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NOTES

GOOD FAITH RELIANCE UPON FEDERAL RESERVE BOARD STAFF OPINION LETTERS: THE CIRCUITS CONVERGE

I. Introduction

The Federal Reserve Board (FRB) administers the Truth in Lending Act (Act)¹ pursuant to Title I of the Consumer Credit Protection Act.² Congress intended this legislation to effect an "informed use of credit."³ It empowered the FRB to "prescribe regulations"; to make "classifications, differentiations, or other provisions"; and to provide any "adjustments and exceptions" it deemed "necessary or proper."⁴ This vague and discretionary mandate effectively made the FRB the "central single agency for issuing all regulations on credit disclosures."⁵

1. 15 U.S.C. §§ 1601-65 (1970)[hereinafter cited as Act]. The FRB is not the sole administrator of the Act. Its jurisdiction is restricted to member state banks. *Id.* § 1607 (Supp. V, 1975). The following agencies are also responsible for supervision of the Act: the Federal Deposit Insurance Corporation for insured state banks which are non-federal reserve; the Comptroller of the Currency for national banks; the Bureau of Federal Credit Unions for federal credit unions; the Federal Home Loan Bank Board through the Federal Savings and Loan Insurance Corporation, or directly with respect to any institution subject to sections 1426(1), 1437, 1464(d) and 1730 of Title 12; the Civil Aeronautics Board for air carriers under its jurisdiction; and the Agriculture Department for certain creditors under the Packers and Stockyard Act. *Id.* The overall enforcing agency for any of these various departments is the Federal Trade Commission. *Id.* § 1607(c).

2. *Id.* §§1601-65 (1970). Consumer advocates had tried for years to pass truth-in-lending legislation. Senator Paul Douglas first introduced a credit disclosure bill in 1959. He attempted every year thereafter to garner support for some such version of it until his defeat in a reelection bid in 1966. Senator William Proxmire then took up the cause, successfully piloting the Consumer Credit Protection Act through Congress in 1968. M. NADEL, *THE POLITICS OF CONSUMER PROTECTION* 130-37 (1971).

3. 15 U.S.C. § 1601 (Supp. V, 1975). Congress determined that to enhance "economic stabilization" and "competition among the various financial institutions" it should strengthen the informed use of credit. Therefore, it attempted "to assure a meaningful disclosure of credit terms" so that the consumer might avoid the "uninformed use of credit." *Id.*

4. *Id.* § 1604 (1970).

5. H.R. REP. No. 1040, 90th Cong., 1st Sess. 19 (1967). In this report the following language appears:

All substantive regulations in connection with the full disclosure of the terms and conditions of finance charges in credit transactions . . . shall be issued by the Board of Governors of the Federal Reserve System. No one can deny their experience and

Congress wanted the FRB to consolidate all disclosure requirements.⁶ It did so, but in a confusing fashion, utilizing three different methods to disseminate truth-in-lending information. First, it published an administrative code, Regulation Z,⁷ to prescribe disclosure rules. Second, it supplemented the code with interpretations⁸ of the rules in an effort to educate the public. Third, it delegated to staff attorneys the ministerial task of replying to public inquiries about the Act.⁹ Confusion resulted when the regulations, interpretations, and staff letters disagreed on the applicable law.¹⁰

These inconsistencies have perplexed the federal courts. As a result, the circuits recognize different sources as the legitimate voice of the FRB. For example, the Second and Fifth Circuits give legal effect to only specific provisions of Regulation Z, while the Ninth Circuit lends credence to staff opinion letters as well.¹¹ This Note will explore these differences, and discuss the probable impact of a 1976 amendment to the Act.

II. Evolution of the Problem

In empowering the FRB to administer the Act with discretion, Congress failed to place any statutory limitations on the Board's authority.¹² As a result, the FRB required stricter disclosure than the Act itself,¹³ thereby exceeding the intentions of Congress.

expertise in these matters. Accordingly, . . . for uniformity of application to all affected segments of the industries concerned, a single set of comprehensive regulations should be issued.

Id. at 18.

6. *Id.*; see, e.g., *Mason v. General Fin. Corp.*, 542 F.2d 1226, 1231 (4th Cir. 1976).

7. 12 C.F.R. §§ 226.1-.14 (1976).

8. These interpretations immediately follow the provisions of Regulation Z at 12 C.F.R. §§ 226.101-.1001 (1976).

9. The FRB's authority to delegate these correspondence writing duties presently derives from 41 Fed. Reg. 28,255-56 (1976)(to be codified in 12 C.F.R. § 226.1(d)(4)).

10. See, e.g., *Herbst v. First Fed. Savings and Loan Ass'n*, 538 F.2d 1279 (7th Cir. 1976) (uncertainties and inconsistencies of FRB staff opinions); *Williams v. Bill Watson Ford, Inc.*, 423 F. Supp. 345 (E.D. La. 1976)(uncertainties over the definition of a "charge" under the Act and Regulation Z). See also cases cited in note 11 *infra*.

11. See *Martin v. Commercial Secs. Co.*, 539 F.2d 521 (5th Cir. 1976); *Pollock v. General Fin. Corp.*, 535 F.2d 295 (5th Cir. 1976); *Ives v. W. T. Grant Co.*, 522 F.2d 749 (2d Cir. 1975); *Bone v. Hibernia Bank*, 493 F.2d 135 (9th Cir. 1974).

12. See text accompanying notes 1-5 *supra*.

13. See, e.g., *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356 (1973); *Allen v. Beneficial Fin. Co.*, 531 F.2d 797 (7th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3275 (U.S. Oct. 12, 1976)(No. 76-182).

The United States Supreme Court addressed the scope of FRB authority in *Mourning v. Family Publications Service, Inc.*¹⁴ In that case a FRB regulation required the lender to disclose all charges in connection with any contract providing for payment in more than four installments.¹⁵ But section 121 of the Act merely required disclosure if a lender offered to finance for a charge.¹⁶ In sustaining the more stringent provision, the Court described it as "reasonably related to the purposes of the enabling legislation."¹⁷ Eight justices,¹⁸ in deference to the FRB's experience and resources,¹⁹ convincingly bestowed great authority upon the Board. Thus, the Court permitted the FRB to supplement with regulations those parts of the Act under its jurisdiction.

Mourning resolved the legitimacy of Regulation Z, but never expressly decided whether the FRB could interpret that regulation, write staff opinion letters,²⁰ or publish pamphlets *en masse* in furtherance of its statutory mandate to ensure an "informed use of credit."²¹ Because the United States Supreme Court has not since addressed the scope of FRB authority,²² conflicting theories prevail

14. 411 U.S. 356 (1973).

15. *Id.*

16. *Id.* at 362-63; 15 U.S.C. § 1631 (1970).

17. 411 U.S. at 369. The Court cites *Thorpe v. Housing Authority*, 393 U.S. 268 (1969), as authority for the concept that federal agencies need only satisfy a test of reason in administration of their duties. In that case a tenant was evicted for being head of a tenant's group. The landlord, however, did not inform the tenant of the reasons for his eviction as required by a circular authored by the Department of Housing and Urban Development. The Court upheld the validity of the circular pronouncing the aforementioned reasonableness test. *Id.* at 280-81.

18. *Mourning* was a five to four decision. However, only Justice Powell truly dissented. Justices Douglas, Rehnquist and Stewart agreed with the majority on the law, but they wanted the case remanded to settle a question of fact. 411 U.S. at 378-88.

19. The Court noted that "Congress determined to lay the structure of the Act broadly and to entrust its construction to an agency with the necessary experience and resources to monitor its operation." 411 U.S. at 365. Moreover, the Court underscored the congressional desire to ensure the FRB enough discretionary power to cope with willing evaders of the Act. *Id.*

20. However, an argument could be posited that *Mourning* accepted the validity of FRB letters *sub silencio*. The Court did refer to an advisory letter which Vice Chairman Robertson had written. *Id.* at 368-69. Nonetheless, there was no such express holding to that effect.

21. See note 3 *supra*.

22. *Mourning* was recently mentioned in *Weinberger v. Salfi*, 422 U.S. 749 (1975). That case involved the denial of social security benefits to a widow. The Court referred to the "latitude" given legislative decisions that concern the private area of the law. *Id.* at 774. This was an obvious allusion to the sweeping powers that Congress granted the FRB.

concerning *Mourning's* effect on these other sources of truth-in-lending information.

One school of thought believes the FRB has authority to utilize means other than Regulation Z in administering the Act, since both Congress and the Court essentially rendered it autonomous.²³ Others seem to rely upon *Mourning's* strict holding which legitimated Regulation Z alone.²⁴ The circuits reflect both rationales.²⁵

Amendments to the Act have largely obviated the controversy. In 1974 Congress passed an amendment which validated FRB interpretations of Regulation Z.²⁶ In 1976 Congress again amended the statute to legitimate *official* staff letters.²⁷ Because the federal courts have not as yet construed this new amendment,²⁸ an analysis of the past confusion among the circuits is essential to a complete understanding of its probable effect.

III. Conflict Among the Circuits

A. FRB Methods To Disseminate Information: Interpretations, Staff Letters, and Pamphlets

On July 10, 1976 the FRB amended section 226.1 of Regulation Z to set out the various methods of procuring reliable truth-in-lending information.²⁹ Previously no such reliable regulatory guideline existed. Instead, the prospective creditor depended upon either FRB interpretations, staff letters, or pamphlets³⁰ which did not necessar-

23. See, e.g., *Bone v. Hibernia Bank*, 493 F.2d 135 (9th Cir. 1974); *St. Germain v. Bank of Hawaii*, 413 F. Supp. 587 (D. Haw. 1976).

24. See, e.g., *Martin v. Commercial Secs. Co.*, 539 F.2d 521 (5th Cir. 1976); *Ives v. W. T. Grant Co.*, 522 F.2d 749 (2d Cir. 1975); see generally *Johnson v. Associates Fin., Inc.*, 369 F. Supp. 1121 (S.D. Ill. 1974) and *Stefanski v. Mainway Budget Plan, Inc.*, 326 F. Supp. 138 (S.D. Fla. 1971), *rev'd on other grounds*, 456 F.2d 211 (5th Cir. 1972) wherein both courts utilized the *Mourning* rationale without citation to the United States Supreme Court decision. *Stefanski* was decided prior to *Mourning*.

25. See notes 23-24 *supra*.

26. 15 U.S.C. § 1640(f) (Supp. V, 1975).

27. Act of February 27, 1976, Pub. L. No. 94-222, § 3(b), 90 Stat. 197 (to be codified in 15 U.S.C. § 1640(f)).

28. One such federal district court expressly declined to pass on the question in light of the new amendment. See *Lewis v. Walker-Thomas Furniture Co.*, 416 F. Supp. 514, 517-18 (D.D.C. 1976).

29. 41 Fed. Reg. 28,255-56 (1976) (to be codified in 12 C.F.R. § 226.1); see note 106 *infra*.

30. One can readily appreciate how a creditor might be misled into believing that *What You Ought to Know About Truth in Lending* was the official FRB interpretation of the law. The pamphlet contains the following language:

ily carry the stamp of full FRB approval.

The FRB issued formal interpretations to clear up any confusion resulting from the more equivocal sections of Regulation Z.³¹ At least one FRB administrator considered them as authoritative as the regulation itself.³² Others suggested that "[s]ince the Board wrote Regulation Z, it [was] obviously best able to interpret provisions found there."³³ Nonetheless, the FRB did not always support these views. For example, FRB officials have occasionally characterized these interpretations as non-substantive in order to avoid the public notice requirements of the Administrative Procedure Act.³⁴ This ambivalence within the FRB raised doubts about whether such interpretations were binding as law.

Staff attorneys wrote both official and unofficial opinion letters in response to factual problems which creditors presented.³⁵ They assigned FRB numbers to the official correspondence and distributed such correspondence as Public Position Letters in order to resolve issues of general public concern.³⁶ In contrast, the staff designed the unofficial correspondence to meet the needs of the individual inquirer.³⁷ In the FRB's view,³⁸ this distinction did not change

If you extend consumer credit, then you must become familiar with Regulation Z on Truth in Lending. You will be responsible, as a creditor, for complying with the Regulation.

This pamphlet tells you how Regulation Z affects your business. It tells you what you must let your customer know when you offer or extend them consumer credit-including agricultural and real estate credit.

The pamphlet then includes the text of the Act and the Regulation, questions and answers about truth-in-lending, and sample disclosure forms. A footnote on the cover page informs the reader that the material in the pamphlet has been prepared by the Board of Governors of the Federal Reserve System.

31. The present requirements for issuing an interpretation appear at 41 Fed. Reg. 28,256 (1976) (to be codified in 12 C.F.R. § 226.1(d)(4)(i)).

32. See, e.g., the March 22, 1972 statement of Vice Chairman Robertson before the Subcommittee on Consumer Affairs of the House Banking and Currency Committee. CLONTZ, TRUTH IN LENDING MANUAL §§ 1-13 to 1-22 (3d ed. 1973) [hereinafter cited as CLONTZ].

33. CLONTZ, *supra* note 32, ¶ 1.01-A[3], at 5 (1975).

34. See *Continental Oil Co. v. Burns*, 317 F. Supp. 194, 197 (D. Del. 1970).

35. CLONTZ, *supra* note 32, at 5.

36. *Id.*

37. *Id.*

38. Deputy Secretary Kenneth A. Kenyon said on one occasion:

[T]he Board considers the present informal and flexible procedure, by which members of its staff provide opinions on regulatory provisions, an essential part of its operations. It is the Board's view that the public is entitled to rely on a formal staff opinion unless and until it is altered by the Board after formal consideration.

the legal effect of the correspondence. Nonetheless, the courts did not always agree.³⁹

The FRB utilized various other methods in an effort to educate the public. It distributed over two million copies of *What You Ought to Know About Truth in Lending*,⁴⁰ a pamphlet explaining the Act. In addition, FRB staff answered questions by telephone, and periodically held training sessions for member bank employees.⁴¹ In 1974, the FRB instituted an adult and secondary education pilot program to further public familiarity with the Act.⁴² These methods of acquiring truth-in-lending information were even less authoritative than either interpretations or staff letters.⁴³

Reliance was the problem. Violation of the Act carried stringent criminal and civil penalties.⁴⁴ The creditor who, in good faith, relied

Excerpt from FRB letter No. 444 of Kenneth A. Kenyon, Deputy Secretary of the FRB (March 1, 1971), reprinted in *Philbeck v. Timmers Chevrolet, Inc.*, 499 F.2d 971, 979 n.17 (5th Cir. 1974).

39. See, e.g., cases cited in note 24 *supra*.

40. See CLONTZ, *supra* note 32, at 1-15. The FRB also has distributed over 3.5 million copies of a leaflet, *What Truth in Lending Means to You* in both Spanish and English containing information analogous to the pamphlet. *Id.*; see also note 30 *supra*.

41. See statement of Hon. Jeffrey M. Bucher, Board of Governors of the Federal Reserve System before the SUBCOMM. ON CONSUMER AFFAIRS OF THE HOUSE COMM. ON BANKING, CURRENCY AND HOUSING, 94TH CONG., 1ST SESS., CONSUMER INFORMATION 33 (Comm. Print 1975) [hereinafter cited as CONSUMER INFORMATION].

42. *Annual Report to Congress on Truth in Lending For the Year 1974 on January 3, 1975*, CONSUMER INFORMATION 36.

43. See, e.g., *Johnson v. Associates Fin., Inc.*, 369 F. Supp. 1121, 1123-24 (S.D. Ill. 1974) (court rejects pamphlets); accord, *Scott v. Liberty Fin., Co.*, 380 F. Supp. 475, 480 (D. Neb. 1974).

44. The criminal penalties are found in 15 U.S.C. § 1611 (1970) which provides: Whoever willfully and knowingly

(1) gives false or inaccurate information or fails to provide information which he is required to disclose under the provisions of this subchapter or any regulation issued thereunder,

(2) uses any chart or table authorized by the Board under section 1606 of this title in such a manner as to consistently understate the annual percentage rate determined under section 1606(a)(1)(A) of this title, or

(3) otherwise fails to comply with any requirement imposed under this subchapter, shall be fined not more than \$5,000 or imprisoned not more than one year, or both.

See also 15 U.S.C. § 1614 (Supp. V, 1975) (liability of assignees). The civil penalties associated with truth-in-lending violations are equally as stringent. 15 U.S.C. § 1640(a) (Supp. V, 1975) provides:

Individual or class action for damages; amount of award; factors determining amount of award.

Except as otherwise provided in this section, any creditor who fails to comply with

upon an opinion, interpretation, or pamphlet risked punishment if the courts refused to recognize its validity. A movement arose to enact an exculpatory provision in the Act for such "good faith" reliance.

B. Attempted Resolution

The statute, as originally enacted, did not exculpate from liability one who in good faith followed the ostensibly "official" advice of a FRB interpretation, staff letter or pamphlet. One enterprising defendant sought to create such a defense, citing the Act's "bona fide" error clause in *Ratner v. Chemical Bank New York Trust Co.*⁴⁵ The

any requirement imposed under this part or part D of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—

- (1) any actual damage sustained by such person as a result of the failure;
- (2) (A) in the case of an individual action twice the amount of any finance charge in connection with the transaction, except that the liability under this subparagraph shall not be less than \$100 nor greater than \$1,000; or
(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not be more than the lesser of \$100,000 or 1 per centum of the net worth of the creditor; and
- (3) in the case of any successful action to enforce the foregoing liability the costs of the action, together with a reasonable attorney's fee as determined by the court.

In determining the amount of award in any class 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.

The United States District Court for the Northern District of Illinois interpreted "intentional" to mean that "the defendant knew what it was doing and did it, although its failure . . . was apparently negligent or a mistake of law rather than willful or wanton." *Eovaldi v. First Nat'l Bank*, 71 F.R.D. 334, 337 (N.D. Ill. 1976). Therefore, misplaced reliance upon an FRB staff letter in good faith was not a valid excuse for violation of the Act under this section. The flagrant wrongdoer and the hapless creditor who tried to comply with the law suffered the same penalties.

45. 329 F. Supp. 270 (S.D.N.Y. 1971). The *bona fide* error clause appears in 15 U.S.C. § 1640(c) (Supp. V, 1975). That section provides:

A creditor may not be held liable in any action brought under this section for a violation of this subchapter if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

United States District Court for the Southern District of New York rejected his argument, concluding that Congress enacted the clause at the behest of businessmen who feared penalties for inadvertent errors,⁴⁶ "notwithstanding the maintenance of procedures adapted to avoid any such error."⁴⁷ Defendant's inventive statutory construction, although initially dismissed, laid the foundation for more successful efforts in the future.

Congress amended the Act in 1974 to afford immunity similar to that which the court had rejected in *Ratner*.⁴⁸ The amendment had a narrow scope since its "good faith" immunity clause applied only to reliance on "any rule, regulation, or interpretation thereof by the Board."⁴⁹ Congress clearly intimated that pamphlets and staff letters were not within its ambit.⁵⁰ The FRB itself conceded that "this section does not extend to good faith compliance with Federal Reserve Board staff opinion letters."⁵¹

The 1974 amendment left businessmen in a quandary. Because of the amendment, it could no longer be stated with conviction that "the public is entitled to rely on a formal staff opinion unless and until it is altered by the Board after formal consideration."⁵²

46. 329 F. Supp. at 281 n.17.

47. See note 45 *supra*; see also *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871 (7th Cir. 1976). The Seventh Circuit Court of Appeals clearly suggested that the defendant who seeks exculpation for truth-in-lending violations under the *bona fide* clause must do more than demonstrate his good faith attempts at compliance. *Id.* at 878; accord, *Hinkle v. Rock Springs Nat'l Bank*, 538 F.2d 295, 297 (10th Cir. 1976).

48. 15 U.S.C. § 1640(f) (Supp. V, 1975).

49. *Id.* The immunity provision reads as follows:

No provision of this section or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board, notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

Id.

50. See S. REP. NO. 278, 93d Cong., 1st Sess. 13 (1973). The report noted that "in order to confer immunity from civil liability, the rule, regulation, or interpretation thereof *must be approved by the Board itself and not merely the staff of the Board.*" *Id.* (emphasis added). Since it is the staff which writes the correspondence, a recipient of such a letter cannot rely upon it with impunity.

51. Collins, *Current Developments in Truth in Lending and Other Consumer Credit Protection Legislation*, 2 OHIO NO. L. REV. 477, 478 (1975).

52. Excerpt from FRB letter No. 444 of Kenneth A. Kenyon, Deputy Secretary of the FRB (March 1, 1971), reprinted in *Philbeck v. Timmers Chevrolet, Inc.*, 499 F.2d 971, 979 n.17 (5th Cir. 1974); see note 38 *supra*.

These events caused a difference of opinion among the circuits and their district courts. Some courts recognized that the 1974 amendment did not legitimate staff letters, and refused to consider binding those staff opinions they felt were incorrect.⁵³ Other courts gave legal effect to all FRB opinion letters and pamphlets despite their exclusion from the immunity clause.⁵⁴ Thus the public suffered the unhappy circumstance of having different law govern the construction of the Act in adjoining circuits.

C. Divergent Views

The Ninth Circuit has generally given legal effect to staff letters, formal Board interpretations, and circulated pamphlets. In *Bone v. Hibernia Bank*⁵⁵ the court was required to determine the proper computation method for measuring the unearned portion of a finance charge. Regulation Z did not address the issue. But *What You Ought to Know About Truth in Lending*, a Board interpretation, and a staff letter collectively prescribed a given method.⁵⁶ The court found these authorities binding, implicitly accepting and expanding *Mourning v. Family Publications Service, Inc.*⁵⁷ It adopted *Mourning's* deference to the great expertise and experience of the FRB,⁵⁸ but also effectively found the judgment of staff employees tantamount to law.⁵⁹

The United States District Court for the District of Hawaii recently reiterated the *Bone* rationale in *St. Germain v. Bank of Hawaii*.⁶⁰ It described staff letters as the "forerunners" of formal FRB interpretations.⁶¹ Speaking in terms of the vast pragmatic

53. See *Jones v. Community Loan & Inv. Corp.*, 544 F.2d 1228, 1229 (5th Cir.1976); cf. *Pennino v. Morris Kirschman & Co.*, 526 F.2d 367, 371 n.8 (5th Cir. 1976) (pamphlets); see also *Pedro v. Pacific Plan*, 393 F. Supp. 315, 323 (N.D. Cal. 1975) (staff letters are a "valuable tool," but not binding); *Stefanski v. Mainway Budget Plan, Inc.*, 326 F. Supp. 138, 142 (S.D. Fla. 1971), *rev'd on other grounds* 456 F.2d 211 (5th Cir. 1972).

54. See, e.g., *Woods v. Beneficial Fin. Co.*, 395 F. Supp. 9, 12-13 (D. Ore. 1975); *Bone v. Hibernia Bank*, 493 F.2d 135,139 (9th Cir. 1974); *Philbeck v. Timmers Chevrolet, Inc.*, 499 F.2d 971, 976-77 (5th Cir. 1974).

55. 493 F.2d 135 (9th Cir. 1974).

56. *Id.* at 139.

57. 411 U.S. 356 (1973); see also note 19 *supra*.

58. 493 F.2d at 140.

59. *Id.* at 139.

60. 413 F. Supp. 587 (D. Haw. 1976); *contra Pedro v. Pacific Plan*, 393 F. Supp. 315, 323 (N.D. Cal. 1975). Both are district courts within the Ninth Circuit.

61. 413 F. Supp. at 591-92.

problems the FRB faces in shouldering its administrative responsibilities, the court noted "staff opinion letters are clearly the only manageable vehicle by which the Board may respond to the mass of inquiries from creditors or prospective creditors regarding compliance with the Act's rules, regulations, and interpretations."⁶² Thus, the Ninth Circuit squarely supports FRB promulgations whether official or otherwise.

The Third Circuit also accepts the validity of staff opinion letters. In *Johnson v. McCrackin-Sturman Ford, Inc.*,⁶³ plaintiff alleged that defendant failed to set forth the acceleration provisions in a retail installment contract for the purchase of a new car. However, a staff opinion letter and a FRB interpretation each indicated such disclosure was not necessary.⁶⁴ The court agreed, stating FRB interpretations "are entitled to great weight," while staff opinions "are to be considered the opinion of the Board" until a formal proclamation supercedes them.⁶⁵ The positions of the Ninth and Third Circuits are bold since Congress clearly suggested the 1974 "good faith reliance" amendment did not include staff letters within its purview.⁶⁶

The Second Circuit disputes the authority of staff letters. In *Ratner v. Chemical Bank New York Trust Co.*⁶⁷ defendant produced a staff letter which concluded that disclosure of an "open credit plan" was unnecessary.⁶⁸ The United States District Court for the Southern District of New York refused to give this correspondence effect.⁶⁹

Since the district court decided *Ratner* prior to *Mourning* and before the 1974 "good faith reliance" amendment, its relevance might have been suspect. However, the Second Circuit ratified *Ratner's* rationale in *Ives v. W. T. Grant Co.*⁷⁰ which was decided

62. *Id.* at 591.

63. 527 F.2d 257 (3d Cir. 1975).

64. *Id.* at 267.

65. *Id.* & n.23. See *Philbeck v. Timmers Chevrolet, Inc.*, 499 F.2d 971 (5th Cir. 1974).

66. See notes 45-47 *supra* and accompanying text.

67. 329 F. Supp. 270 (S.D.N.Y. 1971).

68. *Id.* at 278.

69. One writer has theorized that the court refused to give this correspondence effect because it was *ex post facto*. Garwood, *A Look at Truth in Lending—Five Years After*, 14 SANTA CLARA LAWYER 491, 494 n.18 (1973-74).

70. 522 F.2d 749 (2d Cir. 1975).

after both *Mourning* and the 1974 amendment. In discussing the effect of the "good faith reliance" clause upon staff letters and pamphlets, the court found these authorities legally insufficient as a defense because "the reference in subsection (f) to 'any rule, regulation, or interpretation thereof by the Board' means those requirements of Truth in Lending that have become part of Regulation Z."⁷¹

The Second Circuit is a jurisdiction which geographically encompasses the commercial center of the world. Its creditors need to have readily available information concerning the Act in order to function within the law. Pamphlets and staff letters are convenient sources. Nevertheless, *Ives* expressly refused to give either of these legal effect. It construed the 1974 amendment to mean that only specific interpretations appended to Regulation Z were substantively binding. Such an approach has not eased the plight of creditors and is less desirable than that taken by the Ninth and Third Circuits.⁷²

The present law of the Fifth Circuit is unclear, although in the past it decided the issue of FRB staff letter reliability in a fashion similar to the Ninth Circuit. In *Philbeck v. Timmers Chevrolet, Inc.*,⁷³ the court gave FRB interpretations and staff opinions "great weight, for they constitute part of the body of 'informed experience and judgment of the agency to whom Congress delegated appropriate authority'."⁷⁴ Recent decisions within the Fifth Circuit, however, do not reflect this deference.

In *Willis v. Town Finance Corp.*,⁷⁵ defendant failed to disclose a security interest which would vest in all properties acquired within ten days of the loan.⁷⁶ A staff clarification letter had determined that such disclosure was unnecessary. Departing from the *Philbeck*

71. *Id.* at 758.

72. Nonetheless *Ives* is technically correct. *Mourning* never expressly required the courts to honor FRB staff letters as substantive law. Rather it specifically upheld the right of the FRB to issue reasonable regulations in administration of the Act. 411 U.S. at 369. Moreover, Congress did expressly exclude staff letters from the ambit of the 1974 "good faith reliance" amendment. See note 50 *supra* and accompanying text. Thus *Ives* is sound, but query: Is it desirable?

73. 499 F.2d 971 (5th Cir. 1974).

74. *Id.* at 976 quoting *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 372 (1973).

75. 416 F. Supp. 10 (N.D. Ga. 1976).

76. *Id.* at 11.

precedent, the United States District Court for the Northern District of Georgia held contrary to the letter.⁷⁷ It noted "[t]he *Philbeck* rationale would seem to mandate that this Court simply reverse the precedent in this district [lower court decisions] and follow the January 5, 1975 F.R.B. staff 'clarification' Opinion Letter . . . This Court leans more toward the restricted view of staff opinion letters as expressed by *Ives v. W. T. Grant*."⁷⁸

Willis could be restricted to its facts because Judge Moye might have allowed his adverse perception of congressional lobbying to cloud his reasoning.⁷⁹ However, this distinction would not explain *Pollock v. General Finance Corp.*,⁸⁰ wherein the Fifth Circuit, on similar facts, affirmed the "after acquired property" rule of *Willis*.⁸¹

A recent Fifth Circuit decision, *Martin v. Commercial Securities Co.*,⁸² does more than imply a lack of faith in staff letters. The *Martin* court refused to give effect to the interpretation contained in one such letter "in the absence of a Regulation requiring it."⁸³ Although the court purported to comply with the *Philbeck* rule that a staff letter must be afforded "substantial weight,"⁸⁴ it attributed very little authority to the letter.

The Fifth Circuit has also demonstrated an aversion for *What You Ought to Know About Truth in Lending*. In *Pennino v. Morris Kirschman & Co.*,⁸⁵ the court based its decision upon the intent of

77. *Id.* at 12-13.

78. *Id.* at 12.

79. Judge Moye alleged that industry representatives "instigated" opinion and clarification letters which were favorable to their interests. He refused to follow the interpretations of a single FRB employee subjected to this "lobbying" process. *Id.* at 13.

80. 535 F.2d 295 (5th Cir. 1976).

81. *Id.* at 299.

82. 539 F.2d 521 (5th Cir. 1976). This case involved the disclosure of an acceleration clause in a combination promissory note-chattel mortgage finance arrangement. The disclosure statement appeared on the front of the document. On the reverse side, where the borrower signed his name, the lender had an additional disclosure statement which mentioned the acceleration clause. *Id.*

83. *Id.* at 529. The court noted that "[i]t is highly illuminating that there is no reference in the Act, the Regulations, or the Official Interpretations of the Federal Reserve Board to acceleration clauses or the right to accelerate payments, even though they are a common feature of installment notes and are traditional creditors' remedies." *Id.* at 524. Thus the Fifth Circuit apparently only permits "good faith" reliance upon FRB regulations under the 1974 amendment. See *McGowan v. Credit Center, Inc.*, 546 F.2d 73, 76-77 (5th Cir. 1977); *Jones v. Community Loan & Inv. Corp.*, 544 F.2d 1228, 1229 (5th Cir. 1976).

84. *Id.* at 529.

85. 526 F.2d 367 (5th Cir. 1976).

Congress in enacting the 1974 "good faith reliance" amendment.⁸⁶ It refused to recognize the legitimacy of anything but a formal FRB proclamation.

Until recently, the Fifth Circuit had concurred with the Ninth in giving legal effect to all FRB pronouncements. Now, for consistency, it seemingly heeds *Philbeck*, and affords FRB staff letters "substantial weight,"⁸⁷ but only if they conform to the court's interpretation of the Act. In effect, both the Fifth Circuit and the Second refuse to consider staff letters authoritative.⁸⁸

The Seventh Circuit has not squarely addressed the issue of FRB authority. In *Allen v. Beneficial Finance Co.*,⁸⁹ the co-maker of a note filed a complaint against the lender for allegedly failing to disclose the finance terms in a "meaningful sequence," as required by Regulation Z.⁹⁰ The Seventh Circuit found *Mourning* dispositive, holding that the FRB could promulgate a regulation concerning a financing arrangement not covered in the Act.⁹¹ But the court adhered to the definition of a "meaningful sequence" which a staff letter had proposed.⁹² Perhaps the Seventh Circuit now recognizes the validity of such correspondence.

However, the Tenth Circuit's view is quite clear. In *Begay v. Ziems Motor Co.*,⁹³ plaintiff alleged that defendant truck seller did not meaningfully disclose the existence of an acceleration clause in the financing agreement.⁹⁴ Despite the existence of a FRB staff opinion letter which favored plaintiff's position, the Tenth Circuit refused to follow it concluding that "the letter [was not] such a construction or interpretation as to constitute an official interpretation, and it represent[ed] no more than the Director's view."⁹⁵

This conflict among the circuits is a serious one because creditors

86. *Id.* at 371 n.8.

87. 539 F.2d at 529.

88. The Fifth Circuit has recently affirmed the *Martin* rationale in *McDaniel v. Fulton Nat'l Bank*, 543 F.2d 568, 569 (5th Cir. 1976). These views seem inconsistent with those of a court which once sympathized with a creditor who was guilty of merely "technical violation[s] of the Truth-in-Lending Act." *Stefanski v. Midway Budget Plan, Inc.*, 456 F.2d 211, 213 (5th Cir. 1972). What could be more technical than noncompliance with the Act because of misplaced reliance upon a FRB staff letter which is later deemed invalid by the court?

89. 531 F.2d 797 (7th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3275 (U.S. Oct. 12, 1976)(No. 76-182).

90. *Id.*

91. *Id.* at 800.

92. *Id.* at 801.

93. No. 75-1694 (10th Cir., Feb. 28, 1977).

94. *Id.* at 2.

95. *Id.* at 12. The court of appeals adopted the Fifth Circuit's rationale in *Martin. Id.* at 10-12. See notes 82-84 *supra* and accompanying text.

have to rely upon the FRB for guidance in order to comply with the law. If the courts refuse to give legal effect to letters or pamphlets, the creditor might have to pay penalties in spite of his good faith reliance.⁹⁶ In the Second, Fifth and Tenth Circuits, the creditor can only depend upon FRB interpretations; in the Ninth and Third Circuits, one might follow staff letters with impunity; in the Seventh Circuit the creditor must surmise the applicable law.

D. A Moot Controversy?

The 94th Congress may have finally resolved the conflict. Businessmen, who were tired of being senselessly penalized for their attempts to comply with the law, suggested to the Subcommittee on Consumer Affairs of the House Banking, Currency and Housing Committee that at least staff letters should carry substantive weight.⁹⁷ Ideally they desired a credit form review system, whereby prospective creditors could merely submit proposed credit applications to the staff, and upon approval, use the applications without fear of suit.⁹⁸ Congress heeded their complaints and, on February 27, 1976 amended the 1974 "good faith reliance" provision to legitimate 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."⁹⁹

96. See note 44 *supra*.

97. CONSUMER INFORMATION 143-53. The Subcommittee on Consumer Affairs of the House Banking, Currency and Housing Committee held hearings on April 15, 1975. As a result of these hearings, a general feeling prevailed that something would be done to ease the plight of creditors. See, e.g., the exchange between Sheldon I. London of the National Home Furnishing Association and Representative Wylie:

Mr. Wylie. We tried to address ourselves to this problem, as you know, in the last Congress. As a matter of fact, a good faith compliance provision was put in the bill (1974 Amendment). . . .

Apparently what you are saying is that it is not quite enough.

Mr. London. Precisely, sir.

Mr. Wylie. And what you are suggesting is something along the lines of the OSHA type arrangement where an advisory opinion can be asked for in advance, and if an advisory opinion is given and the person follows that advisory opinion [*sic*], then he has, in effect, exercised good faith compliance.

Mr. London. Yes.

Id. at 153.

98. *Id.* at 142.

99. Act of February 27, 1976, Pub. L. No. 94-222, § 3(b), 90 Stat. 197 (to be codified in 15 U.S.C. § 1640(f)). This amendment provides:

The floor debates in both the House of Representatives and the Senate reflect congressional concern for the hapless creditor who suffered penalties for his compliance. Representative Annunzio deplored the anomalous situation where businessmen had to "wait until they [were] sued" in order to get an accurate statement of the law.¹⁰⁰ He also pointed out that the amendment "is only permissive and does not force the Federal Reserve Board to designate staff members who can hand down advisory opinions unless the Board so chooses."¹⁰¹ Senators Garn and Proxmire urged support of the amendment, indicating that any such interpretation or approval would have "binding effect."¹⁰² These comments demonstrate two congressional purposes. First, Congress wished to grant the FRB sufficient discretion to administer the Act. Thus only the FRB could provide the "procedures"¹⁰³ for procuring truth-in-lending information. Second, Congress wanted to enact an exculpatory provision. It did so by providing a defense to truth-in-lending violations based upon good faith reliance, similar to that which defendant proposed in *Ratner v. Chemical Bank New York Trust Co.*¹⁰⁴

The 1976 amendment was designed to vest discretion with the FRB. Conceivably, the Board could have seized the opportunity to legitimate its pamphlets and seminars, as well as its staff letters under the "approvals" or "procedures" phrases of the amendment.

No provision of this section or section 112 imposing any liability shall apply to any act done or omitted in good faith in conformity with any 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.

100. 122 CONG. REC. H816 (daily ed. Feb. 9, 1976).

101. *Id.*

102. 122 CONG. REC. S1548 (daily ed. Feb. 6, 1976) (remarks of Senator Proxmire).

Senator Proxmire:

In addition the House amendment would authorize the Federal Reserve Board to delegate to its staff the authority to issue interpretations or approvals that would have *binding effect* in subsequent litigation over violations of the Truth in Lending Act. *That is, compliance with such an interpretation would constitute an absolute defense* to a creditor until that interpretation was reversed by higher authority.

Id. (emphasis added); see also the remarks of Senator Garn. *Id.* at 1547.

103. See note 99 *supra*.

104. See notes 45-47 *supra* and accompanying text.

Congress probably would have permitted this in light of the concern of the Subcommittee on Consumer Affairs for businessmen's complaints in this area.¹⁰⁵ The FRB, however, cautiously exercised this discretion. It amended section 226 of Regulation Z on July 10, 1976, but did not significantly increase its powers.¹⁰⁶

The new regulations only allow immunity for reliance on "official interpretations" and "official staff letters."¹⁰⁷ These are not liberally issued. The FRB grants *official* interpretations upon request so long as a "potentially controversial" issue "of general applicability" is involved.¹⁰⁸ These are binding as substantive law. Secondly, the *staff* dispatches its own *official* staff interpretations to clear up "technical ambiguities" if "no significant policy implications" exist.¹⁰⁹ The FRB also considers these legally operative. Lastly, the *staff* send *unofficial* staff interpretations to the curious as a service.¹¹⁰ A creditor cannot rely upon these unofficial staff interpretations to gain protection under the amended "good faith" clause of the Act.¹¹¹ Moreover, the FRB has refused to initiate the review system of creditors' forms which businessmen requested in

105. See notes 97-98 *supra* and accompanying text.

106. The amended regulation appears at 41 Fed. Reg. 28,255-56 (1976) (to be codified in 12 C.F.R. § 226.1). New section 226.1(d)(3) provides:

Designation of official to issue interpretations. Pursuant to section 130(f) of the Act [section 1640(f) of this title], the Board has designated the Director and other officials of the Office of Saver and Consumer Affairs as officials "duly authorized" to issue, at their discretion, official staff interpretations of this Part. This designation shall not be interpreted to include authority to approve particular creditors' forms in any manner.

New section 226.1(d)(4) provides:

The type of interpretation issued will be determined by the Board and the designated officials by the following criteria:

- (i) Official Board interpretations will be issued upon those requests which involve potentially controversial issues of general applicability dealing with substantial ambiguities in this Part and which raise significant policy questions.
- (ii) Official staff interpretations will be issued upon those requests which, in the opinion of the designated officials, require clarification of technical ambiguities in this Part or which have no significant policy implications.
- (iii) Unofficial staff interpretations will be issued where the protection of Section 130(f) of the Act [section 1640(f) of this title] is neither requested nor required, or where time strictures require a rapid response.

107. 41 Fed. Reg. 28,256 (1976) (to be codified in 12 C.F.R. §§ 226.1(d)(4)(i)-(ii)).

108. *Id.* (to be codified in 12 C.F.R. § 226.1(d)(4)(i)).

109. *Id.* (to be codified in 12 C.F.R. § 226.1(d)(4)(ii)).

110. *Id.* (to be codified in 12 C.F.R. § 226.1(d)(4)(iii)).

111. See note 99 *supra*.

the House hearings.¹¹² Given the seemingly boundless grant of administrative power to the FRB through the 1976 amendment, these changes in Regulation Z are an exercise in restraint.

The legal effect of pamphlets, leaflets and the various FRB educative programs remains doubtful because the FRB has ignored an opportunity to legitimate all of its pronouncements. It has only protected interpretations and *official* staff letters. Under present law, the inquirer must make his intentions clear to the FRB. If he expresses a desire for immunity and grave policy implications are involved, the FRB will issue an official interpretation.¹¹³ If immunity is desired and only technical ambiguities are involved, the staff will send an official staff interpretation.¹¹⁴ But if the inquirer does not indicate his desire for exculpation, the staff will send him an unofficial staff interpretation which, if relied upon, affords no protection.¹¹⁵

IV. Conclusion

The scope of FRB authority has been a source of contention since Congress delegated it responsibility to administer the Act.¹¹⁶ Nevertheless, it has emerged as the legitimate overseer. Congress wanted an agency with the necessary expertise to unify all credit regulations. The United States Supreme Court agreed. These supportive forces defined FRB authority.

In its first five years as administrator of the Act, the FRB's role progressed from that of regulator to that of legislator as well. This occurred when the United States Supreme Court allowed the FRB

112. See text accompanying note 98 *supra*.

113. Any request for formal FRB interpretations or official staff interpretations of Regulation Z must be addressed to the Director of the Office of Saver and Consumer Affairs, Board of Governors of the Federal Reserve System, Washington, D.C. 20551. 41 Fed. Reg. 28,255 (1976) (to be codified in 12 C.F.R. § 226.1(d)(1)).

114. *Id.* (to be codified in 12 C.F.R. § 226.1(d)(4)(ii)).

115. *Id.* (to be codified in 12 C.F.R. § 226.1(d)(4)(iii)).

116. Indeed reformers are still attempting to limit the FRB's powers. See, e.g., *A Bill to Promote the Independence and Responsibility of the Federal Reserve System: Hearings on H.R. 12934 Before the House Comm. on Banking, Currency and Housing, 94th Cong., 2d Sess.* 12 (1976). Kathleen F. O'Reilly, Legislative Director, Consumer Federation of America, suggests that the FRB could be more accountable to Congress if it were required to submit reports on its enforcement activities. *Id.* Congress might then be in a more favorable position to judge whether "the Federal Reserve is properly and persistently carrying out its obligation to protect consumers." *Id.*

to supplement the Act through Regulation Z. Then Congress enacted the 1974 amendment which permitted the FRB to supplement Regulation Z with interpretations. Finally, the 1976 amendment has validated "official" staff letters, and has probably resolved some of the conflict among the circuits.¹¹⁷ Should the trend continue, pamphlets, leaflets and training sessions will also bind as law, enabling the FRB to educate the public about the Act without senselessly subjecting anyone to liability.

Michael Thomas Kelly

117. It is possible that the Second Circuit could adhere to its previous reasoning expressed in *Ives v. W. T. Grant Co.*, 522 F.2d 749 (2d Cir. 1975). In that case the court refused to recognize as valid anything not a part of Regulation Z. The new regulation has not incorporated these staff letters into Regulation Z. Therefore, conceivably, the Second Circuit could continue to protest their validity. This is unlikely, however, because the new regulation specifically includes *official* staff correspondence within the purview of the "good faith reliance" clause.