Eliminating the Labyrinth: A Proposal to Simplify Federal Mortgage Lending Discrimination Laws

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Home ownership always has been considered a part of the American dream. It is deemed so important to our nation's health and welfare that for over sixty years it has been the cornerstone of the federal government's national housing policy. Indeed, our charter of government puts the right to hold and to enjoy property on the same plane as that of life.

1. Prompted by the economic upheavals of the Great Depression, the federal government intervened in the real estate and financial industries on a massive scale by establishing programs designed to promote and maintain home ownership. In 1932, Congress established the Reconstruction Finance Corporation and the Federal Home Loan Bank System to stabilize financial institutions and to strengthen the national credit supply system. Act of Jan. 22, 1932, ch. 8, 47 Stat. 5 (repealed 1966); Federal Home Loan Bank Act, 47 Stat. 725 (1932) (codified as amended at 12 U.S.C. §§ 1421-1449 (1988)). The Home Owners' Loan Act of 1933 created the Homeowners Loan Corporation to provide emergency relief to homeowners by refinancing or buying defaulted mortgages. Act of June 13, 1933, ch. 64, 48 Stat. 128 (1934) (codified as amended at 12 U.S.C. §§ 1461-1470 (1988)). The National Housing Act of 1934 led to the creation of the Federal Savings & Loan Insurance Corporation (FSLIC) and the Federal Deposit Insurance Corporation (FDIC). National Housing Act, ch. 847, 48 Stat. 1246 (1934) (codified as amended at 12 U.S.C. § 1701-50jj (1988)). These institutions were designed to insure the deposits in savings and loans and state chartered commercial banks in order to encourage depositors to trust the integrity of financial institutions. Id. The National Housing Act also created the Federal Housing Administration (FHA), which initiated or promoted additional home ownership incentives, including mortgage insurance and the long-term, self-amortizing mortgage. Id.

and liberty.\(^2\)

Throughout most of our history, however, home ownership has been an elusive dream for minorities. The elimination of slavery in 1865 did little to merge African-Americans into the mainstream of the nation’s economic life, and for more than a century racial segregation laws, exclusionary zoning ordinances, racially restrictive covenants, and absolute refusals to deal kept the minority American’s dream of home ownership from becoming a reality.\(^3\)

One of the obstacles that minorities historically encountered in the effort to own a home was discrimination in home financing. The history of discrimination in mortgage lending has been well documented. After the depression when the federal government became active in the residential mortgage market, it embraced and nationalized racially discriminatory home mortgage underwriting criteria. In the 1960s and 1970s, discrimination in the financing of housing was finally identified as a problem and received attention from the executive branch,\(^4\)


3. For discussions of the history of racial discrimination and segregation in housing, see JAMES A. KUSHNER, FAIR HOUSING § 5.01 (1983); ROBERT G. SCHWEMM, HOUSING DISCRIMINATION §§ 2.2–2.8 (1990); Karl Taeuber, The Contemporary Context of Housing Discrimination, 6 YALE L. & POLY REV. 339 (1988).

4. See, e.g., Exec. Order No. 12,259, 3 C.F.R. 307 (1981) (ordering all programs and activities of executive agencies relating to housing and urban development to be administered affirmatively to further fair housing); Exec. Order No. 11,063, 3 C.F.R.
Congress,\(^5\) the courts,\(^6\) and regulatory agencies.\(^7\) This federal action was intended to eliminate racial and other barriers to home financing and to ensure that minorities and other historically excluded groups received equal access to mortgage credit. Enforcement and oversight authority was granted to many federal agencies as well as to private citizens.\(^8\)

One would expect that with the many laws prohibiting discrimination in housing finance and the nation's historical commitment to home ownership, minority communities today would enjoy the same access to mortgage credit as does the

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7. Despite the enactment of fair lending laws and Congress's clear expression of federal policy that discriminatory lending practices should be eliminated, the federal regulatory agencies authorized to enforce fair lending laws did little or nothing throughout most of the 1970s to implement this national priority. The Senate Banking Committee in 1977 harshly criticized the financial supervisory agencies for not promulgating antirelining regulations. S. REP. No. 175, 95th Cong., 1st Sess. 33 (1977). Only after being sued by a coalition of civil rights groups did the Comptroller of the Currency, the Federal Reserve Board, the FDIC, and the Federal Home Loan Bank Board promulgate regulations to enforce and monitor compliance with those laws. For a listing of these regulations, see id. at 33; see also infra Part II.C. The Department of Housing and Urban Development (HUD) did not implement regulations relating to fair lending until after the Fair Housing Amendments Act of 1988 was passed.

8. See discussion infra Part II.
white community. Yet mortgage lending studies indicate otherwise. Almost all modern studies of lending patterns show a lack of conventional lending in inner-city minority neighborhoods, particularly in racially changing areas. These recent access-to-credit studies conclude that race still plays the most significant role in determining who receives conventional mortgage financing. Even the federal government has observed continuing noncompliance with the nation’s equal credit laws.10 Congress continues to study the problem, conducting regular hearings and occasionally tinkering with


10. See the government reports and studies cited in Dane, Federal Enforcement: 1989–1990, supra note 9, at 120 n.3; Dane, Federal Enforcement: 1980s, supra note 9, at 251. In October 1991, the Federal Reserve Board released a study of 1990 Home Mortgage Disclosure Act (HMDA) data showing large racial disparities in loan approval and rejection rates for both conventional and government-backed loans. Glenn B. Canner et al., Home Mortgage Disclosure Act: Expanded Data on Residential Lending, 77 FED. RESERVE BULL. 869 (1991). A follow-up study conducted using 1991 HMDA data showed the same results. Glenn B. Canner & Dolores S. Smith, Expanded HMDA Data on Residential Lending: One Year Later, 78 FED. RESERVE BULL. 801 (1992); see also ALICIA H. MUNNELL ET AL., MORTGAGE LENDING IN BOSTON: INTERPRETING HMDA DATA (Federal Reserve Bank of Boston Working Paper No. 92-7, October 1992) (finding that even after controlling for economic and property factors such as credit history and income ratios, there were statistically significant differences in treatment based on race in the metropolitan Boston area).

11. See, e.g., Current Status of the Community Reinvestment Act: Hearings Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs, 102d Cong., 2d Sess. (1992); Home Mortgage Disclosure Act: Joint Hearings of the Subcomm. on Consumer Affairs and Coinage and the Subcomm. on
existing legislation. Federal law enforcers recently have begun announcing new initiatives, the efficacy of which remains to be seen.


The lack of federal enforcement efforts in the area of mortgage lending discrimination which contrasts with its rigorous efforts in the sales and rental area, and may be one reason that race remains a significant determinant in residential financing decisions. Another reason may be that the mortgage lending underwriting and approval process remains a mystery to most laypersons and even to fair-housing advocates, thus making discriminatory lending decisions more difficult to identify and to prove than other discriminatory housing practices.

The object of this Article is to demonstrate that the statutory and regulatory framework established by the federal government in its efforts to fight mortgage-lending discrimination is an extremely complicated labyrinth of dead ends, false passages, and elusive goals. Instead of addressing the mortgage-lending discrimination problem directly and comprehensively, Congress has taken a piecemeal and incomplete approach that generally has failed to bring the mortgage-lending industry into equal access compliance.

After pointing out the problems and deficiencies in the current statutory and regulatory scheme, this Article suggests a bold, comprehensive solution to the problem that, if implemented effectively, should ensure that conventional mortgage markets serve the minority community equally as well as the white community.


15. See Dane, Federal Enforcement: 1980s, supra note 9, at 248, 252–55, 263 (arguing that the statutory framework relating to lending discrimination is confusing, complicated, and ineffective); Regan, supra note 14, at 651, 656–61 (arguing that the legislative scheme established by Congress has not provided a satisfactory solution to the redlining problem); Michael B. Tolcott, Note, Legislating Against Mortgage Redlining: The Need for a Firmer Commitment, 12 Rutgers L.J. 151, 180 (1980) (arguing that federal legislation has not yet addressed the problem of redlining).
I. HISTORY OF MORTGAGE LENDING DISCRIMINATION

During the 1920s and 1930s, economic theorists and appraisers espoused the view that economic value and loan risk were related to race. The theory of "homogeneity" held that real estate values would remain stable or would increase only if the characteristics of the residents, including income levels and race, remained homogenous. The principle of "conformity" buttressed this concept, and held that maximum value was realized only when sociologic and economic conformity were present. The "infiltration" theory espoused the view that as different groups of people "infiltrated" or "invaded" a particular neighborhood, property values would decline. Thus, appraisers were required to note whether the neighborhood being appraised was likely to be affected in the near future by the introduction of any disharmonious racial or ethnic groups.

Widely influential texts of the time reflected these values. Real estate and appraisal manuals repeatedly emphasized that the racial characteristics of the neighborhood affected real estate value and, therefore, loan risk. In the 1931 edition of McMichael's Appraising Manual, appraisers were advised to determine whether there were "undesirable racial elements" in an area. A 1932 professional text, The Valuation of Real Estate, declared that, although most variations and differences between people are slight and result in only gradual declines in value, "there is one difference in people, namely race, which can result in a very rapid decline." The first edition of the


Calvin Bradford has documented extensively the history of mortgage lending discrimination on the basis of race, both in the conventional loan market and in the government-backed loan market. In addition to the article cited above, see CALVIN P. BRADFORD, REPORT ON THE ROLE OF THE VETERANS ADMINISTRATION IN CAUSING RAPID AND MASSIVE RACIAL RESEGREGATION 1 [hereinafter BRADFORD, VETERANS ADMINISTRATION REPORT]; Calvin Bradford, Financing Home Ownership: The Federal Role in Neighborhood Decline, 14 URB. AFFAIRS Q. 313 (1979); Calvin Bradford, The History of Discrimination in the Mortgage Lending Industry, in NAT'L FAIR HOUSING ALLIANCE, MORTGAGE LENDING INVESTIGATION MANUAL (Stephen M. Dane & Calvin P. Bradford eds., 1993).

17. STANLEY L. MCMICHAEL, MCMICHAEL'S APPRAISING MANUAL 278 (1931).

American Institute of Real Estate Appraisers Manual, *Real Estate Appraisal*, published in 1935, explained that "to have the attributes of a good residential area, it is essential that protection be afforded against the infiltration of inharmonious racial groups."\(^{19}\) A ranking of races and nationalities in order of their impact on value, with the most favorable at the top and the least desirable at the bottom, appeared in one of the texts that was popular at the time:\(^{20}\)

1. English, Germans, Scotch, Irish, Scandinavians
2. North Italians
3. Bohemians or Czechoslovakians
4. Poles
5. Lithuanians
6. Greeks
7. Russians, Jews of the lower class
8. South Italians
9. Negroes
10. Mexicans

A summary of the literature of the era determined that "mortgage lenders were conditioned by the same attitudes on the racial issue as were the realtors and home builders. Their mortgage officers read the same texts and swallowed the same myths."\(^{21}\)

Two federal programs established during the Great Depression had a particularly profound impact on racially based residential mortgage-lending practices. The Federal Housing Administration (FHA) was created by the National Housing Act of 1934.\(^{22}\) This agency instituted a program of insuring residential mortgage loans, which restored some vitality to the depressed real estate and lending industries. Its most significant

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20. Homer Hoyt, *One Hundred Years of Land Values in Chicago* 316 (1933).
21. Charles Abrams, *Forbidden Neighbors—A Study of Prejudice in Housing* 174 (1955). These theories focused not so much on the characteristics of the borrower as they did on the characteristics of the neighborhood within which the property was located. Prior to the 1930s, lenders were more concerned with the quality of the collateral than with the creditworthiness of the applicant. Not until longer, self-amortizing loans became popular did borrower characteristics become of equal concern. Robert Schafer & Helen F. Ladd, *Discrimination in Mortgage Lending* 4 (1981).
contribution to the lending industry was its standardization of mortgage loan policies and practices. Because it insured mortgages held on real estate located throughout the country, the FHA needed a uniform and objective method of deciding whether a particular mortgage loan was insurable. The FHA published an underwriting manual which attempted to cover all aspects of the lending decision, including the creditworthiness of the applicant and the adequacy of the real estate securing the mortgage. Appraisal techniques, property valuation, and credit underwriting all became standardized for FHA-insured loans.

Unfortunately, while establishing its uniform underwriting criteria in the 1930s and 1940s, the FHA drew upon the prevailing expertise and wisdom of the private lending community. Indeed, the FHA hired Homer Hoyt, one of the economists who assisted in the development of racially based appraisal theory, to develop its underwriting standards. The FHA's 1938 underwriting manual provided:

Areas surrounding a location are investigated to determine whether incompatible racial and social groups are present, for the purpose of making a prediction regarding the probability of the location being invaded by such groups. If a neighborhood is to retain stability, it is necessary the properties continue to be occupied by the same social and racial classes. A change in social or racial occupancy generally contributes to instability and a decline in values.

Prior to 1947, FHA rules required racial segregation and racially restrictive covenants. Thus, the federal government actually reinforced the institutionalization of racist attitudes in the lending decision calculus.

23. BRADFORD, VETERANS ADMINISTRATION REPORT, supra note 16, at 8.
24. FEDERAL HOUSING ADMIN., UNDERWRITING MANUAL ¶ 937 (1938).
25. CITIZENS' COMM'N ON CIVIL RIGHTS, supra note 14, at 7-10, 14; Jim Eggleston, Comment, Mortgage Discrimination: Eliminating Racial Discrimination in Home Financing Through the Fair Housing Act of 1968, 20 ST. LOUIS U. L.J. 139, 140-42 (1975). The FHA was not the only federal agency to rely on racially based appraisal theory. In 1936, the Homeowners Loan Corporation (HOLC) conducted a study of Oakland, California neighborhoods as a guide to local mortgage lenders who intended to participate in the new FHA mortgage-insurance program. The “hazardous” areas, colored red on the HOLC's map, were defined as those with an “undesirable population.” Center for Real Estate & Urban Economics, Redlining, in CURRENT URBAN LAND TOPICS, Oct. 1975, at 1.
The federal government's policies guaranteed that African Americans and other minorities generally were excluded from participating in the government-backed financing program. As late as 1960, for example, the FHA served only 9.1% of the nonwhite population who had secured housing financing. Minorities owned less than two percent of the postwar FHA-insured housing by that date. Because they were unable to secure either conventional or government-backed financing, minorities were able to purchase homes only through private financial arrangements that were predatory and abusive. The pent-up demand for financing enabled speculators to offer less attractive options, such as land installment contracts, at exorbitant interest rates. Minority neighborhoods were condemned to the “underworld of real estate finance.”

Although the FHA finally eliminated racial restrictions from its underwriting guidelines in the 1960s in response to Executive Order 11,063, the private home finance industry continued to do business as usual. Studies conducted by the Comptroller of the Currency and the Federal Home Loan Bank Board suggested the “strong probability of race discrimination in mortgage credit.” Evidence presented at hearings before the United States Senate Committee on Banking, Housing, and Urban Affairs during consideration of the Home Mortgage Disclosure Act of 1975 supplied “ample documentation that credit-worthy persons are sometimes denied loans on sound homes solely because of the location of the property.” Testimony and studies from over a dozen cities showed a consistent reluctance by most lenders to make loans to those in older, inner-city neighborhoods, a practice referred to as redlining. A large minority or ethnic population was one

33. Id. at 2, 5-8.
characteristic common to all redlined areas. Later studies using data gathered during the mid-1970s confirmed that race was a statistically significant factor in the conventional mortgage markets of many urban areas.

Congress finally began to address this problem in the 1970s with the passage of the Home Mortgage Disclosure Act, the Community Reinvestment Act, and the Equal Credit Opportunity Act. Blatant forms of discrimination by the lending industry began to disappear, only to be replaced by more subtle discriminatory behavior that produced the same result.

34. Id. at 3-4.

Although the race of the applicant and the racial composition of the neighborhood in which the mortgaged property was located were the most studied and publicized problems in the area of equal credit access, they were not the only bases for discriminatory lending practices. Testimony in the early 1970s before the National Commission on Consumer Finance noted that single women faced a variety of lender prejudices and therefore often were unable to obtain mortgages to buy real estate. FEDERAL RESERVE SYSTEM COMPLIANCE HANDBOOK I.1.22 (1979); see also NATIONAL COUNCIL OF NEGRO WOMEN, INC., WOMEN & HOUSING: A REPORT ON SEX DISCRIMINATION IN FIVE AMERICAN CITIES 59-73 (1975); SCHAFER & LADD, supra note 21, at 6-7, 377 n.8 (1981). Discrimination against the elderly in consumer credit transactions was documented in congressional hearings relating to the Equal Credit Opportunity Act of 1976. See S. REP. No. 589, 94th Cong., 2d Sess. 3 (1976), reprinted in 1976 U.S.C.C.A.N. 403, 403-05.
36. See discussion infra Part III.
37. Today, lenders rarely simply refuse to do business in certain neighborhoods or with certain applicants. Rather, lenders may discriminate by applying different terms and conditions to loan applications from inner-city neighborhoods or from statutorily protected applicants. See, e.g., Harrison v. Otto G. Heinzroth Mortgage Co., 430 F. Supp. 893 (N.D. Ohio 1977) (finding that a mortgage company employee violated the 1968 Fair Housing Act by refusing to offer neutral financing terms for the purchase of a house located in a racially mixed neighborhood). Some lending policies may be facially neutral but have a racially discriminatory effect. See, e.g., Old W. End Ass'n v. Buckeye Fed. Sav. & Loan, 675 F. Supp. 1100, 1106 (N.D. Ohio 1987) (holding that a lender's underwriting terms, although neutral on their face, may have had a discriminatory effect in violation of 1968 Fair Housing Act).

One form of discriminatory lender behavior that is not detectable by analysis of statistical data is "prescreening." "Prescreening" occurs when a lender discourages an applicant from submitting a formal mortgage loan application, or refers the applicant to another lender in an effort to avoid doing business with the applicant. It is a variation of the real estate practice of steering. See, e.g., Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 94 (1979) (holding that directing prospective homebuyers according to their race violates the Fair Housing Act); Havens Realty Corp. v. Coleman, 455 U.S. 363, 366 n.1 (1982) (steering members of racial and ethnic groups to buildings occupied primarily by such groups and away from buildings inhabited primarily by members of other racial and ethnic groups constitutes a discriminatory housing practice in violation of the Fair Housing Act). "Prescreening" appears in its most noxious form when the lender simply refuses to accept any application at all. When motivated by...
Studies analyzing mortgage lending data from the 1980s continue to find gross lending disparities based on race. The problem, it seems, remains.

II. CURRENT LAWS AND REGULATIONS PROHIBITING DISCRIMINATORY LENDING PRACTICES

The federal government has created a maze of equal-credit-opportunity and fair lending statutes and regulations, each having its own purpose and appropriate function. Any particular lender suspected of discriminatory lending activity may be subject to some statutes and regulations, but not to others. Enforcement mechanisms vary widely. The Attorney General has authority to enforce some statutes, but not others. Federal statutes provide for private enforcement by litigation in a few instances through an express cause of action in the applicant or other person aggrieved by a discriminatory lending decision. Other statutes prohibit one or more types of discrimination but do not provide an express cause of action to the aggrieved person. At times only administrative regulation and enforcement are available, and even then responsibilities are dispersed among many different federal agencies. Limited participation by the public is permitted by some regulatory agencies. Some federal statutes and regulations are merely recordkeeping or policy statements designed to inhibit discriminatory lending practices or promote investment in traditionally redlined neighborhoods, without providing for any meaningful penalties for those lenders who fail to comply. This Part will discuss those federal executive orders, statutes, and regulations that relate to equal access to credit, and will identify their relative strengths and weaknesses.

race or any other protected characteristic, “prescreening” is clearly illegal. 12 C.F.R. §§ 202.5(a), 528.3 (1993). Fair housing and equal credit advocates have identified many other forms of prevalent discriminatory lender behavior. COMMUNITY REINVESTMENT ACT REPORT, supra note 14, at 3, 5.

38. See studies cited supra notes 9–10.
A. Executive Orders

Issued by President Kennedy in 1962, Executive Order No. 11,063\(^39\) directs all departments and agencies in the executive branch of the federal government, insofar as their functions relate to housing matters, to take whatever action is necessary and appropriate to prevent discrimination on the basis of race, color, creed, or national origin in the programs they administer.\(^40\) In particular, Executive Order 11,063 directs federal agencies to ensure that no discrimination occurs in private lending related to loans insured or guaranteed by the federal government.\(^41\) The order therefore applies to lenders who make FHA and VA loans, but does not apply to lending practices involving conventional loans. Executive Order No. 12,259,\(^42\) issued by President Carter in 1980, made the Department of Housing and Urban Development (HUD) primarily responsible for coordinating agency implementation of Executive Order 11,063, and expanded that Order to cover discrimination based on sex.\(^43\)

As with any executive order, there exists no private mechanism to enforce these directives. Only HUD and other agencies of the executive branch can enforce them, either by informal methods of conference, conciliation, and persuasion, or by canceling agreements, refusing further aid, and otherwise taking appropriate regulatory action against any lender in violation of the terms of the orders.\(^44\) The Attorney General is authorized to accept referrals from the executive agencies for violations of the laws covered by the executive orders and can initiate any civil or criminal action deemed appropriate.\(^45\)

\(^40\) Id. at 654, reprinted as amended in 42 U.S.C. § 302 (1988).
\(^41\) Id. at 653, reprinted as amended in 42 U.S.C. § 101(b) (1988).
\(^43\) Id. at 308, 311, reprinted as amended in 42 U.S.C. §§ 1-201, 1-604(b) (1988).
B. Legislation

1. The Fair Housing Act—Title VIII of the Civil Rights Act of 1968, commonly known as the Fair Housing Act, was signed into law on April 11, 1968. Its purpose is “to provide . . . for fair housing throughout the United States.” The original Act prohibited discrimination in the financing of housing on the basis of race, color, religion, or national origin. The Act was amended in 1974 to add sex as a prohibited basis and again in 1988 to add the protected categories of handicap and familial status. The 1988 Amendments also substantially revised the language of the financing discrimination section.

The Fair Housing Act prohibits any person whose business includes engaging in “residential real estate-related transactions” from discriminating in the terms or conditions of such transactions on a prohibited basis. The term “residential real estate-related transaction” includes the making or purchasing of a loan, or the providing of other financial assistance, that is secured by residential real estate or the purpose of which is to purchase, construct, improve, repair, or maintain a dwelling. Discriminatory appraisal

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52. The term “person” is defined as “one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, receivers, and fiduciaries.” 42 U.S.C. § 3602(d)(1988).
53. Id. § 3605(a).
54. Id. The term “dwelling” is defined as

any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.
practices also are prohibited.\textsuperscript{55}

This Act provides fairly comprehensive coverage. The prohibitions of the Act extend to all institutional mortgage lenders, such as banks, savings and loans, mortgage companies, credit unions, and insurance companies.\textsuperscript{56} All of the critical stages in the mortgage loan and approval process arguably are covered, including the solicitation and intake of applications,\textsuperscript{57} processing, appraising, underwriting, insuring, and closing. Postclosing activities, such as transactions in the secondary mortgage market\textsuperscript{58} and loan foreclosure procedures are covered also.\textsuperscript{59} Even loans not involving mortgages, such as those related to home improvement contracts, home repair transactions, personal or education loans that are secured by real estate, and home equity loans, are covered.\textsuperscript{60} HUD and the courts generally have construed the Fair Housing Act broadly in housing-finance discrimination cases.\textsuperscript{61}

\textit{Id.} § 3602(b). Section 804 of the Act, \textit{id.} § 3604, also has been construed to prohibit discriminatory financing decisions even though § 805 explicitly governs financing. Laufman v. Oakley Bldg. & Loan Co., 408 F. Supp. 489, 493 (S.D. Ohio 1976) (holding that § 804 is applicable to transactions involving the sale of housing).


56. Courts construing an earlier version of the financing discrimination section of the Act applied it to developers and persons or entities other than banks and financial institutions. See, e.g., Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir.) (holding that building contractors and land contractors could be liable for discriminatory real estate financing schemes), \textit{cert. denied}, 419 U.S. 1070 (1974); Love v. De Carlo Homes, Inc., 482 F.2d 613, 616 (5th Cir.) (finding provisions of the Act applicable to developers but affirming summary judgment because of a lack of evidence), \textit{cert. denied}, 414 U.S. 1115 (1973).

57. \textit{See supra} notes 52–54 and accompanying text.

58. As part of the mortgage loan transaction, the borrower signs a note requiring payment of the borrowed principal and interest to the lender. Like other forms of commercial paper, this note can be bought, sold, assigned, and transferred. Market activity in mortgage notes and related documents is called the secondary mortgage market or secondary market. DENNIS, \textit{supra} note 1, at 30. Discriminatory activity in such transactions is prohibited expressly by 42 U.S.C. § 3605(b) (1988). For an example of a case brought against a secondary market purchaser of a mortgage loan, see Old W. End Ass'n v. Buckeye Fed. Sav. & Loan, 675 F. Supp. 1100 (N.D. Ohio 1987).


60. \textit{See supra} note 54 and accompanying text.


Although this provision was the first equal-credit statute of the modern era and is now almost 25 years old, there are few reported cases construing it. This dearth of authority may be due to the relatively complex nature of the mortgage lending decision, to the difficulty in identifying discriminatory lending behavior, to the lack of enforcement activity by the U.S. Department of Justice, or to a combination of these and other reasons.

There exists, however, a well-developed body of case law construing Title VIII and those principles apply with equal force to housing finance discrimination claims brought
The Fair Housing Act is enforced principally by the Secretary of HUD, the Attorney General, and private persons. HUD is required to investigate complaints of lending discrimination filed with it, and may either conciliate the complaint, dismiss it, or, if probable cause exists to believe a discriminatory practice has occurred or is about to occur, issue a charge of discrimination. The issuance of such a charge by HUD prompts either an administrative hearing or a civil action in federal district court, an option that can be exercised by the complainant, the respondent, or any aggrieved person on whose behalf the initial complaint was filed. HUD has subpoena power under the Act and may order discovery to aid its investigations. The Act also bestows on HUD other enforcement duties, such as conducting studies, issuing regulations, making reports, and educating the public.

The Attorney General is authorized by the Fair Housing Act to initiate "pattern or practice cases" and to commence civil

under § 3605. Some important principles relating to housing finance have been established by the courts, such as the prohibition against redlining (discrimination based upon the location of property) and the elements of a prima facie case of lending discrimination. See generally SCHWEMM, supra note 3, § 18.2. Litigation involving the specific application of § 3605 remains relatively sparse, however.

63. Id. §§ 3612(o), 3613(e), 3614.
64. Id. § 3613. Other federal departments and agencies, including those with supervisory authority over regulated financial institutions, are responsible for administering their own programs and activities relating to housing "affirmatively to further the purposes" of the Act. Id. § 3608(d). Thus, many federal agencies have promulgated regulations relating to mortgage lending discrimination, at least in part, under the authority of the Act. See, e.g., 12 C.F.R. pt. 27 (1993) (Comptroller of the Currency); id. pt. 338 (Federal Deposit Insurance Corporation); id. pt. 528 (Office of Thrift Supervision); id. § 701.31 (National Credit Union Administration).
66. Id. § 3612(a).
67. Id. § 3611.
68. Id. §§ 3608, 3609. Additionally, see Executive Order No. 12,259, which makes the Secretary of HUD responsible for developing guidelines for other federal agencies subject to the Executive Order, for promulgating regulations, and for coordinating implementation of the Executive Order with other agencies. 3 C.F.R. 307 (1981), reprinted in 42 U.S.C. §§ 1982, 3608 notes (1988). HUD's enforcement responsibilities under the Fair Housing Act were expanded in 1988 to include more than mere conciliation efforts. Prior to the 1988 amendments, HUD was not a significant player in the enforcement of the finance discrimination provisions of the Act, and its limited activities in the field were criticized. See Dane, Federal Enforcement: 1989–90, supra note 9, at 260. Since the amendments HUD has shown some promise in this area, but has been encouraged to do more. Id. at 121–22.
69. 42 U.S.C. § 3614(a) (1988) (permitting the Attorney General to bring suit against any person "engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by" the Act).
actions referred by HUD. The Attorney General does not have subpoena power, but may enforce a subpoena issued by HUD.

Private persons are provided with two methods of enforcing the Act. Any person "aggrieved" by a discriminatory lending decision may file an administrative complaint with HUD. This administrative complaint may be conciliated, enforced by the issuance of a charge of discrimination, or dismissed. In the alternative, any aggrieved person may choose to initiate a civil action in federal or state court. Either method may result in injunctive relief, compensatory or punitive damages, and attorneys fees.

Although it contains strong prohibitory language, the Fair Housing Act is not an effective tool for combatting mortgage lending discrimination. Its principal shortcoming is its lack of a proscribed method to identify violations of the Act or

70. Id. § 3614(b).
71. Id. § 3614(c).
72. The term "aggrieved" has been interpreted broadly by the Supreme Court to include any person who would have standing under the constitutional case or controversy standard. See Havens Realty Corp. v. Coleman, 455 U.S. 363, 372-73 (1982); Gladstone, Realtors v. City of Bellwood, 441 U.S. 91, 103 (1979); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 208 (1972). SCHWEMM, supra note 3, at § 12.2, for a comprehensive discussion of standing under the Fair Housing Act.

Thus, in many of the early reported redlining cases the private plaintiffs were white applicants seeking loans in minority or integrated neighborhoods. See, e.g., Harrison v. Otto G. Heinzeroth Mortgage Co., 414 F. Supp. 66 (N.D. Ohio 1976), supplemented, 430 F. Supp. 893 (N.D. Ohio 1977); Laufman v. Oakley Bldg. & Loan Co., 408 F. Supp. 489 (S.D. Ohio 1976). In one case, the plaintiffs were white sellers of property for which a mortgage loan application had been made, the white realtor involved in the transaction, and a neighborhood organization. Old W. End Ass'n v. Buckeye Fed. Sav. & Loan, 675 F. Supp. 1100, 1102 (N.D. Ohio 1987). The applicants themselves were not even parties to the suit. Id. at 1102. But see Jorman v. Veterans Admin., 830 F.2d 1420 (7th Cir. 1987) (holding that residents of a racially changing neighborhood did not have standing under the Act to challenge the Veterans Administration's home loan guarantee program).

74. Id. § 3610(b).
75. Id. § 3613(a).
76. Id. § 3613(c).
patterns of discriminatory lending behavior. Individual loan applicants typically are not sophisticated enough to realize when they have been prescreened illegally or denied a mortgage loan on a prohibited basis. Lenders are not even required by the Act to notify rejected applicants of the reasons for any adverse action taken on the application. Swift and effective testing for evidence of disparate treatment in underwriting is virtually impossible. The only way to identify residential mortgage lenders who may be discriminating on prohibited bases is to compare their treatment of similarly qualified loan applicants, either by using statistical methods or on a loan-by-loan basis. This type of review can be accomplished only if mortgage loan application and approval data are made available to the public. The Fair Housing Act, however, does not contain a data collection or reporting requirement.

The Act also lacks sufficient clarity in a number of areas. A lender's marketing strategies may have a profound impact on the extent to which the lender makes loans "available" to minorities and minority neighborhoods, yet marketing techniques are not addressed in the Act. Intimately related to a

77. See Regan, supra note 14, at 647 & n.70 (stating that a prima facie case "requires a vast compilation of statistical data, involving significant expenditures of time and money").
78. See supra note 37.
79. Such a requirement is found in the Equal Credit Opportunity Act. See discussion infra Part II.B.2.
80. The Office of Thrift Supervision has emphasized the critical importance of marketing and advertising techniques by lenders:

Marketing practices. Savings associations should review their advertising and marketing practices to ensure that their services are available without discrimination to the community they serve. Discrimination in lending is not limited to loan decisions and underwriting standards; a savings association does not meet its obligations to the community or implement its equal lending responsibility if its marketing practices and business relationships with developers and real estate brokers improperly restrict its clientele to segments of the community. A review of marketing practices could begin with an examination of an association's loan portfolio and applications to ascertain whether, in view of the demographic characteristics and credit demands of the community in which the institution is located, it is adequately serving the community on a nondiscriminatory basis. The Office will systematically review marketing practices where evidence of discrimination in lending is discovered.

12 C.F.R. § 571.24(d) (1993). The Federal Reserve Board reportedly is looking more closely at lenders' marketing efforts. McGarity, supra note 9, at 24.
81. This is not to say that discriminatory or ineffective marketing to minorities and minority neighborhoods is not covered by the Act. Discriminatory advertising, such as the use of only white role models, clearly is prohibited by the Act. See 42 U.S.C.
lender's marketing strategies are the physical locations of its offices or branches and the availability of its residential loan products and services to the minority community, items about which the Act is silent. The issue of whether discriminatory activities by insurers of homeowners are covered by the Fair Housing Act remains unresolved. There also is uncertainty as to whether the mortgage insurance decision is a "residential real estate-related transaction" within the meaning of the Fair Housing Act. Other concepts related to discrimination in

§ 3604(c) (1988); see also Ragin v. New York Times Co., 923 F.2d 995, 999–1000 (2d Cir.), cert. denied, 112 S. Ct. 81 (1991). An argument can be made that the failure to affirmatively market mortgage loan products to minorities or minority neighborhoods is a sophisticated form of prescreening, and that either by design or in effect it does not "make available" mortgage loans to minorities in violation of § 3604(a). In September, 1992, the Department of Justice filed suit and simultaneously entered a consent decree in a mortgage lending discrimination case requiring that the defendant lender, among other remedies, (1) expand its lending territory to include minority neighborhoods; (2) advertise extensively in black-oriented newspapers and radio stations; (3) target sales calls to real estate agents and builders active in minority neighborhoods; and (4) open a branch office in a predominantly minority neighborhood. Joint Motion for Entry of Consent Decree, United States v. Decatur Fed. Sav. & Loan Ass'n, No. 92-CV-2198 (N.D. Ga. filed Sept. 17, 1992) (on file with the University of Michigan Journal of Law Reform). The issue of marketing is subject to enough debate, however, that some legislative clarification is necessary.

82. A study of credit needs in San Diego, California, found that minority census tracts contained only 5.7% of the city's bank branches, as compared to 21.9% of the city's population. David Paul Rosen & Assocs., Community Credit Needs Assessment: City of San Diego S-6 (Mar. 6, 1992) (unpublished report available from David Paul Rosen & Assocs.). The study stated that there was "a disturbing correlation between race and branch location irrespective of income." Id.


84. According to one expert in the field, "Mortgage insurance is a financial guarantee provided to a mortgage lender in return for a premium paid by a mortgage borrower, which assures that the borrower will fulfill the mortgage obligations." DENNIS, supra note 1, at 103. If the borrower defaults on the mortgage loan, the insurer indemnifies the lender for its loss, up to a certain limit. Many lenders are required by law to obtain residential mortgage insurance when the loan-to-value ratio of the residential loan exceeds 80%. The federal secondary mortgage market agencies—the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac)—generally will not purchase
housing finance with which the courts and regulators have had to contend, such as pre-screening, redlining, foreclosure practices, and the effects test, are not clearly addressed in the Act.

It is true that other legislation by Congress fills some of these gaps. But this legislation also has weaknesses that contribute to the overall infirmity of the federal scheme constructed to eliminate the mortgage lending discrimination dilemma.

2. Equal Credit Opportunity Act—The first Equal Credit Opportunity Act (ECOA) was passed in 1974 as amendments to Title VIII of the Consumer Credit Protection Act. Its purpose was to prohibit creditors from discriminating in consumer credit transactions on the basis of sex or marital status. The second Equal Credit Opportunity Act, enacted in 1976, expanded the range of prohibited bases to include race, color, national origin, religion, age, receipt of public assistance, and good faith exercise of any rights under the Consumer Credit Protection Act.

The ECOA prohibits "creditors" from discriminating on a prohibited basis "in any aspect" of a credit transaction. The term "creditor" is defined broadly to include not only the actual creditor, but also any person who regularly arranges for the


Fair housing advocates posit that mortgage insurance is covered by the Fair Housing Act in either 42 U.S.C. § 3604 or § 3605. HUD regulations are silent on the issue, but the Department of Justice takes the position that 42 U.S.C. § 3604 covers such a transaction. Brief of United States as Amicus Curiae at 13–21, Briceno v. United Guar. Residential Ins. Co. (N.D. Ohio Sept. 1, 1989) (No. 3:89 CV 7325) (on file with the University of Michigan Journal of Law Reform). The industry claims that it is not covered by the Act. Congress has held hearings on the issue of alleged discrimination in the private mortgage insurance industry, but has not yet clarified its position. See Secondary Mortgage Markets and Redlining: Hearings Before the Subcomm. on Consumer and Regulatory Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs, 102d Cong., 1st Sess. (1991) [hereinafter Secondary Mortgage Markets].


88. The ECOA is significantly broader than the Fair Housing Act in the types of credit transactions covered. Whereas the Fair Housing Act covers only loans secured by real estate or whose purpose is related to home ownership, the ECOA covers all types of consumer loans. Compare 42 U.S.C. § 3605(a) (1988) with 15 U.S.C. §§ 1691(a), 1691a(d) (1988).
extension of credit or any assignee of the original creditor who participates in the decision to extend credit.\(^8\) Thus, a buyer of mortgage loans in the secondary market who works closely with a mortgage loan originator and who participates in the originator's decision whether to approve or reject an application is covered by the ECOA, just as he is covered by the Fair Housing Act. The language is broad enough to include the entire spectrum of loan processing, including intake, underwriting, closing, loan terms and conditions, and perhaps foreclosure.

The ECOA also imposes an affirmative duty on creditors to notify rejected applicants of the reasons for any action taken against them.\(^9\) Without this requirement, a mortgage loan applicant would have no way of knowing why a lender disapproved her application, because the Fair Housing Act imposes no such duty. The ECOA also imposes a duty on each lender to furnish, upon request, a copy of any appraisal report that

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

15 U.S.C. § 1691a(e) (1988). Under this definition, a bank official who regularly participates in the making of credit decisions or in establishing a credit extension policy may be liable under the ECOA. See United States v. American Future Sys., Inc., 571 F. Supp. 551, 560–61 (E.D. Pa. 1983) (finding a company official who established a credit extension policy to be a creditor even though he did not review most applications), aff'd, 743 F.2d 169 (3d Cir. 1988). A natural gas utility that provides gas to its customers prior to being paid and a grocery store that has established accounts for its customers are both "creditors" within the meaning of this statute. In re Brazil, 21 B.R. 333, 334 (Bankr. N.D. Ohio 1982) (holding that a gas company is a creditor under the ECOA); Smith v. Lakeside Foods, Inc., 449 F. Supp. 171, 172 (N.D. Ill. 1978) (holding that a grocery store is a creditor under the ECOA).

was prepared as part of the application process.\textsuperscript{91} This require-
ment is unique to the ECOA and is not contained in the Fair
Housing Act.

Because it is limited to discrimination by creditors, however, the
ECOA ignores other necessary agents in the housing finance
process, such as appraisers, homeowners, mortgage insurers,
and secondary market participants who are not involved in the
actual loan origination decision.\textsuperscript{92} The ECOA also does not
require lenders to collect and report data on their housing
finance decisions. Neither does it expressly address other
housing finance discrimination problems such as marketing,
including branch locations and the availability and variety of
loan products, redlining, foreclosure practices, and the effects
test.\textsuperscript{93}

Moreover, the ECOA's enforcement scheme is inefficient,
primarily because it attempts to cover all credit transactions,
not just those associated with housing finance. No less than
twelve federal administrative agencies have enforcement
authority under the ECOA, five of which exercise supervisory
authority over some, but not all, mortgage lenders.\textsuperscript{94} The
enforcement methods available to these agencies vary greatly.
The Attorney General has authority to bring a civil action to

\textsuperscript{92} See Markham v. Colonial Mortgage Serv. Co., 605 F.2d 566, 571 (D.C. Cir.
1979) (holding that a real estate agent and mortgage broker who did not participate
in the loan approval decision were not liable under the ECOA). This does not mean
that a creditor is immune from liability for relying upon discriminatory appraisal or
insurance practices. For example, the regulations interpreting the ECOA prohibit
a creditor from using information to discriminate against an applicant on a prohibited
basis. 12 C.F.R. § 202.6(a) (1993). A lender who uses an appraisal that he knows is
racially discriminatory to deny a loan application violates this rule. The statute and
regulations also prohibit credit decisions that have a discriminatory effect. Cherry
v. Amoco Oil Co., 490 F. Supp. 1026, 1030 (N.D. Ga. 1980); 12 C.F.R. § 202.6(a), n.2
(1993). Denying loan applications based upon a private mortgage insurer's minimum
insurance guidelines, for example, could have such a discriminatory effect, thereby
exposing the creditor to liability.

\textsuperscript{93} See supra notes 80–84 and accompanying text.
\textsuperscript{94} These agencies are the Comptroller of the Currency, the Board of Governors
of the Federal Reserve System, the FDIC, the Federal Home Loan Bank Board, the
National Credit Union Administration, the Secretary of Transportation, the Secretary
of Agriculture, the Farm Credit Administration, the Small Business Administration,
the ICC, the SEC, and the FTC. 15 U.S.C. § 1691c(a) (1988). The first five listed above
have supervisory authority over certain financial institutions. Id.

Each of these agencies is authorized to issue regulations relating to enforcement
of the ECOA. Id. § 1691c(d). They also are authorized to refer any matter to the
Attorney General for litigation, or the Attorney General can bring an action in-
dependently of any such referral if a pattern or practice of discrimination is believed
to exist. Id. § 1691e(g), (h).
enforce the ECOA, but only upon recommendation from another enforcing agency or when a pattern or practice is alleged.\footnote{Id. § 1691e(h); see also United States v. Landmark Fin. Servs., Inc., 612 F. Supp. 623, 625–26 (D. Md. 1985) (allowing an action by the Department of Justice against creditors seeking the imposition of penalties and injunctive relief); United States v. Beneficial Corp., 492 F. Supp. 682, 688 (D.N.J. 1980) (allowing an action by the Department of Justice but not allowing the recovery of monetary damages), aff'd without opinion, 673 F.2d 1302 (3d Cir. 1981).}

The ECOA provides an express cause of action to private persons, but only to applicants for credit, as distinguished from the Fair Housing Act’s grant of standing to “any person aggrieved” by an allegedly discriminatory lending decision.\footnote{Compare 42 U.S.C. § 3613 (1988) with 15 U.S.C. § 1691e (1988). At least two courts have held in the residential mortgage context that persons or organizations other than the loan applicant do not have standing to assert a claim under the ECOA. Old W. End Ass’n v. Buckeye Fed. Sav. & Loan, 675 F. Supp. 1100 (N.D. Ohio 1987); Evans v. First Fed. Sav. Bank, 669 F. Supp. 915 (N.D. Ind. 1987).} There exists no administrative adjudicatory option as is available under the Fair Housing Act.

The ECOA has not been the subject of voluminous public and private litigation to date.\footnote{See Walter Gorman, Enforcement of the Equal Credit Opportunity Act, 37 BUS. LAW. 1335, 1345–48 (1982); Peter D. Schellie, Equal Credit Opportunity, 41 BUS. LAW. 1029, 1038 (1986). But see Laura L. Rogers & John L. Culhane, Jr., Developments Under the Equal Credit Opportunity Act and Regulation B, 43 BUS. LAW. 1571, 1577 (1988) (observing an increase in ECOA litigation activity).} This may be due to difficulties in quantifying damages for technical violations, such as the adverse-action notice requirement.\footnote{Gorman, supra note 97, at 1348–49.} With the exception of the adverse-action and appraisal-disclosure requirements, there is little in the ECOA that improves upon the prohibitions and enforcement mechanisms available in the Fair Housing Act to combat housing-finance discrimination,\footnote{See Regan, supra note 14, at 650–51. The one exception to this statement may be the additional protected categories not contained in the Fair Housing Act: age, marital status, and the receipt of public assistance.} and the ECOA enforcement scheme is markedly more confusing and less effective.

3. Home Mortgage Disclosure Act—The preceding discussion lamented the absence of any data collection, recordkeeping, or reporting requirements in the Fair Housing Act or the ECOA. This gap in the statutory scheme was partially eliminated in 1975 by the passage of the Home Mortgage Disclosure Act (HMDA).\footnote{Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, tit. III, 89 Stat. 1124, 1125; (codified as amended at 12 U.S.C. §§ 2801–2810 (1988)).} THe HMDA was enacted in response to studies by community and neighborhood organizations that demonstrated
the widespread existence of redlining by lenders in urban areas. Its purpose was to provide the public and public officials with sufficient information to determine whether depository institutions were serving the housing needs of the communities and neighborhoods in which the institutions were located. The HMDA requires most lending institutions to compile and make available for public inspection, the number and total dollar amount of mortgage loans originated or purchased by the institution during each fiscal year.

The data required to be disclosed by HMDA has been used extensively by community groups and local governments to identify whether historically redlined neighborhoods are still suffering from discriminatory lending policies and to identify which lenders have a poor record of performance in these areas. By 1984, over 200 studies using HMDA data had been performed. Virtually all of the recent comprehensive studies that have tried to determine whether mortgage lending discrimination problems still exist in urban areas rely heavily on HMDA data.

Although the HMDA data is extremely valuable to fair housing advocates, the HMDA provides no independent enforcement mechanisms. It remains solely a recordkeeping and disclosure statute; it does not itself prohibit redlining or discriminatory lending practices. It does not purport to deal with lender marketing behavior or practices of supporting industries that may inhibit the flow of mortgage monies into the

101. See supra note 9.
105. See supra notes 9–10.
108. See Regan, supra note 14, at 649; Tolcott, supra note 15, at 158 & n.38, 159.
minority community.\textsuperscript{109} The theory behind the HMDA was that the public disclosure of geographic lending patterns by depository institutions would "deter" them from practicing redlining.\textsuperscript{110} The HMDA does not provide any private cause of action to persons aggrieved by a lender's discriminatory practices nor does it allow private actions to enforce violations of the HMDA. The requirements of the Act instead are enforced solely by the federal financial regulatory agencies. More recent studies suggest that, contrary to legislative intent, the disclosure requirements of the HMDA have not deterred lenders from depriving older, minority neighborhoods of mortgage credit.

Moreover, the type of data required by the HMDA remains limited. Overall approval and rejection rates for each lender, as well as the total number and dollar value of loans originated or purchased, can be calculated and categorized according to the race, sex, income level, and census tract of the applicant. The reasons for rejections, however, need not be disclosed.\textsuperscript{111} Even if the bases for rejections were reported, it would be difficult to draw any definitive conclusions about intentionally discriminatory behavior without being able to access and review individual loan files.\textsuperscript{112}

Thus, even with the overlay of the HMDA's data requirements and the prohibitive sections of the Fair Housing Act and the

\textsuperscript{109} There is growing concern among fair-lending activists that private mortgage insurance companies and the secondary mortgage market have adopted policies and underwriting criteria that effectively redline inner-city neighborhoods and unnecessarily discriminate against low-income borrowers. See \textit{Community Reinvestment Act Hearings}, supra note 106 (testimony of Mildred Brown, President of ACORN); \textit{id.} at 39–40 (statement of Gale Cincotta); \textit{id.} at 260 (statement of the Comptroller of the Currency); \textit{id.} at 450 (letter from Allen J. Fishbein to Senator William Proxmire, May 10, 1988); see also \textit{Secondary Mortgage Markets}, supra note 84. These practices include requiring minimum loan amounts, requiring minimum downpayments, imposing unduly restrictive credit rating requirements, adopting restrictions on considerations of certain sources of income, and using abandonment ratios in the relevant neighborhood. \textit{Id.}; see also Bradford, supra note 14, at 11. Even lender representatives acknowledge that certain lending practices, such as minimum loan amounts and outdated underwriting guidelines, may be unintentionally racially biased. \textit{Mortgage Bankers Ass'n of Am.}, \textit{HMDA Task Force Report} 9 (1992). Evidence continues to surface that homeowner insurers engage in redlining practices. See, e.g., \textit{H.R. Rep. No. 865, 96th Cong., 2d Sess.} 8 (1980); David I. Badain, \textit{Insurance Redlining and the Future of the Urban Core}, \textit{16 Colum. J.L. & Soc. Pros.} 1 (1980); Gregory D. Squires \& William Velez, \textit{Insurance Redlining and the Transformation of an Urban Metropolis}, \textit{23 Urb. Aff. Q.} 63 (1987).


ECOA, significant gaps remain. The HMDA prohibits nothing, so the weaknesses in coverage that exist under the Fair Housing Act and the ECOA remain. Additionally, private citizens, who can best enforce the latter two statutes, still lack access to all of the available data they need. A comprehensive challenge to remaining discriminatory lending practices, must find its strength elsewhere.

4. Community Reinvestment Act—The Community Reinvestment Act (CRA)\textsuperscript{113} was introduced in Congress by Senator William Proxmire on January 24, 1977. The CRA, like the HMDA, was designed to improve the performance of regulated financial institutions in urban neighborhoods. The Senate Banking Committee believed that existing law provided general authority to the federal financial agencies to assess a regulated lender’s performance in meeting the credit needs of urban communities, but that the regulatory agencies were not adequately doing so.\textsuperscript{114} The Senate Banking Committee criticized the Federal Home Loan Bank Board and other federal financial supervisory agencies for not monitoring lenders’ performances in these areas.\textsuperscript{115} The Committee emphasized, as it did in promoting the enactment of the HMDA in 1975, the “amply documented cases of red-lining.”\textsuperscript{116} Accordingly, the CRA requires federal financial supervisory agencies to “assess” a regulated institution’s record of meeting the credit needs of its community, including low- and moderate-income neighborhoods, and to take the institution’s record “into account” when evaluating an institution’s application to establish a depositary facility.\textsuperscript{117}

Like the HMDA, however, the CRA does not itself prohibit discriminatory conduct. It merely instructs federal regulators to consider certain factors when reviewing depositary facility applications.\textsuperscript{118} The CRA is vague and provides little guidance

\textsuperscript{114} S. REP. No. 175, 95th Cong., 1st Sess. 33 (1977).
\textsuperscript{115} Id. at 33–35.
\textsuperscript{116} Id. at 33.
\textsuperscript{118} Regulators apparently have not been doing much in the first decade of the CRA’s existence. See generally Community Reinvestment Act Hearings, supra note 106; Robert C. Art, Social Responsibility in Bank Credit Decisions: The Community Reinvestment Act One Decade Later, 18 PAC. L.J. 1071 (1987); Dane, Federal Enforcement: 1980s, supra note 9, at 260–62; Dane, Federal Enforcement: 1989–1990 supra note 9, at 122–23.
to the regulators, the institutions regulated, or the interested public. Further the Act does not provide any express cause of action to those wishing to challenge a regulated institution's compliance with the CRA, nor does it provide for the collection or reporting of relevant information concerning specific institutions. It applies only to regulated financial institutions, a term that generally excludes mortgage companies that are unaffiliated with a government-regulated lender. Therefore, even in conjunction with the other statutes identified above, the CRA is not an effective means of eliminating discriminatory lending behavior.

5. Other Statutes Prohibiting Discrimination in Housing Finance—(a) The Civil Rights Acts of 1866 and 1870—The Civil Rights Acts of 1866 and 1870 were passed in an effort to rid the United States of the relics of slavery. These statutes were passed in an era largely predating the development of the lending and mortgage industries and thus are not as clear in scope and language as other prohibitive statutes, such as the Fair Housing Act and the ECOA. Nevertheless, the courts have had little difficulty in concluding that these laws prohibit

119. See Eisen & Dennan, supra note 13, at 335; Tolcott, supra note 15, at 159–62.
120. Federal regulations promulgated under authority of the CRA have established a protest procedure whereby interested parties can challenge a regulated lender's application to establish a branch bank or merge with another regulated financial institution. See, e.g., 12 C.F.R. § 543.2 (1993). This procedure has proven invaluable to community advocates wishing to challenge a lender's practices in inner-city neighborhoods. See Dane, Federal Enforcement: 1980s, supra note 9, at 261. Indeed, community organization use of the CRA protest procedure has been the major method of enforcement of federal policy against discriminatory lending practices affecting older, minority, urban neighborhoods. Art, supra note 118, at 1095–1101.
121. Regulations promulgated under authority of the CRA require regulated institutions to adopt and to publish a "CRA Statement," which typically contains: a delineation of the local community, the types of credit available, and the efforts of the institution to assess and meet community credit needs. See, e.g., 12 C.F.R. §§ 25.4, 228.4, 345.4, 563e.4 (1993). The Statements generally are not helpful in analyzing an institution's compliance with other nondiscrimination statutes such as the Fair Housing Act or the ECOA.
123. See Regan, supra note 14, at 656–61 (identifying limitations of the CRA); Tolcott, supra note 15, at 159–62, 170–71 (same).
125. For example, they prohibit discrimination only on the basis of race and do not prohibit discrimination based on religion, sex, national origin, marital status, age, or the receipt of public assistance. The concept of race discrimination embodied in them is broad enough, however, to include one's ethnic background or ancestry. Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617–18 (1987); Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987).
discriminatory lending practices.\textsuperscript{126} These statutes differ significantly from more recent equal-credit laws because a plaintiff must adduce evidence of discriminatory intent in order to prevail.\textsuperscript{127} Under the Fair Housing Act and the ECOA, proof of a discriminatory impact is sufficient.\textsuperscript{128} In a discriminatory treatment case the element of intent should not be a particularly onerous burden for the plaintiff, particularly because the elements of a prima facie case of housing-finance discrimination are the same under these statutes as under the Fair Housing Act.\textsuperscript{129} If the claim is based on the discriminatory impact of the lender's policies on a class of applicants or on certain neighborhoods, a recovery under section 1981 and section 1982 may be more difficult. In order to recover, the plaintiff will have to prove that the lender

\textsuperscript{126} See, e.g., Evans v. First Fed. Sav. Bank, 669 F. Supp. 915 (N.D. Ind. 1987) (holding that discrimination in the financing of owned property is a violation of § 1982); Contract Buyers League v. F & F Inv., 300 F. Supp. 210, 216 (N.D. Ill. 1969) (holding that discrimination in the sale of residences violates § 1982), cert. denied, 400 U.S. 821 (1970); cf. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 n.10 (1968) (declining to express a view as to whether § 1982 extends to discriminatory financing). One of the most expansive readings of § 1982 established the proposition that housing developers are prohibited by that section from "exploiting" a dual housing market created over the years by other actors in the market. Clark v. Universal Builders, Inc., 501 F.2d 324, 331–34 (7th Cir.), cert. denied, 419 U.S. 1070 (1974). In Clark the developer required that sales of its homes to blacks be made only pursuant to land installment contracts rather than conventional mortgages. \textit{Id.} at 335–36. In response to the defendants' arguments that they were merely making economically justified decisions based upon existing market conditions, the court said:

\begin{quote}
We cannot accept this contention for although the laws of supply and demand may function so as to establish a market level for the buyer in the black housing areas, it is clear that these laws are affected by a contrived market condition which is grounded in and fed upon by racial discrimination. . . . Accordingly, neither prices nor profits—whether derived through well-intentioned, good faith efforts or predatory and unethical practices—may reflect or perpetuate discrimination against black citizens.
\end{quote}

\textit{Id.} at 331–32.

\textsuperscript{127} General Bldg. Contractors Ass'n., Inc. v. Pennsylvania, 458 U.S. 375, 391 (1982) (holding that an employer must discriminate purposefully to be liable under § 1981); Studifin v. New York City Police Dep't, 728 F. Supp. 990, 994 (S.D.N.Y. 1990) (dismissing plaintiffs' civil rights action against his landlord, pursuant to § 1981, § 1982, and § 1985(3) of the Civil Rights Act, because plaintiff failed to describe or claim any intentional or purposeful discrimination by the landlord).


intended to discriminate when it promulgated or applied the challenged procedures.

These statutes also differ from more recent legislation in that they lack any federal enforcement authority. Neither the Attorney General nor any other federal agency is expressly authorized to initiate action or otherwise enforce the statutes. The statutes also do not contain any useful record keeping, data collection, or reporting requirements, nor are they broad enough to encompass many facets of the housing-finance decision.

(b) Title VI of the Civil Rights Act of 1964—Title VI of the Civil Rights Act of 1964\(^{130}\) (Title VI) prohibits discrimination under any program receiving federal financial assistance.\(^{131}\) The term “federal financial assistance” includes grants and loans of federal funds, as well as any federal agreement, arrangement, or other contract which has as one of its purposes the provision of financial assistance.\(^{132}\) The term “program” includes any program, project, or activity qualifying for the provision of financial aid.\(^{133}\)

Responsibility for federal enforcement of Title VI rests with each federal agency providing the federal assistance covered by Title VI. Although the Attorney General is not given independent authority to enforce it, the Department of Justice has interpreted Title VI implicitly to authorize the Attorney General to commence a civil action upon referral from an enforcing agency.\(^{134}\)

A private cause of action to enforce the provisions of Title VI has been recognized judicially.\(^{135}\) One court has held that Title VI provides a cause of action for geographic redlining against an institution subject to Federal Home Loan Bank Board (now Office of Thrift Supervision) regulations.\(^{136}\) Another court has held, however, that Title VI does not provide a private cause of action to a rejected applicant for a home-repair loan who

\(^{131}\) Id. § 2000d.
\(^{132}\) 12 C.F.R. § 529.2(d) (1993).
\(^{133}\) Id. § 529.2(f). Title VI and the regulations promulgated pursuant to it by the Office of Thrift Supervision do not apply to any federal financial assistance by way of insurance or guaranty contracts. Id. § 529.3. Thus, FHA and VA loans are not covered.
\(^{134}\) See U.S. COMM’N ON CIVIL RIGHTS, supra note 14, at 59.
alleges discrimination under a community-development, block-grant program.\(^{137}\)

(c) **Title I of the Housing and Community Development Act of 1974**—Title I of the Housing and Community Development Act of 1974\(^{138}\) (HCDA) prohibits discrimination based on race, color, national origin, or sex in the implementation or benefits of any program or activity funded in whole or in part under the HCDA.\(^{139}\) HUD and the Attorney General have express enforcement authority,\(^{140}\) but restrictive standing requirements and the lack of an express private enforcement mechanism have prevented private litigants from enforcing the nondiscrimination provisions.\(^{141}\)

(d) **Title V of the National Housing Act**—Title V of the National Housing Act\(^{142}\) prohibits discrimination on the basis of sex in extending mortgage credit on “federally related” mortgage loans.\(^{143}\) The term “federally related” is defined to apply to virtually all conventional, FHA, and VA loans.\(^{144}\) Lenders are prohibited by this statute from refusing to consider the combined income of both husband and wife for the purpose

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139. 42 U.S.C. § 5309 (1988). The most notable programs funded by the HCDA are Community Development Block Grants (CDBG) and Urban Development Action Grants (UDAG). The HCDA also requires compliance with the Fair Housing Act. Id. § 5304(b)(2).

140. Id. § 5309 (1988).


144. A “federally related mortgage loan” is one that is secured by residential property designed for occupancy by one to four families, and (1) is made by a lender whose deposits are insured by a federal agency or by a lender regulated by a federal agency, (2) is insured, guaranteed, or assisted by HUD or any other agency of the federal government, (3) is eligible for purchase by Fannie Mae, Ginnie Mae, or Freddie Mac, or (4) is made by any “creditor” who makes or invests in residential real estate loans aggregating more than $1,000,000 per year. 12 U.S.C. § 1735f-5(b) (1988). The term “creditor” is defined to include a person or organization that regularly extends consumer credit payable in more than four installments and is the entity to whom the debt is initially payable. 15 U.S.C. § 1602(f) (1988).
of extending mortgage credit to a married couple or spouse thereof. Enforcement authority resides with HUD and there is no apparent private cause of action.

C. Federal Administrative Agency Regulations

There are at least a dozen sets of federal regulations promulgated by six different federal regulatory agencies that pertain in some way to housing finance discrimination matters. They each cover different institutions and regulate different acts. They all ultimately are designed to assist in the fight against discriminatory lending behavior, but none of them is comprehensive. Some are enforced only by the federal

145. See Regulation Chart, infra Appendix.

146. By far the most comprehensive of the fair lending regulations is Regulation B, which administratively enforces the ECOA. 12 C.F.R. § 202 (1993). Promulgated by the Federal Reserve Board, Regulation B is administered by each of the federal agencies identified in the ECOA. Id. pt. 202.1(a).

Regulation B is broad in scope. It prohibits creditors from discriminating against any applicant on a prohibited basis regarding any aspect of a credit transaction. See id. § 202.1(b). The term "prohibited basis" is defined by Regulation B to include not only the characteristics of the applicant, but also the characteristics of individuals with whom an applicant deals. 12 C.F.R. § 202.2(z) (1993). For example, a creditor may not discriminate against a non-Jewish applicant because of that person's business dealings with Jews, or discriminate against an applicant because of the characteristics of the prospective tenants in an apartment complex to be constructed with the proceeds of the credit. Id. Creditors are prohibited from discriminating because of the characteristics of other individuals residing in the neighborhood where the property offered as collateral is located.

Regulation B prohibits creditors from prescreening applicants by discouraging them, on a prohibited basis, from making or pursuing an application. 12 C.F.R. § 202.5(a) (1993). It prohibits creditors from inquiring about or requesting certain information unrelated to the applicant's creditworthiness, such as sex, marital status, race, or birth control practices. Id. § 202.5(b). Even certain information permitted to be collected may not be used by a creditor to discriminate against an applicant on a prohibited basis. Id. § 202.6(a). Consistent with the legislative history of the ECOA, Regulation B makes it clear that the "effects test" is applicable to a creditor's determination of creditworthiness. Id. § 202.5(b) & n.2. Thus, lender policies, practices, or requirements that have an adverse impact on protected groups constitute a violation of the ECOA even without any showing of discriminatory intent.

The term "creditor" is broadly defined to include anyone who,"in the ordinary course of business, regularly participates in the decision of whether or not to extend credit." Id. § 202.2(l). The term includes the "creditor's assignee, transferee, or subrogee who so participates." Id. According to the regulation, "the term also includes a person who, in the ordinary course of business, regularly refers applicants or prospective applicants to creditors, or selects or offers to select creditors to whom a request for credit may be made." Id. Thus, a secondary mortgage market participant who participates in a creditor's decision to approve or to reject an application falls within
agency that implemented them, while others are enforced simultaneously by many different agencies. Some lending institutions are subject to only one set of regulations, while others may be responsible for complying with as many as five different sets of regulations. The various regulations make only passing reference to such crucial stages of the mortgage lending process as preapplication inquiries, underwriting, appraisal, and insurance.

A layperson trying to determine which regulations are applicable to a particular lender would have an easier time deciphering the Rosetta Stone. Aside from the gaps in coverage, the redundancies, and the difficulties in interpretation, merely determining who is covered by which guidelines would discourage even the most intrepid mortgage loan applicant.

the meaning of "creditor" under Regulation B.

Other federal regulations that apply specifically to housing financing by regulated lenders are as strong as, and in some respects more comprehensive than, Regulation B. Regulations adopted by the Office of Thrift Supervision (OTS) expressly prohibit geographic redlining, a lender's reliance on discriminatory appraisals, the promulgation of discriminatory loan underwriting guidelines, prescreening, and discriminatory advertising. Id. §§ 528.2, 528.2a, 528.3, 528.4. These regulations also require each member institution to make its loan underwriting guidelines available to the public upon request at each of its offices, and requires each member institution to review its underwriting guidelines annually to ensure equal opportunity in lending. Id. § 528.2a(b).

The OTS regulations contained in 12 C.F.R. § 571.24 (1993) are intended to supplement its other nondiscrimination regulations and to aid member institutions in developing and implementing nondiscriminatory lending policies. Id. § 571.24(a). Of major significance is the regulation's clarification that "[t]he use of lending standards which have no economic basis and which are discriminatory in effect is a violation of [the] law even in the absence of an actual intent to discriminate." Id. § 571.24(b). This section also identifies many practices which may be discriminatory in effect, such as requiring fluency in the English language, or refusing to lend to, or offering less favorable terms to applicants because of the income level of residents in an area. Id. at § 571.24(d). The regulation encourages member institutions to review their advertising and marketing practices to ensure that their services are available without discrimination to the community they serve. The OTS explains that an institution does not meet its obligations to the community or fulfill its equal-lending responsibility if its marketing practices and business relationships with developers and real estate brokers improperly restrict its clientele to limited segments of the community.

Lending regulations promulgated in 1989 by the chief federal enforcer of the Fair Housing Act, HUD, unfortunately are vague and tepid. See 24 C.F.R. §§ 100.110–.135 (1993). HUD had an opportunity to adopt strong, specific regulations applicable to the entire lending industry, and was urged to do so, but its final product fell short of expectations. See Dane, Federal Enforcement: 1989–1990, supra note 9, at 121.

See generally Dennis, supra note 51.
seeking to investigate whether she has been the subject of prohibited discrimination.

If the regulatory scheme is a distorted reflection of the statutory scheme itself, it is only slightly so. Because the federal government has addressed the mortgage lending discrimination problem in a piecemeal, ad hoc manner, a confusing and incomplete puzzle of prohibitions, requirements, and enforcement mechanisms has resulted. Rather than attempting to improve the current framework, Congress should dismantle it and start anew.

III. ELIMINATION OF THE LABYRINTH

The previous discussion suggests the need for a unified, comprehensive approach to the currently existing problems in coverage and enforcement. This Article proposes to consolidate all extant legislation into one statute and to add provisions that the current scheme lacks. This statute would cover every aspect of the process that leads to a mortgage loan, from the lender's marketing and outreach programs, to preapplication inquiries, to loan processing and underwriting, and continuing through postclosing activities such as the sale and servicing of mortgage loans and their retirement. The law should include not only prohibitions against discrimination and unfair treatment, but also affirmative duties such as requirements of data collection and reporting, easy identification of the location of lender facilities, and access to those facilities. Enforcement powers should be consolidated into one federal agency with the combined financial and civil rights expertise necessary to identify and to eliminate barriers to equal-credit access. A private right of action also should be provided as an alternative means of enforcement of the statute to ensure that any failures in federal enforcement efforts do not hinder the act's ultimate goal of eliminating racially discriminatory barriers to mortgage credit.

A. The Mortgage Lending Discrimination Act

There are now two executive orders, nine federal statutes, and perhaps a dozen different regulations that prohibit or relate to discrimination in the financing of housing. This fractured
program of addressing mortgage-lending discrimination exists because home financing is an element of many other federal interests. Mortgage loans are (1) contracts involving (2) the extension of credit (3) for the purchase of residential (4) property. Many mortgage loans are insured, guaranteed, purchased, or sold by federal agencies or corporations.

Trying to eliminate lending discrimination with a piecemeal system is not a sensible approach. A single law that amalgamates all prohibitions and requirements relating to mortgage-lending discrimination would be immensely simpler and more efficient. That residential mortgage loans implicate many different federal interests does not require diffuse and uncoordinated regulation of civil rights responsibilities. Moreover, the strong federal interest in civil rights, combined with the federal government's historical involvement in the financial industry, make a statutory marriage between the two regulated areas a natural step. The appeal of having all civil rights responsibilities in one location is the same whether one is a fair housing advocate or a conscientious lender.

B. Scope of Coverage

The act which I am proposing would encompass every aspect of a mortgage lender's practices that affect the availability of mortgage credit, as well as every part of the mortgage-lending decision-making process. The former will ensure that minority and inner-city applicants have the same access to home mortgage credit as suburban, white communities. The latter will ensure that applications from minorities or minority neighborhoods receive equal treatment in the processing, underwriting, selling, and servicing of loans.

Thus, the legislation expressly should include the implied obligation contained in the CRA of "meeting the credit needs" of minorities and minority neighborhoods. Lenders should be required to market their mortgage-lending products to minorities and minority neighborhoods through standard marketing tools, including the mass media. Lenders should be required to provide the same services and facilities in or near minority neighborhoods (such as branch offices, loan origination offices, and weekend and evening hours) as they provide to nonminority neighborhoods. Loan products and pricing policies should be required to be designed so that their appeal to minorities and minority neighborhoods is the same as their appeal to nonminorities and nonminority neighborhoods. To ensure that minorities and minority neighborhoods are treated alike in the processing of loan applications, the law should prohibit discriminatory treatment, whether intentional or not, at every stage of the process. Phases covered by the act would include initial screening (whether by telephone or at a face-to-face encounter with the lender), applying for the loan, processing the loan application, underwriting the loan, making counteroffers, assisting loan applicants in completing the application process or overcoming problems, closing the loan, selling the loan in the secondary market, servicing the loan throughout its life, and using foreclosure proceedings if a default should occur.

The act should not be limited only to the actions of lenders. It also should apply to any support industry that assists the lender or that provides data necessary to make a decision on

156. The act need not be limited only to the protection of minorities or other groups currently protected by the Fair Housing Act and the ECOA. Commentators have suggested enacting legislation prohibiting any form of geographic redlining, not just redlining based on racial or ethnic factors. See Regan, supra note 14, at 661.

157. In this regard, federal employment guidelines may provide useful guidance. All "federal contractors" within the meaning of Executive Order 11,246, the Rehabilitation Act of 1973, and the Vietnam Era Veterans' Readjustment Act are required to adopt and implement "Affirmative Action Plans" to increase their employment of, and deter discrimination against, minorities, women, the handicapped, and qualified veterans. 29 U.S.C. § 793 (1988); 41 C.F.R. §§ 60-3.1 to 60-3.18 (1993); id. §§ 60-250.5 to 60-250.7; id §§ 60-741.5 to 60-741.7. This affirmative action plan requirement is imposed as a condition of doing business with the federal government. Like these employers, the vast majority of lenders enjoy the benefits and privileges of federal programs (such as federal charters, federal insurance or guarantees, and other special federal programs) or do business with the federal government (such as HUD, the VA, Fannie Mae, and Freddie Mac). See supra note 155. It seems quite appropriate, therefore, to impose a similar "Affirmative Marketing Plan" requirement on lenders who enjoy the benefits of federal programs.
a loan application. Thus, the appraiser and the appraisal process, the credit report and the credit reporting agency, the homeowners insurer and the insurance underwriting decision, and the private mortgage insurer and its underwriting process all should be within the act's scope. Every step necessary to the mortgage-lending decision-making process must be encompassed within the act; otherwise mortgage loan applicants will not be protected fully from all possible sources of discriminatory activity.

C. Data Collection, Recordkeeping, and Reporting

A major impediment to effective enforcement of the current statutory and regulatory scheme is the difficulty in identifying racially discriminatory mortgage-lending behavior and lenders who are not meeting the credit needs of minorities and minority neighborhoods. The data required to be collected and publicly reported under the HMDA are of some value, but those requirements are incomplete. Currently, there is no access to data from which a rejected mortgage loan applicant can determine whether he has been treated differently from other similarly situated applicants. There is no way for the public to determine what efforts a particular lender has made to service minority markets as compared to its efforts to serve nonminority markets. Logistical problems with traditional investigative techniques make identification difficult in the absence of other relevant data concerning the consistency and patterns of a particular lender's record. A strongly worded, all-encompassing statute prohibiting mortgage-lending discrimination and requiring lenders to meet the credit needs of minorities and minority neighborhoods will be useless if violators cannot be identified easily.

Thus, the act should require the collection, compilation, and reporting of relevant data from applications. This data should

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158. For example, a special task force of the Mortgage Bankers Association has recommended that private mortgage insurers legally be required to report information regarding loans on which they deny insurance and also that lenders assure that appraisal reports do not contain obvious or hidden references to minority neighborhoods. MORTGAGE BANKERS ASS'N OF AMERICA, supra note 109, at 18.
159. See supra notes 78–79 and accompanying text.
160. See supra note 77–79 and accompanying text.
include race, sex, length of employment, credit ratings, income-to-debt ratios, and perhaps other important underwriting factors. Assuming that the confidentiality of specific, mortgage-loan applicants can be protected, the comparison of this data will permit researchers and other sophisticated observers to identify lenders who are treating similarly situated applicants differently based upon protected characteristics or geographic location.\textsuperscript{161}

Some of the regulations promulgated by the federal financial regulatory agencies require lenders to adopt and publish a CRA statement containing certain information relevant to the lenders' efforts to meet the credit needs of low- and moderate-income communities.\textsuperscript{162} Generally, these CRA statements include a listing of the types of credit products made available by the lender and a description of what efforts the lender is making to meet the credit needs of the community.

The preparation and issuance of such CRA statements, or a more detailed variant of them, should be a part of the comprehensive legislative package, rather than a regulatory requirement subject to revision or rescission by a regulatory agency. The CRA statement should require more detail than current regulations. It should include such information as the locations of the lender's branch offices, or mortgage origination offices, employment statistics broken down by protected categories, the marketing and advertising efforts made by the lender to solicit loans from minorities and minority neighborhoods, and other information that would be of assistance to fair-housing advocates, the public, and federal regulators in investigating of the lender's overall performance with minority applicants and applications from minority neighborhoods.\textsuperscript{163}

\section*{D. Enforcement}

When Congress has passed a comprehensive statute to address a particular discrimination problem, it historically has placed

\begin{itemize}
\item \textsuperscript{161} One commentator has suggested that lenders should be required on request "to justify a particular mortgage loan denial vis-à-vis loans granted by the [lender] in nearby communities." Regan, supra note 14, at 651, 658.
\item \textsuperscript{162} See supra note 121.
\item \textsuperscript{163} See, e.g., Tolcott, supra note 15, at 157–58 & n.38 (suggesting the mandatory disclosure of deposit-source data by location).
\end{itemize}
enforcement authority within a single federal agency, sometimes a newly created one. For example, the Equal Employment Opportunity Commission is responsible for enforcing most of the nation's laws prohibiting employment discrimination.\textsuperscript{164} The Department of Justice has been granted authority to challenge discriminatory educational systems.\textsuperscript{165} In the Fair Housing Act, Congress gave comprehensive enforcement powers to HUD.\textsuperscript{166}

Tackling the problem of residential-mortgage-lending discrimination requires such a high degree of experience, knowledge, and sophistication that it is sensible to have only one federal agency responsible for enforcing the law in this area. This will ensure consistency in the development of substantive regulations, investigatory procedures, enforcement mechanisms, and penalties. It will be more efficient and cost-effective to channel training and administrative costs to one agency, rather than splitting those costs among two or more agencies.\textsuperscript{167}

That different types of financial institutions historically have been regulated separately is not an argument against single agency enforcement. Lenders have been regulated separately because they historically have served different functions.\textsuperscript{168} Deregulation has blurred these separate functions in recent years. In any event, there is no significant difference between lenders with respect to equal lending responsibilities. Such responsibilities should be the same for all lenders. If the Equal

\begin{thebibliography}{167}
\item 167. The current structure of the banking regulatory system may be one of the reasons why mortgage lending discrimination remains a problem. See Tolcott, supra note 15, at 178–79. For decades, commentators have lamented the complexity and lack of logic of the federal regulatory system, "unquestionably the most confusing aspect of our banking structure." Howard H. Hackley, Our Baffling Banking System, 52 Va. L. Rev. 565, 592 (1966).
\item 168. See generally DENNIS, supra note 1, at 3–19; Hackley, supra note 167, at 569–80, 592–96.
\end{thebibliography}
Employment Opportunity Commission can enforce the country's equal employment laws across industry lines, then a single federal agency should be able to enforce a comprehensive equal-lending law. In this particular area, there is no rationale for multiple federal enforcement.\textsuperscript{169}

The more difficult question concerns which regulatory agency should assume such responsibility. The agency must have both a sophisticated knowledge of the financial industry and experience in, and a commitment to, the protection of civil rights. The federal financial regulatory agencies have the former qualification, but lack the latter. HUD arguably has the latter, but does not enjoy the former. A third possibility is the establishment of a separate agency. Perhaps the most logical solution would be to place enforcement authority within the jurisdiction of HUD, but to ensure that a separate Office of Mortgage Lending Discrimination is established and staffed with both experienced civil rights investigators and former financial institution regulators. Because the proposed legislation's primary focus is the protection of civil rights, it makes sense to choose an agency that has civil rights experience to shoulder the regulatory responsibility. Moreover, the federal financial regulatory agencies have other primary responsibilities, such as insuring the safety and soundness of the financial institutions that they regulate. Further, those agencies have not been noted for their vigorous enforcement of the civil rights laws, despite their legal obligation to do so.\textsuperscript{170}

To the extent that conflict may arise between the safety and soundness of an institution and its obligations under the nondiscrimination legislation, the conflict should be resolved through consultation between two separate federal agencies rather than internally within a single agency. The establishment of a new, separate agency whose sole responsibility would be the enforcement of this act seems unnecessary and inefficient. Not only would the creation of a new agency involve an expensive, logistical burden, it also might lose the institutional expertise in either civil rights or financial matters that HUD and the federal supervisory agencies currently possess.

Another question raised by the proposed act concerns the types of enforcement mechanisms to be used. Financial

\begin{footnotes}
\item\textsuperscript{169} Cf. Hackley, \textit{supra} note 167, at 827-30 (proposing the consolidation of all federal banking regulatory authority into a single agency).
\item\textsuperscript{170} See \textit{supra} note 118.
\end{footnotes}
institutions in violation of the HMDA, the CRA, their implementing regulations, or Executive Orders 11,063 and 12,259 are subject to nonadjudicatory sanctions by the enforcing agency. Lenders charged with violating the ECOA, the Civil Rights Acts of 1866 and 1870, and perhaps Title VI can be sued in federal court by private citizens. Lenders who allegedly have violated the financing provisions of the Fair Housing Act can be prosecuted by HUD in adjudicative administrative proceedings, or can be sued by the Department of Justice or private citizens in federal court.

Adopting the optional adjudicatory system established by the Fair Housing Act, with some modifications, will be the most effective means of enforcement. Although it may be too early to determine whether HUD's relatively new administrative enforcement authority will be implemented effectively, it certainly has more promise than the supervisory hand-slapping that has characterized the federal financial agencies' enforcement efforts to date. There are many advantages to using specialized administrative adjudication over other methods of enforcement, and whether administrative or judicial it should be retained as a part of the enforcement scheme. Remedies available to the government should include cease and desist orders, fines and sanctions, affirmative injunctive relief, and monetary damages for those adversely affected by discriminatory lending behavior.

An absolutely critical component of the enforcement scheme must be the retention of a private right of action. With respect to challenges to allegedly discriminatory treatment, the Fair Housing Act's broad standing provisions allowing any

171. See supra note 68.
172. See supra notes 96, 127, 135.
173. See discussion supra note 62–68 and accompanying text.
174. See discussion supra Part II.B.1.
175. See sources cited supra note 118.
177. Although it has been suggested that the primary burden of combating a public issue as significant and complex as mortgage-lending discrimination should be placed on the federal government, see Barbara A. Kleinman & Katherine S. Berger, Note, The Home Mortgage Disclosure Act of 1975: Will It Protect Urban Consumers from Redlining?, 12 NEW ENG. L. REV. 957, 984–86 (1977), the government's poor track record in this area suggests that a strong private right of action should be retained. See supra notes 61, 68, 71.
person “aggrieved” by such a decision to sue in federal court should remain intact. This will ensure that not only residential-mortgage-loan applicants, but also sellers of property, realtors, and neighborhood residents who may be affected adversely by discriminatory lending behavior can challenge a particular mortgage loan decision.

Moreover, the legislation’s advertising and marketing, data collection and recordkeeping, and community reinvestment provisions should be enforced by community interest groups, fair-housing advocates, and the public generally. As discussed above, these provisions are just as critical to the effective elimination of discriminatory lending behavior as the nondiscrimination prohibitions themselves.178 Conceptually, the marketing and data reporting requirements are obligations that the lender owes to the public, and therefore members of the public should have a right of action to enforce those provisions.

Short shrift can be made of the argument that allowing community and fair-housing activists to sue lenders whenever they are dissatisfied with the lender’s behavior will lead to a costly and burdensome litigation explosion. First, as a matter of principle, the nation should not compromise the enforcement of its civil rights laws simply because it may be costly to do so. Further, discriminatory behavior, particularly lending discrimination, exacts social costs that are just as great, if not greater, than those incurred through increased litigation.179

Second, the “litigation explosion” argument has been advanced before, most notably by employers when Congress provided a direct private right of action to employees who had been discriminated against. Those fears proved to be either unfounded or exaggerated,180 and no one is now seriously proposing the elimination of those employment discrimination laws.181
Third, there is little potential danger of a litigation explosion because such litigation is too costly and complicated for private citizens to initiate on their own. Community groups and fair-housing advocates typically are too few in number or too short on funds to be able to litigate a large number of these cases.

Fourth, even if there is a substantial increase in private litigation seeking to compel lenders to comply with the requirements of the act, lenders still are protected from abusive litigation proceedings by various federal statutes and litigation rules. If the cases brought by activists are successful, it means only that the lenders are not complying with the dictates of the law.

Finally, providing a private right of action to enforce the marketing, recordkeeping, and community reinvestment provisions of the act is merely a substitute for the dedication of resources to the same end by the federal agency in charge of enforcing the act. There is little in this proposal that is different or significantly more onerous than the law currently requires. This litigation explosion argument can therefore be seen as the embodiment of a hidden fear that the public will be better enforcers of the law than the federal regulators. Such a consequence, however, argues in favor of a private right of action, because the overall societal benefits should exceed the overall societal costs.

E. Regulations

A broader, more comprehensive, unified statute addressing mortgage-lending discrimination necessarily will require the implementation of new regulations. Fortunately, much of the necessary groundwork already has been completed and many regulations that currently exist, albeit in scattered places, can be consolidated into one comprehensive act. Some additional regulations will be necessary to flesh out any areas currently not covered. The benefits to be achieved by such consolidation are the same as those for which the act itself would be passed—to simplify and amalgamate the procedural and

182. See Fed. R. Civ. P. 11, 16(f), 37 (imposing penalties on attorneys and parties engaging in abusive practices). The judicial systems of many states have similar provisions.

183. See regulations discussed supra Part II.C.
substantive regulations relating to mortgage-lending discrimination and equal access to credit. 184

CONCLUSION

It is possible, though difficult and time consuming, to map out a path through the labyrinth that Congress has constructed over the years to eliminate discriminatory lending behavior. A better approach is to completely overhaul the current, haphazardly constructed system. Most of the basic groundwork already has been laid. All that is necessary is an appropriate dismantling of the current system to the extent that it relates to residential-mortgage-lending discrimination and a reconstruction of what currently exists, with some additions, into a comprehensive act.

Neither Congress nor the executive branch should be reluctant to pursue such a course, especially when it involves the fundamental national policies of civil rights and home ownership. The executive and legislative branches arguably have managed to solve the crisis in the thrift industry with a major overhaul of the statutory and regulatory system governing its behavior. Fair-housing advocates and the nation at large should demand no less regarding the problem of discrimination in housing finance.

184. A more comprehensive discussion of how current regulations can be improved and what new regulations are needed is beyond the scope of this Article.
### APPENDIX

**SUMMARY OF FEDERAL REGULATIONS RELATING TO DISCRIMINATION IN THE FINANCING OF HOUSING**

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- **Prohibits Discrimination**: Enforces the prohibitions against discrimination in the lending and other services provided to consumers, and it prevents institutions from excluding eligible low- or moderate-income neighborhoods from participation in any program or activity receiving federal financial assistance.
- **Compliance Reports**: Requires lenders to file compliance reports to ensure that they are meeting the requirements outlined in the regulations.
- **Effect Test**: Adopts a test to measure the effects of discriminatory practices.
- **Redlining**: Prohibits redlining, which is the practice of avoiding or discriminating against particular geographic areas.
- **General Accounting Records**: Requires lenders to maintain detailed records to ensure compliance with the regulations.
### SUMMARY OF FEDERAL REGULATIONS RELATING TO DISCRIMINATION IN THE FINANCING OF HOUSING

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#### General Requirements
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- Application Log § 338.4
- CRA Statement § 345.4
- Public Comment Files § 345.5
- FDIC Assesses Performance § 345.7
- Prohibits Discrimination with Regard to Goods, Services, or Accommodations Offered or Provided by the Aided Business or Enterprise, Including the Granting of Credit
- Prohibits Discrimination in Lending, incl. Reliance on Discriminatory Appraisals
- Prohibits Discrimination in Advertising, incl. "Indirect" Discrimination
- Expands Discussion of What Locational Factors are Appropriate

#### Documents/Information Required to be Maintained
- CRA Statement § 345.4
- Public Comment Files § 345.5
- Public Notice § 345.6
- Compliance Reports § 113.5
- Some Information Available to the Public § 113.5
- Investigation Procedure § 113.6
- Expressly Prohibits "Redlining"
- Adopts "Effects" Test

#### Abbreviations:
- CRA - Community Reinvestment Act, 12 U.S.C. § 2901
- FHA - Fair Housing Act, 42 U.S.C. 3601
- FDIA - Federal Deposit Insurance Act, 12 U.S.C. § 1811
- Title VI - Title VI of Civil Rights Act of 1964, 42 U.S.C. § 200d
- NHA - National Housing Act, 12 U.S.C. § 1701