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Statement by

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Committee on Banking, Housing

and Urban Affairs

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I am pleased to have this opportunity to present the views of the Board of Governors on S. 3008, dealing with rule-making procedures under the Equal Credit Opportunity Act, and on a draft proposal for a new form of private enforcement remedy for violations of the Truth in Lending Act.

S. 3008 would require the Board to follow special rulemaking procedures, beyond those already imposed upon it by the Administrative Procedure Act, in adopting regulations under the Equal Credit Opportunity Act. Specifically, the bill would prescribe three new procedures. First, it would require the Board to hold oral hearings in connection with any rulemaking proceeding under the Act, unless the rulemaking involved solely a "nonsubstantive amendment" to an existing regulation. Second, the bill would require the Board to provide any person interested in a proposed regulation an opportunity to cross-examine any other interested person who has made an oral presentation, as well as any employee of the United States who has made either a written or an oral presentation. Such cross-examination would be limited to "disputed issues of material fact", and the Board would be given authority to impose limits on cross-examination and to conduct the cross-examination itself

on behalf of any person who may be entitled to cross-examine. Further, any regulations adopted by the Board under the Equal Credit Opportunity Act would be subject to direct review in a United States Court of Appeals within 60 days after the regulation is promulgated, and the reviewing court would not be permitted to sustain the regulation unless it were to find that the regulation is supported by "substantial evidence."

I can assure the Committee that the Board is quite sensitive to the need for rulemaking procedures that afford all interested parties a full opportunity to express their views. Our rulemaking actions can have a significant impact on both businesses and consumers, and we are acutely aware of the need to be well informed when we act. However, we firmly believe that the procedures we have been following are eminently fair to all interested parties, and we do not believe that the new procedures proposed in S. 3008 would improve the quality of our rulemaking. Furthermore, we fear that such new procedures would significantly impede our ability to implement promptly the Congressional purpose underlying consumer protection legislation.

When Congress adopted the Administrative Procedure Act in 1946, it imposed a general requirement that before an administrative agency could adopt substantive regulations it must give public notice and offer interested members of the public an opportunity to submit comments. However, Congress did not see

fit in that Act to impose a requirement for oral hearings in connection with the promulgation of regulations, and the great preponderance of administrative rulemaking has been carried on solely on the basis of written submissions.

Nonetheless, it has been the practice of the Board of Governors in complex rulemaking proceedings, particularly such as those arising under recent consumer legislation, to afford interested members of the public an opportunity to present their views both in writing and orally in public sessions, generally conducted by members of the Board. For example, during the years following the 1970 Amendments to the Bank Holding Company Act, the Board has held extensive public hearings in considering proposed regulations defining permissible nonbanking activities for holding companies. During 1975, the Board held public hearings in connection with its rulemaking under the Equal Credit Opportunity Act and under the Fair Credit Billing Act, during which it received testimony from 38 witnesses. On the basis of the comments received at the Equal Credit hearings, the Board revised its proposed regulation and republished it for additional written comments before adopting a final regulation.

In any future rulemaking of similar magnitude, such as will be called for under the Equal Credit Opportunity Act Amendments passed by the Congress last week, the Board would expect to follow the same practice. In fact, in connection with this next Equal Credit rulemaking, it is the Board's intention to hold a public hearing prior to promulgating any proposed regulations simply to

elicit suggestions as to how we might proceed in this area. When proposed regulations have been drafted, we will then schedule a second hearing to provide an opportunity for comment on those specific proposals.

The Board believes, however, that it is not necessary to make oral presentations mandatory for all future rulemaking under the Equal Credit Opportunity Act, or even for all future "substantive" amendments to rules adopted under that Act. The Board frequently has occasion to make relatively minor substantive changes in its rules in order to strengthen their enforcement or to correct deficiencies that have come to light, and the amendatory process could be unduly encumbered and delayed if an oral presentation were required in every such case. While S. 3008 would relieve the Board from the mandatory oral hearing requirement in the case of any "nonsubstantive" amendment, it is often extremely difficult to draw the line between "substantive" and "nonsubstantive" actions. The drawing of such distinctions is a lawyer's delight, and to make the hearing requirement turn on such a distinction, would, we fear, simply encourage litigation over relatively minor aspects of procedure.

There is great danger, we believe, of "over-judicializing" rulemaking procedures, particularly in the area of consumer protection legislation. It is too easy for "due process" to become

a means for delay, and those who have the greatest interest in obstructing new regulations and the greatest willingness and ability to bear the costs of litigation are likely to be the ones who will benefit most from highly formalized procedures. It is principally for this reason that the Board opposes the provisions in S. 3008 that would give a right of cross-examination to any party to a proposed rulemaking. Even though the bill provides some safeguards against protracted cross-examination by private parties, the creation of a right of cross-examination in proceedings in which there may be literally dozens of parties eligible to exercise that right is in itself likely to lead to significantly more lengthy rulemaking. We are particularly concerned that the provision of S. 3008 that would permit cross-examination of government employees could be interpreted to require public interrogation of Board staff members who have helped to develop proposed regulations. We do not think this was the intent of the bill, and we think it would significantly inhibit the freedom of communication within the Board if staff members were subject to such public questioning on their recommendations to Board members.

Furthermore, we believe that cross-examination in proceedings of this sort is unnecessary for several reasons. First, the judgments that the Board must make in rulemaking proceedings will very rarely turn upon narrow issues of fact, of a sort particularly susceptible to cross-examination. Rather, the

Board's judgment will normally be formed on the basis of its understanding of Congressional intent, on broad policy considerations, economic data, and more general information about industry and consumer practices. While cross-examination can serve a very valuable function in adjudicatory proceedings, where the Board must decide the rights of specific parties based upon the narrow facts of a particular case, it is of much less importance in broadly applicable rulemaking. Second, in our oral hearings interested parties will always have an opportunity to rebut factual assertions made by others with whom they disagree. It is our practice to keep the hearing record open for a reasonable period following the close of the hearing for the submission of additional data and views, so that any party who takes issue with a factual assertion made during the hearing will have a chance to contest that assertion.

On the subject of judicial review of the Board's Equal Credit rules, we seriously question the desirability of imposing stricter standards than are applicable in the case of other types of rulemaking. Generally, rules promulgated by an administrative agency are reviewable under the "rational basis" test -- that is, they must be sustained by the reviewing court if they are not arbitrary and there is any rational basis to support them. This standard of review recognizes that there is necessarily a range

in which agency discretion may be exercised in adopting substantive rules to effectuate the intent of Congress. Under a given set of circumstances an agency may reasonably elect any one of a number of approaches -- in fact, it may reasonably be able to choose either of two alternatives that are in direct conflict with one another.

Under the "substantial evidence" test proposed in S. 3008, however, much more compelling support for the regulation would have to be shown in the record. A reviewing court would be required to weigh all the evidence in the record, and to set aside the Board's judgment if it were not supported by the weight of the evidence -- even though the Board's action may have a rational basis in the record. Under this standard the range in which Board discretion could operate would thus be significantly more limited than it is at present.

Undoubtedly there are some groups affected by our regulations who would like to see the Board's discretion limited. But Congress has entrusted rulemaking authority under the Equal Credit Opportunity Act to the Board, as it has with respect to a number of other consumer protection measures, presumably because it has confidence in the Board's ability to make reasoned judgments in this area. We at the Board value that confidence, and we trust that the results of our efforts in this area have demonstrated that that confidence was not misplaced. Congress has not given us reason to

believe that more strict judicial review of our rulemaking efforts is warranted by our performance. Accordingly, we do not believe that any need has been demonstrated for special judicial review procedures under the Equal Credit Opportunity Act.

Let me now turn to the draft proposal to amend the civil liability provisions of the Truth in Lending Act. This interesting proposal would create a new form of enforcement action that could be instituted by private parties. The idea derives from the ancient concept of an action qui tam -- that is, an action brought by an "informer" under a statute that provides for the recovery in a civil action of a money penalty for violation of a particular law, with a portion of the penalty going to the person who brings the action and the remainder to the state or to some other institution. The Board believes this idea is worthy of further discussion and consideration by the Congress, but we have some concerns about the impact it could have on the volume of Truth in Lending litigation.

Under section 130(a) of the Truth in Lending Act, as it was amended in Public Law 93-495, consumers can bring individual or class actions against creditors who violate the Act's provisions and recover actual damages plus court costs and reasonable attorney's fees. In addition, in an individual action, a plaintiff is entitled to recover twice the applicable finance charge but not less than $100 nor more than $1,000. In a class action, members of the class are entitled to recover

such additional sums as the court may allow without regard to any minimum amount for each member of the class. However, under a measure passed by the Congress last week, the total statutory recovery may not exceed the lesser of $500,000 or 1 per cent of the creditor's net worth.

Under the qui tam proposal a creditor who violates a Truth in Lending requirement may be liable to an individual for the greater of $500 or any actual damage sustained by the individual, but in a class action the recovery would be limited to actual damages sustained by members of the class. In addition, any obligor, or any "bona fide consumer protection organization," would be permitted to institute an action in a federal court alleging that a creditor has engaged in a course of conduct in violation of Truth in Lending requirements. If the plaintiff in such an action prevailed, the court could issue a declaratory judgment or could enjoin the course of conduct, and could impose a civil penalty upon the creditor of not less than $15,000 nor more than $500,000, of which not less than $5,000 nor more than $10,000 would be awarded to the prevailing plaintiff, with the balance going to the United States. Attorney's fees and costs would also be awarded. At the time the qui tam suit was instituted the plaintiff would be required to notify both the Board and the Attorney General of the pendency of the case, and the government would have the option of intervening as co-plaintiff if it so elected.

While this proposal merits further study, the Board is not presently convinced that the qui tam proposal would strengthen enforcement of Truth in Lending, nor do we see a need for this remedy in order to protect creditors from exposure to extraordinary liabilities. The present limitations upon class action recoveries in these cases, it seems to us, not only provide a significant deterrent to violations, but also guard against potentially crippling liabilities. There is some danger, moreover, that by holding out the prospect of a reward to the successful plaintiff of up to $10,000, in addition to attorney's fees and costs, this proposed remedy could encourage frivolous litigation that might not otherwise be brought. In every such case the Board and the Department of Justice would be obliged to assess the case and to decide whether to intervene. Where the suit is successful the plaintiff will enjoy a windfall -- far in excess of the statutory penalties presently permitted -- while other obligors who may have been equally wronged by the same creditor will receive nothing. Indeed, while it is not clear in the bill, it may well be that the rights of such other obligors would be extinguished by the qui tam recovery.

There is no question that the subject of remedies for Truth in Lending violations is an extremely important one --

particularly in view of the growing amount of litigation involving Truth in Lending issues. In one federal court in Georgia, for example, more than one fourth of the cases on the docket are Truth in Lending cases. The Board endorses the basic concept that enforcement of Truth in Lending should be principally through the actions of private parties, and while the qui tam proposal is an innovative one, we believe caution is advisable in creating new rights of action, so that the ends of justice are not disserved by a clogging of the judicial and regulatory processes.

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