Mortgage Discrimination: Paperwork and Prohibitions Prove Insufficient—Is it Time for Simplification and Incentives?

Robert G. Boehmer
MORTGAGE DISCRIMINATION: PAPERWORK AND PROHIBITIONS PROVE INSUFFICIENT—IS IT TIME FOR SIMPLIFICATION AND INCENTIVES?

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I. INTRODUCTION

Racial discrimination in United States mortgage lending has, for far too long, burdened both those subjected to it and the society which must accept its inevitable and negative consequences. Such

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1. See generally Mortgage Discrimination: Hearing Before the Subcomm. on Consumer and Regulatory Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs, 101st Cong., 2d Sess. 1 (1990) [hereinafter Mortgage Discrimination Hearings II] (statement of Sen. Dixon, Chairman of the Subcommittee, opening the hearing) ("I was greatly troubled by the statistics which showed that blacks in minority neighborhoods got fewer loans and got rejected for loans more often than whites in white neighborhoods, even when incomes were comparable."); Discrimination in Home Mortgage Lending: Hearing Before the Subcomm. on Consumer and Regulatory Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs, 101st Cong., 1st Sess. 2 (1989) [hereinafter Mortgage Discrimination Hearings I] (statement of Sen. Dixon, opening the hearing) ("[I]t's 21 years since passage of the Fair Housing Act. Fifteen years since the Equal Credit Opportunity Act was passed in the Congress; and 11 years since the Community Reinvestment Act became the law of this land, and still we have discrimination in lending."); Dan Gillmor & Stephen K. Doig, Segregation Forever?, AM. DEMOGRAPHICS, Jan. 1992, at 48, 48 ("More than 25 years have passed since the Civil Rights Act of 1964 outlawed racial discrimination in housing. Yet data from the 1990 census show black-white segregation is still a fact of life in America.").


As of the late 1960's and through the mid 1970's, redlining was indisputably a common, if not universal, practice among lending institutions in urban areas of the country. Lenders attempted to justify their actions as being a necessary part of their fiduciary obligation to depositors to minimize risk. While lenders claimed that redlining occurred only after a neighborhood had already begun to decline, redlining came to be recognized as a major cause of urban neighborhood decline, as well as an effect. The refusal of lenders to invest in redlined neighborhoods has been found to contribute to a pattern of decline, including the inability of owners to maintain their property, the transformation of neighborhoods from owner-occupied areas to rental areas, and intensified segregation. In addition, when loans are

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discrimination has long been prohibited by federal law.\textsuperscript{3} Despite that prohibition, expanded Home Mortgage Disclosure Act\textsuperscript{4} (the "HMDA") data released in 1991 and 1992\textsuperscript{5} evidence a continued and shocking disparity between the rate of home loan approval for Caucasian as compared to black applicants.\textsuperscript{6}

A great deal of debate has taken place concerning the reasons for this disparity.\textsuperscript{7} Some have claimed that racial discrimination—whether intentional or unintentional—based on mistaken assumptions by lenders about particular categories of borrowers\textsuperscript{8} is a major contributing factor. Others claim that the disparity may result principally from application of sound lending standards.\textsuperscript{9} In either case, the existence of a wide racial gap in home loan approval rates is indisputable.\textsuperscript{10}

When this long-standing prohibition of mortgage discrimination is viewed alongside a continued pattern of racial disparity in loan approval rates, the conclusion is compelled that it is time for a new approach. This approach should not water down the existing law but should recognize that, to the extent the law is so complex that it cannot be readily understood by those regulated, it is more likely to foster litigation than to achieve its goals. This fresh approach should further recognize that to the extent that a law contains inconsistencies and unnecessarily burdensome regulatory requirements,\textsuperscript{11} those regu-

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\textsuperscript{3} See infra notes 18-284 and accompanying text (summarizing the federal statutes regulating mortgage discrimination); see generally PAUL H. SCHIEBER & DENNIS REPLANSKY, LENDERS' GUIDE TO CONSUMER COMPLIANCE AND ANTI-DISCRIMINATION LAWS (1991) (providing a summary of these laws).


\textsuperscript{5} See infra notes 336-78 and accompanying text.

\textsuperscript{6} See infra note 338 and accompanying text.

\textsuperscript{7} See infra notes 358-59 and accompanying text.

\textsuperscript{8} See infra note 349 and accompanying text.

\textsuperscript{9} See infra notes 356-57 and accompanying text.

\textsuperscript{10} See infra notes 338, 353-55 and accompanying text.

\textsuperscript{11} The Internal Revenue Code may be an example of a law with a laudatory purpose, raising revenue for public causes, which has become so inconsistent and burdensome that
lated are less likely to comply voluntarily.

Perhaps the current fury about the overall regulatory burden on financial institutions\(^\text{12}\) provides a realistic opportunity to adopt a new approach. Specifically, this Article argues that a significant reduction in the "paperwork" associated with this regulatory structure, combined with vigorous enforcement of existing law and the creation of significant incentives for lenders to invest in distressed areas of their communities has the potential to have a profound impact on the existing pattern of mortgage discrimination. This solution may be one capable of surviving the legislative process because it contains attractive features both for lenders and for those suffering from discrimination.

II. SCOPE OF ARTICLE

This Article first summarizes the panoply of federal statutes and administrative regulations designed to reverse the pattern of mortgage discrimination in the United States. Although the focus of this Article is upon race-based mortgage discrimination, an incomplete and inaccurate picture of the law concerning mortgage discrimination is created if other prohibited reasons for discrimination, such as disability, are not taken into account. This section of the Article demonstrates that these laws have focused on a two-pronged approach to the problem: prohibition and record-keeping. This section also describes the often confusing and inconsistent standards created by that approach, which may well be one significant factor contributing to the continued pattern of discrimination.

A number of these federal statutes and regulations were amended as a result of passage of the Financial Institutions Reform, Recovery and Enforcement Act of 1989\(^\text{13}\) (the "FIRREA"), the Federal Deposit Insurance Corporation Improvement Act of 1991\(^\text{14}\) (the "FDICIA"), and the Housing and Community Development Act of 1992\(^\text{15}\) (the "HCDA"). Accordingly, this Article discusses the FIRREA,\(^\text{16}\)

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12. See infra notes 379-401 and accompanying text.
FDICIA, and HCDA in order to illustrate the concern of Congress about mortgage discrimination and the complexity of the structure which Congress has created to address the problem. Further, significant legislative proposals made in 1992 are analyzed. These proposals provide significant insight into predicting statutory changes likely to meet with success in the near future.

This Article next discusses the extent of the disparity in mortgage lending rates in the United States based on 1990 and 1991 HMDA data released to the public by the Federal Reserve Board (the “FRB”) in 1991 and 1992. Those FRB reports were based upon extensive data submitted by financial institutions and other mortgage lenders throughout the United States as required by the HMDA.

HMDA reporting is just one of the many requirements imposed on United States financial institutions by a complex, and often inconsistent, series of federal laws and regulations. Accordingly, this Article examines the extent of that regulatory burden. Given the pervasive nature of that regulatory structure and the enormous amount of money being expended to comply with its requirements, this section of the Article questions the cost-effectiveness of the current approach, and argues that the desire for alleviation of this burden may provide an opportunity to achieve an improvement in mortgage discrimination laws.

Finally, this Article proposes a legislative approach intended to address this continuing problem of mortgage discrimination. This approach has the following key elements: first, leave in place and vigorously enforce the existing statutory prohibitions against discrimination, while requiring regulatory changes to ensure clarity and consistent application; second, simplify existing reporting requirements, while broadening the scope of data collected, to enable meaningful conclusions to be drawn from the data; third, create a system of tangible reward and penalty for lenders meeting and failing to meet

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community reinvestment standards; fourth, fund an incentive-based system rewarding lenders who engage in significant mortgage lending in economically distressed areas; and fifth, require consistency among various administrative agencies in their promulgation of regulations applicable to regulated lenders.

III. FEDERAL MORTGAGE DISCRIMINATION STATUTES

A. The Fair Housing Act

1. Applicability to Mortgage Discrimination

Section 805 of the Fair Housing Act\(^\text{18}\) (the "FHA") prohibits discrimination on the basis of race, color, religion, sex, handicap, familial status, or national origin in certain mortgage transactions.\(^\text{19}\) Discrimination in mortgage lending which violates the FHA will often violate 42 U.S.C. § 1981\(^\text{20}\) and § 1982\(^\text{21}\) (commonly known as the Civil Rights Act of 1866) as well.\(^\text{22}\)

2. Which Lenders Are Regulated?

Any person whose business includes engaging in "residential real estate-related transactions" is subject to § 805 of the FHA.\(^\text{23}\) However, a pattern emerges here which is a central theme throughout the enforcement structure of the fair lending laws. Specifically, enforcement responsibility is scattered among numerous federal agencies.

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\(^{21}\) § 1982.


\(^{23}\) 42 U.S.C. § 3605(a).
For example, the government agency responsible for supervision of a particular lender's compliance with the FHA depends upon the identity of the lender. Regulations of the Office of the Comptroller of the Currency (the "OCC") apply to national banks and banks located in the District of Columbia,\(^{24}\) regulations of the Federal Deposit Insurance Corporation (the "FDIC") apply to state banks which are not members of the Federal Reserve system,\(^{25}\) regulations of the National Credit Union Administration (the "NCUA") implement the FHA for credit unions,\(^{26}\) regulations of the Office of Thrift Supervision (the "OTS") apply to savings banks,\(^{27}\) and rules of the Department of Housing and Urban Development ("HUD") must be consulted concerning the advertising aspects of the FHA for all of these lenders.\(^{28}\)

### 3. What Activity Is Prohibited or Required?

Many federally regulated lenders must consider two separate aspects of the FHA: prohibition of discrimination and compliance with the monitoring requirements of the appropriate supervisory agency. First, § 805 of the FHA prohibits discrimination on the basis of race, color, religion, sex, handicap, familial status, and national origin.\(^{29}\) Second, although the FHA does not expressly require lenders to maintain loan application registers ("LARs") to evidence their compliance with FHA requirements, a number of the supervisory agencies have determined that the maintenance of data in this format is necessary to enable them to effectively enforce the FHA. For example, this is required for national banks by the regulations of the OCC,\(^{30}\) for state non-member banks by regulations of the FDIC,\(^{31}\) and for savings associations by the regulations of the OTS.\(^{32}\)

31. Id. §§ 338.5-.9.
32. Id. § 528.6.
The interplay between these fair housing LARs and related aspects of other federal laws is an apt example of the complex and confusing regulatory structure which characterizes the federal fair housing laws. For example, in addition to providing the supervisory agencies with data to facilitate their responsibility to monitor compliance with the FHA, these LARs serve a separate function. Regulation B\textsuperscript{33} ("Reg. B") of the FRB, adopted to implement the Equal Credit Opportunity Act\textsuperscript{34} (the "ECOA"), does require that lenders maintain records (although Reg. B does not require those records to be in log sheet format) concerning certain loan applications to enable the supervisory agencies to monitor compliance with the ECOA.\textsuperscript{35} Reg. B, however, allows those agencies to adopt a substitute monitoring program.\textsuperscript{36} Accordingly, the fair housing LAR regulations of the OCC, FDIC, and OTS serve the dual function of monitoring compliance with the FHA and the ECOA.\textsuperscript{37}

Designing a loan application register which serves a dual function does not, however, go far enough to meet the compliance needs of many lenders. The HMDA and Regulation C\textsuperscript{38} ("Reg. C") of the FRB require the collection of data in log sheet format concerning certain loan applications, originations and purchases.\textsuperscript{39} Due to inconsistencies between Reg. C and the fair housing regulations, many lenders have been forced to maintain two separate log sheets.\textsuperscript{40}

The FDIC proposed regulations in the spring of 1991 to deal with these overlapping requirements,\textsuperscript{41} which became final in the fall of 1991.\textsuperscript{42} These regulations largely solve this aspect of the LAR problem for state nonmember banks. They are designed to allow the state member bank, in one LAR, to simultaneously comply with the monitoring requirements of the FHA, the ECOA, and Reg. B, and the HMDA and Reg. C.\textsuperscript{43}

The match between these log sheets is not perfect, however. First, some banks are exempt under the HMDA’s thirty million dollar
exemption from collecting data concerning the race, national origin, sex and income of applicants and borrowers. However, there is no corresponding exemption under the FDIC's fair housing regulations. Thus, in order to take advantage of the new combined LAR procedures, a bank in this situation must forego the benefit of the HMDA exemption.

Second, the timeliness requirements of the new FDIC fair housing regulations are more stringent than Reg. C. The FDIC's fair housing regulations require the LARs to be kept current within thirty days of the loan disposition date. Reg. C has no similar timeliness requirement. Once again, the lender must meet the more stringent standard under the FDIC's fair housing regulations in order to take advantage of the new combined LAR procedures.

Third, the relationship between these LARs, the broad new "geocoding" policy under the Community Reinvestment Act, and the broad new small business and farm loan reporting provisions of FDICIA is not fully resolved.

4. What Are the Remedies for Failure to Comply?

A person who believes that their rights under the FHA have been violated may file a complaint with HUD. Additionally, the Secretary of HUD may, on the Secretary's own motion, decide to file such a complaint. The filing of the complaint generally leads to either a dismissal of the complaint, a conciliation agreement, or the filing of a charge by HUD.

If HUD files a charge, this charge will be heard by an administrative law judge, unless one of the parties chooses to transfer the matter to a federal district court. The award may include actual damages, injunctive or other equitable relief, a civil penalty, and/or

44. See infra notes 138-39 and accompanying text.
45. 56 Fed. Reg. 50,034.
46. Id. at 50,034-35.
47. See id. at 50,036.
48. See infra note 185 and accompanying text.
50. See infra note 230 and accompanying text.
52. Id.
53. Id. § 3610(g)(3).
54. Id. § 3610(b)(2).
55. Id. § 3610(g)(2)(A).
56. Id. § 3612(b).
57. Id. § 3612(a).
58. Id. § 3612(g)(3).
reasonable attorney's fees. The FHA also permits a private action by an aggrieved person. The award in a private action may include actual and punitive damages, injunctive or other equitable relief, and/or attorney's fees.

The United States Department of Justice may also decide to bring an action in federal district court. This may be done when the Justice Department determines that there is a pattern or practice of discrimination. In such a case, the court may award injunctive or other equitable relief, monetary damages, a civil penalty, and/or attorney's fees.

B. The Equal Credit Opportunity Act

1. Applicability to Mortgage Discrimination

The ECOA, which is implemented by Reg. B of the FRB, has a much broader scope than the FHA. The ECOA applies to a wider range of creditors, a wider range of credit transactions, and contains a more expansive list of prohibited reasons for discrimination. The ECOA prohibits any discrimination by a person who regularly extends credit on the basis of race, color, religion, national origin, sex, marital status, age (if the applicant has contractual capacity), receipt of public assistance income, or the good faith exercise of rights under

59. Id. § 3612(p).
60. Id. § 3613(a)(1)(A).
61. Id. § 3613(c)(1).
62. Id. § 3613(c)(2).
63. Id. § 3614(a).
64. Id. § 3614(d)(1)(A).
65. Id. § 3614(d)(1)(B).
66. Id. § 3614(d)(1)(C).
67. Id. § 3614(d)(2).
68. 12 C.F.R. pt. 202 (1992). In addition to Reg. B, the Federal Reserve Board (the "FRB") has published and periodically updates official staff commentary to the Regulation. See, e.g., id. The official commentary was recently revised to deal with a conflict between the ECOA and the HMDA, which is implemented by Reg. C of the FRB. 57 Fed. Reg. 12,202 (1992); see generally Revisions to Reg B Commentary Adopted, ABA BANK COMPLIANCE, May 1992, at 4.
69. Reg. B defines the term "discriminate" to mean treating an applicant less favorably than other applicants. 12 C.F.R. § 202.2(n). Such discrimination is prohibited at all stages of the credit process. Id. § 202.4. This prohibition is further implemented by the specific rules concerning taking applications, id. § 202.5, evaluation of applications, id. § 202.6, and the actual extension of credit, id. § 202.7. There is an exception to this nondiscrimination rule applicable to special purpose credit programs. Id. § 202.8 (as authorized by 15 U.S.C. § 1691(c)).
the Consumer Credit Protection Act.70

2. What Lenders Are Regulated?

The ECOA applies to any person who regularly extends credit.71 It is not limited to consumer transactions, despite the fact that the location of its codification causes it to be commonly described as a "consumer protection" statute. Although some of its provisions concerning notice72 and record retention73 are applied in a different fashion when a business credit transaction is involved, discrimination in business credit is also prohibited.74

3. What Activity Is Required or Prohibited?

The ECOA has several separate functions. First, it prohibits discrimination.75 In testing whether the prohibited discrimination has occurred, the intent of the lender is not the determining factor. The "effects test"76 applies, with the result that a credit policy which has the effect of discriminating against a protected person is prohibited even if it is unintentional.77

Second, the ECOA requires a creditor to notify each applicant78 who has submitted a completed application79 for credit of its action
on the application. If "adverse action" is taken, the applicant must receive notice.

Third, the ECOA applies special rules when credit information is furnished for an account upon which both spouses participate. Specifically, the credit information must be reported in the names of both spouses.

Fourth, the creditor must satisfy the record retention requirements of the ECOA. As a general rule, a creditor must retain records for twenty-five months in order to comply with the ECOA. However, there are shortened time limits applicable to business credit.

Finally, Reg. B requires creditors to collect certain data about applicants for home loans to enable supervisory agencies to monitor compliance by the creditors with ECOA. Reg. B allows those supervisory agencies to adopt their own monitoring programs as a substitute for ECOA monitoring programs. A number of these supervisory agencies have adopted substitute monitoring programs.

These substitute monitoring programs serve the dual purpose of enabling the supervisory agency to monitor compliance with the ECOA as well as the FHA. However, those substitute monitoring programs have often been inconsistent with the HMDA data collection requirements, creating uncertainty and enormous regulatory burdens for the regulated lenders.

4. What Are the Remedies for Failure to Comply?

The ECOA contains provisions authorizing a wide range of private and governmental relief for ECOA violations. Private actions, commenced either by the individual aggrieved party or as a class

83. 12 C.F.R. § 202.10(b).
84. Id. § 202.12(b)(1)-(3).
85. Id. § 202.12(b)(5).
86. Id. § 202.13(a)-(c).
87. Id. § 202.13(d).
88. In the case of national banks, the Fair Housing Home Loan Data System is a substitute monitoring system. 12 C.F.R. § 27.6 (1992). The information collected by state non-member banks under the FDIC's Fair Housing regulations is a substitute monitoring system. Id. § 338.5. In the case of savings associations, the monitoring system under § 528.6 is used by the Office of Thrift Supervision to monitor compliance with ECOA. Id. § 528.6 (Paperwork Reduction Act Notice).
89. See supra notes 38-47 and accompanying text.
action, are authorized.\textsuperscript{90} In addition to actual damages, an award of punitive damages is authorized,\textsuperscript{91} equitable and declaratory relief may be granted,\textsuperscript{92} and the plaintiff may recover costs and reasonable attorney’s fees.\textsuperscript{93}

In addition to these private remedies, the appropriate supervisory agencies\textsuperscript{94} may refer the matter to the United States Attorney General to institute a civil action.\textsuperscript{95} The United States Attorney General may also commence an action when there is reason to believe that there is a ‘pattern or practice of violations of the ECOA by a particular creditor or group of creditors.\textsuperscript{96}

C. The Home Mortgage Disclosure Act of 1975

The Home Mortgage Disclosure Act of 1975,\textsuperscript{97} as originally proposed, contained provisions designed to enable conclusions to be drawn about disinvestment.\textsuperscript{98} Specifically, the statement of finding and purpose in the original proposal would have made specific reference to the provision of home loans in areas from which deposits had been received,\textsuperscript{99} and the proposal would have required that records

\textsuperscript{91} 15 U.S.C. § 1691e(b).
\textsuperscript{92} Id. § 1691e(c).
\textsuperscript{93} Id. § 1691e(d).
\textsuperscript{94} 12 C.F.R. § 202.14(a).
\textsuperscript{95} 15 U.S.C. § 1691e(g).
\textsuperscript{96} Id. § 1691e(h).
\textsuperscript{98} Home Mortgage Disclosure Act of 1975: Hearings on S. 1281 Before the Comm. on Banking, Housing, and Urban Affairs, 94th Cong., 1st Sess. 18 (1975) [hereinafter HMDA: Senate Hearings] (statement of Robert R. Elliott for Carla A. Hills, Secretary, HUD). “S. 1281 is a disclosure bill that would enable the public to learn the geographical lending patterns of most banks and savings institutions. The idea, frankly, is that many consumers would favor institutions that kept at least some money in the community.” Id. at 2 (statement of Sen. Proxmire, Chairman of the Committee); see also H.R. REP. No. 561, 94th Cong., 1st Sess. 10, 19 (1981) [hereinafter HMDA: House Report], reprinted in 1975 U.S.C.C.A.N. 2303, 2311-22.
\textsuperscript{99} HMDA: Senate Hearings, supra note 98, at 5 (text of § 2(a) of S. 1281).
about the source of deposits be maintained.\textsuperscript{100}

In addition to concern about disinvestment, Congress was concerned about "redlining" at the time of the HMDA's adoption.\textsuperscript{101} As adopted, the data collection requirements of the HMDA focus on this problem rather than upon the relationship of deposits to loans. Redlining, of course, may be either racially or geographically motivated, or both.

One of the primary arguments against the enactment of the HMDA was that the regulatory burden imposed was not justified by the value of the data collected.\textsuperscript{102} The argument was made that, despite these burdens, the data collected would not be sufficient to determine whether redlining was in fact taking place.\textsuperscript{103}

1. Applicability to Mortgage Discrimination

The HMDA, which is implemented by Reg. C,\textsuperscript{104} does not prohibit mortgage discrimination of any kind. Instead, it establishes an elaborate reporting scheme concerning home loans and home improvement loans by certain lenders. Originally, the purpose of this reporting system was to provide the public and supervisory agencies with sufficient information to determine whether the lenders were meeting their duty to serve the housing needs of their communities and to enable public officials to make decisions about public sector invest-

\textsuperscript{100} Id. at 6-7 (text of § 4(a) of S. 1281).

\textsuperscript{101} Id. at 1 (statement of Sen. Proxmire).

\textsuperscript{102} Id. at 19-20 (statement of Frank Wille, Chairman of the FDIC).

\textsuperscript{103} Id. ("It is far from certain, however, that the requirements of this bill would provide sufficient information to enable either citizens or public officials to adequately assess whether depository institutions are serving the housing needs of various neighborhoods and the community."); see also Home Mortgage Disclosure Amendments of 1980: Hearings on S. 2290 and S. 2291 Before the Comm. on Banking, Housing, and Urban Affairs, 96th Cong., 2d Sess. 15-17 (1980) (statement of Victor Marrero, Under Secretary of HUD, concerning the comparison of costs and benefits of HMDA data); \textit{HMDA: Senate Hearings, supra} note 98, at 20 (statement of the Chairman of the Board of Governors of the FRB concerning lack of information about mortgage rates and terms, character of property, financial, income or other economic characteristics of the borrowers on credit demand); \textit{HMDA: House Report, supra} note 98, at 32 (minority view of the proposed statute asserting that, as revised, the disclosure burden would be "relatively small" but that the benefits would also be "small").

ments. Its purpose has now been expanded to provide the public and supervisory agencies with sufficient information to determine whether those lenders are complying with the various fair lending laws.

2. Which Lenders Are Regulated?

The reporting requirements of the HMDA apply only when the lender is either a “depository institution” which makes “federally related mortgage loans,” or is “engaged for profit in the mortgage lending business.” For the purposes of the HMDA, a “mortgage loan” is one secured by residential real property or a home improvement loan.

Prior to the FIRREA, the HMDA had already been expanded beyond its original scope to apply to mortgage banking subsidiaries of bank and thrift holding companies and to savings and loan service corporations. The FIRREA further expanded the HMDA to apply to other lending institutions in the mortgage banking business.

107. 12 U.S.C. § 2802(2). Depository institutions include: banks (as defined in 12 U.S.C. § 1813(a)(1) (1988 & Supp. II 1990)), savings associations (as defined in id. § 1813(b)(1)), and credit unions. Note that Reg. C treats a mortgage lending subsidiary of one of the lenders as an independent entity. The result is that the subsidiary is subject to Reg. C if it meets the “other lending institution” threshold, 12 C.F.R. § 203.2(e)(2), and if it does, it must separately comply with Reg. C. HMDA Requirements Amended, supra note 104, at 6.
108. 12 U.S.C. § 2802(2); see also 12 C.F.R. § 203.2(e) (defining “financial institution”).
109. 12 U.S.C. § 2802(4); see also 12 C.F.R. § 203.1(c) (applying Reg. C to “other mortgage lending institutions” as defined in id. § 203.2(e)); id. § 203.2(e)(2) (defining these institutions to mean for profit institutions other than regulated financial institutions whose “home purchase loan originations equaled or exceeded ten percent of its loan origination volume, measured in dollars, in the preceding calendar year”).
110. 12 U.S.C. § 2802(1). A financial institution is within the scope of Reg. C only if it “originated in the preceding calendar year a home purchase loan (other than temporary financing such as a construction loan) secured by a first lien on a one-to-four family dwelling” which is federally regulated. 12 C.F.R. § 203.2(e)(1). A for-profit mortgage lender is within the scope of Reg. C only if its “home purchase loan” originations exceed a certain amount. Id. § 203.2(e)(2). A “home purchase loan” refers only to a loan which is both secured by and for the purpose of purchasing a “dwelling.” Id. § 203.2(g). A “dwelling” is a residential structure (including a condominium, a cooperative unit, a mobile home, or a manufactured home). Id. § 203.2(d). Therefore, the applicability of Reg. C to a particular lender depends on its activity concerning “home purchase loans,” but the lender, once within the scope of Reg. C, will also be required to report information concerning “home improvement loans.” A “home improvement loan” is one that is either classified by the lender as a home improvement loan, or one stated by the borrower at the time of the application to be for the purpose of repairing, rehabilitating or remodeling a dwelling. Id. § 203.2(f).
111. Pub. L. No. 101-73, § 1211(d), 103 Stat. 183, 525 (1989); see generally Harrell,
Even lenders which meet those standards are not automatically responsible for compliance with the HMDA. The lender is subject to the HMDA’s reporting duties only if it has a home or branch office located within a metropolitan statistical area (an “MSA”).

Also, institutions with total assets of ten million dollars or less have been administratively exempted from the requirements of the HMDA.

3. What Activity Is Required or Prohibited?
   a. Maintenance of Loan Application Register

The basic mandate of the HMDA is for the lender to maintain a record of certain loan applications, originations, and purchases. That record, which Reg. C requires in an LAR format, must be maintained on a calendar year basis, and must reflect all mortgage loans for which that lender received a completed application, all mortgage loans originated by that lender, and all mortgage loans purchased by that lender. This requirement of maintaining information concerning loan applications, in addition to information concerning loan originations and purchases, became effec-

supra note 16; infra part III.F.6. (concerning FDICIA changes).

112. For the definition of “branch office,” see 12 C.F.R. § 203.2(c).

113. 12 U.S.C. § 2803(a)(1). This is determined as of December 31 of the preceding calendar year. 12 C.F.R. § 203.3(a)(1). For the definition of MSA, see id. § 203.2(b).

114. 12 C.F.R. § 203.3(a)(2)-(3). Note that this $10 million exemption is available to “other lending institutions” only when their assets, when combined with any parent, fall below the threshold. Id. § 203.3(a)(3). However, a financial institution does not have to include the assets of its holding company, if any, in applying this test. Id. § 203.3(a)(2). Exemptions based on state law are also available under state law, in certain limited circumstances. See id. § 203.3(b).


118. The FIRREA added this provision to the HMDA. § 1211(e), 103 Stat. at 525-26. An “application” is any oral or written request for a home purchase loan or a home improvement loan meeting the application procedures of the institution to which it is submitted for that type of credit. 12 C.F.R. § 203.2(b). This definition was designed by the FRB to be consistent with the concept of an application under ECOA and Reg B. HMDA Requirements Amended, supra note 104, at 5. In the case of an application that is denied, the reporting takes place for the year in which the denial occurs. 12 C.F.R. pt. 203 app. A (IV)(A)(2).

119. 12 U.S.C. § 2803(a)(1). This includes refinancing. See 12 C.F.R. § 203.4(a). Loans in a fiduciary capacity, loans on unimproved land, temporary financing, the purchase of an interest in a loan pool, and the purchase of the right to service loans need not be reported on the LAR. Id. § 203.4(d). Loan originations are reported for the year in which the loan is closed. Id. at pt. 203 app. A (IV)(A)(1).

tive upon passage of the FIRREA for applications taken after January 1, 1990.121

The required information in the LAR must be itemized.122 In connection with itemization, there are two separate requirements. The first is to itemize by number and dollar amount.123 The second is to itemize by additional characteristics such as the race of the applicant or borrower.124 The lender is not required to state its reason for denial of the loan on the LAR but may do so if it chooses.125 This provision permitting, but not requiring, an explanation by the lender of the reason for the denial was added to the HMDA by the FIRREA.126

The number and dollar amount itemization is intended to allow the public and supervisory agencies to determine exactly where the loans are (or are not) being made. Therefore, the information must be itemized by census tract for mortgage loans secured by property in a county with a population of more than 30,000 which is within an MSA.127 If that property is located in a smaller county within an MSA, then the itemization must be made by county.128 A separate itemization must be maintained for loans secured by property not within an MSA.129

The second level of itemization requires the lender to report whether the transaction involves a government backed loan,130 whether the property securing the loan will be occupied by the borrower,131 whether the loan is a home improvement loan,132 and certain personal characteristics of the applicant or borrower. These personal characteristics include income level, race, and gender (the "Personal HMDA Data").133 This requirement that the lender collect

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122. 12 C.F.R. § 203.4(a) together with Appendix A to Reg. C specifies the format of the LAR. 12 C.F.R. § 203.4(b) together with Appendix B to Reg. C specifies the format of the race, national origin, sex, and income data in the LAR.
124. 12 C.F.R. § 203.4(a).
125. Id. § 203.4(c).
126. HMDA Requirements Amended, supra note 104, at 5.
128. Id.
129. Id. § 2803(a)(2)(B).
130. Id. § 2803(b)(1).
131. Id. § 2803(b)(2).
132. Id. § 2803(b)(3).
133. Id. § 2803(b)(4). On March 12, 1992, the FRB proposed a change to the categoriza-
Personal HMDA Data, in addition to the geographic information, was added to the HMDA by the FIRREA. The FIRREA significantly expanded the HMDA reporting duties of the lender. Prior to the FIRREA, the HMDA focused on geographic lending patterns rather than upon discrimination based on the applicant’s personal characteristics. The HMDA, as amended by the FIRREA, is now designed to collect more data about the applicant’s personal characteristics to enable more effective enforcement of the laws prohibiting discrimination in lending. As discussed below, however, even this expanded HMDA data has not been sufficient for that purpose.

There is a limited exemption (the “Small Lender HMDA Exemption”) applicable to these LAR duties. If a lender subject to the HMDA has assets of not more than thirty million dollars (as of its most recent fiscal year), that lender need not collect the Personal HMDA Data. Similarly, the Personal HMDA Data need not be collected for loans purchased. However, the remaining HMDA duties continue to apply to such a lender despite the availability of this limited exemption.

In addition to preparing this LAR, the HMDA imposes retention requirements on the lender. Specifically, the lender must maintain the LAR for at least five years after the close of the fiscal year covered by each LAR.

b. Submission of LAR to Appropriate Supervisory Agency

Each lender covered by the HMDA’s LAR requirements must submit their LAR to their supervisory agency annually. This must be accomplished by March 1 of each calendar year following the year for which the data is collected.

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134. § 1211(a), 103 Stat. at 524.
136. Id.
137. See infra notes 356-57 and accompanying text.
138. 12 U.S.C. § 2803(i); 12 C.F.R. § 203.4(b)(2)(ii). The lender is not prohibited from collecting this data if the exemption applies.
139. 12 C.F.R. § 203.4(b)(2)(i). However, the lender is not prohibited from collecting this data if the exemption applies.
140. 12 U.S.C. § 2803(c). But see 12 C.F.R. § 203.5(a) (requiring retention for two years).
142. 12 C.F.R. § 203.5(a).
c. Public Availability of Disclosure Statement Based on LAR

The Federal Financial Institutions Examination Council (the "FFIEC") is charged by the HMDA with the responsibility of constructing a record maintenance system to facilitate public access to the information contained in the LARs submitted by the regulated lenders. The HMDA requires that the system, as designed by the FFIEC, include provisions for a central depository in each MSA. At each such central depository, all disclosure statements for lenders having a home or branch office in that MSA must be available for public inspection and copying.

The FRB chose to implement this requirement, after the FIRREA, by a process which requires the lender to maintain an LAR but not to cross tabulate data. Instead, the lender submits the data to its supervisory agency. The FFIEC then prepares a disclosure statement for each institution and sends it to that institution with a facsimile to the central depository.

In addition to public availability of information at these central depositories, each lender must make this information (i.e., the disclosure statement prepared for that lender by the FFIEC, not the original LAR) available for public inspection and copying during the hours that the lender is normally open for business. This disclosure statement must first be made available within thirty calendar days after it is received by the lender and must be kept available for at least five years. This must be done at the lender’s home office and in at least one branch office within each MSA in which that

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144. Id.
145. 12 C.F.R. § 203.1(d). Under Reg. C, the Federal Financial Institutions Examination Council (the "FFIEC") uses the data from the LARs to prepare "disclosure statements" for each financial institution for each MSA showing patterns in lending according to location, age of housing stock, income level, sex, and racial characteristics. Id.
146. See 55 Fed. Reg. 27,886 (1990) (samples of the disclosure statements and aggregate MSA reports to be produced by the FFIEC from the HMDA data contained in the LARs submitted to the various supervisory agencies).
148. 12 C.F.R. § 203.5(c).
149. Id. § 203.5(b). As required by the Housing and Community Development Act of 1992, this information must now be made publicly available earlier. 58 Fed. Reg. 13,403 (1993).
lender maintains a physical branch office.\textsuperscript{150} In the case of a lender having branch offices in more than one MSA, only the information applicable to that MSA need be maintained at the branch office within that MSA.\textsuperscript{151}

The HMDA does not expressly impose a notice requirement on the lender concerning the public availability of the disclosure statement. Reg. C, however, requires a notice in the lobby of its home office and in the lobby of any physical branch office located in an MSA.\textsuperscript{152}

4. What Are the Remedies for Failure to Comply?

A violation of the HMDA is subject to administrative sanctions.\textsuperscript{153} Private remedies are not provided by the HMDA.\textsuperscript{154}

\section*{D. Community Reinvestment Act of 1977}

1. Applicability to Mortgage Discrimination

The Community Reinvestment Act (the “CRA”)\textsuperscript{155} does not

\begin{footnotesize}
\textsuperscript{150} 12 C.F.R. § 203.5(c).
\textsuperscript{151} Id.
\textsuperscript{152} Id. § 203.5(d).
\textsuperscript{153} 12 U.S.C. § 2804(c). This is implemented by 12 C.F.R. § 203.6(a). \textit{See Fed May Consider Civil Money Penalties Against Banks that Delay on HMDA Data}, 56 BNA’s BANKING REP. 732 (1991).
\textsuperscript{154} Note, however, that it appears likely that lenders with “poor HMDA showings” may soon become defendants in class action litigation. \textit{Regulators, Experts Continue to Warn About Dangers of Credit Discrimination}, BNA BANKING DAILY, Oct. 5, 1992, \textit{available in LEXIS, Nexis Library, BNABD File}. In other words, although the HMDA may not provide the legal basis for the claim, it may well be a source of the evidence or provide motivation to bring the claim.
\end{footnotesize}
specifically prohibit discrimination in mortgage lending. In fact, at the
time the CRA was enacted, one of the primary concerns of Congress
disinvestment, the practice of lending institutions in accepting
deposits from a specific area while declining to make an equivalent
amount of loans secured by property in that same area. The original
Senate proposal contained a definition of “primary savings service
area” as “a compact area contiguous to a deposit facility from which
such facility obtains or expects to obtain more than one-half of its
deposit customers.” In connection with any application for a de-
posit facility, that Senate proposal would then have required the appli-
cant to indicate the proportion of “consumer deposits” from that
area which would be reinvested in that area, as well as demonstrating
the manner in which that applicant was then meeting the credit needs

HAMLIN, CRA COMPLIANCE: A PRACTICAL PERSPECTIVE (1991); Glenn Canner and Joe M.
Cleaver, The Community Reinvestment Act: A Progress Report, 66 FED. RESERVE BULL. 87
(1980); Robert P. Chamness, Is There a Need to Improve CRA Performance?, ABA BANK
COMPLIANCE, October/Autumn 1991, at 5; Warren L. Dennis, The Community Reinvestment
Act of 1977: Defining “Convenience and Needs of the Community,” 95 BANKING L.J. 693
(1978); Steven J. Eisen & Keith C. Dennen, The Community Reinvestment Act: Regulators
Give It a New Emphasis, 107 BANKING L.J. 334 (1990); Allen J. Fishbein, Satisfying Your
Examiner & Satisfying Your Community Are Not Always the Same, ABA BANK COMPLIANCE,
October/Autumn 1990, at 2; Peter F. Healey, A Banker’s Guide to the Community Rein-
vestment Act, 96 BANKING L.J. 705 (1970); Diane Knapp, The New Uniform Interagency CRA
Rating System: Summary and Checklist, ABA BANK COMPLIANCE, July/Summer 1990, at 41;
Jeffrey T. Paul, Community Reinvestment Act Training, ABA BANK COMPLIANCE, April/Spring
1990, at 9; James F. Pilkingston, Complying With the CRA in Rural America, ABA BANK
COMPLIANCE, October/Autumn 1991, at 31; Julia W. Seward, The “Whys” and “Hows” of
Community Outreach Programs, ABA BANK COMPLIANCE, January/Winter 1991, at 26;
Patricia F. Warf, Expanding the CRA Statement—Blueprint for Community Banks, ABA BANK
COMPLIANCE, October/Autumn 1990, at 26; Anne Marie Regan, Note, The Community Rein-
vestment Act Regulations: Another Attempt to Control Redlining, 28 CATH. U. L. REV. 635
(1979).

Some savings institutions, savings banks, commercial banks, and credit unions are
members of the Federal Home Loan Bank System. Under the FIRREA, the Finance Board
replaced the Federal Home Loan Bank Board in the supervision of Federal Home Loan
Banks. If an institution is a member of that system, additional community support require-
ments established by the FIRREA must be consulted. Community Support Requirements for

156. See Community Credit Needs, supra note 155, at 17 (statement of Ralph Nader); S.
REP. No. 175, 95th Cong., 1st Sess. 34 (1977) (“While the Committee rejected the course of
setting target percentages for reinvestment, it should be self-evident that an institution export-
ing 99 percent of its dollars outside of the city in which it is chartered is not serving community convenience and needs.”).

157. S. 406, 95th Cong., 1st Sess. § 3(4) (1977), reprinted in Community Credit Needs,
supra note 155, at 6.

158. Id. § 3(5).
of its existing primary service areas.\textsuperscript{159} That proposal would also have required periodic reports from financial institutions concerning the relationship of consumer deposits to loans in primary service areas.\textsuperscript{160} In addition to its concern with disinvestment, Congress was also concerned with discrimination—both geographic and racial. In facing this issue, Congress focused on the responsibilities of financial institutions to the public which are created by the granting to that institution of a "public charter."\textsuperscript{161} Therefore, the CRA, as it was enacted, "encourages" federally regulated lenders to meet the credit needs of their local communities.\textsuperscript{162} The legislative history of the CRA makes it clear that Congress did not intend to create a system of credit allocation.\textsuperscript{163} In direct contrast to the HMDA, however, the CRA does impose affirmative lending obligations on the lender. Since a lender engaging in prohibited mortgage discrimination may not be meeting this standard, the CRA provides a potentially potent tool for use in reversing the historical patterns of mortgage discrimination in the United States. However, the potency of the CRA has been recognized by lenders, regulators, and community groups only in recent years.\textsuperscript{164} As stated in a recent article, "[i]n 1988, we said that CRA had ‘skyrocketed’ in importance since 1984. If that is how CRA changed between 1984 and 1988, then it has shot into warp drive and surpassed the speed of light in 1990."\textsuperscript{165}

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\begin{itemize}
  \item \textsuperscript{159} Id. \S 4(1)(C)-(D).
  \item \textsuperscript{160} Id. \S 4(4).
  \item \textsuperscript{161} See \textit{Community Credit Needs}, supra note 155, at 9 (statement of Sen. Proxmire, Chairman).
  \item \textsuperscript{163} \textit{Community Credit Needs}, supra note 155, at 2 (opening statement of Chairman Proxmire). However, some legislators viewed the new law as a credit allocation approach. See S. Rep. No. 175, 95th Cong., 1st Sess. 82 (1977) ("[A] rose by any other name’ is still ‘credit allocation.’").
  \item \textsuperscript{164} Community groups, not regulators, appear to have been the primary moving force behind enforcement of the CRA. Art, supra note 2, at 1095-101.
2. Which Lenders Are Regulated?

The CRA applies only to "regulated financial institutions."\(^{166}\) Since each particular category of regulated lenders is supervised by a different "Federal financial supervisory agency,"\(^{167}\) the CRA is implemented by a series of federal regulations. In the case of national banks, the regulations of the OCC apply.\(^{168}\) Regulations of the FRB apply to state banks which are members of the Federal Reserve System (state member banks),\(^{169}\) and regulations of the FDIC apply to those which are not (state non-member banks).\(^{170}\) Finally, regulations of the OTS apply to savings banks.\(^{171}\)

In addition to these regulations issued by the individual supervisory agencies, there are a number of joint regulatory policies which must be taken into account. There is a general policy statement of the Federal Financial Supervisory Agencies concerning the CRA.\(^{172}\) Also, the FFIEC has issued a document in question and answer format which addresses many of the common CRA questions,\(^{173}\) a policy

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166. 12 U.S.C. § 2901(a). The definition of "regulated financial institution" for purposes of the CRA, incorporates the definition of "insured depository institution" from § 1813. See id. § 2902(2). That definition includes national banks, state banks which are members of the Federal Reserve system, state banks which are not members of the Federal Reserve system, federal savings and loan associations and state savings and loan associations. Id. § 1813(c)(2)-(5). It does not include credit unions or other mortgage lenders such as private mortgage bankers. Id.

167. Id. § 2902(1).

168. Id. § 2902(1)(A). These regulations are located at 12 C.F.R. §§ 25.1-8, .101 (1992). These regulations were amended on June 12, 1991 to implement changes to the CRA made by the FIRREA. 56 Fed. Reg. 26,899 (1991) (to be codified at 12 C.F.R. § 25.5(a)(3), (c)(3)).


170. 12 U.S.C. § 2902(1)(C). These regulations are located at 12 C.F.R. §§ 345.1-8, .101-02 (1992). These regulations were amended on June 12, 1991 to implement changes to the CRA made by the FIRREA. 56 Fed. Reg. 26,903 (1991) (to be codified at 12 C.F.R. § 345.5(a)(3), (c)(3)). The FDIC has named community affairs officers to serve in the office of Consumer Affairs in each of the eight signed offices. These offices are intended to promote compliance with CRA and fair lending laws. 57 BNA'S BANKING REP. 144 (1991).


statement on analyses of geographic distribution of lending, uniform interagency guidelines for disclosure of written evaluations and revised assessment rating system, and a policy aimed at consistency among the various banking agencies in CRA exams. The FFIEC issued a press release on June 17, 1992 for the purpose of clarifying the expectations of the various supervisory agencies concerning CRA documentation; this press release stated:

[T]he agencies base their evaluation of CRA performance primarily on how well an institution helps meet the credit needs of its community or communities, not on the amount of documentation it maintains . . . . [A] lack of documentation is not sufficient basis on which to grant a poor rating if an institution's performance can otherwise be determined to be satisfactory or better.

In making this general statement, the FFIEC also recognized that CRA documentation would "generally be less formal and less extensive in small and rural institutions than in larger, urban institutions."

3. What Activity Is Required or Prohibited?
The CRA seeks to achieve its stated goals through a process of
evaluation\textsuperscript{179} and public disclosure.\textsuperscript{180} However, the goals of the CRA and the standards for evaluation were stated by Congress in imprecise terms.\textsuperscript{181} Congress deliberately granted broad discretion to the supervisory agencies to implement these broad goals through the regulatory process.\textsuperscript{182} At the heart of the CRA is its subjectivity. As stated in an article reviewing CRA in the first ten years: "In an age in which government regulation commonly took the form of detailed requirements, quotas, and timetables, C.R.A. followed a very different model. It established a direction and goal, and then allowed private industry latitude and discretion in choosing methods to attain the goal."\textsuperscript{183}

For example, some of the key operative terms in the CRA, such as "community" and "credit," are left without definition. Despite this subjectivity, some lenders have come to see CRA compliance as a profit opportunity rather than as a purely regulatory burden.\textsuperscript{184} Per-

\textsuperscript{179.} Each supervisory agency is required to assess each financial institution’s “record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of such institution.” 12 U.S.C. § 2903(1). This must be accomplished through written evaluations made at the conclusion of each examination of an insured depository institution by its supervisory agency. 12 U.S.C. § 2906(a)(1).

\textsuperscript{180.} Each written evaluation of an insured depository institution contains a public section, which includes the rating assigned by the financial supervisory agency. See 12 U.S.C. § 2906(b)(1)(C).

\textsuperscript{181.} E.g., Ellen Braitman, ‘Nonprescriptive’ CRA Regulations Defended, AM. BANKER, May 14, 1992, at 5, 5 (in which a governor of the Board of Governors of the FRB described the CRA rules as “deliberately nonprescriptive” and said that “creativity is essential” to compliance).

\textsuperscript{182.} 12 U.S.C. § 2905.

\textsuperscript{183.} Art, supra note 2, at 1073.

\textsuperscript{184.} See generally Bankers Should View Community Lending as a Profitable Business, Lenders Say, BNA BANKING DAILY, Oct. 26, 1992, available in LEXIS, Nexis Library, BNABD File (reporting upon two major lenders’ claims of profitability but pointing out that two or three periods are necessary to reach desired performance levels once a new program is initiated); Steven Cocheo, Giving Home Loans a Second Opinion: Nine Philadelphia-area Lenders Serve the Low/Moderate Income Market with Flexible Underwriting and Cooperative Peer Review, ABA BANKING J., Oct. 1992, at 85 (reporting on a plan under which lenders agree not to reject a loan until all members of the group have had the opportunity to consider it); Erica Copulsky, Banks Team Up with Non-Profit Orgs to Meet Low-Income Lending Goals, BANK LETTER, Oct. 12, 1992, at 1, 1 ("An increasing number of lenders who are reaching more potential borrowers but do not have the capacity to turn these applications into mortgage approval, are teaming up with non-profit organizations, housing groups and government entities to help them meet government mandated goals for making affordable housing loans."); Griffith L. Garwood, CRA Regulations Gain New Respectability, BANKERS MAG., May-June 1992, at 39, 41 ("CRA may have some frustrating aspects, but paying attention to CRA may uncover substantial opportunities that otherwise may have been ignored."); Penny Lunt, How Seven Banks Serve Low-Income Markets, ABA BANKING J., Sept.
haps a long-term solution to the problem of mortgage discrimination can be advanced by the creation of lender incentives which reinforce this attitude.

The supervisory agencies have recently exercised this discretion to encourage the use of "geocoding" by lenders to facilitate the geographic analysis of lending patterns. This policy may be the most far reaching aspect of the CRA to date. First, it goes even farther than the HMDA with respect to the collection of data concerning loans because the CRA policy relates to all loan products, not a limited category of loans as in the case of the HMDA. Second, in contrast to the HMDA which is strictly a data collection statute, the CRA policy requires the lender to affirmatively demonstrate how it is dealing with the trends reflected by the data collected. In this respect, lenders are currently operating in the absence of significant guidance. The new policy gives significant directions concerning the data to be collected and the manner in which that data must be presented. However, it provides almost no useful guidance about the specific lending patterns which will be deemed acceptable or unacceptable.

a. Defining the Community To Be Served by a Particular Regulated Lender

As a first step in the CRA process, each regulated lender must

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186. Compare this to the small business and farm loan provisions adopted by the FDICIA. *See* infra notes 230-34 and accompanying text. There is, obviously, a significant additional reporting overlap.

187. *See* Barefoot, supra note 185, at 42-43 ("To my knowledge, agencies have provided absolutely no written guidance to banks on how to answer the question of whether the geographic patterns revealed by analysis are satisfactory or not . . . . When you begin to analyze your geographic lending patterns, you are stepping into the abyss.").
delineate, and review at least annually, the local community or communities (the "Entire Community") which it will serve. In making this delineation, maps must be used and low- and moderate-income areas must not be excluded.

b. Adopting the CRA Statement

It is possible that one institution will have an Entire Community consisting of more than one local community. Each institution must adopt a CRA statement for each particular local community. That statement must include, at a bare minimum, the delineation of the local community, the specific types of credit available from that institution in that local community, and a copy of the institution's CRA notice. In addition to these mandatory elements of the CRA statement, each institution is "encouraged" to include a statement of how its current CRA efforts help meet community credit needs, a periodic report concerning its record in that regard, and a description of its efforts to ascertain the actual needs of the local community.

Board of director involvement in this CRA statement process is mandatory. The board must review the statement at least annually, act on any material change at its first regular meeting following any change, and note all of these actions in the minutes of the board meetings.

This CRA statement is a public document. A copy of each statement must be maintained at the home office. Also, the statement applicable to a particular local community must be kept at each office in that local community. If a member of the public asks for a copy, it must be provided.

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188. See, e.g., 12 C.F.R. § 345.3(a).
189. See id.; see also id. § 345.3(b) (for permissible means of delineating the entire community); id. § 345.3(c) (for an exception applicable to institutions predominantly serving military personnel).
190. See id. § 345.4(a).
191. See id. § 345.4(b). The specific types of credit in the statement must be broken down into categories such as "residential loans" for one to four family dwellings. Id.
192. See id. § 345.4(c).
193. See id. § 345.4(d).
194. See id. § 345.4(e)(1).
195. See id. § 345.4(e)(2).
196. See id. § 345.4(f). A reasonable amount not exceeding the cost of reproduction and mailing may be charged. Id.
c. The Public Comment File

In addition to the CRA statement, the institution must maintain a public comment file. Those must be "readily available for public inspection," and must contain: (1) any signed written comments received from the public during the last two years; (2) a copy of the public section of the institution's last CRA performance evaluation (within 30 business days of receipt); (3) any responses to public comments or the performance evaluation which the institution wishes to make; and (4) any CRA statements in effect during the past two years.197 A complete copy of this CRA public comment file, including the most recent CRA performance evaluation, must be maintained at the home office.198 All materials relating to a particular local community, as well as the most recent CRA performance evaluation, must be available in at least one designated office in that community.199 The institution must, upon request, provide any member of the public with a copy of the public section of its most recent CRA performance evaluation.200

d. The CRA Rating System

The CRA rating system was substantially modified by the FIRREA.201 Specifically, a four-tier rating system was introduced to replace the five-tier system in place prior to the FIRREA.202 Each institution now receives a rating of outstanding,203 satisfactory, needs to improve, or substantial noncompliance.204 The public disclosure provisions of the CRA were substantially modified by the FIRREA.205 Specifically, section 807 of the FIRREA206 requires each supervisory agency to prepare a written

197. See id. § 345.5(a).
198. See id. § 345.5(c)(1), (c)(3).
199. See id. § 345.5(c)(2), (c)(3).
200. See id. § 345.5(d). A reasonable fee not to exceed the cost of reproduction and mailing may be imposed. Id. Note that the institution must meet the public notice requirements of the regulations in order to inform the public about these rights. Id. § 345.6.
201. See generally Harrell, supra note 16; see also infra text accompanying note 271 (concerning the modifications adopted by Congress in 1992).
205. See generally Harrell, supra note 16.
206. See generally Interagency CRA Guidelines Proposed, ABA BANK COMPLIANCE, Mar.
evaluation of the institution’s record of meeting the credit needs of its entire community (including low and moderate income neighborhoods). That evaluation must have a public section and a confidential section. The statute contemplates that the supervisory agencies will adopt assessment factors. The public section of the report must state the agency’s conclusion concerning each of those assessment factors, the facts supporting those conclusions, and the rating (including the basis for the rating). The Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991 added a new section to the CRA. Specifically, the CRA as amended now requires the various supervisory agencies to give positive consideration in CRA evaluations to lenders that have sold on favorable terms, made available on a rent-free basis, or donated a branch in a predominantly minority neighborhood to any minority or women’s depository institution.

This rating system has been widely criticized since its enactment. A major criticism has been that the regulators have stressed documentation of an institution’s CRA efforts over actual CRA performance in the rating process. As stated in a summary of a recent survey of

208. Id. § 2906(a)(2); see also id. § 2906(c) (concerning the confidential section of the evaluation).
209. Id. § 2906(b)(1)(A); see also, e.g., 12 C.F.R. § 345.7 (describing the twelve assessment factors).
212. See id.; see also Comptroller of the Currency, Community Reinvestment Act, Banking Bull. 92-43, Aug. 10, 1992, available in LEXIS, Banking Library, OCCBJ File (containing guidance concerning the manner in which this new provision will be administered by the supervisory agencies).
Rather than working to foster a new round of self-examination ..., the new CRA rules seem to have prompted a defensive posture among bankers. Fully 75% of the respondents indicated that the increased attention on CRA compliance has led them to focus on documentation via market research projects and geo-demographic analyses of loan portfolio data bases.214

Another related criticism has been that the CRA ratings issued by the supervisory agencies have been inflated.215 Although the CRA has created many administrative nightmares and is often subject to charges of grade inflation, it has brought about significant improvements in
lending practices.216

4. What Are the Remedies for Failure to Comply?

Private remedies for CRA violations are not expressly provided.217 However, the teeth given to the CRA by Congress are found in the ability of supervisory agencies to take an institution's record for meeting the credit needs of its entire community into account in connection with any application for a deposit facility.218 In an article reviewing the impact of the CRA ten years following its enactment, one author described the number of denials of deposit facility applications on CRA grounds as "minuscule and, for at least one of the supervisory agencies, zero."219 However, this tool is now being used frequently by the regulators.220

216. E.g., Art, supra note 2, at 1072. Art states:
Modifying the behavior, attitudes, and norms of the banking industry and of banking regulatory agencies, in relation to issues of social responsibility, is an accomplishment of major proportions. The Federal Community Reinvestment Act, enacted in 1977 with that ambitious goal, has succeeded to a significant extent, and is likely to become increasingly important in coming years.
Id.; see Robert B. Cox, Community Relations: With Big Push, Harris Wins Satisfactory Rating, AM. BANKER, Oct. 20, 1992, at 14 (citing the actions taken to improve CRA performance by a large financial institution after receiving a "needs to improve rating" which caused it to shelve plans to buy another institution); Joseph M. Neal, CRA Plays Las Vegas, NAT'L MORTGAGE News, Sept. 28, 1992, at 4 (claiming that the CRA has played a "pivotal role" in transforming lending practices).

217. Although the U.S. Supreme Court has not addressed the issue, courts have generally denied any claim to an implied private right of action under CRA. Hicks v. Resolution Trust Corp., 970 F.2d 378, 382 (7th Cir. 1992) (dicta); Corning Sav. & Loan Ass'n. v. Federal Home Loan Bank Bd., 571 F. Supp. 396, (E.D. Ark. 1983), aff'd 736 F.2d 479 (8th Cir. 1984) (dicta); Harambee Uhuru School v. Kemp, No. C2-90-949, 1992 U.S. Dist. LEXIS 15125, at *17 (S.D. Ohio Sept. 30, 1992) ("[T]he Court agrees with the dicta in Hicks v. Resolution Trust Corp., supra, to the effect that no private right of action exists under the Community Reinvestment Act.").

218. 12 U.S.C. § 2903. The term "application for a deposit facility" is broadly defined to include branch applications and merger applications. Id. § 2902(3); see also 12 C.F.R. § 345.8.

219. Art, supra note 2, at 1101; see also Regulators Have Been Lax on Enforcing CRA: Cranston, NAT'L MORTGAGE News, Sept. 21, 1992, at 12 (only eight of forty thousand bank applications to expand were denied based on CRA performance from 1977 to 1988). Contrast this with the following characterization of the CRA in a 1991 article: "Once a sleepy little statute without much bite, the political convulsions of the 1980s transformed the CRA into a formidable force for social change." Nancy R. Wilsker, The Community Reinvestment Act of 1977: The Saga Continues . . . , 46 BUS. LAW. 1083, 1083 (1991).

220. See Kenneth Cline, Paying Up for CRA, AM. BANKER, Sept. 16, 1992, at 2 (A holding company for an Atlanta, Georgia based savings and loan association, Decatur Federal Savings and Loan, recently agreed to settle (without any admission of wrongdoing) with the U.S. Justice Department in a case alleging discriminatory lending by the thrift. This was
E. Title III of Americans with Disabilities Act of 1990

Title III of the Americans with Disabilities Act of 1990 (the "ADA"), which is implemented by a regulation of the United States Department of Justice, is largely "uncharted territory." However, it is likely to be a major source of litigation in upcoming years in the area of mortgage discrimination because of its broadly worded prohibition against discrimination based on disability. Specifically, Title III of the ADA provides that, "No individual shall be discriminated against on the basis of disability in the full and apparently the first payment of a fine by a financial institution for a CRA violation.); *Fed Cites CRA Grade in Blocking a Merger, Am. Banker*, Aug. 14, 1992, at 14 (CRA a key factor in applications other than expansion, merger or acquisition applications, such as an application to convert from a savings and loan association to a national bank); see also *Compliance with the CRA Is a Critical Factor in OCC's Consideration of Bank Application, REG. COMPLIANCE WATCH*, Sept. 28, 1992, at 2; *CRA Is Now a Key Factor in Feds Scrutiny of Mergers: Time Consuming Process, REG. COMPLIANCE WATCH*, Aug. 17, 1992, at 1 (senior officers of large financial institution claim that CRA compliance was the most time consuming part of a recent merger application); *Statistics Show CRA Tops Regulatory Burdens While Politics Interfere with Compliance, REG. COMPLIANCE WATCH*, Aug. 24, 1992, at 4 (bankers complain that even the highest CRA rating is not insulation from a CRA challenge to a merger or acquisition application).


223. *ADA Compliance Is Uncharted Territory, supra* note 221.


Congress did not amend ECOA when it enacted the ADA; the ECOA is not even mentioned in the legislative history. However, for all practical purposes, Title III must be regarded as a *de facto* amendment to the ECOA's prohibition of discrimination in any aspect of a credit transaction.

Three of Title III's requirements . . . have a direct bearing on a bank's credit services: the general prohibition against discrimination in § 36.201(a); Section 36.301(a), which prohibits the use of eligibility criteria that screen out or tend to screen out individuals with disability from fully and equally enjoying a service; and Section 36.302(a), which requires reasonable modification in policies, practices or procedures.

A loan is clearly a service of a place of public accommodation; therefore, a bank may not deny an individual access to a loan on the basis of a disability. A bank will have to consider whether its 'eligibility criteria,' in other words, its credit policies, screen out persons with disabilities, or whether other bank policies or practices unreasonably impede access to credit.

*Id.*
equal enjoyment of goods, services, facilities, privileges, advantages, or accommodation of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.\footnote{225}{A financial institution is clearly a "public accommodation" as that term is used in Title III of the ADA.\footnote{226}{Furthermore, Title III of the ADA provides specific descriptions of activities which will be considered to be prohibited discrimination. The specifically prohibited activities include:

[\text{Imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, \ldots privileges, advantages \ldots unless such criteria can be shown to be necessary for the provision of the goods, \ldots services, \ldots privileges, advantages \ldots being offered.}}\footnote{227}{F. Federal Deposit Insurance Corporation Improvement Act of 1991

1. Overview


2. Section 122: Small Business Loan Reporting

The small business and farm loan reporting provision of the
FDICIA is nothing short of remarkable when its relative brevity and lack of specificity are compared to its potential impact upon financial institutions. Section 122 requires the appropriate federal banking agencies, within 180 days following the enactment of the FDICIA, to “prescribe regulations requiring insured depository institutions to annually submit information on small businesses and small farm lending in their reports of condition.”

Very little guidance is given to the banking agencies by this legislation about the specific lending activities to which it will apply, or about the type of information that is to be contained in the required reports. However, section 122 does specify the type of information needed “to assess the availability of credit to small businesses and small farms.” Additionally, section 122 provides that it is permissible (not mandatory) to require information about: the total number and aggregate dollar amount of commercial loans and commercial mortgage loans to small businesses; the charge-offs, interest,
and interest fee income on commercial loans and commercial mortgage loans to small business; and agricultural loans to small farms.\textsuperscript{234}

3. Section 223: The Equal Credit Opportunity Act

Section 223\textsuperscript{235} is another element of the FDICIA which, although innocuous at first glance, presents significant compliance issues for financial institutions. First, section 223 amends the ECOA to require supervisory agencies to refer information to the United States 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 . . . in violation of” the ECOA.\textsuperscript{236} Second, it amends the ECOA to authorize the Attorney General to obtain actual and punitive damages in pattern and practice cases.\textsuperscript{237} Third, in cases in which a referral by an agency of a potential violation is not made to the Attorney General, the supervisory agency must refer the matter to HUD (and notify the applicant) when the agency has reason to believe that the ECOA or the FHA has been violated.\textsuperscript{238} Fourth, a provision has been added to the ECOA requiring the creditor to provide the loan applicant with a copy of the appraisal of the collateral in certain situations.\textsuperscript{239}

This appraisal delivery requirement is troublesome both in its lack of specificity and in the potential liability exposure of the lender to third parties which it creates.\textsuperscript{240} The basic mandate of this provision is that the lender “promptly” furnish a copy of the appraisal to an applicant who makes a written request “within a reasonable period of time of the application.”\textsuperscript{241} The statute specifies that the creditor is allowed to require reimbursement for the cost of the appraisal. However, it leaves a number of important questions unanswered. Must notice of this new right be given to the applicant in advance? What

\textsuperscript{234} § 122(d), 105 Stat. at 2252. It appears that this section may have been mislabeled as 122(d) rather than 122(c).

\textsuperscript{235} § 223, 105 Stat. at 2306; see generally Francis X. Grady, The Risks of Disclosing Mortgage Appraisals, AM. BANKER, June 18, 1992, at 4; § 477, 105 Stat. at 2387 (for a related section of the FDICIA).

\textsuperscript{236} § 223(a), 105 Stat. at 2306.

\textsuperscript{237} § 223(b), 105 Stat. at 2306.

\textsuperscript{238} § 223(c), 105 Stat. at 2306.

\textsuperscript{239} § 223(d), 105 Stat. at 2306-07.

\textsuperscript{240} See Grady, supra note 235.

\textsuperscript{241} § 223(d), 105 Stat. at 2306. But see 57 Fed. Reg. 57,697 (1992) (proposed rule resolving some, but not all, of these issues).
is a “prompt” request for the applicant? What is a “reasonable time” within which to deliver the appraisal copy? Perhaps most importantly, will the lender be liable to a third party such as an investor in the business of the applicant if that third party is damaged by reason of reliance on the appraisal?

4. Regulatory Burden Study

As so often happens when a body, such as Congress, is faced with a difficult issue involving many competing interests, the easy solution is to simply decide to study the problem further. This was the approach taken by the FDICIA to the problem of the regulatory burden on financial institutions. Within one year following the enactment of the FDICIA, section 22 of the FDICIA provides that the FFIEC (in consultation with industry, consumer, community and other organizations) must accomplish two tasks. First, it must review the regulatory burden, determine whether it is “unnecessary” in any respect, and identify any changes that may be made without negatively effecting consumers or the safety and soundness of the banking system. Second, it must report its findings to Congress.242

5. Section 222: The Community Reinvestment Act

Section 222243 expands the public section of the CRA evaluation of a financial institution by its supervisory agency. Currently, that public section must contain the supervisory agency’s conclusion concerning each separate assessment factor, the facts supporting those conclusions, and the rating given to the institution (together with the basis for that rating). Section 222 now requires that the data supporting the supervisory agency’s conclusions relating to each assessment factor be made public as well.244

6. Section 224: The Home Mortgage Disclosure Act

Certain non-depository lenders (mortgage lending companies) are now subject to the reporting requirements of the HMDA.245 Section 224246 authorizes the FRB to amend Reg. C to create an exemption

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243. § 222, 105 Stat. at 2306.
244. § 222(a), 105 Stat. at 2306.
245. 12 U.S.C § 2802(2)(B).
for those lenders “that are comparable within their respective industries” to exempt depository institutions. On July 29, 1992, the FRB proposed for comment an amendment to Reg. C which would establish an exemption based on asset size identical to the ten million dollar exemption applicable to depository institutions. However, that proposed regulation would, regardless of asset size, continue to cover those mortgage lending companies if they made 600 or more mortgage loans in the prior calendar year.

7. Section 233: The Bank Enterprise Act

Potentially the most potent provision of the FDICIA applicable to mortgage discrimination is section 233. However, it is only potentially potent because Congress has not yet chosen to appropriate the funds which would bring it to life. Section 233 does not take effect until “appropriations are specifically [authorized] in advance.”


249. §§ 231-234, 105 Stat. at 2308-17.
250. Id. § 233(f). Congress debated the funding of this Bank Enterprise Act in 1992. Representative Thomas Ridge (R-Pa.) originally announced that he would seek $60 million in funding for the fiscal year 1993. Financial Institutions, Rep. Ridge to Ask For $60 Million to Fund FDICIA’s Bank Enterprise Act, DAILY REP. FOR EXECUTIVES (BNA), July 23, 1992, at 142. However, the Appropriations Committee of the House of Representatives recommended only $1 million. Claudia Cummins, $1 Million to Start ‘Greenlining,’ AM. BANKER, July 31, 1992, at 13; FSLIC Resolution Fund Halved, Ridge Gets $1 Million, Under Committee Bill, 59 BNA’s BANKING REP. 129 (1992); see also infra note 275 (concerning the actual funding resolution). The underlying concept of the Bank Enterprise Act, greenlining, was one theme in last year’s presidential election. Although a Republican representative pushed Congress to fund the Bank Enterprise Act, the theme was part of the Democratic platform. See “A National Economic Strategy For America,” issued by Arkansas Gov. Bill Clinton, Democratic Presidential Contender, June 21, 1992, DAILY REP. FOR EXECUTIVES (BNA), June 21, 1992, at 121 (“Create a nationwide network of community development banks to provide small loans to low-income entrepreneurs and homeowners in the inner cities .... Ease the credit crunch in our inner cities by passing a more progressive Community Reinvestment Act to prevent 'redlining' and require financial institutions to invest in their communities.”); Platform: New Focus on CRA, NAT’L MORTGAGE NEWS, July 20, 1992, at 17; Michael Quint, A Bank Shows It Can Profit and Follow a Social Agenda, N.Y. TIMES, May 24, 1992, at A1.

Jesse Jackson observed that:

Both the president and [the] challenger agree that our cities and poor people need jobs, and that jobs require investment. The president sporadically embraces ‘enterprise zones’ in the cities, offering tax breaks to attract private capital. Clinton espouses community development banks, surely a good idea. But neither has offered initiatives commensurate with the size of our problems . . . .
Section 233 is, put as euphemistically as possible, not a model of clear drafting. Accordingly, it creates the potential for significant disputes over its meaning in numerous respects. Nonetheless, it should be retained due to the potential for positive change which it provides.

First, section 233 establishes the Community Enterprise Assessment Credit Board (the "CEACB"). It is the duty of that board to "establish procedures for accepting and considering applications by insured depository institutions . . . for community enterprise assessment credits and making determinations with respect to such applications."  

Second, section 233 establishes a procedure allowing an "insured depository institution" to qualify for a "community enterprise assessment credit" (a "CEAC") for any semiannual period. This CEAC may be earned in either of the following ways: (1) an increase (section 2A increase) in that semiannual period in "new originations of qualified loans and other financial assistance provided for low-and-moderate income persons in distressed communities" or enterprises integrally involved with such neighborhoods (according to standards to be set by the CEACB) or (2), an increase (section 2B increase) in that semiannual period in "the amount of deposits accepted from persons domiciled in the distressed community, at any office of the institution (including any branch) located in any qualified distressed community" and any increase in that semiannual period in "new originations of loans and other [qualified] financial assistance

Jesse Jackson, We Must Stop the War on the Poor, NEWSDAY, May 12, 1992, at 84.

251. § 233(d), 105 Stat. at 2314-15.
252. § 233(e)(1), 105 Stat. at 2315.
253. § 233(a)(1), 105 Stat. at 2311. This is an institution defined as such under section (e)(2) of the Federal Deposit Insurance Act. 12 U.S.C. § 1813(c)(2) (1988).
254. § 233(a)(2), 105 Stat. at 2311.
255. The term "qualified distressed community" is defined in § 233(b), 105 Stat. at 2312-14. First, the lender must notify the agency and the public of its intent to treat an area as such and the agency is given a 90 day period to disapprove. Second, the area must meet certain population requirements. Third, the area must qualify as distressed under at least two out of three standards set by § 233 (Income (at least 70% of families and unrelated individuals in the area have incomes of less than 80% of the median income in the area); Poverty (at least 20% of residents have incomes below poverty level); and Unemployment (rate for the area is at least 1 1/2 times the national average)). § 233(b)(2)-(4), 105 Stat at 2313-14.
256. § 233(a)(2)(A), 105 Stat. at 2311. The factors which the Community Enterprise Assessment Credit Board (the "CEACB") may take into account include, but are apparently not limited to, the factors specified in § 233(a)(4), 105 Stat. at 2311-12. However, investments that are not the result of originations are not to be taken into account. § 233(a)(6), 105 Stat. at 2312.
257. § 233(a)(4), 105 Stat. at 2311-12.
made within that community."  

Third, the amount of the credit under section 233 depends upon whether the lender is qualified as a "community development organization" (a "CDO"). The amount of the credit is five percent if the lender does not meet the CDO standards, and fifteen percent if it does meet the CDO standards. This percentage is applied against the section 2A increases plus the amount of section 2B increases.

8. Section 304: Uniform Real Estate Lending Standards

Within nine months following the enactment of the FDICIA, all federal banking agencies are required to adopt certain "uniform regulations" for real estate lending to become effective within fifteen months following the enactment of the FDICIA. These standards are to apply to loans secured by liens on real estate or made for the purpose of financing the construction of a building or improvements to real estate.

These new standards are not expressly required by section 304 to take mortgage discrimination into account. However, they are required to take into account "risk posed to the deposit insurance funds," "safe and sound operation" of the institution, and "availability of credit." Variations in these standards are permitted for requirements of federal statutes. Therefore, the adoption of these standards should require regulators to address some of the tensions in the law relating to mortgage discrimination among these various factors.

258. § 233(a)(2)(B), 105 Stat. at 2311. Section 233(a)(2)(B) provides that the amount of any credit for increased deposits at any institution or branch may not be greater than the credit for increased loans and other financial assistance by the bank or branch in the distressed community.

259. § 233(a)(3), 105 Stat. at 2311. Although § 233(a)(3) refers to a "community development organization" under § 235, this cross reference appears to be a drafting error since the provisions for those organizations are found in § 234.

260. Id. The CEACB is given authority to adjust these percentages within a stated range. Specifically, the rate for institutions meeting the community development organization standards must at all times be at least three times that of the rate for all others. § 233(a)(5), 105 Stat. at 2312. Furthermore, a cap on the credit is set by § 233. It may not exceed 20% in the case of a lender not meeting the community development organization standards, or 50% in case of a lender meeting those standards. § 233(c), 105 Stat. at 2314.

261. § 233(a)(3).

262. § 304, 105 Stat. at 2354.

263. Id.

264. Id.

265. Id.

266. Id.

267. E.g., Paul S. Nadler, You Can't Have It Both Ways, Folks, AM. BANKER, July 22,
G. The Housing and Community Development Act of 1992

A number of proposals for legislation having an impact on mortgage discrimination were brought before Congress in 1992. Only one was enacted. The mortgage discrimination aspects of the new law, as summarized below, do not provide anything approaching a comprehensive solution.

As the 102d Congress was about to adjourn, banking discrimination legislation applicable to the issue of mortgage was finally enacted. That legislation was signed by President Bush on October 28, 1992, and is titled the Housing and Community Development Act of 1992. The Senate in 1992 originally considered government sponsored enterprises ("GSE") legislation, which also contained a number of banking provisions. On the other side, the House in 1992 originally considered a straight GSE bill.

As a compromise between the Senate and House GSE proposals, the language of another Senate housing bill was inserted in lieu of the text of the House proposal. That compromise was ultimately
enacted as the HCDA.

The HCDA contains a number of provisions relevant to the issue of mortgage discrimination:

1. Provisions easing the regulatory burden:274 None of these regulatory burden provisions relate directly to the issue of discrimination in mortgage lending. Conspicuously absent are any provisions dealing with the administrative burdens of the CRA and HMDA.

2. Community Reinvestment Act modifications (factors to be considered by regulators in evaluating performance): In evaluating the record of a financial institution for CRA purposes, the HCDA adds a factor which the supervising agency is entitled to take into account. Specifically, “capital investment, loan participation, and other ventures undertaken by the institution in cooperation with minority- and women-owned financial institutions and low-income credit unions” may be considered when the record of a non minority-owned and non women-owned financial institution is being evaluated.275

3. Bank Enterprise Act: Technical amendments were made to section 233 of the FDICIA, part of the Bank Enterprise Act.276 In addition to these technical amendments by the HCDA, a separate provision created a minimal level of funding for the Bank Enterprise Act.277

4. Fair Housing Initiatives Program: Section 905 of HCDA was 

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275. § 909, 106 Stat. at 3874.

276. § 1604(b)(2)-(3), 106 Stat. at 4083.

277. Pub. L. No. 102-389, 106 Stat. 1571, 1614 (1992). This provision allocated $1,000,000 to meet the “necessary expenses of issuing minimum requirements and guidelines under sections 233(a) and 233(a) of the Bank Enterprise Act of 1991, except for 233(a)(1)(B) (12 U.S.C. 1834(a) and 1834a(a)), and in estimating the cost of allowing reduced assessment rates and assessment credits.” Id. Funds were not appropriated to actually implement the assessment needs or reduced assessments. Id.
enacted in response to a congressional finding of "pervasive discrimi-
nation in the nation's mortgage lending markets." 278 These changes
included a directive to the Secretary of Housing and Urban Develop-
ment to use funds to "conduct, through contracts with private non-
profit fair housing enforcement organizations, investigations of viola-
tions under Title VIII of the Civil Rights Act of 1968, and such
enforcement activities as appropriate to remedy such violations." 279
The investigation and enforcement activities within the scope of this
section expressly include discrimination in housing loans. 280

5. Report on community development lending: The FRB is re-
quired by the HCDA to submit a report on community development
lending to Congress within one year. 281 That report is to be pre-
pared by the FRB in consultation with the OCC, FDIC, OTS, and
NCUA. 282 The report must compare "residential, small business and
commercial lending by insured depository institutions in low-income,
minority, and distressed neighborhoods to such lending in other neigh-
borhoods." 283 The comparison must specifically address the follow-
ing factors: (a) risks and returns on lending, (b) reasons for differenc-
es in risks and returns, and (c) ways of mitigating any identified risks
of lending in low-income, minority, and distressed neighborhoods. 284

H. 1992 Legislative Proposals: A Glimpse into the Future

There is likely to be a major push for legislation concerning
mortgage discrimination and community reinvestment in the next
session of Congress. 285 The number of proposals (summarized be-
low) introduced in 1992 suggests this outcome.

Some of the 1992 proposals were specifically aimed at the CRA. For
example, Senator Nancy Kassebaum (R-Kan.) introduced a pro-
posal in April 1992 which would have exempted certain institutions
from the CRA. 286 In order to be exempt from the CRA, a financial

278. § 905(a)(5), 106 Stat. at 3869.
280. Id.
281. § 910, 106 Stat. at 3874-75.
282. Id.
283. § 910(a), 106 Stat. at 3874.
284. § 910(b), 106 Stat. at 3874-75.
285. Reg Reduction Bill Won't Pass, but Gives Signal to Ease Burden: FDICIA Blow
286. S. 2511, 102d Cong., 2d Sess. (1992); see also Kassebaum Would Exempt Small
institution would have been required to meet the following three requirements: Community Size—main office (and all branches) located in a community of 15,000 or less which is not part of a metropolitan statistical area; Asset Size—assets (when combined with any parent) of seventy-five million dollars or less in the aggregate, and Loan/Deposit Ratio—loans made (secured and unsecured) are at least fifty percent of deposits.

In introducing this proposal, Senator Kassebaum claimed that CRA emphasis should be placed on “inner-city redlining.” However, the underlying premise of the CRA is the responsibility of all institutions to their communities based on the grant of a charter. That responsibility exists regardless of an institution’s size. Therefore, it would be preferable to adopt a functional approach rather than an arbitrary size based approach—the compliance burden for small institutions should ordinarily be far less than for larger institutions, but the duty should nonetheless exist.

Representative Bill McCollum (R-Fla.) introduced a proposal in the House in June 1992 aimed directly at the CRA called the Community Reinvestment Improvement Act of 1992. In introducing that bill, Representative McCollum stated that “even a reduction in regulatory compliance costs of 25 percent last year could have resulted in an increase of $25 billion in bank loans.”

That bill would have reduced the CRA’s regulatory burden through adoption of the following measures: First, certain financial institutions would have been exempted from the CRA. The exempted institutions would have been those with assets of less than 100 million dollars (adjusted annually) located in communities of 25,000 or less. Second, certain financial institutions would have been entitled to the benefit of a simplified CRA evaluation process. This would have been a self-certification process for banks with less than 500 million dollars in assets (adjusted annually), at least a “satisfacto-

287. S. 2511 § 1.
288. Id.
289. Id.
291. See supra note 161-62 and accompanying text.
Finally, financial institutions with a good CRA record would have been placed in a safe-harbor. In other words, a financial institution with a recent "satisfactory" or "outstanding" rating would have been immune from a CRA challenge to an application for a deposit facility.\textsuperscript{297}

Representative McCollum's approach is not advisable for several reasons. In addition to the inherent limitations of a size-based exemption, the self certification process takes a hands-off approach to enforcement of a statute which regulators for too many years addressed in a hands-off fashion. Also, the approach creates incentives for favorable ratings without creating comparable disincentives for poor ratings.

Representative Frank Annunzio (D-Ill.) introduced another CRA proposal in August 1992 known as the Community Reinvestment Act Amendments of 1992.\textsuperscript{298} The purpose of this proposal, far more limited in scope than the proposals of Senator Kassebaum and Representative McCollum, was to bring domestic branches of foreign banks under the CRA umbrella.\textsuperscript{299}

Representative Maxine Waters (D-Cal.), shortly before adjournment of the last session of Congress in October 1992, introduced yet another bill to amend the CRA.\textsuperscript{300} Among other significant changes, the proposal would have expanded the type of loans covered by the HMDA to include small business, personal and consumer loans; would have expanded the scope of the CRA beyond financial institutions to include private mortgage insurance companies; would have changed the CRA rating system to a performance based system to combat what Representative Waters characterizes as "serious grade inflation";\textsuperscript{301} and would have expanded the public comment period on CRA ratings.\textsuperscript{302}

\textsuperscript{296} Id. § 2 (proposing the addition of § 809, amending the Community Reinvestment Act of 1977).

\textsuperscript{297} Id. § 4 (proposing the addition of § 811, amending the Community Reinvestment Act of 1977).


\textsuperscript{299} See Annunzio Unleashes Movement to Force Foreign Branches to Comply with CRA, REG. COMPLIANCE WATCH, Aug. 17, 1992, at 2; see also 138 CONG. REC. H7721 (daily ed. Aug. 6, 1992) (statement of Rep. Annunzio) (claiming that foreign financial institutions have low loan to asset ratios and "abandoned" Americans during the credit crunch).

\textsuperscript{300} H.R. 6206, 102d Cong., 2d Sess. (1992). Note that this proposal would amend the HMDA as well.

\textsuperscript{301} 138 CONG. REC. E3188 (daily ed. Oct. 9, 1992) (stating that almost 90% of all lending institutions receive an outstanding or satisfactory rating).

\textsuperscript{302} See House Bills Would Amend CRA, Add Requirements on Student Loans, 59 BNA'S
In addition to these proposals aimed specifically at the CRA, a number of broader regulatory relief proposals, which included CRA modifications, were introduced. Although some aspects of these broader proposals are objectionable, the concept of tying regulatory relief to a reform of CRA and related statutes appears viable. The Financial Institutions Safety and Consumer Choice Act of 1992 was introduced as Title IV of the Economic Growth Act of 1992. That proposal would have eliminated duplicate record-keeping under the HMDA and FHA.

Later, on June 2, 1992, Senator Robert Dole (R-Kan.) introduced a broad financial institution regulatory relief package known as the Community Bank Regulatory Relief Act of 1992. Upon its introduction, the bill received the endorsement of the Independent Bankers Association of America.

First, Senator Dole’s proposal would have entirely exempted “small institutions” from CRA compliance. For this purpose, institutions meeting both a geographic test (main office and all branches in a community of 20,000 or less which is not in a metropolitan statistical area) and an asset test (100 million dollars or less) would have been exempt. Second, the proposal would have created a safe harbor for certain institutions. Those with recent “satisfactory” or “outstanding” CRA ratings and assets of 300 million dollars or less would have been insulated from CRA challenges to deposit facility applications.

In addition to these CRA modifications, Senator Dole’s proposal addressed the regulatory burden in broader terms. Section 122 of the FDICIA created broad reporting requirements applicable to small business and farm lending. This proposal would have exempted institutions with assets of 100 million dollars or less from compliance with section 122. Also, Senator Dole’s proposal addressed the many differences in the regulations of the various supervisory agencies. It would have required that economic analysis be made of all

304. Id. § 461.
308. Id. (proposing the addition of § 809, amending the Community Reinvestment Act of 1977).
309. Id. § 102(a).
new regulations, and that within two years, all of those regulations be brought into conformity except as required by law.

On June 18, 1992, Representative Douglas Bereuter (R-Neb.) introduced the Comprehensive Community Bank Burden Reduction Act of 1992 (the “CCBBRA”). That proposal has been described as “the Bush administration’s first salvo in the impending war to deregulate financial institutions.” The sponsor of the bill believes that regulation of financial institutions has moved away from concern about the financial condition of the institution and toward a management of day-to-day business decisions of the institutions. Among the major provisions of the proposal designed to address that concern are several which would have a direct impact upon mortgage discrimination and community reinvestment:

1. The small businesses and farm loan reporting requirements enacted by FDICIA would have been repealed.

2. Changes to the CRA: (a) Self-certification—This procedure would have applied only if three conditions were satisfied: the institution had not been found to have violated the ECOA in the prior five years; the institution did not have a current CRA rating of “needs to improve” or “substantial non-compliance”; and the institution had assets of 100 million dollars or less. If the above requirements were met, the institution would then have been permitted to self-certify its CRA compliance to its supervisory agency. Intentionally false self-certification would have subjected the violator to a ten year loss of the benefits of this self-certification procedure and a civil fine. (b) Safe-harbor—An institution with an “outstanding” or “satisfactory” CRA rating would have been immune from a CRA challenge in connection with an application for a deposit facility. This safe harbor treatment would have applied to an institution satisfying the above self-certification procedures. (c) CRA exemption for certain banks—Wholesale bank and credit card banks would have been exempted from the CRA. (d) State examination—A regulatory agency would have been entitled to accept the exam results of an exam conducted.
ducted by a state agency under a state law comparable to the CRA.

(e) Duplicate information—A provision would have been added to the CRA to coordinate data collection under the HMDA with the CRA. Specifically, an institution would not have been required to collect data for CRA purposes if the HMDA required collection of that same information.

3. Changes to the HMDA 317—The HMDA exemption for small institutions would have been modified. Currently, an institution with ten million dollars or less in total assets is exempt from the HMDA. This proposal would have adjusted that threshold dollar amount annually for changes in the consumer price index. Also, the HMDA currently exempts institutions with thirty million dollars or less in total assets from some (but not all) reporting duties. This proposal would have eliminated that exemption.

4. Changes to the FHA—The loan application register requirements of the various supervisory agencies under the FHA would have been amended. Specifically, any data collection duplicating HMDA requirements would have been prohibited. 318

5. Office of Regulatory Quality—The proposal would have established an Office of Regulatory Quality within each supervisory agency. 319

6. Uniform regulations—All supervisory agencies, within two years, would have been required to complete a review of all regulations and ensure conformity among all of them to the furthest extent possible. 320

7. Duty of regulators to minimize regulatory burden—The supervisory agencies would have been required, within six months, to review regulations to identify those requiring financial institutions to produce “unnecessary internal written policies.” Those regulations would then be amended to delete any unnecessary requirements. 321

8. Economic analysis of burden of regulations—The proposal would have required financial supervisory agencies to make detailed certifications of the economic impact of any regulations adopted. 322

Subsequent to his introduction of the CCBBRA, on July 2, 1992 Representative Bereuter introduced the Credit Availability and Regu-
MORTGAGE DISCRIMINATION

On that same date, Senator Garn (R-Utah) introduced a proposal bearing the same name in the Senate. Many aspects of the CARRA are relevant to mortgage discrimination and community reinvestment:

1. CRA amendments: (a) Self certification—This provision is similar in scope to section 214 of the CCBBRA. However, a financial institution would have been required to be located in a community of 20,000 or less which is not part of a metropolitan statistical area (in addition to the CCBBRA provision) in order to qualify. If an institution did qualify, a self-certification process similar to that proposed under the CCBBRA would have applied. However, the CARRA proposed that the size of the institution as well as its good faith be mitigating factors in assessing any penalty for intentionally submitting false information to the regulators. (b) Safe harbor—The CARRA proposed a safe harbor similar to that proposed by the CCBBRA. In contrast to the CCBBRA, however, only an “outstanding” CRA rating would have insulated a financial institution from a CRA challenge to a deposit facility application. Furthermore, the CARRA would have added a special test for holding company applications which would have insulated those applications from CRA challenge if subsidiaries representing two-thirds of the assets in dollar amount had received “outstanding” ratings while all other subsidiaries received at least “satisfactory” ratings. Also, the provision insulating self-certified institutions from challenge, which was contained in the CCBBRA, was dropped in the CARRA. Presumably, the intent of the drafters was to insulate a self-certified institution as long as the “last” rating it received was “outstanding.” (c) State examinations—The CARRA would have retained the CCBBRA proposal allowing regulators to accept certain state community reinvestment examinations. (d) Collection of duplicate information—The CARRA would have retained the CCBBRA proposal specifying that data required to be collected by the HMDA need not be collected for CRA purposes. (e) Application of the CRA to “special purpose” institutions—The CCBBRA proposed that “wholesale institutions” and “credit card” banks be exempted

325. S. 2967 § 110.
from the CRA. The CARRA takes a different approach to that problem. Specifically, the CARRA proposed that "special purpose banks" (defined as banks that do not generally accept retail deposits such as credit card banks and trust banks) be evaluated for CRA purposes in a way that is "consistent with the specific nature of such banks."326

(f) Additionally, the CARRA would have added an evaluation factor applicable to all financial institutions. This provision would have required regulators to look favorably upon credit extended in any "distressed community" (even if outside the delineated community of that bank).

2. HMDA amendments327—This provision of the CARRA is substantially the same as section 332(2) of the CCBBRA.328

3. Regulatory burden: (a) Small business/farm lending329—The CARRA would have repealed section 122 and 477 of the FDICIA. These are the small business and farm loan reporting requirements enacted by the FDICIA. This is the same approach proposed by section 204 of the CCBBRA. However, the CARRA goes beyond the CCBBRA in this area. The CARRA would have required the supervisory agencies to complete a study and report to Congress within one year on alternate means and methods of obtaining such information. (b) Uniform regulations—The CARRA took an approach similar to that of the CCBBRA with respect to uniform regulations. However, the CARRA would have permitted variation among regulations as required by law and as necessary to protect compelling public interests.330 (c) Duplicate reporting—The CARRA would have prohibited, in a manner similar to section 335 of the CCBBRA, regulations under the FHA requiring collection of data identical to that required to be collected by the HMDA.331

Some key provisions of the CCBBRA were not included in the CARRA. Specifically, the mandate for an economic analysis of all regulations and the establishment of Offices of Regulatory Quality were left out.

Late in the second session of the 102d Congress, Representative

326. Id.
327. Id. § 222.
328. However, the CARRA did not propose, as the CCBBRA did, that the limited exemption from reporting requirements for institutions having $30,000,000 or less in assets be deleted. Id.
329. Id. § 103(a).
330. Id. § 104(b).
331. Id.
Thomas E. Petri introduced a proposal which would have radically altered the supervision structure of the nation’s financial institutions, and therefore, the laws and regulations applicable to mortgage discrimination. The proposal, if ultimately enacted, would be radical in that it would substitute private management for the existing deposit insurance system. The proposed system would “create a 100 percent cross-guarantee system under which each bank or thrift institution will enter into a contract with an ad hoc syndicate of banks, thrifts, pension or endowment funds, insurance companies and the like to guarantee all of its deposits.” This system was introduced in response to what its sponsor characterizes as an “indiscriminate” federal government response to recent problems among banks and thrifts with the result that “the regulatory pendulum has swung to an unjustifiable extreme, and the economy is paying the price.” If this proposal were enacted, the financial institutions now subject to the CRA would presumably be taken outside the scope of the CRA because they would no longer be regulated institutions as defined in the CRA.

IV. EXTENT OF MORTGAGE DISCRIMINATION IN THE UNITED STATES

A. 1990 HMDA Data

The initial public disclosure in 1990 of the expanded HMDA data (the “Preliminary FRB Report”) was striking in a number of respects. First, the sheer volume of the data was overwhelming. Second, the disparities between the loan approval rates for whites and
Asians, on the one hand, and blacks and Hispanics, on the other hand, was shocking. Finally, the ability of the supervisory agencies to make conclusive determinations about the extent of prohibited racial discrimination in the face of this sea of data was perplexing. It was perplexing in the sense that the intricate reporting structure described above, which has consumed so many resources of financial institutions which would otherwise have been available for loans, was not designed in a manner which produces the kind of data that enables the regulators to draw the most basic of conclusions (i.e., whether prohibited discrimination is taking place).

The volume of the data was significantly increased by the provisions of the FIRREA. The FIRREA increased the number of reporting institutions, the number of transactions reported by each institution, and the number of characteristics of each transaction reported. In fact, the volume of 1990 HMDA data was approximately eleven times greater than the HMDA data processed prior to the FIRREA.

In 1990, 9,281 institutions submitted reports on approximately 6.4 million transactions. This was made up of 5.26 million applications (including approvals and declinations). Most of these applications concerned one to four family dwellings (3.09 million for purchase-money loans, 1.02 million for refinancing, and 1.10 million for home improvement). The rest of the applications related to multi-family dwellings. The balance of the transactions (the transactions which were not applications) were sales or purchases of loans.

The resulting volume of data processed by the FRB exceeded that of any other single subject handled by the FRB. It has been humorously suggested that, if all of these reporting institutions had submitted their reports in paper (as opposed to computerized) format, the resulting stack of reports would have been higher than the Washington monument. Given that this volume of data was submitted

338. See id. at 868-70. In 1990, 14.4% of white applicants for conventional home purchases were denied credit. The rejection rate for black and Hispanic applicants were 33.9% and 21.4%, respectively. Id.
339. See id. at 881 ("Because of certain limitations (the most important being incomplete information about applicant’s financial characteristics), the expanded data alone cannot provide the answers to these questions.").
340. See infra note 396 and accompanying text.
341. See supra notes 135-37 and accompanying text.
343. Id. at 862-63, 867.
344. Id. at 862.
during a weak housing market in the United States, the FRB predicts that it will increase significantly in later years.\footnote{346} It is interesting to note that, despite this overwhelming volume of data, the Preliminary FRB Report characterizes the process as "a relatively simple one that minimizes the burden on the reporting institutions and, at the same time, provides a reporting format that offers a large base of information for use by the public and the supervisory agencies."\footnote{347}

The FRB then used this information to prepare disclosure statements on behalf of the FFIEC for transmission to the reporting institutions. This resulted in the distribution of over 1.2 million pages of printed information.\footnote{348}

The 1990 HMDA data, as found in these disclosure statements, was consistent with prior studies\footnote{349} in a number of respects: those with relatively low incomes are more likely to apply for government backed loans than those with relatively high incomes;\footnote{350} black, and to a lesser extent, Hispanic applicants are more likely to apply for government backed loans than white or Asian applicants. This pattern exists even when applicant groups are categorized by income levels.\footnote{351}

A high percentage of home purchase loan applications are approved, approximately 72.3% in the case of conventional applications, and 71.7% in the case of applications for government backed

\footnotesize{[hereinafter Curtain Rises].}

\footnote{346. Preliminary FRB Report, supra note 336, at 862.}
\footnote{347. Id. at 861-62.}
\footnote{348. Id. at 863.}
\footnote{349. See, e.g., MARGERY A. TURNER & VERONICA M. REED, THE URBAN INSTITUTE, HOUSING AMERICAN: LEARNING FROM THE PAST, PLANNING FOR THE FUTURE 16 (1991) ("There can be no doubt that the stubborn persistence of racial discrimination plays an important part in perpetuating patrons of market segregation."); Katherine L. Bradburg et al., Geographic Patterns of Mortgage Lending in Boston, 1982-1987, NEW ENG. ECON. REV., Sept.-Oct. 1989, at 3. Bradburg concluded that: From the available data it is not possible to sort out the precise roles played by lenders, as opposed to buyers, sellers, developers, realtors, appraisers, insurers and others, in the complex housing and mortgage markets. What is indisputable is that the ratio of mortgage loans to housing varies by race and this pattern cannot be fully explained by economic and other non-racial factors. Id. at 4; see also Mike Dorning, Who Gets Home Mortgages Still an Issue of Black and White, CHI. TRIB., Dec. 2, 1990 (Business sec.), at 1; The Color of Money, ATLANTA J. & CONST., May 1-16, 1988 ("Whites receive five times as many home loans from Atlanta's banks and savings and loans as blacks of the same income—and the gap has been widening each year."); see generally Preliminary FRB Report, supra note 336, at 863-66 (citing various studies on lending discrimination); S. REP. No. 167, 102d Cong., 1st Sess. 86-89 (1991).}
\footnote{350. Preliminary FRB Report, supra note 336, at 867.}
\footnote{351. See id.}
loans. However, the rejection rate is greater for black and Hispanic applicants than for white or Asian applicants. Specifically, approximately 12.9% of Asian applicants, and 14.4% of white applicants were turned down for conventional financing as compared to turn down rates of approximately 21.4% for Hispanic applicants, and 33.9% for black applicants. Furthermore, this same pattern holds true even when applicant groups are categorized by income levels. For example, when grouped in the lowest income category, 17.2% of Asians, 23.1% of whites, 31.1% of Hispanics, and 40.1% of blacks were turned down. When grouped in the highest income category, 11.2% of Asians, 8.5% of whites, 15.8% of Hispanics, and 21.4% of blacks were turned down. Similar rejection patterns are reflected by the data applicable to government backed loans.

Accordingly, the 1990 HMDA data caused regulators, the financial institutions, and the public to ask the same two questions which have been presented for years: (1) are regulated lenders meeting their CRA duties to low and moderate income areas of their community, and (2) are mortgage lenders impermissibly discriminating on the basis of race?

The Preliminary FRB Report then went to great length to emphasize that the HMDA data did not conclusively establish the existence of impermissible racial discrimination in mortgage lending. The primary reason that the FRB took this stance is the absence of certain key pieces of information concerning prospective borrowers and their proposed collateral from the required HMDA data. For example, the Preliminary FRB Report emphasized the lack of information concerning the creditworthiness of individual applicants and

352. Id. at 868.
353. Id.
354. Id. at 870.
355. Id. at 870-71.
356. See id. at 873-76, 881; see also Mortgage Discrimination Hearings I, supra note 1, at 4-6 (comments of John P. LaWare, member of the Board of Governors of the Federal Reserve System concerning inconclusiveness of the Federal Reserve's study of mortgage lending discrimination, prepared pursuant to FIRREA concerns of deliberate discrimination); John P. LaWare, Do Lenders Discriminate?, Nat'l Mortgage News, Feb. 17, 1992, at 4 (comments of Mr. LaWare upon the FRB report concerning the 1990 HMDA data). There is significant debate over the existence of a negative correlation between racial composition of neighborhoods and private sector investment in those neighborhoods in the form of mortgages. Compare Richard C. Hula, Neighborhood Development and Local Credit Markets, Urb. Aff. Q., Dec. 1991, at 249 with Anne B. Shay et al., Racial Barriers to Credit: Comment on Hula, Urb. Aff. Q., Sept. 1992, at 12. See also Richard C. Hula, A Brief Response to Shay, Goldstein and Bartelt, Urb. Aff. Q., Sept. 1992, at 141.
concerning the appropriateness of the valuations of particular parcels offered as collateral. 357

Industry sources also widely criticized allegations of racial discrimination based on the 1990 HMDA data. One criticism was that the data made institutions who worked the hardest to lend in low and moderate income areas of their community look the worst. This allegedly occurs when a financial institution, in order to meet its CRA duties, aggressively markets its services to the low and moderate income areas of its community. If the marketing is effective, a high number of low and moderate income applicants are attracted, but many are turned down for financial reasons such as poor credit history, unstable employment history, high debt-to-income ratio, and insufficient collateral. As a result, the HMDA data show a high rejection rate for these applicants. 358

Others criticized 1990 HMDA data as containing technical errors. For example, one news report indicated that a major lender had determined that its report failed to include data concerning home improvement loans. 359

The FRB was criticized by some members of Congress for taking this position concerning the inconclusiveness of the HMDA data. 360 In fact, that criticism included charges that the FRB was actively attempting to shield the lenders from criticism. 361

As had been widely predicted, the release of the 1990 HMDA data prompted nine major regulatory responses. 362 The various agen-

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357. Preliminary FRB Report, supra note 336, at 875-76; see also Paul H. Schieber, Minority Lending Needs To Be Better Understood: Federal Reserve Board Study a Starting Point, MAG. OF BANK MGMT., Jan. 1992, at 56. The additional factors described in that article are employment stability (disproportionately hampers minority applicants), family assets (generally lower for black families than for white families), income (generally lower for black families than for whites), appraisals, secondary market guidelines, quality of housing stack offered by the loan applicants, and the impact of the actions of third parties (such as real estate agents). Id. at 56-57.


359. See Curtain Rises, supra note 345, at 20.


361. Another criticism of the regulators in their response to the 1990 HMDA data has been that those trying to deal with the problem are largely white and male. Largely White, Male Regulators in Spotlight for Overlooking Race, Sex Discrimination, REG. COMPLIANCE WATCH, June 15, 1992, at 4.

362. See Fair Lending: Implications of the Recent Home Mortgage Disclosure Act Data:
cies responsible for supervision of financial agencies uniformly indicated that compliance with fair lending laws would receive increased attention in the examination process. The agencies commenced investigations of specific lenders suspected of fair lending law violations, began considering the referral of some cases to the Department of Justice, launched additional studies, and provided lenders with additional information in an attempt to broaden the understanding of the fair lending laws. An example of this increased regulatory attention to lending discrimination is the major role that the CRA is playing in the approval process for mergers involving financial institutions. In addition, a project aimed at identifying those violating the fair lending laws through the use of testers, a concept rejected by the M, has been announced by HUD.

363. See The Memo to Chief Executive Officers and Directors of National Banks and All Examining Personnel from the Senior Deputy Comptroller for Bank Supervision Policy, available in LEXIS, BANKNG Library, OCCBJ file (Dec. 11, 1991); CRA Examinations Enhanced in Wake of Latest HMDA Data, REG. COMPLIANCE WATCH, June 1, 1992, at 1.


367. Comptroller of the Currency, Guide to Fair Mortgage Lending, BANKING BULL. 92-17, Mar. 31, 1992, available in LEXIS, BANKNG Library, OCCBJ file (outlining a "preventive approach for financial institutions to help ensure compliance with the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act (FHA)").


B. 1991 HMDA Data

The 1991 HMDA Data was recently released. Although there are disagreements over the interpretation of HMDA data for 1991, community organizations claim that the 1991 data shows little change from the 1990 data.

C. Federal Reserve Bank of Boston Study

The City of Boston recently released a study on mortgage lending discrimination in the Boston, Massachusetts area. The major conclusion of that study should be considered in detail because it refutes the argument that race-based discrimination is not a significant factor in race-based disparities in loan approval rates. The authors of that study concluded:

The results of this study indicate that race does play a role as lenders consider whether to deny or approve a mortgage loan application. The impact of race is substantially less than indicated by the
original 1990 HMDA data, which showed black and Hispanic applicants for mortgages in the Boston metropolitan area in 1990 were turned down at a rate 2.7 times that for white applicants. As it turns out, the higher denial rate for minorities in Boston is accounted for, in large part, by their having higher loan-to-value ratios and weaker credit histories than whites. They are also more likely to be trying to purchase a two- to four-unit property rather than a single-family home. Nevertheless, after taking account of such factors a substantial gap remains.

A black or Hispanic applicant in the Boston area is roughly 60 percent more likely to be denied a mortgage loan than a similarly situated white applicant. This means that 17 percent of black or Hispanic applicants instead of 11 percent would be denied loans, even if they had the same obligation ratios, credit history, loan to value, and property characteristics as white applicants. In short, the results indicate that a serious problem exists in the market for mortgage loans, and lenders, community groups, and regulators must work together to ensure that minorities are treated fairly.374

This study was undertaken in direct response to the 1990 HMDA data.375 The study sought to correct some of the inadequacies in the HMDA data, including lack of information about factors such as credit and employment history and property characteristics.376 Although the results of the study are more favorable to lenders than the 1990 HMDA data viewed alone, the results do not exonerate lenders of claims of racial discrimination.377

374. Id. at 43-44.

375. See Claudia Cummins, Boston Fed Study Finds Loan Bias Exaggerated, but Still Significant, AM. BANKER, Oct. 9, 1992, at 1, 1 ("The study took a comprehensive look at many variables that affect mortgage lenders' decisions in the Boston area, seeking to isolate when race appeared to be the key factor in rejections."); Minority Loan Applicants: Race-Based Loan Disparity Persists, According to New Study by Boston Fed., BNA BANKING DAILY, Oct. 13, 1992, available in LEXIS, Nexis Library, BNABD File (reporting that the Federal Reserve Bank of Boston, in conducting the study, collected data on 1,200 conventional mortgage loan applications by blacks and Hispanics, and 3,300 by whites in the Boston metropolitan area).

376. See Race-Based Loan Disparity Persists, According to New Study by Boston Fed, 59 BNA'S BANKING REP. 59 (1992) (reporting that the study took thirty-eight factors into account).

377. Although the study found that minority applicants had, on average, higher debt burdens, higher loan-to-value ratios, and weaker credit histories, those factors alone did not account fully for the difference in acceptance rates between black and white applicants. The researchers concluded that only race could account for the remaining difference in acceptance rates. Cummins, Loan Bias, supra note 371, at 1; see also Impending 1991 HMDA Data Give Lenders Reason to Worry, REG. COMPLIANCE WATCH, Oct. 26, 1992, at 1 (reporting on a recent New York State Banking Commission study reaching similar conclusions). But see
statistical model developed by researchers in conducting the study may provide lenders and regulators with a tool to detect the existence of discrimination in the lending practices of particular institutions.\textsuperscript{378}

\textbf{V. Regulatory Burden on Financial Institutions}

Piece by piece, the above-described puzzle of regulations applicable to the wide range of activities engaged in by United States financial institutions, including mortgage lending, has been assembled. Unfortunately, when one steps back to look at the puzzle it is simply not possible to see the big picture clearly.\textsuperscript{379}

One of the major contributing factors in this lack of clarity is the continual change in the pieces constituting the puzzle. In an attempt to understand the reasons for this anomalous situation and to formulate a recipe for a cure, the American Bankers Association commissioned and funded a study which was completed in 1989.\textsuperscript{380}

That study found the regulatory structure to be growing rapidly and identified the simple fact of continuous change as the single greatest


\textsuperscript{380} The results of this study are summarized by Allie Buzzell, The Burden of Bank Regulation: A Synopsis of the Study, ABA Bank Compliance, July/Summer 1990, at 5. This American Bankers Association study was preceded by a study of the burden of regulation on six major economic sectors, one of these sectors being banking, conducted by the Senate Committee on Governmental Affairs and completed in 1977. That study concluded that imprecise mandates from Congress, overlap and duplication of agency responsibilities, and lack of effective oversight of the agency operations were the main sources of the burdens of the regulatory system on banks. It recommended that a single banking oversight agency be formed to replace the Comptroller of the Currency, the FDIC and the Federal Reserve Board. Id. at 8. Another study preceding the 1989 American Bankers Association study was conducted in 1979 for the Business Roundtable by Arthur Andersen & Co. Three of the forty-eight companies included were large banks. The study identified a series of factors which cause the incremental cost of compliance with regulations to be high. These incremental costs are high when the regulation either requires or results in one of the following: continuous monitoring, new technology, new or modified equipment, recurring operation or maintenance costs, modifications (as opposed to adjustments) in existing facilities, lack of flexibility in permissible methods of compliance, a stringent standard, engineering solutions necessary because compliance is not yet possible, and when frequent adaptations are required. Id. Finally, in 1984 a task force led by then Vice President George Bush released a report titled Blueprint for Reform: The Report of the Task Group on Regulation of Financial Services. The task force identified problems in the banking regulatory structure such as outdated requirements, vague legislative mandates, jurisdictional overlap, and inconsistent policy directives. Id.
source of burden upon financial institutions.\textsuperscript{381} Bankers, as a result, are pushing for legislation to ease the regulatory burden.\textsuperscript{382} In that effort, some bankers claim that the burden has become so severe as to threaten the financial viability of the banking industry.\textsuperscript{383}

A distressing result of the continually growing regulatory structure is the enormous cost of compliance, or attempted compliance.\textsuperscript{384} The American Bankers Association conducted a survey of banks concerning the regulatory burden,\textsuperscript{385} and received responses from 974 banks.\textsuperscript{386}

One survey question requiring a written response asked bankers to identify specific regulatory problems which could be eliminated by changes in regulation.\textsuperscript{387} Responses to this question were received from 529 survey participants. The CRA was mentioned by 69\% of those responding to this question. This was the most commonly identified problem area. The second highest percentage, 12.3\%, identified consumer protection rules, including the HMDA and FHA. The seventh highest percentage, 4.9\%, identified the ECOA.\textsuperscript{388}

This concern with the CRA extended to other aspects of the survey. The CRA was the most frequently cited regulation in the “most time consuming for CEOs” category,\textsuperscript{389} the “regulations giving CEOs most headaches” category,\textsuperscript{390} and the “most time consuming for bank complaint managers/officers” category.\textsuperscript{391}

\begin{itemize}
\item \textsuperscript{381} Buzzell, supra note 380, at 11.
\item \textsuperscript{382} Barbara A. Rehm, \textit{War on Red Tape Moves to the Home Front}, \textit{AM. BANKER}, Aug. 5, 1992, at 1.
\item \textsuperscript{383} \textit{See Growing Paperwork Burden Is Under Scrutiny by Congress; Regulators Sympathize}, \textit{REG. COMPLIANCE WATCH}, July 6, 1992, at 1 (reporting on comments of FDIC Chairman William Taylor).
\item \textsuperscript{385} \textit{AMERICAN BANKERS ASSOCIATION, SURVEY OF REGULATORY BURDEN: SUMMARY OF RESULTS} (1992).
\item \textsuperscript{386} Id. at C-2.
\item \textsuperscript{387} Id. at B-9.
\item \textsuperscript{388} Id.
\item \textsuperscript{389} Id. at C-9.
\item \textsuperscript{390} Id. at C-12.
\item \textsuperscript{391} Id. at C-15.
\end{itemize}
The survey results point out a troubling gap between the perceptions of regulators and the experience of bankers. In a 1991 article, a member of the Board of Governors of the Federal Reserve System characterized the CRA burden as follows: "Even with these changes, the CRA’s actual legal requirements are relatively few in number and quite straightforward. And, most important, the burden of these legal requirements still falls on the bank supervisory agencies." 392

At the time of adopting the CRA, Congress did not believe that it would impose a significant regulatory burden on financial institutions. The Senate Report of its version of the Housing and Community Development Act of 1977 stated: "The question of whether the bill will increase the regulatory burden on financial institutions was thoroughly considered by the Committee. The Committee believes that the regulatory agencies already have sufficient data to carry out the intent of this act without requiring additional red-tape." 393

Based on these survey responses, the American Bankers Association reported that the industry had spent 10.7 billion dollars in 1991 on regulatory compliance. This amounts, according to American Bankers Association computations, to fifty-nine percent of bank industry profits during 1991. 394

Computation of compliance costs is, obviously, a difficult matter. Furthermore, these compliance cost estimates must be viewed with caution since they are based on figures submitted by banks themselves to the trade organization representing those banks. However, the American Bankers Association claims that the 10.7 billion dollar figure is actually low because it fails to include amounts such as the cost of complying with the banking legislation enacted in 1991.

The American Bankers Association survey also fails to account for the impact of the Americans With Disabilities Act of 1990 on the regulatory burden. Regulators have already made it clear that the

392. John P. LaWare, A CRA Report Card: How Are Lenders Doing, J. COMMERCIAL BANK LENDING, April 1991, at 6. Even 10 years after the adoption of the CRA, commentators did not view the record-keeping aspects of CRA to be a significant burden on financial institutions. See Art, supra note 2, at 1088 ("The record-keeping and mechanical requirements of the regulations are quite limited and not significantly burdensome."); see also id. at 1105, 1135.

393. S. REP. No. 175, 95th Cong., 1st Sess. 34 (1977). Contrast these views to the additional views of Senators Morgan, Tower, Garn, Lugar, and Schmitt that "the bill as reported would not only add a tremendous amount of paperwork for our already overburdened financial institutions, but would also have the adverse effect of causing a reduction in credit availability in these areas which we are trying so desperately to revitalize." Id. at 81.

394. AMERICAN BANKERS ASSOCIATION, supra note 385, at A-2.
burden of compliance with the ADA may well exceed the CRA compliance burden. 395

Why are these costs estimates “distressing”? A major reason is the fact that the money being expended on this regulatory compliance would otherwise be available for loans. The American Bankers Association estimates that an additional twenty to thirty billion dollars per year would be available for lending if only one-quarter of the money now being expended by banks upon regulatory compliance could be redirected to capital. 396

The regulators, as well as the regulated institutions, have expressed significant concern over the growing regulatory burden. 397 Although recognizing the special nature of the responsibility of financial institutions to society, regulators have expressed concern that this regulatory burden is placing the financial institution industry at a competitive disadvantage 398 and is falling disproportionately on smaller institutions. 399 Although regulators are currently in the midst of programs and studies designed to minimize this burden, 400 they believe legislation will be needed to adequately address the problem. 401

VI. LEGISLATIVE PROPOSAL

Any one piece of banking legislation will, standing alone, not make a significant dent in existing racial disparities in home mortgage

395. Disabilities Act More Onerous than CRA, Regulators Say, REG. COMPLIANCE WATCH, Mar. 2, 1992, at 1, 1; FDIC, OCC to Step Up Examinations; More Scrutiny of Compliance Matters, REG. COMPLIANCE WATCH, Feb. 24, 1992, at 3 ("[A]ll the regulations that are going to have to be promulgated to comply with this new law are overwhelming and . . . regulators are just now beginning to understand the vastness of compliance and enforcement problems that they are going to create.").


398. Id. at 608.

399. Id. at 609.

400. Id. at 609-10 (noting that an FRB program to minimize regulatory burden has been in place since 1978; the FFIEC mission is to ensure consistency among agencies; the FRB is participating with other regulatory agencies in a “Regulatory Uniformity Project” that has goal of promoting consistency and reducing regulatory burden; and the FFIEC is required under § 221 of the FDICIA to review procedures of its member agencies in order to identify unnecessary burdens); see also Banking Agencies Move to Ensure Uniformity in Interpretations of Significant Legal Issues, THRIFT REGULATOR, Sept. 28, 1992, at 4.

401. LaWare, supra note 397, at 610.
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That will occur only as education changes attitudes now causing people to use race as a determining factor in their dealings with others. Nonetheless, an improvement in the current statutory structure—a change which simplifies and provides incentives—has the potential to provide some relief from the current regulatory burden and also decrease the amount of mortgage discrimination.

In crafting this statutory improvement, there is a temptation to create more governmental agencies with oversight authority, and to require existing agencies to conduct further studies to get to the root of the problem. Those approaches should be avoided given the large number of agencies already in existence and the overwhelming number of studies already completed.

Given the continuation of discrimination in the face of a statutory structure which has been largely in place for over two decades, another temptation is to throw out the existing structure and begin anew. This approach is to be avoided as well. If aggressive enforcement focusing on substance rather than form is undertaken, this existing structure provides a solid foundation for positive change. It is not time to throw out the good with the bad and require a complete retooling by lenders, regulators, and community organizations.

Instead, the suggested approach is a refinement of the existing structure in a manner which will be seen as positive by lenders, regulators, and community organizations. To the extent that all of these groups view the structure as substantive and positive rather than technical and negative, the likelihood of change is enhanced. This approach would not address any single piece of the statutory structure in isolation. Instead, the FHA, ECOA, HMDA, CRA, and ADA are treated as complementary elements of a structure designed to eliminate discriminatory lending practices, a structure which must be administered in a unified manner.

In striving for uniform application, this approach would not attempt to distinguish among regulated financial institutions based on the institution’s assets or the populations of the communities in which they operate. All financial institutions, regardless of size or location, have a special duty to the community based upon special rights conferred upon those institutions by law. Accordingly, this approach would be a functional one, requiring that the various statutes be applied in light of the purpose of the particular institution.

The first element of this proposal involves conduct of financial institutions which is required (other than data collection) or prohibited by the various statutes and accompanying regulations. In many cases,
particularly in the case of smaller institutions, compliance may well be adversely affected by the staggering nature of the task of simply locating the various statutes and regulations. In this case, Reg. B could serve as a model, a single regulation that applies to all regulated financial institutions. The proposed statute would first require that a single regulation be drafted by the FFIEC (and adopted by the various regulating agencies) implementing the anti-discrimination, notice, and record retention requirements of the FHA, ECOA, and ADA as they apply to regulated financial institutions.

The second element of this proposal is that the Bank Enterprise Act component of the FDICIA be funded. This would provide incentives for compliance.\footnote{402. A technical corrections provision should be considered to clarify the drafting of the Bank Enterprise Act. See supra notes 249-61 and accompanying text.}

The third element of this proposal would unify the scattered, inconsistent data collection requirements of the FHA, ECOA, HMDA, CRA, and FDICIA (and the ADA, to the extent that any similar data collection requirements are added). Specifically: (a) Any lender satisfying the data collection requirements of the HMDA should be deemed to satisfy the data collection requirements of the FHA. (b) Any lender satisfying the data collection requirements of the HMDA should be deemed to satisfy the data collection requirements of the CRA with respect to that lender’s particular loans covered by HMDA. (c) Sections 122 and 477 of the FDICIA\footnote{403. Although not a central element of this proposal, the appraisal amendment to the ECOA under § 233 of the FDICIA should be statutorily clarified. See supra notes 235-41 and accompanying text.} should be repealed and the CRA should be amended to require that lenders subject to the CRA collect data on “small business” and “small farm” loan applications, organizations and purchases in the same format as required for loans covered by the HMDA. The terms “small business” and “small farm” should be defined (in contrast to the approach taken by the FDICIA) in line with the purpose of the loan and the total asset size of the borrower as stated by the borrower on the application. “Geocoding” of types of credit beyond that required by the HMDA and these “small business” and “small farm” loan provisions should not be mandated. (d) All of the mandatory data collection requirements should require information about the borrower’s creditworthiness, employment and salary history, debt-to-income ratio, and value of collateral to be collected in order that more accurate conclusions may
be drawn from the data collected.

The fourth element of this proposal would make a basic modification to the CRA. The overall intent of this modification would be to meet community demands to hold lenders accountable for their records of meeting community credit needs, while providing incentives for lenders with outstanding records. It is proposed that a series of presumptions based upon a lender's CRA rating be created. These presumptions would apply to CRA challenges to deposit facility applications. A lender with an "outstanding" rating would be entitled to an irrebuttable presumption in favor of the application on CRA grounds. A lender with a "satisfactory" rating would receive a rebuttable presumption in favor of the application. A lender with a "needs to improve" rating would face a rebuttable presumption against the application on CRA grounds. A lender with a "substantial noncompliance" rating would be subject to an irrebuttable presumption against the application on CRA grounds.

The fifth element of this proposal would modify section 806 of the CRA, which authorizes the various supervisory agencies to adopt regulations implementing the CRA. Although positive changes are already being implemented in this respect, this change would statutorily require the regulatory agencies to incorporate the following concepts into the CRA regulations: (a) the rating must be based on performance, not documentation; (b) the rating must take into account, both in terms of documentation and performance, the asset size of the institution and the size of its community; and (c) the rating must take into account any restrictions imposed on the activities of the organizations by the terms of its charter.404

The final element of this proposal goes beyond the mortgage discrimination law. Regulatory uniformity among the various supervisory agencies with respect to all regulations within a one year period should be statutorily mandated. Deviations would be permitted only to the extent required to comply with the applicable law.

VII. CONCLUSION

Somewhere along the road to solving the problem of mortgage
discrimination in the United States, a road paved with good intentions, the "solution" took on a life of its own. The solution, rather than the underlying problem, appears to have become the focus.  

It is, of course, not possible to eradicate mortgage discrimination through any system of laws alone. Until the underlying social problems are addressed, any legal solution is doomed to failure. However, it is time to modify that legal system in order that it will be poised to assist in solving the problem as these underlying social problems are addressed.

This Article is not an argument for making the laws applicable to mortgage discrimination more lax. However, it is time to recognize that the existing structure has simply not worked well. Accordingly, alternative approaches must be explored.

The first step in solving the problem of mortgage discrimination is to make the structure of the current laws prohibiting mortgage discrimination less complex. This includes incorporating the various laws regulating mortgage discrimination into a single, comprehensible, and consistent format. To the extent that the structure is overly complex, the likelihood of compliance is decreased. The second step is to make the reporting requirements less burdensome. The excessively burdensome system currently in place appears to be decreasing confidence in the system and to be diverting precious resources away from real solutions. The third step is to create tangible rewards and penalties for lenders based on their community reinvestment records. The fourth step is to create incentives for lenders to invest in financially distressed areas of the United States. The fifth and final step is to assure overall uniformity in bank regulation to the extent reasonably possible.

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405. Debra Cope, Fed Consumer Panel: Loan Bias Exists, and Something Must be Done, AM. BANKER, June 15, 1992, at 6, 6 ("A panel of advisers to the Federal Reserve Board has urged bankers and regulators to quit arguing about whether loan bias exists, and get on with the job of eliminating it.").

406. See Barbara A. Rehm, Activists Warn Banks that Campaign to Ease CRA Rules Might Backfire, AM. BANKER, June 29, 1992, at 1, 6-7.

407. FDIC Willing to Evaluate CRA Rating System, Taylor Pledges, 58 BNA'S BANKING REP. 765 (1992) (reporting on recommendations to reward banks with outstanding CRA ratings in an amount equal to penalties assessed against non-complying institutions).