there is no showing of discrimination. R.E. 144. But that inference ignores the allegations that, overall, defendants charged non-Asian borrowers mean overages that were significantly higher than they charged Asian borrowers– facts that make the inference of discrimination more plausible

than the contrary inference. In any event, the district court was not free to draw an inference in favor of the defendants. To the contrary, *Twombly* itself reaffirmed the rule that all reasonable inferences must be drawn in favor of the non-moving party, here the United States. See *Twombly*, 550 U.S. at 555. The allegations in the complaint state an initial approximation of the number of persons affected by defendants' discriminatory conduct and assert that they are statistically significant. Discovery may reveal that, in fact, the vast majority or nearly all non-Asian customers were charged higher dealer mark-ups compared to similarly-situated Asian customers.[16] But the facts alleged in the complaint are more than sufficient to make the claim of discrimination plausible.

Finally, numerous courts have addressed – and denied – motions to dismiss, similar to the motions filed here, asserting that the complaint's statistical showing of a disparate impact failed to state a claim for relief.[17] In *Ramirez*, for example,

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[16] We note that the United States was given 15 days to file an amended complaint. See R.E. 59. At the complaint stage, the United States had only limited access to the defendants' loan files and had not engaged in formal discovery. Therefore, in the 15 days it had in which to amend, it had no opportunity or ability to develop more detailed statistical evidence. That it can do so during discovery further demonstrates that it would be premature to shut the case down at the pleading stage.

[17] Although defendants argued that the complaint was fatally flawed because it did not identify a specific policy or practice that underlies a disparate impact claim, the district court neither addressed this issue nor dismissed the complaint on

(continued…)

the court concluded that the complaint sufficiently alleged that the discretionary pricing policy had a disparate impact on minority borrowers as compared to similarly-situated white borrowers. *Ramirez*, 633 F. Supp. 2d at 928-929. The complaint alleged that under the defendant's pricing policy, minority borrowers pay more discretionary charges and that government data shows that minorities who borrowed from the defendant "are almost 50% more likely than white borrowers to have received a high-APR loan to purchase or refinance their home." *Ibid.* In a similar case, the court held that dismissal was inappropriate even though the allegations relied generally on data and studies to set forth a history of disparate impact discrimination in mortgage lending using similar credit pricing systems. *Hoffman*, 589 F. Supp. 2d at 1011-1012; see also *Taylor* v. *Accredited*

(…continued)
this basis. In any event, cases uniformly hold that a subjective or discretionary policy of permitting loan officers to "mark-up" otherwise objective risk-based loan rates, sometimes called a "Discretionary Pricing Policy," is a policy or practice that may underlie a disparate impact action. See, *e.g.*, *Ramirez* v. *GreenPoint Mortg. Funding, Inc.*, 633 F. Supp. 2d 922, 927-928 (N.D. Cal. 2008) (plaintiffs "have singled out the subjective portion of a lending policy that allegedly relies on both subjective and objective criteria, and they need do no more to meet the 'specific policy or practice' requirement for stating a disparate impact claim"); *Hoffman* v. *Option One Mortg. Corp.*, 589 F. Supp. 2d 1099, 1011-1012 (N.D. Ill. 2008) ("the crux of the complaint is that plaintiffs paid more subjective charges for their loans than white borrowers as a result of the [Discretionary Pricing] Policy"; allegations in complaint found sufficient to withstand dismissal); *Miller* v. *Countrywide Bank, N.A.*, 571 F. Supp. 2d 251, 258 (D. Mass. 2008); *Osborne* v. *Bank of America, National Association*, 234 F. Supp. 2d 804, 812 (M.D. Tenn. 2002).

Home Lenders, Inc., 580 F. Supp. 2d 1062, 1068-1069 (S.D. Cal. 2008) (complaint alleged sufficient facts to support a disparate impact claim citing Federal Reserve data and other reports comparing loan rates to white versus African-American homeowners and also noting that defendant's data is contained in some of the reports); *Hernandez* v. *Sutter West Capital*, No. 09-03658, 2010 WL 3385046 (N.D. Cal. 2010) (plaintiff set forth a disparate impact claim under ECOA based on, *inter alia*, a study showing that Hispanics received loans that were worse than those received by similarly situated Caucasian borrowers).

In yet another similar case, the court held that the complaint properly pled disparate impact in alleging that African-American borrowers are three times more likely to obtain a high-APR home mortgage and two-times more likely to obtain a high-APR refinancing loan than white borrowers. *Miller* v. *Countrywide Bank, N.A.*, 571 F. Supp. at 258-259. The court noted that the complaint referred to reports containing mortgage data indicating disparate discriminatory impacts, and that the conclusion that "African-Americans receive higher rates than *similarly situated* whites" was "fairly comprised in the complaint." *Ibid.*; see also *Guerra* v. *GMAC LLC*, No. 2:08-cv-01297, 2009 WL 449153 at *5 (E.D. Pa. 2009) (plaintiffs' allegations, including that the defendant's discretionary pricing policy causes minorities to pay higher "subjective fees," and cites to studies of disparities in loan rate to minority and non-minority borrowers, "are sufficient to suggest a

disparate impact"). The statistical information pled in some of these complaints was no more detailed than in the amended complaint in this case. See, *e.g.*, *Ramirez*, 633 F. Supp 2d at 928-929; *Miller* v. *Countrywide Bank, N.A.*, 571 F. Supp. 2d at 258-259; *Taylor*, 580 F. Supp. 2d at 1068-1069; *Guerra*, 2009 WL 449153 at *5. Indeed, in one case, the statistical evidence found to be sufficient to survive a motion to dismiss was not even defendant specific. See *Hoffman*, 589 F. Supp. 2d at 1011-1012.[18]

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[18] With respect to causation, these cases have generally rejected arguments that the plaintiff did not adequately plead a causal connection between the identified policy and the alleged disparate impact, finding that causation can be inferred from the complaint. In *Miller* v. *Countrywide Bank, N.A.*, for example, the court rejected the defendant bank's argument that plaintiffs alleged only "bottom line disparities without providing a theory of how the targeted policy caused the disparity." *Miller*, 571 F. Supp. 2d at 259 (internal quotation marks omitted). The court concluded that "[u]ltimately, the question of causation – to what extent the discrepancy is explainable by objective data or race – is premature. It seems clear that Plaintiffs' complaint gives rise to a fair inference of causation; the question of proof will become an issue at later stages in the proceeding." *Ibid.* See also *Guerra*, 2009 WL 449153 at *6 (the allegation that the discretionary pricing policy "accounts for a significant portion" of the alleged statistical disparities in lending rates between similarly-situated minority and non-minority borrowers was sufficient to give rise to an inference of discrimination, and that therefore the question of causation was premature); *Osborne*, 234 F. Supp. 2d at 812 (based on allegation that pricing policy results in significantly higher finance costs being imposed on Africa-Americans, "it is not unreasonable to infer that African-American and white customers would incur roughly equal finance costs if * * * [the lender] relied upon objective lending criteria alone. Thus, the plaintiffs have adequately pled causation. * * * Whether they can prove causation remains to be seen."); *Wise* v. *Union Acceptance Corp.*, No. 02-0104, 2002 WL 31730920 at *4 (S.D. Ind. 2002) (complaint adequately pled an ECOA disparate impact

(continued…)

2. The Complaint Alleged Sufficient Facts To State A Plausible Claim Of Discrimination Against Non-Asians

The district court also concluded that the disparate impact claim was not plausible because the classification as Asians and non-Asians was too vague and it is unclear who is put in the Asian category. R.E. 144. Again, the court placed too stringent a burden on the plaintiff in addressing the sufficiency of the complaint. The amended complaint alleged that defendants discriminated on the basis of race or national origin by making loans to non-Asian customers at rates higher than those charged to Asian customers. In other words, the amended complaint alleged that those who were not Asian (or perceived to be non-Asian) were given a worse deal, conduct that constitutes discrimination on the basis of the race or national origin of the non-Asians. See *Nance* v. *Ricoh Elecs., Inc.*, 381 F. App'x 919 (11th Cir. 2010) (unpublished) (Caucasian employees alleged that employer had a discriminatory policy against non-Asians; "there is no dispute that [plaintiff] is a member of a protected class").

These allegations – along with reasonable inferences drawn from the allegations – are sufficient at the pleading stage to state a claim of discrimination

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(…continued)
claim, and whether the subjective markup policy "truly approximately caused damage to Plaintiffs * * * [is a] question[] to be addressed at a later time").

against non-Asians by charging them greater mark-ups. The court's concern with the appropriate categorization of specific borrowers based on their last name and photograph, and the possibility that some borrowers may have been categorized incorrectly, does not defeat the plausibility of the claim for relief but rather raises a question of proof. Likewise, the precise scope of the discrimination against non-Asians can be fleshed out during discovery. Again, "[s]pecific facts are not necessary"; the complaint need only give defendants fair notice of the nature of the claim and the grounds on which it rests. *Twombly*, 550 U.S. at 555; cf. *Swanson*, 614 F.3d at 405 (Complaint sufficiently alleged a claim of race discrimination when a bank turned down her application for a loan: "Swanson's complaint identifies the type of discrimination that she thinks occurred (racial), by whom (Citibank, through [the manager and outside appraisers]), and when (in connection with her effort in early 2009 to obtain a home-equity loan). That is all she needed to put in the complaint.").

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, I state that I am not aware of any other cases that are related to this appeal.

s/ Thomas E. Chandler
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Attorney

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief does not exceed the type-volume limitation imposed by Federal Rules of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains no more than 7,865 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

s/ Thomas E. Chandler
Thomas E. Chandler
Attorney

Dated: January 3, 2011

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2011, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLANT with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 3, 2011

s/Thomas E. Chandler
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ADDENDUM

15 U.S.C. IV
United States Code, 2009 Edition
Title 15 - COMMERCE AND TRADE
CHAPTER 41 - CONSUMER CREDIT PROTECTION
SUBCHAPTER IV - EQUAL CREDIT OPPORTUNITY
From the U.S. Government Printing Office, www.gpo.gov

SUBCHAPTER IV—EQUAL CREDIT OPPORTUNITY

§1691. Scope of prohibition

(a) Activities constituting discrimination

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

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

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

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

(b) Activities not constituting discrimination

It shall not constitute discrimination for purposes of this subchapter for a creditor—

(1) to make an inquiry of marital status if such inquiry is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of credit-worthiness; [1]

(2) to make an inquiry of the applicant's age or of whether the applicant's income derives from any public assistance program if such inquiry is for the purpose of determining the amount and probable continuance of income levels, credit history, or other pertinent element of credit-worthiness [1] as provided in regulations of the Board;

(3) to use any empirically derived credit system which considers age if such system is demonstrably and statistically sound in accordance with regulations of the Board, except that in the operation of such system the age of an elderly applicant may not be assigned a negative factor or value; or

(4) to make an inquiry or to consider the age of an elderly applicant when the age of such applicant is to be used by the creditor in the extension of credit in favor of such applicant.

(c) Additional activities not constituting discrimination

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

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

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

(3) any special purpose credit program offered by a profit-making organization to meet special social needs which meets standards prescribed in regulations by the Board;

if such refusal is required by or made pursuant to such program.

(d) Reason for adverse action; procedure applicable; “adverse action” defined

(1) Within thirty days (or such longer reasonable time as specified in regulations of the Board for any class of credit transaction) after receipt of a completed application for credit, a creditor shall

notify the applicant of its action on the application.

(2) Each applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor. A creditor satisfies this obligation by—

(A) providing statements of reasons in writing as a matter of course to applicants against whom adverse action is taken; or

(B) giving written notification of adverse action which discloses (i) the applicant's right to a statement of reasons within thirty days after receipt by the creditor of a request made within sixty days after such notification, and (ii) the identity of the person or office from which such statement may be obtained. Such statement may be given orally if the written notification advises the applicant of his right to have the statement of reasons confirmed in writing on written request.

(3) A statement of reasons meets the requirements of this section only if it contains the specific reasons for the adverse action taken.

(4) Where a creditor has been requested by a third party to make a specific extension of credit directly or indirectly to an applicant, the notification and statement of reasons required by this subsection may be made directly by such creditor, or indirectly through the third party, provided in either case that the identity of the creditor is disclosed.

(5) The requirements of paragraph (2), (3), or (4) may be satisfied by verbal statements or notifications in the case of any creditor who did not act on more than one hundred and fifty applications during the calendar year preceding the calendar year in which the adverse action is taken, as determined under regulations of the Board.

(6) For purposes of this subsection, the term “adverse action” means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.

(e) Appraisals; copies of reports to applicants; costs

Each creditor shall promptly furnish an applicant, upon written request by the applicant made within a reasonable period of time of the application, a copy of the appraisal report used in connection with the applicant's application for a loan that is or would have been secured by a lien on residential real property. The creditor may require the applicant to reimburse the creditor for the cost of the appraisal.

(Pub. L. 90–321, title VII, §701, as added Pub. L. 93–495, title V, §503, Oct. 28, 1974, 88 Stat. 1521; amended Pub. L. 94–239, §2, Mar. 23, 1976, 90 Stat. 251; Pub. L. 102–242, title II, §223(d), Dec. 19, 1991, 105 Stat. 2306.)

AMENDMENTS

1991—Subsec. (e). Pub. L. 102–242 added subsec. (e).

1976—Subsec. (a). Pub. L. 94–239 designated existing provisions as cl. (1), expanded prohibition against discrimination to include race, color, religion, national origin and age, and added cls. (2) and (3).

Subsec. (b). Pub. L. 94–239 designated existing provisions as cl. (1) and added cls. (2) to (4).

Subsecs. (c), (d). Pub. L. 94–239 added subsecs. (c) and (d).

EFFECTIVE DATE

Section 708, formerly §707, of title VII of Pub. L. 90–321, as added by Pub. L. 93–495, title V, §503, Oct. 28, 1974, 88 Stat. 1525, renumbered and amended by Pub. L. 94–239, §§7, 8, Mar. 23, 1976, 90 Stat. 255, provided that: “This title [enacting this subchapter and provisions set out as notes under section 1691 of this title] takes effect upon the expiration of one year after the date of its enactment [Oct. 28, 1974]. The amendments made by the Equal Credit Opportunity Act Amendments of 1976 [enacting section 1691f of this title, amending this section and sections 1691b, 1691c, 1691d, and 1691e of this title, repealing section 1609 of this title, enacting provisions set out as notes under this section, and repealing provisions set out as a note

under this section] shall take effect on the date of enactment thereof [Mar. 23, 1976] and shall apply to any violation occurring on or after such date, except that the amendments made to section 701 of the Equal Credit Opportunity Act [this section] shall take effect 12 months after the date of enactment [Mar. 23, 1976]."

SHORT TITLE

This subchapter known as the "Equal Credit Opportunity Act", see Short Title note set out under section 1601 of this title.

CONGRESSIONAL FINDINGS AND STATEMENT OF PURPOSE

Section 502 of Pub. L. 93–495 provided that: "The Congress finds that there is a need to insure that the various financial institutions and other firms engaged in the extensions of credit exercise their responsibility to make credit available with fairness, impartiality, and without discrimination on the basis of sex or marital status. Economic stabilization would be enhanced and competition among the various financial institutions and other firms engaged in the extension of credit would be strengthened by an absence of discrimination on the basis of sex or marital status, as well as by the informed use of credit which Congress has heretofore sought to promote. It is the purpose of this Act [see Short Title note set out under section 1601 of this title] to require that financial institutions and other firms engaged in the extension of credit make that credit equally available to all credit-worthy customers without regard to sex or marital status."

[1] *So in original. Probably should not be hyphenated.*

§1691a. Definitions; rules of construction

(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "applicant" means any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.

(c) The term "Board" refers to the Board of Governors of the Federal Reserve System.

(d) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.

(e) The term "creditor" means any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.

(f) The term "person" means a natural person, a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

(g) Any reference to any requirement imposed under this subchapter or any provision thereof includes reference to the regulations of the Board under this subchapter or the provision thereof in question.

(Pub. L. 90–321, title VII, §702, as added Pub. L. 93–495, title V, §503, Oct. 28, 1974, 88 Stat. 1522.)

§1691b. Promulgation of regulations by Board; establishment of Consumer Advisory Council by Board; duties, membership, etc., of Council

(a) Regulations

(1) The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain but are not limited to such classifications, differentiation, or other provision, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.

(2) Such regulations may exempt from the provisions of this subchapter any class of transactions that are not primarily for personal, family, or household purposes, or business or commercial loans made available by a financial institution, except that a particular type within a class of such transactions may be exempted if the Board determines, after making an express finding that the application of this subchapter or of any provision of this subchapter of such transaction would not contribute substantially to effecting the purposes of this subchapter.

(3) An exemption granted pursuant to paragraph (2) shall be for no longer than five years and shall be extended only if the Board makes a subsequent determination, in the manner described by such paragraph, that such exemption remains appropriate.

(4) Pursuant to Board regulations, entities making business or commercial loans shall maintain such records or other data relating to such loans as may be necessary to evidence compliance with this subsection or enforce any action pursuant to the authority of this chapter. In no event shall such records or data be maintained for a period of less than one year. The Board shall promulgate regulations to implement this paragraph in the manner prescribed by chapter 5 of title 5.

(5) The Board shall provide in regulations that an applicant for a business or commercial loan shall be provided a written notice of such applicant's right to receive a written statement of the reasons for the denial of such loan.

(b) Consumer Advisory Council

The Board shall establish a Consumer Advisory Council to advise and consult with it in the exercise of its functions under this chapter and to advise and consult with it concerning other consumer related matters it may place before the Council. In appointing the members of the Council, the Board shall seek to achieve a fair representation of the interests of creditors and consumers. The Council shall meet from time to time at the call of the Board. Members of the Council who are not regular full-time employees of the United States shall, while attending meetings of such Council, be entitled to receive compensation at a rate fixed by the Board, but not exceeding $100 per day, including travel time. Such members may be allowed travel expenses, including transportation and subsistence, while away from their homes or regular place of business.

(Pub. L. 90–321, title VII, §703, as added Pub. L. 93–495, title V, §503, Oct. 28, 1974, 88 Stat. 1522; amended Pub. L. 94–239, §3(a), Mar. 23, 1976, 90 Stat. 252; Pub. L. 100–533, title III, §301, Oct. 25, 1988, 102 Stat. 2692.)

AMENDMENTS

1988—Subsec. (a). Pub. L. 100–533 amended subsec. (a) generally. Prior to amendment, subsec. (a) read as follows: "The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain but are not limited to such classifications, differentiation, or other provision, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith. In particular, such regulations may exempt from one or more of the provisions of this subchapter any class of transactions not primarily for personal, family, or household purposes, if the Board makes an express finding that the application of such provision or provisions would not contribute substantially to carrying out the purposes of this subchapter. Such regulations shall be prescribed as soon as possible after the date of enactment of this Act, but in no event later than the effective date of this Act."

1976—Pub. L. 94–239 designated existing provisions as subsec. (a), inserted provisions exempting from regulations of this subchapter any class of transactions not primarily for personal, family, or household purposes to be determined by the Board, and added subsec. (b).

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94–239 effective Mar. 23, 1976, see section 708 of Pub. L. 90–321, set out as an Effective Date note under section 1691 of this title.

§1691c. Administrative enforcement

(a) Enforcing agencies

Compliance with the requirements imposed under this subchapter shall be enforced under:

(1) section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818], in the case of—

(A) national banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25(a) [1] of the Federal Reserve Act [12 U.S.C. 601 et seq., 611 et seq.], by the Board; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Directors of the Federal Deposit Insurance Corporation;

(2) Section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818], by the Director of the Office of Thrift Supervision, in the case of a savings association the deposits of which are insured by the Federal Deposit Insurance Corporation.

(3) The Federal Credit Union Act [12 U.S.C. 1751 et seq.], by the Administrator of the National Credit Union Administration with respect to any Federal Credit Union.

(4) Subtitle IV of title 49, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board.

(5) Part A of subtitle VII of title 49, by the Secretary of Transportation with respect to any air carrier or foreign air carrier subject to that part.

(6) The Packers and Stockyards Act, 1921 [7 U.S.C. 181 et seq.] (except as provided in section 406 of that Act [7 U.S.C. 226, 227]), by the Secretary of Agriculture with respect to any activities subject to that Act.

(7) The Farm Credit Act of 1971 [12 U.S.C. 2001 et seq.], by the Farm Credit Administration with respect to any Federal land bank, Federal land bank association, Federal intermediate credit bank, and production credit association;

(8) The Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.], by the Securities and Exchange Commission with respect to brokers and dealers; and

(9) The Small Business Investment Act of 1958 [15 U.S.C. 661 et seq.], by the Small Business Administration, with respect to small business investment companies.

The terms used in paragraph (1) that are not defined in this subchapter or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(b) Violations of subchapter deemed violations of preexisting statutory requirements; additional agency powers

For the purpose of the exercise by any agency referred to in subsection (a) of this section of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (a) of this section, each of the agencies referred to in that subsection may exercise for the purpose of enforcing compliance with any requirement imposed under this subchapter, any other authority conferred on it by law. The exercise of the authorities of any of the agencies referred to in subsection (a) of this section for the purpose of enforcing compliance with any requirement imposed under this subchapter

shall in no way preclude the exercise of such authorities for the purpose of enforcing compliance with any other provision of law not relating to the prohibition of discrimination on the basis of sex or marital status with respect to any aspect of a credit transaction.

(c) Overall enforcement authority of Federal Trade Commission

Except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to some other Government agency under subsection (a) of this section, the Federal Trade Commission shall enforce such requirements. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act [15 U.S.C. 41 et seq.], a violation of any requirement imposed under this subchapter shall be deemed a violation of a requirement imposed under that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with the requirements imposed under this subchapter, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act, including the power to enforce any Federal Reserve Board regulation promulgated under this subchapter in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.

(d) Rules and regulations by enforcing agencies

The authority of the Board to issue regulations under this subchapter does not impair the authority of any other agency designated in this section to make rules respecting its own procedures in enforcing compliance with requirements imposed under this subchapter.

(Pub. L. 90–321, title VII, §704, as added Pub. L. 93–495, title V, §503, Oct. 28, 1974, 88 Stat. 1522; amended Pub. L. 94–239, §4, Mar. 23, 1976, 90 Stat. 253; Pub. L. 98–443, §9(n), Oct. 4, 1984, 98 Stat. 1708; Pub. L. 101–73, title VII, §744(m), Aug. 9, 1989, 103 Stat. 439; Pub. L. 102–242, title II, §212(d), Dec. 19, 1991, 105 Stat. 2300; Pub. L. 102–550, title XVI, §1604(a)(7), Oct. 28, 1992, 106 Stat. 4082; Pub. L. 104–88, title III, §315, Dec. 29, 1995, 109 Stat. 948.)

REFERENCES IN TEXT

Section 25(a) of the Federal Reserve Act, referred to in subsec. (a)(1)(B), which is classified to subchapter II (§611 et seq.) of chapter 6 of Title 12, Banks and Banking, was renumbered section 25A of that act by Pub. L. 102–242, title I, §142(e)(2), Dec. 19, 1991, 105 Stat. 2281. Section 25 of the Federal Reserve Act is classified to subchapter I (§601 et seq.) of chapter 6 of Title 12.

The Federal Credit Union Act, referred to in subsec. (a)(3), is act June 26, 1934, ch. 750, 48 Stat. 1216, as amended, which is classified generally to chapter 14 (§1751 et seq.) of Title 12. For complete classification of this Act to the Code, see section 1751 of Title 12 and Tables.

The Packers and Stockyards Act, 1921, referred to in subsec. (a)(6), is act Aug. 15, 1921, ch. 64, 42 Stat. 159, as amended, which is classified to chapter 9 (§181 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 181 of Title 7 and Tables.

The Farm Credit Act of 1971, referred to in subsec. (a)(7), is Pub. L. 92–181, Dec. 10, 1971, 85 Stat. 583, as amended, which is classified generally to chapter 23 (§2001 et seq.) of Title 12, Banks and Banking. For complete classification of this Act to the Code, see Short Title note set out under section 2001 of Title 12 and Tables.

The Securities Exchange Act of 1934, referred to in subsec. (a)(8), is act June 6, 1934, ch. 404, 48 Stat. 881, as amended, which is classified principally to chapter 2B (§78a et seq.) of this title. For complete classification of this Act to the Code, see Codification note set out under section 78a of this title and Tables.

The Small Business Investment Act of 1958, referred to in subsec. (a)(9), is Pub. L. 85–699, Aug. 21, 1958, 72 Stat. 689, as amended, which is classified principally to chapter 14B (§661 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 661 of this title and Tables.

The Federal Trade Commission Act, referred to in subsec. (c), is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (§41 et seq.) of chapter 2 of this title. For complete classification of this Act to the Code, see section 58 of this title and Tables.

CODIFICATION

In subsec. (a)(4), "Subtitle IV of title 49" substituted for "The Acts to regulate commerce" on authority of Pub. L. 95–473, §3(b), Oct. 17, 1978, 92 Stat. 1466, the first section of which enacted subtitle IV of Title 49, Transportation.

In subsec. (a)(5), "Part A of subtitle VII of title 49" substituted for "The Federal Aviation Act of 1958 [49 App. U.S.C. 1301 et seq.]" and "that part" substituted for "that Act" on authority of Pub. L. 103–272, §6(b), July 5, 1994, 108 Stat. 1378, the first section of which enacted subtitles II, III, and V to X of Title 49.

AMENDMENTS

1995—Subsec. (a)(4). Pub. L. 104–88 substituted "Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board" for "Interstate Commerce Commission with respect to any common carrier subject to those Acts".

1992—Subsec. (a)(1)(C). Pub. L. 102–550 substituted semicolon for period at end.

1991—Subsec. (a). Pub. L. 102–242, §212(d)(2), inserted at end "The terms used in paragraph (1) that are not defined in this subchapter or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101)."

Pub. L. 102–242, §212(d)(1), added par. (1) and struck out former par. (1) which read as follows: "Section 8 of Federal Deposit Insurance Act, in the case of—

"(A) national banks, by the Comptroller of the Currency,

"(B) member banks of the Federal Reserve System (other than national banks), by the Federal Reserve Board,

"(C) banks the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), by the Board of Directors of the Federal Deposit Insurance Corporation."

1989—Subsec. (a)(2). Pub. L. 101–73 amended par. (2) generally. Prior to amendment, par. (2) read as follows: "Section 5(d) of the Home Owners' Loan Act of 1933, section 407 of the National Housing Act, and sections 6(i) and 17 of the Federal Home Loan Bank Act, by the Federal Home Loan Bank Board (acting directly or through the Federal Savings and Loan Insurance Corporation), in the case of any institution subject to any of those provisions."

1984—Subsec. (a)(5). Pub. L. 98–443 substituted "Secretary of Transportation" for "Civil Aeronautics Board".

1976—Subsec. (c). Pub. L. 94–239 inserted provisions giving the Federal Trade Commission power to enforce any regulation of the Federal Reserve Board promulgated under this subchapter.

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104–88 effective Jan. 1, 1996, see section 2 of Pub. L. 104–88, set out as an Effective Date note under section 701 of Title 49, Transportation.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102–550 effective as if included in the Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. 102–242, as of Dec. 19, 1991, see section 1609(a) of Pub. L. 102–550, set out as a note under section 191 of Title 12, Banks and Banking.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–443 effective Jan. 1, 1985, see section 9(v) of Pub. L. 98–443, set out as a note under section 5314 of Title 5, Government Organization and Employees.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94–239 effective Mar. 23, 1976, see section 708 of Pub. L. 90–321, set out as an Effective Date note under section 1691 of this title.

TRANSFER OF FUNCTIONS

Functions vested in Administrator of National Credit Union Administration transferred and vested in National Credit Union Administration Board pursuant to section 1752a of Title 12, Banks and Banking.

[1] *See References in Text note below.*

§1691c–1. Incentives for self-testing and self-correction

(a) Privileged information

(1) Conditions for privilege

A report or result of a self-test (as that term is defined by regulations of the Board) shall be considered to be privileged under paragraph (2) if a creditor—

(A) conducts, or authorizes an independent third party to conduct, a self-test of any aspect of a credit transaction by a creditor, in order to determine the level or effectiveness of compliance with this subchapter by the creditor; and

(B) has identified any possible violation of this subchapter by the creditor and has taken, or is taking, appropriate corrective action to address any such possible violation.

(2) Privileged self-test

If a creditor meets the conditions specified in subparagraphs (A) and (B) of paragraph (1) with respect to a self-test described in that paragraph, any report or results of that self-test—

(A) shall be privileged; and

(B) may not be obtained or used by any applicant, department, or agency in any—

(i) proceeding or civil action in which one or more violations of this subchapter are alleged; or

(ii) examination or investigation relating to compliance with this subchapter.

(b) Results of self-testing

(1) In general

No provision of this section may be construed to prevent an applicant, department, or agency from obtaining or using a report or results of any self-test in any proceeding or civil action in which a violation of this subchapter is alleged, or in any examination or investigation of compliance with this subchapter if—

(A) the creditor or any person with lawful access to the report or results—

(i) voluntarily releases or discloses all, or any part of, the report or results to the applicant, department, or agency, or to the general public; or

(ii) refers to or describes the report or results as a defense to charges of violations of this subchapter against the creditor to whom the self-test relates; or

(B) the report or results are sought in conjunction with an adjudication or admission of a violation of this subchapter for the sole purpose of determining an appropriate penalty or remedy.

(2) Disclosure for determination of penalty or remedy

Any report or results of a self-test that are disclosed for the purpose specified in paragraph (1)(B)—

(A) shall be used only for the particular proceeding in which the adjudication or admission referred to in paragraph (1)(B) is made; and

(B) may not be used in any other action or proceeding.

(c) Adjudication

An applicant, department, or agency that challenges a privilege asserted under this section may seek a determination of the existence and application of that privilege in—

(1) a court of competent jurisdiction; or

(2) an administrative law proceeding with appropriate jurisdiction.

(Pub. L. 90–321, title VII, §704A, as added Pub. L. 104–208, div. A, title II, §2302(a)(1), Sept. 30, 1996, 110 Stat. 3009–420.)

EFFECTIVE DATE

Section 2302(c) of div. A of Pub. L. 104–208 provided that:

"(1) IN GENERAL.—Except as provided in paragraph (2), the privilege provided for in section 704A of the Equal Credit Opportunity Act [15 U.S.C. 1691c–1] or section 814A of the Fair Housing Act [42 U.S.C. 3614–1] (as those sections are added by this section) shall apply to a self-test (as that term is defined pursuant to the regulations prescribed under subsection (a)(2) [set out below] or (b)(2) of this section [42 U.S.C. 3614–1 note], as appropriate) conducted before, on, or after the effective date of the regulations prescribed under subsection (a)(2) or (b)(2), as appropriate.

"(2) EXCEPTION.—The privilege referred to in paragraph (1) does not apply to such a self-test conducted before the effective date of the regulations prescribed under subsection (a) or (b), as appropriate, if—

"(A) before that effective date, a complaint against the creditor or person engaged in residential real estate related lending activities (as the case may be) was—

"(i) formally filed in any court of competent jurisdiction; or

"(ii) the subject of an ongoing administrative law proceeding;

"(B) in the case of section 704A of the Equal Credit Opportunity Act, the creditor has waived the privilege pursuant to subsection (b)(1)(A)(i) of that section; or

"(C) in the case of section 814A of the Fair Housing Act, the person engaged in residential real estate related lending activities has waived the privilege pursuant to subsection (b)(1)(A)(i) of that section."

REGULATIONS

Section 2302(a)(2) of div. A of Pub. L. 104–208 provided that:

"(A) IN GENERAL.—Not later than 6 months after the date of enactment of this Act [Sept. 30, 1996], in consultation with the Secretary of Housing and Urban Development and the agencies referred to in section 704 of the Equal Credit Opportunity Act [15 U.S.C. 1691c], and after providing notice and an opportunity for public comment, the Board shall prescribe final regulations to implement section 704A of the Equal Credit Opportunity Act [15 U.S.C. 1691c–1], as added by this section.

"(B) SELF-TEST.—

"(i) DEFINITION.—The regulations prescribed under subparagraph (A) shall include a definition of the term 'self-test' for purposes of section 704A of the Equal Credit Opportunity Act, as added by this section.

"(ii) REQUIREMENT FOR SELF-TEST.—The regulations prescribed under subparagraph (A) shall specify that a self-test shall be sufficiently extensive to constitute a determination of the level and effectiveness of compliance by a creditor with the Equal Credit Opportunity Act [15 U.S.C. 1691 et seq.].

"(iii) SUBSTANTIAL SIMILARITY TO CERTAIN FAIR HOUSING ACT REGULATIONS.—The regulations prescribed under subparagraph (A) shall be substantially similar to the regulations prescribed by the Secretary of Housing and Urban Development to carry out section 814A(d) of the Fair Housing Act [42 U.S.C. 3614–1(d)], as added by this section."

§1691d. Applicability of other laws

(a) Requests for signature of husband and wife for creation of valid lien, etc.

A request for the signature of both parties to a marriage for the purpose of creating a valid lien, passing clear title, waiving inchoate rights to property, or assigning earnings, shall not constitute discrimination under this subchapter: *Provided, however,* That this provision shall not be construed to permit a creditor to take sex or marital status into account in connection with the evaluation of creditworthiness of any applicant.

(b) State property laws affecting creditworthiness

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

(c) State laws prohibiting separate extension of consumer credit to husband and wife

Any provision of State law which prohibits the separate extension of consumer credit to each party to a marriage shall not apply in any case where each party to a marriage voluntarily applies for separate credit from the same creditor: *Provided*, That in any case where such a State law is so preempted, each party to the marriage shall be solely responsible for the debt so contracted.

(d) Combining credit accounts of husband and wife with same creditor to determine permissible finance charges or loan ceilings under Federal or State laws

When each party to a marriage separately and voluntarily applies for and obtains separate credit accounts with the same creditor, those accounts shall not be aggregated or otherwise combined for purposes of determining permissible finance charges or permissible loan ceilings under the laws of any State or of the United States.

(e) Election of remedies under subchapter or State law; nature of relief determining applicability

Where the same act or omission constitutes a violation of this subchapter and of applicable State law, a person aggrieved by such conduct may bring a legal action to recover monetary damages either under this subchapter or under such State law, but not both. This election of remedies shall not apply to court actions in which the relief sought does not include monetary damages or to administrative actions.

(f) Compliance with inconsistent State laws; determination of inconsistency

This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with, the laws of any State with respect to credit discrimination, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. The Board is authorized to determine whether such inconsistencies exist. The Board may not determine that any State law is inconsistent with any provision of this subchapter if the Board determines that such law gives greater protection to the applicant.

(g) Exemption by regulation of credit transactions covered by State law; failure to comply with State law

The Board shall by regulation exempt from the requirements of sections 1691 and 1691a of this title any class of credit transactions within any State if it determines that under the law of that State that class of transactions is subject to requirements substantially similar to those imposed under this subchapter or that such law gives greater protection to the applicant, and that there is adequate provision for enforcement. Failure to comply with any requirement of such State law in any transaction so exempted shall constitute a violation of this subchapter for the purposes of section 1691e of this title.

(Pub. L. 90–321, title VII, §705, as added Pub. L. 93–495, title V, §503, Oct. 28, 1974, 88 Stat. 1523; amended Pub. L. 94–239, §5, Mar. 23, 1976, 90 Stat. 253.)

AMENDMENTS

1976—Subsec. (e). Pub. L. 94–239, §5(1), substituted provisions requiring an election of remedies in legal actions involving the recovery of monetary damages, for provisions specifying a general election of remedies.

Subsecs. (f), (g). Pub. L. 94–239, §5(2), added subsecs. (f) and (g).

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94–239 effective Mar. 23, 1976, see section 708 of Pub. L. 90–321, set out as an Effective Date note under section 1691 of this title.

§1691e. Civil liability

(a) Individual or class action for actual damages

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

(b) Recovery of punitive damages in individual and class action for actual damages; exemptions; maximum amount of punitive damages in individual actions; limitation on total recovery in class actions; factors determining amount of award

Any creditor, other than a government or governmental subdivision or agency, who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for punitive damages in an amount not greater than $10,000, in addition to any actual damages provided in subsection (a) of this section, except that in the case of a class action the total recovery under this subsection shall not exceed the lesser of $500,000 or 1 per centum of the net worth of the creditor. In determining the amount of such damages in any action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

(c) Action for equitable and declaratory relief

Upon application by an aggrieved applicant, the appropriate United States district court or any other court of competent jurisdiction may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this subchapter.

(d) Recovery of costs and attorney fees

In the case of any successful action under subsection (a), (b), or (c) of this section, the costs of the action, together with a reasonable attorney's fee as determined by the court, shall be added to any damages awarded by the court under such subsection.

(e) Good faith compliance with rule, regulation, or interpretation of Board or interpretation or approval by an official or employee of Federal Reserve System duly authorized by Board

No provision of this subchapter imposing liability shall apply to any act done or omitted in good faith in conformity with any official rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(f) Jurisdiction of courts; time for maintenance of action; exceptions

Any action under this section may be brought in the appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction. No such action shall be brought later than two years from the date of the occurrence of the violation, except that—

(1) whenever any agency having responsibility for administrative enforcement under section 1691c of this title commences an enforcement proceeding within two years from the date of the occurrence of the violation,

(2) whenever the Attorney General commences a civil action under this section within two years from the date of the occurrence of the violation,

then any applicant who has been a victim of the discrimination which is the subject of such proceeding or civil action may bring an action under this section not later than one year after the commencement of that proceeding or action.

(g) Request by responsible enforcement agency to Attorney General for civil action

The agencies having responsibility for administrative enforcement under section 1691c of this title,

if unable to obtain compliance with section 1691 of this title, are authorized to refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted. Each agency referred to in paragraphs (1), (2), and (3) of section 1691c(a) of this title shall refer the matter to the Attorney General whenever the agency has reason to believe that 1 or more creditors has engaged in a pattern or practice of discouraging or denying applications for credit in violation of section 1691(a) of this title. Each such agency may refer the matter to the Attorney General whenever the agency has reason to believe that 1 or more creditors has violated section 1691(a) of this title.

(h) Authority for Attorney General to bring civil action; jurisdiction

When a matter is referred to the Attorney General pursuant to subsection (g) of this section, or whenever he has reason to believe that one or more creditors are engaged in a pattern or practice in violation of this subchapter, the Attorney General may bring a civil action in any appropriate United States district court for such relief as may be appropriate, including actual and punitive damages and injunctive relief.

(i) Recovery under both subchapter and fair housing enforcement provisions prohibited for violation based on same transaction

No person aggrieved by a violation of this subchapter and by a violation of section 3605 of title 42 shall recover under this subchapter and section 3612 [1] of title 42, if such violation is based on the same transaction.

(j) Discovery of creditor's granting standards

Nothing in this subchapter shall be construed to prohibit the discovery of a creditor's credit granting standards under appropriate discovery procedures in the court or agency in which an action or proceeding is brought.

(k) Notice to HUD of violations

Whenever an agency referred to in paragraph (1), (2), or (3) of section 1691c(a) of this title—

(1) has reason to believe, as a result of receiving a consumer complaint, conducting a consumer compliance examination, or otherwise, that a violation of this subchapter has occurred;

(2) has reason to believe that the alleged violation would be a violation of the Fair Housing Act [42 U.S.C. 3601 et seq.]; and

(3) does not refer the matter to the Attorney General pursuant to subsection (g) of this section,

the agency shall notify the Secretary of Housing and Urban Development of the violation, and shall notify the applicant that the Secretary of Housing and Urban Development has been notified of the alleged violation and that remedies for the violation may be available under the Fair Housing Act.

(Pub. L. 90–321, title VII, §706, as added Pub. L. 93–495, title V, §503, Oct. 28, 1974, 88 Stat. 1524; amended Pub. L. 94–239, §6, Mar. 23, 1976, 90 Stat. 253; Pub. L. 102–242, title II, §223(a)–(c), Dec. 19, 1991, 105 Stat. 2306.)

REFERENCES IN TEXT

Section 3612 of title 42, referred to in subsec. (i), which related to enforcement of the Fair Housing Act (42 U.S.C. 3601 et seq.) by private persons, was repealed by Pub. L. 100–430, §8(2), Sept. 13, 1988, 102 Stat. 1625. See section 3613 of Title 42, The Public Health and Welfare.

The Fair Housing Act, referred to in subsec. (k), is title VIII of Pub. L. 90–284, Apr. 11, 1968, 82 Stat. 81, as amended, which is classified principally to subchapter I (§3601 et seq.) of chapter 45 of Title 42. For complete classification of this Act to the Code, see Short Title note set out under section 3601 of Title 42 and Tables.

AMENDMENTS

1991—Subsec. (g). Pub. L. 102–242, §223(a), inserted at end “Each agency referred to in paragraphs (1), (2), and (3) of section 1691c(a) of this title shall refer the matter to the Attorney General whenever the agency has reason to believe that 1 or more creditors has engaged in a pattern or practice of discouraging or denying

applications for credit in violation of section 1691(a) of this title. Each such agency may refer the matter to the Attorney General whenever the agency has reason to believe that 1 or more creditors has violated section 1691(a) of this title."

Subsec. (h). Pub. L. 102–242, §223(b), inserted "actual and punitive damages and" after "be appropriate, including".

Subsec. (k). Pub. L. 102–242, §223(c), added subsec. (k).

1976—Subsec. (a). Pub. L. 94–239 substituted reference to member for reference to representative.

Subsec. (b). Pub. L. 94–239 inserted provisions exempting government or governmental subdivision or agency from requirements of this subchapter, incorporated provisions contained in former subsec. (c) relating to recovery in class actions and, as incorporated, raised the total amount of recovery under a class action from $100,000 to $500,000.

Subsec. (c). Pub. L. 94–239 redesignated subsec. (d) as (c) and specified United States district court or other court of competent jurisdiction as court in which to bring action, and substituted provisions authorizing such court to grant equitable and declaratory relief, for provisions authorizing civil actions for preventive relief. Provisions of former subsec. (c) were incorporated into present subsec. (b) and amended.

Subsec. (d). Pub. L. 94–239 redesignated subsec. (e) as (d) and made minor changes in phraseology. Former subsec. (d) redesignated (c) and amended.

Subsec. (e). Pub. L. 94–239 redesignated subsec. (f) as (e) and inserted reference to officially promulgated rule, regulation, or interpretation and provisions relating to approval and interpretations by an official or employee of the Federal Reserve System duly authorized by the Board. Former subsec. (e) redesignated (d) and amended.

Subsec. (f). Pub. L. 94–239 redesignated subsec. (g) as (f) and inserted provisions which substituted a two year limitation for one year limitation and provisions extending time in which to bring action under enumerated conditions. Former subsec. (f) redesignated (e) and amended.

Subsecs. (g) to (j). Pub. L. 94–239 added subsecs. (g) to (j). Former subsec. (g) redesignated (f) and amended.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94–239 effective Mar. 23, 1976, see section 708 of Pub. L. 90–321, set out as an Effective Date note under section 1691 of this title.

[1] *See References in Text note below.*

§1691f. Annual reports to Congress; contents

Each year, the Board and the Attorney General shall, respectively, make reports to the Congress concerning the administration of their functions under this subchapter, including such recommendations as the Board and the Attorney General, respectively, deem necessary or appropriate. In addition, each report of the Board shall include its assessment of the extent to which compliance with the requirements of this subchapter is being achieved, and a summary of the enforcement actions taken by each of the agencies assigned administrative enforcement responsibilities under section 1691c of this title.

(Pub. L. 90–321, title VII, §707, as added Pub. L. 94–239, §7, Mar. 23, 1976, 90 Stat. 255; amended Pub. L. 96–221, title VI, §610(c), Mar. 31, 1980, 94 Stat. 174.)

AMENDMENTS

1980—Pub. L. 96–221 substituted "Each year" for "Not later than February 1 of each year after 1976".

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96–221 effective on expiration of two years and six months after Mar. 31, 1980, with all regulations, forms, and clauses required to be prescribed to be promulgated at least one year prior to such effective date, and allowing any creditor to comply with any amendments, in accordance with the regulations, forms, and clauses prescribed by the Board prior to such effective date, see section 625 of Pub. L.

96–221, set out as a note under section 1602 of this title.

EFFECTIVE DATE

Section effective Mar. 23, 1976, see section 708 of Pub. L. 90–321, set out as a note under section 1691 of this title.