

STATEMENT OF COMMISSIONER PERTSCHUK
ON
EQUAL CREDIT OPPORTUNITY ACT ENFORCEMENT

July 21, 1982

I am grateful to Commissioner Bailey for initiating this enforcement review session. I share her concern that the Commission has grown slack in its enforcement of the ECOA during the past two years, as well as her fear that the staff has begun to stray from our Congressional mandate and the Commission's conception of how the Act should be enforced.

We must not lose sight of the fact that the ECOA reflects Congressional policy on social justice, not economic efficiencies. It expresses Congress' judgment that discrimination by creditors on the basis of race, color, religion, national origin, sex or marital status, or age is not tolerable. In the face of that determination, it is irrelevant -- and indeed a diversion of scarces resources -- for the staff to be debating whether particular violations of the Act can be "justified" on economic grounds. I hope the Commission will make it clear to the staff today that the Commission's resources are not to be squandered exploring the economic underpinnings or ramifications of discrimination. That is not "lean and mean" enforcement. The academic community is perfectly capable of evaluating the economic soundness of the ECOA; the Commission should concentrate on carrying out the will of Congress efficiently.

Because the Commission's resources are so limited, it is self-evident that we must take care to pursue those cases that suggest the greatest likelihood of consumer injury. What is not self-evident is what kinds of violations do in fact cause injury. I think there is general agreement among the Commissioners and the staff that cases concerning actual discrimination must be given first priority. But I do not agree with the judgment of some staff attorneys and economists that in the absence of evidence of discrimination, we should assume that failure to comply with the notice requirements of the Act causes no harm. This issue also merits discussion at this meeting.

Another issue relating to consumer injury is whether there is sufficient injury to warrant Commission action when a consumer is discriminated against by a single creditor in a market where most creditors do not discriminate. I detect a trend, at least among the economists on the staff, to adopt a knee-jerk reaction against all ECOA cases where there is not evidence that an entire market is discriminating. This attitude is based on at least two dangerous assumptions: (1) that the humiliation and inconvenience of being denied credit on the initial try does not constitute substantial injury, and (2) in the absence of any evidence, the Commission should assume the absence of market-wide discrimination. This places an enormous burden on the staff to investigate an entire market before successfully challenging even the most blatant and clear-cut violations by a single member. Whether it is intended or not, such an analysis brings ECOA enforcement to a virtual standstill.

Finally, I agree with Commissioner Bailey that we should discuss the application of the "deterrence model" of assessing civil penalties to the ECOA area. She has pointed out in her memorandum the practical difficulties in implementing a formula that depends on determining the benefits of law violations and the probability, as perceived by the industry as a whole, of violations being detected and punished. Those practical concerns alone establish in my mind the absurdity of the notion that the Commission can even approach "perfect deterrence." I think it would be disingenuous for us to embrace a formula that will always miss the mark so widely. But I also have a philosophical concern about the use of this model in the ECOA area in particular. That concern goes back to the fact that this Act embraces certain non-economic values of our society. Its focus is consumer injury -- not ill-gotten economic gains. Thus, a model for determining civil penalties that gives no consideration to consumer injury but rather rests only on economic benefits to violators seems to me particularly inappropriate here.