Seduced and Abandoned: The Federal Fair Lending Enforcement "Effort" Under the CRA

Testimony of Calvin Bradford for the National Training and Information Center (NTIC) before the Subcommittee on Domestic Policy of the House Committee on Oversight and Government Reform
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Thank you Chairman Kucinich, Mr. Issa, and members of this Committee for this chance to review the performance of the federal agencies charged with the enforcement of the lending laws and the Community Reinvestment Act (CRA). My name is Calvin Bradford. I am a board member of the National Training and Information Center (NTIC).

This month is the 30th anniversary of the passage of the Community Reinvestment Act. Senator William Proxmire introduced the Community Reinvestment Act (as Senate Bill 406) in January of 1977. The bill was the product of interactions between legislators, officials of the South Shore Bank in Chicago (a community development bank), and leaders of the anti-redlining movement – especially the National People's Action (NPA) led by Gale Cincotta, of Chicago.

I am particularly proud to be here today before so many Committee members who represent the strength of the community reinvestment movement. The original organizing that led to the NPA came from Chicago. NPA was founded and initiated its national anti-redlining campaign at a meeting of community groups in 1973 in Baltimore. Over the 35 years of NPA's activities, Cleveland has always been a source of continuing national leadership and initiative.

Summary of Written Statement

(Oral Statement)

For institutions that are chartered by the Federal government and/or that receive the substantial benefits and protections of deposit insurance, the activities of acquisitions, mergers, and branching are not a right, but are a privilege. The Community Reinvestment Act was intended to ensure that institutions that failed to meet the convenience and needs of their local communities would not be eligible for these financial privileges. Moreover, the CRA was intended to be one of the major tools in the eliminating of racial redlining and discrimination in lending.

In the 1995 revisions to the CRA regulations, the agencies eliminated key aspects of the CRA enforcement. They eliminated the evaluation of the institution's assessment of community credit needs. In essence, they eliminated the role of the community and made the CRA process a private affair between the lender and the regulator. By what first appeared to be subtle changes in the delineation of the CRA assessment area, they actually "permitted" institutions to draw their CRA assessment areas in any way they pleased as long as the regulator could be convinced that it was a "reasonable" area for the institution to serve. In spite of some language about not discriminating and not excluding low- and moderate-income areas, what was reasonable was ultimately left to the subjective discretion of the examiner.

At the same time, the regulators eliminated the assessment factors related to evidence of illegal discrimination. What remained was simply an instruction to consider any evidence of discrimination after the examiner had used the new scoring system to assign the CRA rating. Unlike the formal assessment factors, there were no guidelines and no scores associated with the examiner's review of evidence of discrimination. There was only the instruction to consider any actions that the lender may have made to correct the problems. All of this was left to the subjective opinion of the examiner. Ironically, while the fair lending examinations and other statements by these agencies indicate that discrimination is more likely to occur where decisions are made subjectively and without clear standards – the agencies created precisely such a subjective process to evaluate evidence of discrimination itself. In a CRA system based on numerical scores, the assessment of discrimination effectively counted for nothing

Still, there appears to be enough language in the past and current CRA regulations, interpretive statements, and fair lending examination guidelines to convince any "reasonable" person that racial redlining in the delineation of the assessment area and any substantive act of discrimination by the lender would result in a failing CRA rating. Indeed, the interpretive comments for the most recent CRA regulations stated flatly that, "evidence of willful discrimination should result in an automatic 'substantial non-compliance' rating."

In the examination process, institutions are allowed to decide whether to include the loans from their holding company affiliates. As the examples in my written statement demonstrate, this choice may radically change the lending patterns used in a CRA examination at the choice of the institution. Moreover, this may ignore the role of affiliates in other markets where their patterns may reflect discrimination. In addition, while the CRA examinations rely on previous fair lending examinations for evidence of discrimination, the fair lending examinations actually prohibit the examiners from analyzing the lending practices of holding company affiliates.

In addition to issues related directly to the CRA examination process, the "sunshine" provisions of the Gramm-Leach-Bliley Act of 1999 allow the regulatory agencies at their pure discretion to impose arbitrary and extreme punishments on community groups and citizens who dare to comment on a lender's performance and engage in reinvestment agreements. Yet, no obligations are placed on the performance of lenders in such agreements. This Congressionally approved intimidation of American citizens has produced, as the banking lobby had hoped, a chilling effect on community involvement in the CRA.

My written statement shows the extent to which the regulatory agencies have simply decided that they are above the civil rights laws and that no discrimination can exist if they do not recognize it. I have reviewed three cases where the Department of Justice sued major metropolitan institutions for discrimination in explicitly redlining the entire city of Detroit or the minority portions of Gary, Indiana, and Chicago while the regulatory agencies gave these same lenders high CRA marks. The agencies continued to reward these lenders by approving their applications for branches, mergers, and acquisitions while the redlined communities have continued to suffer from disinvestment and subprime abuses.

I have included one case where the lender was twice found in violation of the fair lending laws in Federal court and was rewarded by the regulatory agency by raising its grade to Outstanding and continuing to approve its applications for banking privileges. I have included another case where a lender under a Cease and Desist order for a pattern and practice of discrimination violations switched to another regulatory agency and received a passing CRA rating just before it settled a discrimination suit with the Department of Justice that imposed new obligations for corrective actions.

Finally, I have included a case where the Department of Justice sued a bank and its vice president for his alleged sexual harassment of female loan applicants, including seeking sexual favors for loan approvals. In this case, the regulatory agency which was examining the bank during the period of the harassment had not done a fair lending examination in six years and had decided that there was no need to do one during the period when the harassment occurred. The bank got a passing CRA rating.

For the regulators, their clever and narrow use of the regulations they drafted to control their own behavior allow them to treat these regulations as a kind of regulatory "signing statement" where they can use their own discretion to reinterpret or ignore lending behavior that would violate the fair lending laws.

Is this what Congress intended for the CRA?

At the end of my written statement are eleven recommendations for changes in the CRA, repeal of the sunshine act, changes in the fair lending examinations, and support for fair lending enforcement. I would be glad to respond to any questions or concerns that you may have and NTIC would be glad to provide the Committee with additional information on points and issues that might not be addressed adequately in our limited time here today.

The CRA: Built to Be a Fortress in the War Against Racial Redlining

Last March I brought to this Subcommittee's attention several cases where the regulatory examiners had given passing and even Outstanding CRA ratings to lending institutions that were simultaneously being sued by the Department of Justice for both racial redlining and discrimination in lending. In one case, the lender had twice been found liable for lending discrimination in Federal court. Nonetheless, the regulatory agencies continually reported that they did not find violations of the fair lending laws in these institutions and continued to grant them license to expand their financial power in the marketplace by allowing them to engage in branching, mergers, and acquisitions.

In order to try to explain how this could happen, I am submitting for the record some comments on the development of the CRA, its intent, and its regulatory history, and the relationships between the CRA and the fair lending examination process. I believe this will provide a valuable context for understanding both the reasons why the regulatory agencies did not enforce the fair lending laws in these CRA evaluations and also the seriousness of the agencies' failures to enforce fair lending laws in general.

Some of the problems we are dealing with today come from a lack of understanding about the history and intent of the CRA and a fundamental failure of the regulatory agencies to fulfill their obligations under the fair lending laws. I had the good fortune to be able to work with the legislators, community groups, and reinvestment advocates who developed the Home Mortgage Disclosure Act (HMDA) and with these same people and members of the South Shore Bank who are responsible for the CRA. I have also been fortunate enough to have been part of the research staffs for two of the special state commissions and tasks forces on redlining in the 1970s and to be part of the research staff for the National Commission on Neighborhoods. Among the more than 50 lending suits where I have served as an expert are two major lending suits where I provided background information on the history of the segregated housing finance markets and where the courts made important rulings on redlining.[1]

Let me take you back to the nation in 1977. As a result of the urban riots of the 1960s and the growth of the civil rights movement, government policies in the late 1960s and 1970s finally focused on the role discrimination played in the formation of segregated communities and in the process of economic disinvestment from these communities. Among the most powerful forces of disinvestment was the redlining of minority communities by the lending and real estate industries – a practice that had once even been endorsed by the rulings of the Supreme Court in supporting racially restrictive covenants. The nation's leading housing program – FHA – literally invented redlining in mortgage lending in the 1930s, with actual maps with lines defining neighborhoods where loans should not be made. As the FHA influenced the underwriting standards for the private markets, redlining was incorporated into the appraisal and underwriting standards of the lending industry. The principle is that if the Federal government uses a lending standard, then the private sector cannot be criticized for adopting that same standard.

Thus, minority inner-city neighborhoods were cut off from FHA loans, which were overwhelming made by the independent mortgage banking industry. These neighborhoods were also cut off from the major sources of conventional loans that were made (and held in portfolio at that time) primarily by savings institutions and commercial banks.[2]

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[1] These two cases (*Honorable, et al. v. Easy Life Real Estate System, et al.* and *Hargraves, et al. v. Capital City Mortgage Corporation and Thomas K. Nash*) provided the bases for court opinions that defined reverse redlining (the concentration of high cost or high risk loans predominantly in minority markets) as a violation of the Fair Housing Act.

[2] (See "Neighborhood Reinvestment," Chapter 1 in *People Building Neighborhoods: Final Report to the President and the Congress of the United States,* The National Commission on Neighborhoods, 1979).

In the late 1960s as a result of civil rights pressures, the FHA reversed its redlining and literally pumped existing and new high risk FHA programs into minority neighborhoods. The interventions failed to deal with the lack of conventional lenders in the minority market – for the bank regulatory agencies did nothing to reverse the practices of the savings institutions and commercial banks. Most of all, the interventions failed to take account of the financial opportunities which the racially segregated home lending market provided for exploiting racial segregation and racial change.

In a misguided effort to draw FHA lenders into inner-city areas that had previously been redlined, FHA first eliminated its "economic soundness" standard (which had been the basis for the previous redlining) in favor of absurd underwriting standards that are déjà vu in relation to some of the subprime standards of today. For example, a 1968 FHA Mortgagee Letter stated that properties were to be rejected only in "those instances where a property has so deteriorated or is subject to such hazards ... that the physical improvements are endangered or the livability of the property or the health or safety of its occupants are seriously affected" (August 2, 1968).

This lack of concern for the soundness and condition of homes resulted in many FHA homebuyers being sold homes that were defective and in need of major repairs. Moreover, the opportunity to exploit the pent up demand for home ownership in the minority communities and the opportunities to feed racial fears and foment racial resegregation through panic peddling and the resulting profits on high volumes of loans and the lack of limits on loan fees led to massive fraud and abuse in the FHA programs in minority areas and areas of racial change.

In his 1973 book (*Cities Destroyed for Cash*), Brian Boyer collected the minority FHA communities created by FHA into a single mythical city (Romney City, named after George Romney, the Secretary of HUD who pushed the program). Boyer concluded that Romney City had 350,000 houses (about half of them already boarded up) and a population of 1,400,000 - equal to the sixth largest city in the United States. Describing the FHA scandals as a "$70 billion slum" (in 1973 dollars, of course), Boyer provides this evaluation:

> The national solution to the black riots of 1966, 1967 and 1968 was the FHA low-income housing programs, but what they have done is destroy the homes and neighborhoods of the poor, giving millions of people a glimpse of hope yet quickly snatching it away.
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> In addition, the policies of the real estate and mortgage industries, compounded by the FHA programs, have created the flight of ethnic and working whites out of our cities into the suburban noose around the ghetto. They created class bitterness and hatred where none needed to exist. Where, at least, no new bitterness and hatred were called for. These industries and the FHA worked the economic levers that kept this

> society physically segregated. Some of it was the product of ignorance, but none of it was accidental.
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> Nor have urban blight and abandonment been the result of processes no man understood or could prevent, as the official line pretends. Instead, the destruction of our cities has come about solely for profit.... (at page 20).

As several of you on this Subcommittee know from experience, whole sections of cities such as Detroit, Chicago, Cleveland, Philadelphia, Baltimore, Boston, Atlanta, and Washington were devastated by the concentration of foreclosures and abandoned buildings. FHA was the predatory lender of the 1970s.

The anti-redlining movement grew out of neighborhood organizations combating the wave of mortgage foreclosures and deterioration that they saw emanating from the FHA scandals and the lack of sound conventional lending by savings institutions and banks in minority and racially changing communities. A 1973 study by a city agency in Baltimore provided the first intensive study of an entire city's mortgage lending records and provided the first classifications of different mortgage markets for different communities defined by race and class.[3] Other studies in Philadelphia, Chicago, and other cities followed – often done by painstaking individual searches of property transfer records by local community groups. The results of these studies provided the factual basis for the community claims that the savings institutions and banks had cut off minority and racially changing and diverse communities from conventional lending while leaving them to the plague of FHA abuses.

In the spring of 1973, in Baltimore, these neighborhood organizations came together and formed the National People's Action launching the national campaign against racial redlining.[4] This led to a two-pronged national legislative campaign. First, there was the campaign for the Home Mortgage Disclosure Act, which, in its original form, forced the disclosure of mortgage lending by savings institutions and commercial banks - the prime source of conventional loans. Overwhelmingly, the data from the HMDA showed what the community leaders had claimed, that little lending was done by savings institutions and banks in minority and racially changing or diverse areas.

The second part of the legislative campaign sought ways to outlaw the redlining of minority and racially changing or diverse communities which were typically older neighborhoods with concentrations of low- and moderate-income residents. Armed with the HMDA, the community anti-redlining movement helped to develop the CRA as part of this legislative effort in the battle against racial redlining.

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[3] See "Homeownership and the Baltimore Mortgage Market", Home Ownership Development Program, City of Baltimore, 1973)

[4] Soon after this, the National Training and Information Center (NTIC) was formed as a non-profit educational and training organization that provided research and technical assistance to neighborhood organizations combating disinvestment.

Working largely through NPA, community groups wanted a law that required the conventional mortgage lenders to serve their communities and end the redlining. At the same time, a group of investors seeking to purchase a bank for the purpose of reinvestment had successfully challenged the efforts of a bank in the South Shore community of Chicago to leave the community after it had changed racially. This example of the use of the existing bank regulatory process highlighted the potential role for community groups to intervene in the established process of granting charters and approving applications for mergers, acquisitions, and branches.

Research on the existing regulatory process for chartering financial institutions and approving applications for mergers, acquisitions, and new branches had shown that each applicant must define a community that the new institution would serve. And the language stated that the chartered institution was to serve both the "convenience and needs" of that community. There was, however, no regulatory process to ensure that these defined communities were actually served once the institution received its charter.

Taking account of the lack of regulatory requirements to ensure that the chartered institutions served the credit needs of their communities and drawing on the model of the South Shore Bank, Senator William Proxmire (Chairman of the Senate Committee on Banking, Housing, and Urban Affairs) began to outline legislation that would encourage lenders to act more like the South Shore Bank. In December of 1976, Senator Proxmire circulated a letter with an initial rough draft of a bill to be known as the "Community Reinvestment Act". Also attached to the letter was a conceptual outline which explained clearly the rationale and intent of the proposed legislation.

In the conceptual outline attached to his letter, Senator Proxmire stated that, "The federal bank regulatory agencies have considerable leverage over financial institutions. One of the most significant powers is the authority to approve or deny applications for deposit facilities." The Senator went on to note:

> The authority to operate new deposit facilities is given away free to successful applicants even though the authority conveys substantial economic benefit to the applicant. Those who obtain new deposit facilities receive a semi-exclusive franchise to do business in a particular geographic area. The government limits the entry of other potential competitors into that area if such entry would unduly jeopardize existing financial institutions. … The government provides deposit insurance through the FDIC and the FSLIC [Federal Savings and Loan Insurance Corporation] with a financial backup from the U.S. Treasury. The government also provides ready access to low cost credit through the Federal Reserve Banks or the Federal Home Loan Banks.

The Senator's outline continued:

> In return for these benefits, financial institutions are required by law and regulatory policy to serve the "convenience and needs" of their communities as a condition for acquiring new deposit facilities. … However, in practice, the regulators have tended to ignore credit needs and have focused primarily on

> deposit needs.[5] The regulators have thus conferred substantial economic benefits on private institutions without extracting any meaningful quid pro quo for the public. … The proposed legislation directs the bank regulatory agencies to use their leverage in approving applications for deposit facilities in a way that will benefit local communities. … The bill would not inject any radically new element into the deposit facility application and approval process already in place. Instead, it merely amplifies the "community need" criteria already contained in existing law and regulation and provides a more explicit statutory statement of what constitutes "community need".

The Senator saw a need to define a "primary savings service area" from which the institution draws "more than one-half of its deposit customers", to assess the credit needs of that community, and to demonstrate how it has served those needs. The original draft of the act generally institutionalized the process that had been used by the investors in the South Shore Bank in keeping the bank from moving out of the community. The draft required the financial regulatory agencies to consider the institution's record of serving its local community when approving applications for charters, mergers, acquisitions, and branches, and to encourage testimony by community and consumer groups at hearings related to the applications.[6]

National People's Action was already working with Senator Proxmire and saw the development of the Community Reinvestment Act both as a vehicle to build an economic development banking industry in the United States and as an opportunity to end racial redlining by the banks and savings institutions.[7] With the technical support of NTIC, these groups advocated some changes in the language of the Act. They recommended some of the language that is now part of the CRA, such as language that lenders have a "continuing and affirmative obligation to meet the credit needs of the communities they are chartered to serve". This made meeting the credit needs an ongoing obligation rather

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[5] One of the main claims of the anti-redlining movement was that banks and savings institutions took the deposits from their communities and siphoned them off into the white and suburban communities.

[6] Draft of the Community Reinvestment Act attached to a letter from Senator Proxmire dated December 17, 1976.

[7] Running parallel to and in concert with the movement against redlining was the reinvestment movement seeking to build private lending programs to reinvest in the communities that had been redlined. While the World Bank and other foreign aid programs were designed to support economic growth in third world economies, there was no real program in the United States to support reinvestment in the disinvested communities that existed in depressed rural areas and in so many inner city communities. The reinvestment movement saw the need to develop the investment, lending, and programmatic skills necessary to revitalize disinvested communities. Together, community action groups, the growing base of community-based development corporations, and the South Shore Bank, in particular, provided both a political base for action and sound practical applications as support for making reinvestment part of the banking business. While it is beyond the scope of these hearings to review the development banking side of the Community Reinvestment Act, largely from the efforts of community-based initiatives and scores of negotiated community reinvestment agreements with individual lenders, a wide range of successful programs have been developed even though these agreements have never been recognized by the bank regulatory agencies and even though neither the regulatory agencies (including the Treasury Department), HUD, nor the Department of Commerce have ever taken seriously the role of building an economic development banking industry.

than one that only needed to be reviewed if the lender sought an application for an acquisition, merger, or branch.

They also recommended changes that would make it harder for institutions to define service areas that avoided what the community organizations termed “historically underserved” or “historically neglected” communities. They specifically recommended defining these as census tracts “which are characterized by minority or racially changing populations, lower income households, or an older housing stock.” They recommended defining the “primary service area” for savings institutions as “that geographic territory which includes the areas in which the institution originates 80% of its loans and all other areas which are as close as or closer to the association’s facilities as such areas.” The “primary service area” for commercial banks was defined as “that geographic territory from which the institution receives 80% of its consumer deposits and all other areas which are as close as or closer to the bank’s facilities as such areas.” The concept was to define the service areas essentially as a circle around the facilities where the radius ran from the facility to the census tract with loans farthest from the facility. NPA wanted this type of language in the Act to ensure that lenders could not gerrymander their areas to avoid minority areas and the nearby communities which were typically older areas with low- and moderate-income residents.

At this time, the large savings institutions and banks that were of most concern to the community groups typically had their main office, or a major office, in the central business district of the central city of the metropolitan areas where they operated. The thinking on the “primary service area” was that one should start at this central office and aggregate the deposits (or loans) from each census tract moving in ever expanding concentric circles until the circle (as limited by natural boundaries) encompassed 80% of the deposits (or loans). In this way, even if the lender skipped over inner-city minority and racially changing and diverse communities and the low- and moderate-income white communities adjacent to the minority and diverse communities in order to reach white and higher-income communities farther away, the institution’s service area for the CRA would have to include all these communities.

While race was clearly at the heart of redlining, community groups were also concerned that the process of racial resegregation and panic-peddling caused disinvestment in white or racially changing and diverse communities next to or near areas that were already minority or were, themselves, in the process of change. These nearby and adjacent communities were typically comprised of an older housing stock and concentrations of low- or moderate-income residents. The groups wanted to make sure that integration, itself, did not produce disinvestment and discourage white communities from welcoming minority neighbors without the fear of financial disinvestment. Thus, they had proposed a definition of historically underserved communities that was not only based on race, but was based on income and an older housing stock.

NPA’s recommendations also contained extensive additions of requirements for affirmative marketing programs to reach “minority groups” and all persons in the “historically underserved area”, annual reports from the regulatory agencies of the deposits and loans within the service area neighborhoods, examinations to ensure that there is "no discrimination in the quoting or application of conditions, terms, or in the case of real property, the appraisal, due to the geographic location of the applicant or the subject property", and that the regulatory agencies develop an annual review of performance and use the full range of their enforcement authority against institutions with unsatisfactory ratings.[8]

NPA's recommendations were considered and some were incorporated into Senate Bill 406 when it was submitted at the end of January of 1977. The bill contained the language about the "affirmative and continuing obligation" of lenders to serve their local communities. The bill defined the local community as the "primary savings service area", which was, itself, defined as "a compact area contiguous to a deposit facility from which such facility obtains or expects to obtain more than one-half of its deposit customers." The bill required institutions to "analyze the deposit and credit needs" of this community and it instructed the regulatory agencies to "encourage testimony at public hearings on applications". The bill did not include the definition of "historically underserved" communities and it did not include the various detailed requirements for lending programs and fair lending oversight that were recommended by the community groups.

Generally, NPA was told that the detailed provisions were not appropriate for a bill and were more appropriately left to the implementing regulations. NPA was told that adding such details that are normally part of the regulatory process made it harder to move the bill through Congress. Additionally, NPA was assured that with the prohibitions against lending discrimination in the Fair Housing Act of 1968 and the recently-enacted Equal Credit Opportunity Act (ECOA), existing laws already provided enough protection for minorities in the area of lending and it would simply be redundant and confusing to add further anti-discrimination language to the bill.

The Fair Housing Act already prohibited discrimination by lenders against lending to minorities. In just the past year (1976) in Ohio, the *Laufman* case had established that redlining was covered by the Fair Housing Act.[9] The Federal Home Loan Bank Board had filed its own amicus brief in support of the decision in the *Laufman* case. The FHLBB was the regulator of the nation's largest savings and loans and mutual savings banks, which were the largest conventional home lenders at this time. Moreover, the Equal Credit Opportunity Act (ECOA) had just been passed in 1976, giving more direct prohibitions against racial discrimination in lending of any kind. Fair lending was clearly the law of the land already – and the bank regulatory agencies were mandated to affirmatively enforce the fair lending laws.

[8] This is taken from a draft of the Community Reinvestment Act with revisions from NTIC. The draft is undated, but it was most likely in January of 1977.

[9] *Laufman v. Oakley Building & Loan Co*., 404 F. Supp. 791 (S.D. Ohio 1975), 72 F.R.D 116 (S.D. Ohio 1976), and 408 F. Supp. 489 (S.D. Ohio 1976).

Aside from the fair lending laws, lawsuits, and court decisions, the campaign for the Home Mortgage Disclosure Act had brought national attention to the issues of redlining by banks and savings institutions, and the bill for the CRA was often simply referred to as an anti-redlining bill. The work of the National Commission on Neighborhoods had begun and it was designed to focus national attention on redlining and disinvestment issues. HUD had held "public meetings" (the HUD version of a hearing) that focused on racial redlining and it had just published a book on these meetings and the history of redlining.[10] The Department of Justice had sued the largest professional appraisal organizations and the major mortgage company and savings industry trade organizations for incorporating discriminatory practices into their appraisal and underwriting processes, respectively.[11]

In light of these and many other related development and activities, it did seem that it would be inconceivable to interpret the Community Reinvestment Act provisions in a way that would not consider race discrimination in both the definition of the service area and in the evaluation of the institution's lending and services. Therefore, in the final drafting, the bill was made as simple as possible with the understanding that the regulatory agencies would resolve the specifics through the regulations that would implement the Act.

NPA remained skeptical about not including more specific language about the definition of the service area and against discrimination. The banking lobby opposed the bill completely. The regulatory agencies opposed the bill, but with the fallback position that if the bill was passed, it should be simple and leave them the typical role of dealing with the implementation in the regulation. Nonetheless, community groups did not openly oppose the simple version of the bill. In the final version of the bill, the definition of local community service areas was left to the regulatory process. All that survived of the language referring to "historically underserved" communities was the added provision that the lender was required to serve the needs of low- and moderate- income communities.

The specific language in the Act related to low- and moderate-income areas was, itself, part of the racial anti-redlining intent of the Act. While many of us reluctantly accepted the conventional wisdom of the time (naively it now seems) that with the clear prohibitions against lending discrimination in the existing laws, no one could possibly construe the CRA as not intended to prohibit racial redlining, there was nothing in federal law to protect the low- and moderate- income communities that were not already predominantly minority.

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[10] See Calvin Bradford and Dennis Marino, *Redlining and Disinvestment as a Discriminatory Practice in Residential Mortgage Loans*, U.S. Department of Housing and Urban Development, 1977.

[11] See *U.S. Department of Justice v. American Institute of Real Estate Appraisers et al.* (Civil Action Number 76-C-1448). The settlement by the American Institute of Real Estate Appraisers in 1977 made fundamental changes in appraisal theory and training to eliminate past forms of discrimination.

The term "historically underserved communities" in some of the draft recommendations for the CRA bill was intended to forbid the redlining of not only minority communities but other adjacent or nearby communities that might suffer disinvestment as a result of their proximity to minority areas. This term, however clear to the community advocates, did not have any existing statutory meaning. There was a general belief that high income communities were too lucrative for lenders to ignore, but that low- and moderate-income communities would be threatened by disinvestment if they were seen as in the path of racial change. Therefore, it seemed imperative to place special language in the bill that would protect these low- and moderate-income communities and let the fair lending laws serve as the existing protection of minority areas.

Even though it was not written into the legislation, the action of the investors who challenged the effort of the bank in the South Shore community of Chicago set the precedent for any entity to file a formal challenge against any of these covered applications on the basis of a lender's failure to adequately serve its community. The role of the CRA challenge was established without having to be written into the law, though the language instructing the regulatory agencies to encourage community testimony at application hearings was omitted from the Act itself.

Now You See It – Now You Don't: Regulatory Slight of Hand and the Disappearance of Racial Protections in CRA Enforcement

The omission of specific language on serving minority communities has, unfortunately, been used by both the banking community and the regulatory agencies to claim that race is simply not a focus of the CRA. Of course, as indicated above, at the time the bill was drafted, the obligations of lenders to serve minorities and the anti-redlining purpose of the bill was claimed to be so clear that this language was not needed.

"Now you see it, and now you don't" may be the best way to describe the CRA protections against racial discrimination in the regulatory process. There is clear evidence that community groups were not alone in their assumption that racial discrimination was an essential part of the CRA and its enforcement.

Immediately after the CRA was passed, HUD had contracted for a report on the likely impact of the CRA. The report includes sections on what the examination process should look like and what types of resources should be used in the examination process. At the beginning of the section on the examination of the institution's record is the statement, "The first almost elementary aspect of any assessment should be an evaluation of the lenders (sic) record under the Fair Housing Act, Equal Credit Opportunity Act, and related non-discrimination regulations. A lender in violation of these provisions is, *a priori*, not meeting the needs of his community" (emphasis added).[12]

[12] Warren Dennis, "Working paper No. 24 - The Community Reinvestment Act of 1977 – Its Legislative History and Its Impact on Applications for Changes in Structure Made by Depository Institutions to The Four Federal Financial Supervisory Agencies", Credit Research Center, Krannert Graduate School of

For support for this statement, the report cites a no more convincing source than the testimony of the representative of the Federal Home Loan Bank Board at the hearings on Senate Bill 406. The report goes on to review how such anti-discrimination reviews can be done, also citing the hearings on Senate 406 regarding anti-redlining regulations in California that were developed for the savings and loan department there as part of its review of lending institutions. The report continues:

> Examiners should be given a program for analyzing Home Mortgage Disclosure Act data as an integral part of the CRA review. Loan locations should be plotted on race and income coded census tract maps, with overlays for the different types of loans on the report. This device gives the examiners a tool for reviewing the institution's designation of "market area" and spotting "gerrymandered neighborhoods."

Discrimination, Redlining, and the Initial Regulations in 1978

Unfortunately, from the issuance of the first implementing regulations in October of 1978, there was evidence that the regulatory agencies would not require lenders to define their local community definitions in ways that would ensure the elimination of racial redlining.[13] These regulations provided for three ways of defining the local community area. The first method required using existing boundaries, such as entire Metropolitan Statistical Areas (MSAs) or counties. If an institution chose this method, it would typically avoid redlining. The second method allowed for defining the local community reflected some of the *general concepts* in the draft CRA legislation by providing for a local community defined the institution's lending patterns. In this case, the institution was to delineate an "effective lending territory" defined as "that local area or areas around each office or group of offices where it makes a substantial portion of its loans and *all other areas equidistant from its offices as those areas*" (emphasis added). On the other hand, there was also a third option where the institution could "use any other reasonably delineated local area that meets the purposes of the Community Reinvestment Act and does not exclude low- and moderate-income neighborhoods".

The regulatory agencies were left with great discretion to decide what would be interpreted as "a substantial portion" of an institution's loans. The most encouraging language was related to the lending territory where the local community would essentially be defined by areas around the office, or offices and all other areas "equidistant" from those areas. The regulators provided for the most discretion in the third option, where an institution could define any type of area it pleased as long as it

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Management – Purdue University, 1978, under a contract with HUD, pages 80-81. In a foreshadowing of the problems that we are addressing today, the report warns that aside from the Federal Home Loan Bank Board, the bank regulatory agencies have little experience with fair lending enforcement and the understanding of the fair lending laws. The report even notes that "the Federal Reserve Board continues to contest its obligations under the Fair Housing Act."

[13] The regulations and the introductory comments are found in the *Federal Register*, Volume 43, Number 198 for Thursday, October 12, 1978, at pages 47114 to 47155.

could convince the regulator that this did not unreasonably exclude low- and moderate-income areas. Although there is often a substantial overlap between low- and moderate-income areas and minority areas, they are not the same. Over the evolution of the CRA regulations, this third option has provided the most leeway for allowing institutions to gerrymander their service areas and continue redlining.

On the positive side, the regulations set up twelve assessment factors. These included factors related to the process that the institution had used to contact local organizations and assess local credit needs. Two of these factors related directly to fair lending. Factor "D" (also commonly referenced as assessment factor number 4) took account of "any practices intended to discourage applicants for the types of credit set for in the institution's CRA statement(s)". Assessment factor number "F" (also commonly referenced as assessment factor number 7) took account of "evidence of prohibited discriminatory or other illegal credit practices".

In the introductory section for the regulations (titled "Supplementary Information"), the regulatory agencies comment on assessment factor "F" by noting that it "refers chiefly to violations of the Equal Credit Opportunity Act and the Fair Housing Act." The commentary goes on to state that "some commentators felt that 'violations' could be determined only by a court. However, the Agencies believe evidence of violations found by examiners would be a material consideration in evaluating applications covered by the CRA."

The substance and comments on the interpretation of factor F was, perhaps, the most encouraging part of the regulations in terms of tying the CRA to the prohibition of discrimination and redlining. Clearly, the courts had already determined that the Fair Housing Act prohibited redlining and the agencies were stating that the Fair Housing Act was one of the two main laws to be used in assessment factor F. Second, these comments made it clear that the threshold for evidence of a violation was not only a finding in court, but findings by the examiners as well. Here, the regulations did seem to follow the concept that a lender that violated the fair lending laws would fail the CRA exam.

The Guidelines for Disclosure of Written Evaluations 1990

Further light was shed on the inclusion of fair lending in the CRA process when the agencies released the Uniform Interagency Community Reinvestment Act Guidelines for Disclosure of Written Evaluations.[14] Here, the Agencies showed how the twelve individual assessment factors were actually grouped into five major "performance categories". The first category covered two assessment factors under the heading of "Ascertainment of Community Credit Needs." The second category grouped three assessment factors under the heading of "Marketing and Types of Credit Offered and Extended." The third category grouped two assessment factors under the heading of

[14] These guidelines were released by the Federal Financial Institutions Examination Council on April 25, 1990, as part of an amendment to the CRA that required the release of a public version of the CRA rating and exam for each institution.

"Geographic Distribution and Record of Opening and Closing Offices". The fourth category grouped assessment factors D and F under the heading of "Discrimination and Other Illegal Practices." The final category grouped three assessment factors under the heading of "Community Development."

The guidelines then provided profiles of how each of these five groupings of assessment factors is related to the ratings given to the institution. Under Category IV (Discrimination and Other Illegal Practices) the guidelines read in part, "The institution is evaluated in this category on its compliance with antidiscrimination and other related credit laws, *including efforts to avoid doing business in particular areas* or illegal screening" (emphasis added).

The CRA is not a "credit law". Income is not a protected class and the antidiscrimination laws do not prohibit treating low- and moderate-income areas differently from other areas unless that has a disproportionate effect on a protected class.[15] The statements concerning "efforts to avoid doing business in particular areas or illegal screening" can only be related to the Fair Housing Act or ECOA.

In relating this category of assessment factors to the CRA ratings, the guidelines indicate that in order to receive a passing CRA rating of Satisfactory or Outstanding, the institution needs to be in substantial compliance with all antidiscrimination laws and regulations. A failing grade of Needs to Improve is given to any institution where "substantive violations are noted on an isolated basis" and a rating of Substantial Noncompliance is given to an institution that "has demonstrated a pattern or practice of prohibited discrimination, or has committed a large number of substantive violations of the antidiscrimination laws and regulations".

Under these guidelines, a lender with even an isolated substantive violation of the fair lending laws should clearly receive a failing rating on these factors. Thus, it is the standards for these fair lending laws and not any other standard in the CRA, that must be used to determine if the institution has violated any "discrimination and other illegal practices". That is, the CRA does not amend the fair lending laws or require that they be applied in some special way to institutions covered by the CRA.

<u>*The Restructuring of the Regulations in 1995 - The Historical Context*</u>

In December of 1993, the Federal agencies responded to a request by President Clinton to revise the CRA regulations to make them more objective and effective. This was done during a period of increased awareness of racial redlining and discrimination by regulated lenders. In May of 1988, the *Atlanta Journal/Constitution* ran a Pulitzer Prize winning series on racial redlining and discrimination by the banks and savings institutions in Atlanta ("The Color of Money" by Bill Dedman). This refocused national attention on lending discrimination and helped lead to changes in the HMDA that

[15] ECOA does prohibit discrimination against an individual based on the source of one's income coming from a form of public welfare, but no law protects persons or areas based on their income, *per se*.

produced individual loan data by race and ethnicity. By 1993, these data were routinely used by the regulatory agencies and the public in reviewing racial lending patterns.

Also, the Department of Justice began a series of lending discrimination cases against depository lenders, beginning with Decatur Federal, the main lender criticized in the Color of Money series. DOJ settled its case against Decatur Federal in 1992. The complaint cited the exclusion of most of the African-American communities in Fulton County (which includes Atlanta) as a violation of both the Fair Housing Act and the Community Reinvestment Act. The consent decree required the lender to expand its CRA area to include all of the minority areas it had previously excluded in Fulton County. This began a series of DOJ cases against depository institutions where the exclusion of minority areas from the lender's CRA community was cited as a violation of the fair lending laws.

In June of 1993, DOJ began its investigation of Chevy Chase in the Washington, D.C., metropolitan area. The resulting complaint also included charges of racial redlining in the delineation of the Chevy Chase CRA community. The settlement (in August of 1994 prior to the publication of the final CRA regulations) required the lender to include all of the District of Columbia in its CRA service area.

Therefore, during the period of the reform of the CRA regulations, racial redlining was clearly defined as a violation of the fair lending laws and the CRA by the Department of Justice. The DOJ settlements included a section on CRA compliance focused on expanding the service areas to include minority communities.

Restructuring of the Regulations and the Assessment of Discrimination

In December of 1993, the regulatory agencies proposed major changes to the CRA regulations, allegedly to streamline the process and provide for a wide range of investment and development activities. As noted in the December 7, 1993, memo to the Federal Reserve Board from its staff seeking approval to publish the proposed regulations, the new regulations were the response from President Clinton to "develop more objective, performance-based assessment standards that minimize compliance burden while improving performance."

As part of the background for the regulations, the Fed had sought advice from its own Consumer Advisory Council. In the list of its recommendations for CRA reform the first item was that "evidence of willful discrimination should result in an automatic "substantial noncompliance" CRA rating."[16] This seems no more than a restating of the ways in which the existing two fair lending assessment factors were to be applied.

[16] This list was attached to the December 3, 1993 memo from the staff to the Federal Reserve Board, but this item was not mentioned in the entire 32 page summary of the proposed regulations by the staff that had developed the regulations.

In the introductory section of the proposed regulations (titled "Supplementary Information"), the Agencies stated flatly that a "financial institution is not serving its entire community adequately if it is discriminating illegally."[17] The comments went on to summarize the language in the proposed regulations relating to evidence of illegal discrimination. "Therefore, there would be a rebuttable presumption that an institution would receive a composite rating of less than satisfactory if the institution committed an isolated act of illegal discrimination of which it has knowledge that it has not corrected fully or is not in the process of correcting fully or engaged in a pattern or practice of illegal discrimination that it has not corrected fully."

In the proposed regulations, however, these considerations of illegal discrimination were no longer direct assessment factors. Newly proposed revisions of the CRA regulations eliminated the original twelve assessment factors and replaced them with three "tests". There would be a lending test, an investment test, and a service test. The lending test did not include an analysis of racial disparities. The two factors related to discrimination had been eliminated and replaced by the statement reviewed above.

While it appeared that a lender with an isolated but substantive violation of the fair lending laws would automatically fail the CRA exam, many community groups criticized the provision throughout the regulations that continually provided the institution with a private internal opportunity to rebut a rating or finding while providing no such opportunity for the community and general public. Since the exam procedures regularly provide for interaction with the lender, the lender surely has an opportunity to respond to the examiner's concerns prior to the examiner making a finding. This "rebuttable presumption" simply gave the lender a special second, and secret, chance to influence the examination process.

In a revised set of proposed regulations in October of 1994, the agencies claimed that they were responding to this concern by removing the institution's right of rebuttal, but at the same time, they also removed the provision that required a failing CRA rating when evidence of illegal discrimination was found.[18] The final regulation published on May, 4, 1995, only indicates that "evidence of discrimination or other illegal credit practices adversely affects the [regulatory agency's] evaluation of the [institution's] performance." This is followed by a statement that the agency will consider the "nature and extent of the evidence" and any corrective actions that the institution has taken (for example §25.28(c) in the version for the OCC).[19]

In the final regulations, the three assessment tests all have pages of prescribed guidelines as to how they are to be determined. They even have a numerical scoring system assigned to them and to the overall "composite" rating from the three assessment

[17] See *Federal Register*, Volume 58, Number 243, Tuesday, December 21, 1993, pages 67466 to 67508.

[18] The proposed regulations appear in the *Federal Register*, Volume 59, Number 194 for Friday, October 7, 1994, pages 51232 to 51324.

[19] See the final regulations published in the Federal Register, Volume 60, Number 86 for Thursday, May 4, 1995, pages 22156 to 22223.

factors (at page 22170 in the *Federal Register*). The consideration of illegal discriminatory practices is tacked onto the composite rating after it has already been calculated. There is only a single vague sentence relating to how an examiner will take discrimination into account. There is no scoring system of any kind for taking account of discrimination. In an objective – and numerical - rating system, it has no assigned values. One might reasonably suggest that in this context, it counts for nothing.

Ironically, while the fair lending examination procedures of the regulatory agencies essentially alert the examiner to purely subjective underwriting practices as a place where unequal treatment is likely to exist, the determination of evidence of violations of the antidiscrimination laws in the CRA exam is left purely to the subjective opinions of the examiner. Moreover, this subjective process for treating the evaluation of discriminatory practices does not conform to the request from President Clinton to develop more objective and performance based standards.

Critical Changes in the Delineation and Treatment of the Service Area

Next, the local community service areas were eliminated in the CRA regulations and were replaced by the delineation of an "assessment area". These "assessment areas" are the geographic areas used in the CRA examinations. Therefore, unless these areas are challenged by the regulatory agency, the assessment tests are applied only to how well the institution serves these particular geographic areas. I believe it is important to quote the exact language contained in the interpretive introduction to the final regulations, as it reflects the thinking of the regulatory agencies in regard to this issue. With respect to the changes in the designation of the "delineated community", selected sections of the introductory interpretive section read:

> *…the agencies have decided to place a different emphasis on the institution's specific delineation and the methods used by the institution to establish that delineation.*
>
> *The agencies do not expect that, simply because a census tract or block numbering area is within an institution's assessment area, the institution must lend to that census tract or block numbering area*. (emphasis added) The capacity and constraints of the institution, its business decisions about how it can best help to meet the needs of its assessment area, including those of low- and moderate-income neighborhoods, and other aspects of the performance context, would be relevant to explain why the institution is not serving portions of the assessment area(s).
>
> The rule also clarifies that an institution's delineation of its assessment area(s) is not separately evaluated as an aspect of CRA performance, although the delineation will be reviewed for compliance with the assessment area requirements of the rule. If, for example, an institution delineated the entire county in which it is located as its assessment area but could have delineated its assessment area as only a portion of the county, it will not be penalized for lending only in that portion of the county, so long as that portion does not reflect illegal discrimination or arbitrarily exclude low- or moderate-income geographies.

To simplify the process of delineating an assessment area, the final rule encourages institutions to establish assessment area boundaries that coincide with the boundaries of one or more MSAs or one or more contiguous political subdivisions, such as counties, cities, or towns. *An institution is permitted, but is not required, to adjust the boundaries of its assessment area(s) so as to include only the portion of a political subdivision it reasonably can be expected to serve.* (emphasis added) This provision gives institutions some flexibility in their delineations, particularly in the case of an area that would otherwise be extremely large, of unusual configuration, or divided by significant geographic barriers. As with the 1994 proposal, however, such adjustments may not arbitrarily exclude low- and moderate-income geographies from the institution's assessment area(s).

Equidistant Principle. The 1994 proposal would have adopted the effective lending territory principle from the current regulations in slightly modified form. The 1994 proposal would have explicitly linked an institution's CRA obligations to the areas around its branches and deposit-taking ATMs, rather than its other non-deposit taking offices.

The service area delineated by the institution would have had to include all geographies around its branches in which the institution originated or had outstanding during the previous year a significant number and amount of home mortgage, small business and small farm, and consumer loans and any other geographies equidistant from its branches and deposit-taking ATMs.

The final rule eliminates the equidistance principle as a required part of the delineation of an assessment area. This change provides institutions greater flexibility in their delineations. (*Federal Register*, Vol. 60, No. 86, page 22171, emphasis added).

While the regulations maintained the general requirement that the assessment area must consist of "whole geographies" and "may not reflect illegal discrimination", these general provisions were subject to the specific regulations about how the area may be drawn.[20] First, one needs to understand that "geographies" are defined in the regulations as "census tracts", not counties or metropolitan areas, etc. Second, the regulation states that the area must "include geographies in which the bank has its main office, its branches, and its deposit-taking ATMs, as well as *the surrounding geographies in which the bank has originated or purchased a substantial portion of its loans*." (emphasis added) Third, whatever the method of defining the assessment area the regulations provide that "a bank may adjust the boundaries of its assessment area(s) to include only the portion of a political subdivision that it reasonably can be expected to serve". Finally, one must recall that in defining the area, these regulations eliminated the "equidistant" requirement which was seen by the community groups as the one standard that could actually limit the ability of the institution to skip over or surround minority areas without including them in the service area.[21]

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[20] While the language for each agency is essentially the same, the quotations here are taken from the regulations in §25.41 for the Comptroller of the Currency.

[21] In the "Community Reinvestment Act Interagency Questions and Answers Regarding Community Reinvestments (*Federal Register*, Volume 66, Number 134, Thursday, July 12, 2001, at page 36641) under

The Scoring System and the Lending Test

In the revised regulations, CRA ratings are produced by a scoring system assigned to the various tests. Ratings are based on performance within the lender's assessment area(s). In addition to its own activities, a lender may elect to include the lending of all of the affiliates of its holding company. Based on a review of the examination procedures and many public CRA evaluations, when the lending of affiliates is included in the examination, all of the lending is aggregated together and no separate analysis is done of the patterns for different affiliates. Only the loans of the affiliates inside the assessment area are included in the analysis. The analysis gives credit for high levels of penetration in the assessment area without regard for the type or risk level of the loans. Based on this system, a lender that receives an Outstanding on the lending test is assigned 12 points. In the overall composite, a lender needs only 11 points to get a Satisfactory rating overall. Therefore, a lender who gets an Outstanding rating in the lending test passes the CRA exam. Moreover, while the regulators give lip service to taking account of challenges to an application by third parties, they make it clear that a CRA examination and its rating "is an important, and often controlling, factor in the consideration of an institution's record".[22]

Given these regulations, a lender who made no loans or only a few loans in minority census tracts, but who made more loans in white census tracts, could draw the boundary of the assessment area as a collection of white census tracts around its facilities – even if there were minority census tracts that were "equidistant" from the facility. The determination of what is "reasonable" and what constitutes illegal discrimination is left to the subjective views of the examiner. Then, if the lender (either by itself or with its affiliates included) provided a high level of loans to this white area, it could be given an Outstanding rating in the lending test, resulting in a passing CRA grade. The passing CRA grade would make it extremely difficult for a challenge to block any applications of this lender.

The Optional Inclusion of Affiliates

In cases where the institution is part of a holding company, the CRA regulations allow institutions to include or exclude the lending activities of affiliates of that holding company for any particular type of loan. Where an institution decides to include the lending of the affiliates, all of the affiliate lending for that particular loan type are to be included in the examination.

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a section on the limitations on the delineation of an assessment area there is a single statement that the area cannot "arbitrarily exclude low- or moderate-income geographies". No mention is made relating to excluding minority areas.

[22] See, for example, "Community Reinvestment Act Interagency Questions and Answers Regarding Community Reinvestments (*Federal Register*, Volume 66, Number 134, Thursday, July 12, 2001, at page 36640)

Because Citigroup is the largest bank holding company with some extremely varied and complex affiliate structures, some of the problems with the treatment of affiliates by the regulators can be demonstrated in some examples from different depository institutions that are part of Citigroup. These examples highlight some key issues related to the treatment of affiliates as well as issues related to the CRA comment and challenge process, and issues related to the treatment of claims of discrimination and violations of other credit laws. *These historical examples are used to illustrate functional issues related to the practices of the regulators and not to make a case for or against the lending patterns of the mortgage lending subsidiaries and affiliates of Citigroup, which have been substantially restructured today*. Since 2003, NTIC and its grassroots leadership base from around the country have developed an effective partnership with Citifinancial and Citigroup. The partnership entails semi-annually meetings with top Citi executives, foreclosure prevention, REO re-development, affordable loan product development and support for financial education efforts in seven cities.

The first example is taken from the Comptroller's Public Evaluation of Citibank, NA in 2003. In the case of the evaluation of Citibank, NA, the institution chose to include all of the affiliate lenders of Citigroup in the CRA examination. The Comptroller lists seven affiliates where the HMDA data were combined with that of Citibank for the lending test. In this case, the Comptroller assigned an Outstanding rating for Citibank's lending test, guaranteeing it a passing CRA rating overall. Of course, we are not questioning the rating. We are concerned with the case as an example of the process used by the Comptroller and which, presumably, would be applied to other institutions as well.

The assessment area for Citibank is defined essentially as the New York City area and Long Island. In this case, even though Citigroup is the largest bank holding company in the United States and makes loans all across the country through various "affiliates", the Comptroller's evaluation was based on the lending patterns in just a few counties in the state of New York (essentially New York City and Long Island). Indeed, the evaluation states that, "despite the fact that the affiliates are nationwide lenders, CRA consideration was only given for those loans made in the bank's AAs [assessment areas]" (at page 7). For any other lender with affiliates that made loans nationwide, the same standard would be applied.

One affiliate, Citicorp Mortgage, was one of the largest lenders in the nation, yet only its role as part of the aggregate pattern of all the affiliate lenders in the assessment area was reviewed. Moreover, "93.7% of the HMDA loans in the local assessment area were provided by the bank and the affiliate, Citicorp Mortgage" (at page 7). One issue, then, is that the dominant pattern for the lending test may be determined by a single affiliate. While not suggesting that Citibank's performance would necessarily be different if the affiliates were not used, one can see as a practical matter the any institution's choice to include or exclude affiliates might radically change the lending pattern in a particular assessment area.

Another issue of concern is that the analysis of the lending patterns is generally done by reviewing the composite lending for the institution and all of the affiliates combined. If a holding company channels different loan products through different affiliates, as was the case with Citigroup and many holding companies, then any disparate racial patterns associated with the segmented lending may be hidden. Since the CRA rewards lenders for the level of loans, an apparent fair distribution of loans in the merged data may mask, for example, the channeling of prime loans to predominantly white and higher income areas and the channeling of FHA and subprime loans to minority and low- and moderate-income areas.

Another reason to use the example of Citibank is that it provides a view of how the Comptroller dealt with a specific past issue of challenges to the lending practices of an institution acquired by Citigroup. Generally, the CRA evaluations rely simply on the aggregate lending patterns of the institution and all affiliates combined. The Comptroller's evaluation is somewhat unique in this regard as it does comment the separate impact of some of the subprime affiliate lending on the overall pattern as part of a special consideration related to recent CRA challenges and lawsuits against Citigroup in relation to the acquisition of The Associates, one of the nation's largest subprime lenders.

This evaluation covered a period from October of 2000 through June of 2003. This included the time right after Citigroup's acquisition of Associates First Capital Corporation, when a nationwide coalition of community groups mounted a CRA challenge based on the claimed discriminatory and predatory lending practices of The Associates (including such issues as packing credit life insurance into the loans). The challenge was denied and the acquisition took place. The Associates was generally merged into "CitiFinancial" affiliates.

Additionally, the Federal Trade Commission had sued Citigroup (as the successor parent company) for unfair and deceptive trade practices and violations of ECOA by The Associates. The initial settlement for that case was filed in February of 2003 and included a $215 million fund for restitution.

The "Fair Lending Review" section of the Comptroller's evaluation reads:

> We found no evidence of illegal discrimination or other credit practices. However, given the previous adverse publicity involving the bank's affiliates, including Citigroup's settlement with the FTC, the following comments are presented.
>
> With the acquisition of Associates First Capital Corporation in September 2000 and subsequent consolidation with Citifinancial, Citigroup has committed to resolve concerns that had been raised against the former Associates involving alleged deceptive and abusive lending practices.
>
> In considering any potential impact to our CRA assessment of Citibank, we acknowledge Citigroup's efforts to address individual customer concerns and the minimal impact that lending by the affiliate had to the overall lending in the bank's AAs. Therefore, although the concerns were considered, they did not significantly impact our CRA assessment of Citibank. (at page 11)[23]

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[23] One may wonder about the scope of the evidence available to the Comptroller as a foundation for acknowledging "Citigroup's efforts to address individual customer concerns". Surely, some fundamental

The comment on the "minimal impact" of the affiliate relates to sections of the lending test that report that two national subprime affiliates of Citigroup, CitiFinancial Mortgage Corporation (CFMC) and CitiFinancial, Inc. (CFI), were given a separate review. In accordance with the CRA examination procedures, this review only applied to the Citibank assessment area in the New York City area and Long Island. In the specific Citibank, NA assessment area, however, these lenders accounted for only "4.1% of the mortgage loans considered." The report concludes, "There was no difference at all in the bank's geographic distribution of home purchase and home improvement loans in low- and moderate-income geographies factoring CFMC and CFI loans."

While this does not cast doubt on Citibank's lending in its assessment area, this comment raises several issues about the CRA examination process. First, this indicates how the lending patterns for the CRA reviews only look at geographic distributions by area income and not race and ethnicity.

Second, the Comptroller specifically notes patterns for home purchase and home improvement loans while the major claims of potential racial bias in subprime lending at this time were focused on refinance loans, about which the Comptroller's report is silent. Third, by looking only at the role of the CitiFinancial lenders in Citibank's local assessment areas, the larger role of these subprime affiliates in other markets is ignored. Hypothetically, if there was discrimination in the lending of any of these affiliates in some other area, that would be ignored and a lender would be allowed to use the lending of these affiliates in its assessment area alone to boost its CRA rating.

For example, in 2002, NTIC studied the distribution of prime and subprime loans between Citigroup's affiliates in 13 markets around the country from the 2000 HMDA data.[24] This study provides an example of how the role of subprime affiliates can vary from one market to another. In the New York City area, the market was for Brooklyn and Queens, where NTIC found that 11% of the loans were made by subprime affiliates. This was by far the lowest percentage of all the markets they studied. In Baltimore, 85% of the loans were made by the subprime affiliates. In Cleveland it was 93%. In Cincinnati, it was 94%. In Pittsburgh, it was 95%. In Syracuse it was 90%. Outside of the larger urban areas, the percentage of subprime loans was 94% in Des Moines, 96% in Wichita, and 96% in Central Illinois. This shows how one may get a very limited and unrepresentative view of the overall role of an institution's subprime affiliates when looking only at a single institution's assessment are in a CRA examination.

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changes were made to the practices of The Associates when it was folded into CitiFinancial. One may note, however, that at the same time that the Comptroller was examining Citibank, the Federal Reserve was investigating CitiFinancial for continued misrepresentations in marketing credit insurance, for violations of HOEPA, and for misrepresentations to the Federal Reserve investigators. In May of 2004, this investigation resulted in a Cease and Desist Order that included $70 million in civil money penalties.

[24] See NTIC, *Citigroup: Reinventing Redlining – An Analysis of Lending and Branch Disparities for Citigroup's Prime and Subprime Lending Affiliates*, June 2002. The percentages are taken from the summary table at page 13.

A fourth issue is whether the Comptroller's analysis actually does include all of the subprime affiliates. One affiliate which is missing from those listed by the Comptroller is Citicorp Trust, FSB (CTB). According to the CRA evaluation of CTB by the Office of Thrift Supervision (OTS) in May of 2004, this is a subsidiary of CitiFinancial Credit Company.[25]

Also according to the OTS evaluation, CTB works with another Citigroup company, Primerica Financial Services (PFS), to originate refinance loans. The OTS evaluation states:

> PFS representatives forward completed loan applications to CTB for review and approval. Nationally, there are nine loan processing offices, called $.M.A.R.T. (Save Money and Reduce Taxes) Solution Centers, that accept and process the applications. In addition, CTB has a facility in Hanover, Maryland that is responsible for the solicitation of the existing customer base for refinancing. None of these is considered a retail banking office. (at page 5)

The OTS evaluation further states that, "CTB originates first and second mortgage products primarily for debt consolidation purposes rather than refinancing purposes" (at page 5).

As a conceptual issue, debt consolidation refinance loans sold with the solicitation of other credit and insurance products and solicited for continual refinancing (flipping) are the types of loans that have been subject to the most concerns for discrimination and abuse. We are not suggesting, here, that CTB engages in such abusive tactics, but simply that it is important for regulators to pay special attention to these loans.

If CBT had a depository institution in the New York City area with an assessment area overlapping with that of Citibank, NA, then one could understand that under the policy of not counting loans twice, these loans would be excluded from the affiliates included in the Citibank evaluation. The only assessment area defined for CTB, however, is for the Wilmington, Delaware, MSA. In this case, because CTB originates loans from many areas across the country, the OTS – a*t its own discretion* – selected 9 other metropolitan markets outside of CTB's assessment area for review as what it termed "Supplemental Evaluation Areas" to see if the lending patterns in these comparison areas reflected that same high level of service to low- and moderate-income areas as did the small share of CTB's loans in it actual assessment area.[26]

Therefore, by fiat, the OTS appears to have removed these large pools of subprime loans from the CRA evaluations of Citigroup depository lenders in any of the nine supplementary markets that it chose for comparison. Such a move is inconsistent

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[25] The OTS evaluation covers a lending period from 2001 to 2003. CitiFinancial Credit Company is also not listed as one of the affiliates in the Comptroller's evaluation of Citibank, NA.

[26] A list of these areas is found in Table 9 on page 15 of the OTS evaluation.

with the CRA regulations and allows a regulatory agency to essentially hide the loans of an affiliate when they should be counted. In the New York City MSA, for example, the HMDA data for CBT indicates that it had 1,251 loans in 2002 and 1,162 loans in 2003.[27] Since CBT is part of CitiFinancial and a subprime lender, these loans should have been included in the Comptroller's evaluation of Citibank, NA.

This action by the OTS in regard to the loans of CBT is not restricted to the case of Citibank, NA. Citibank, FSB, one of the largest federal savings banks in the nation also received a public CRA evaluation in 2003 that reflected the exclusion of the CBT loans. In this case, the OTS defined 8 assessment areas for Citibank, FSB, across the country.[28] These included the Chicago MSA, the Baltimore MSA, two Florida MSAs, the San Antonio MSA in Texas, MSAs in Connecticut and New Jersey, and the Washington, D.C. MSA. The lending test covered loans for all of 2002 and through June of 2003. Citibank, FSB also chose to have the Citigroup affiliates included in its evaluation.

The OTS also recognized the issues related to the acquisition of The Associates and reported that the aggregate level of lending by the CitiFinancial affiliates across the combined assessment areas was quite small. For example, it stated that for the loans made in 2003 (the first half of the year) only "408 are from affiliates that offer sub-prime loan products" (at page 17). As with the Comptroller's evaluation of Citibank, NA, the list of affiliates did not include CTB, stating that "The only HMDA-reportable affiliate operating within Citibank FSB's assessment areas that is excluded is Citicorp Trust Bank, fsb, which is subject to its own CRA evaluation by OTS" (at page 16).

Based on the HMDA data for 2002, CTB made 4,274 loans in the six assessment areas for Citibank, FSB. Meanwhile, the OTS evaluation reported only 5,041 loans from subprime affiliates in the assessment areas for 2003. Including Citicorp Trust Bank loans would have increased the number of these subprime affiliate loans by 85%. In 2003, CTB made 5,181 loans in the six assessment areas. Counting just half the year would be 2,590 loans. Meanwhile, the OTS evaluation reported just 408 loans from all affiliates for the first half of 2003. Including the estimated half year of CBT loans would have increased the number of these Citifinancial related subprime loans by 635%. Put another way, the OTS report which considered the subprime lending of Citifinancial affiliates to be negligible in 2003 included just 14% of the actual number of these loans.[29]

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[27] In the data presented here and in the CRA evaluations, both the loans originated and the loans purchased by the institution are counted in the lending test.

[28] Office of Thrift Supervision, Community Reinvestment Act performance Evaluation – Public Disclosure – Citibank, Federal Savings Bank, September 8, 2003. The evaluation covered lending from January 1, 2002, through June 30, 2003.

[29] There might be some discrepancies between the exact geographic areas used for the HMDA data from the selected MSAs and the assessment areas. The data for 2003 represents just half of the 2003 data because there is no way of actually calculating from the HMDA data which loans were originated or purchased in the first half of 2003.

There is also some question about the accuracy of the various Citifinancial loans that the OTS did include in its evaluation. My estimates of just loans originated by the Citifinancial affiliates used by the OTS indicates that there would have been 2,144 loans all of 2003. Half of this is 1,072. This is more than two and one half times the number used by the OTS.

Finally, the OTS review of Citicorp Trust Bank itself illustrates another issue with the way the CRA evaluations may work when the institution is primarily a subprime lender and no prime affiliates are included in the analysis. CTB received an Outstanding evaluation in the lending test because both in its lone assessment area and in the "Supplemental Evaluation Areas" hand picked by the OTS, CTB had higher levels of lending to low- and moderate-income areas than did the overall market (which includes both prime and subprime loans). Of course, we know from many studies and analyses of the HMDA data that subprime lending is more highly concentrated in lower-income areas and among lower-income borrowers. It is in these generally less sophisticated markets that the concerns over deceptive practices are greatest.

The CRA process simply gives high marks to a subprime lender for concentrating its loans in this lower-income segment of the market. This reveals just how shallow the lending test really is. While CRA examiners are prohibited from examining the actual loan practices of unregulated affiliates, they can, and should, carry out an examination of the marketing, underwriting, and servicing practices of the institutions they do regulate in the CRA process. Again, while we are not claiming any abuses by CTB in this statement, as a practical matter, high concentrations of subprime loans in these vulnerable markets could reflect either creative financial assistance or predatory and abusive lending. Regulators need to look at more than just the volume of loans to judge the meaning of high loan penetration rates in these lower-income (or minority) areas.

Therefore, from these examples, it is not clear that the regulators include all of the affiliates that should be included when an institution chooses this option. Moreover, a holding company can review the lending patterns of its affiliates and the areas covered by the assessment areas of its depository institutions and structure the choices concerning the inclusion of affiliates in ways that provide the most favorable lending picture for each institution subject to the CRA.

The Elimination of the Assessment of Credit Needs

Aside from placing "a different emphasis" on how a lender could delineate its CRA assessment area, removing a review of how the assessment area is defined as a specific factor in the CRA examination, and eliminating the direct assessment factors related to lending discrimination, the final regulations also eliminated other factors that were important to the assessment of an institution's fair lending.

For example, the rating factors that specifically addressed how the lender assessed the credit needs of its community service area were also eliminated. In the interpretive comments published with the May 4, 19995 regulations the agencies state that, "Under the final rule, the agencies will neither prepare a formal assessment of community credit needs nor evaluate an institution on its efforts to ascertain community credit needs."

In the past, when citizens and organizations have placed comments in the lender's CRA file, these were reviewed as part of the factors related to the lender's assessment of credit needs. These comments, challenges, and other activities provided community organizations and the general public with a vehicle to define credit needs, propose the types of programs or loan products that could serve these needs, and also to identify possible redlining and discrimination issues in the delineation of the service area or in the operations of lending programs. Eliminating the assessment factors related to assessing community credit needs cut the public out of the CRA examination and rating process and reduced the CRA to a private relationship between the lender and the regulatory agency.

No Good Deed Goes Unpunished: The Attack on Community Participation by the Banking Lobby, the Regulators, and Congress

The "Sunstroke" Legislation

The Community Reinvestment Act was designed to protect minority and low-and moderate-income communities from redlining and disinvestment and to create the basis for a development banking industry for underserved communities in the United States. Community-based organizations have done their work.

With few resources and sheer determination, these organizations have led the way in identifying underserved markets, proposing real business solutions, and developing the public-private partnerships to provide the structural and institutional support to channel needed reinvestment into rural, small town, urban, and minority communities. The community-based organizations often created structures or institutional vehicles to channel investments into economic development and housing rehabilitation and development activities when they did not already exist.

Since the CRA was implemented, community-based organizations have been responsible for the creation of hundreds of Community Reinvestment Act agreements and programs. I have been involved personally in projects that have reviewed hundreds of Community Reinvestment Act agreements and programs. These agreements have resulted in well over 100 billion dollars of reinvestment in once redlined and ignored communities.

Aside from the model of South Shore Bank (now called Shorebank), virtually all of the most significant, most effective, and most creative reinvestment programs have their source in models that came from Community Reinvestment Act agreements. These include state-wide or local activities in most of the districts or states represented by this Committee, such as in the Boston, Chicago, Indianapolis, Baltimore, Cleveland, New Britain, and Waterloo areas or regional or statewide agreements as in California and Florida.

These agreements are not defined in the Community Reinvestment Act itself. They arose as part of the assessment of community credit needs and the active participation of the communities that the CRA was designed to serve. Often they evolved from the failure of the lending institutions to take active steps to comply with the CRA and the failure of the regulatory agencies to enforce the Act. Since there is no right to private action under the CRA, community groups and citizens working with a broad range of development organizations not only defined their credit needs but built the programs and capacity to meet those credit needs through the models provided by these formal CRA agreements. The agreements often arose from comments placed in the CRA file, from direct contacts and negotiations with lenders, and from challenges and testimony at CRA hearings on banking applications.

The so-called "CRA Sunshine Requirements (§711) of the 1999 Gramm-Leach-Bliley Act, represent the most reprehensible use of Congress with the banking lobby and the regulators to squash this history of citizen participation in the Community Reinvestment Act.[30] On the surface, this section of the Act may appear to recognize these agreements in requiring public disclosure of their contents, terms, and conditions. It might also appear on the surface that the Act brings some accountability to these agreements by requiring some disclosure by both the depository institutions (or any "affiliate" of the depository institution) and "each nongovernmental entity and person" that is a party to the agreement. In fact, the law is a bizarre form of intimidation designed to terrify community groups and individuals from making such agreements - or even from filing comments or making any contacts related to community credit needs and the CRA.

A CRA agreement is defined as any contract between "a depository institution or affiliate" and "a nongovernmental entity or person made pursuant to or in connection with the Community Reinvestment Act of 1977" (§48(a)). Essentially, any "nongovernmental entity or person" (indicated as an NGEP in the implementing regulations of the regulatory agencies) that has a "CRA communication" with the depository institution and then has a formal agreement with that institution is subject to the provisions of the sunshine requirements and enforcement actions. The implementing regulations for the Federal Reserve provide an example of the "CRA communications" that would subject an NGEP to the law:

> (a) *Definition of CRA communication.* A CRA communication is any of the following—
>
> > (1) Any written or oral comment or testimony provided to a Federal banking agency concerning the adequacy of the performance under the CRA of the insured depository institution, any affiliated insured depository institution, or any CRA affiliate.

[30] The CRA Sunshine Requirements are amendments that add a Section 48 to the Federal Deposit Insurance Act (12 USC 1811 et seq.). References in this statement are to Section 48.

(2) Any written comment submitted to the insured depository institution that discusses the adequacy of the performance under the CRA of the institution and must be included in the institution's CRA public file.
(3) Any discussion or other contact with the insured depository institution or any affiliate about—
(i) Providing (or refraining from providing) written or oral comments or testimony to any Federal banking agency concerning the adequacy of the performance under the CRA of the insured depository institution, any affiliated insured depository institution, or any CRA affiliate;
(ii) Providing (or refraining from providing) written comments to the insured depository institution that concern the adequacy of the institution's performance under the CRA and must be included in the institution's CRA public file; or
(iii) The adequacy of the performance under the CRA of the insured depository institution, any affiliated insured depository institution, or any CRA affiliate (12 CFR §207.2(b)).

Thus, virtually any person or organization that made a comment about its community credit needs, commented on or testified about the lender's past performance, or suggested a form of reinvestment could be subject to the law. As the implementing regulations of the Federal Reserve indicate, such an organization or person could be subject to all the disclosures and penalties of the sunshine requirements, even if the organization or person never actually signed an agreement with the institution. As an example of a covered agreement, the Federal Reserve regulations indicate that if a NGEP simply had a meeting with the lender and defined the specifics of a program and the lender later made a press release that reflected these conditions, this would be considered an agreement subject to the law (12 CFR §207.3(a)).

While depository institutions are required to provide only general data on the annual amounts of resources allocated to an agreement, the community organizations and individual parties are required to file detailed financial accountings of how each dollar that it received was spent (§48(c)).

The federal regulatory agencies may take the disclosure data and determine at their discretion that the community and any individual citizens who are party to the agreement have not fully complied with the disclosure laws. In this case, the regulatory agency is empowered by Federal law to declare the agreement "unenforceable".[31] Even more threatening, the regulatory agency may decide through its own interpretation of the agreement that the funds were not used properly by the community organizations or any individual citizens party to the agreement. In this case, the agency:

[31] The right of the regulatory agencies to void a reinvestment agreement stands in contrast to their statements concerning CRA agreements in the interpretive comments preceding the 1995 regulations. In those comments, the agencies state, "The CRA requires the agencies to assess an institution's record of helping to meet the credit needs of its community, not to enforce privately negotiated agreements. Therefore, an institution's record of fulfilling these types of agreements is not an appropriate CRA performance criterion."

May impose either or both of the following penalties:

(i) Disgorgement by the offending individual of funds received under the agreement.

(ii) Prohibition of the offending individual from being a party to any agreement described in subsection (a) for a period of not to exceed 10 years. (12 USC 1831 §48(f).

On the other hand*, there are no penalties defined in the law for a depository institution (or an affiliate) that violates the agreement in any way.* Indeed, the law specifically states that "no provision of this section shall be construed as authorizing any appropriate Federal banking agency to enforce the provisions of any agreement described" in the law (12 USC 1831 §48(g)).

This law has a chilling effect on any organization or person who would want to file CRA comments or participate in a challenge. If that organization or person later proposed a reinvestment program for that institution and the institution adopted the basic components of the program, these organizations and persons would be subject to the burdens and penalties of the so-called sunshine provisions while there are no penalties for the lender if it disregards its obligations in the agreement. Nothing is more contrary to the original intent of the CRA.

The Sounds of Silence

Since the implementation of the Gramm-Leach-Bliley sunshine provisions, only a handful of brave organizations in Cleveland, Massachusetts and a few other places have filed protests and comments on applications. For example, this Subcommittee requested and received from the Comptroller a list of all merger applications from 2000 to the present. The list includes several hundred applications. The applications involve many of the major institutions that have been the subject of protests in the past, yet the Comptroller has indicated that there has not been a single comment filed against these applications.

Linking the CRA to the Fair Lending Examination Process

In the revised CRA regulations the assessment of discrimination is left to the lone directive to take account of evidence of discriminatory behavior and consider whether changes should be made to the overall CRA rating already assigned to the lender in the systematic process for the various tests. In the examination procedures for the CRA, the regulators are instructed to use the most recent fair lending compliance exam as the basic source for locating evidence of discrimination. Therefore, these fair lending examination procedures need to be reviewed to understand how evidence of discrimination should be determined when completing the CRA exams.

In 1994, the FFIEC issued the Interagency Fair Lending Examination Procedures. The various fair lending examination procedures and guidelines for the individual regulatory agencies reflect the FFIEC guidelines with generally only minor variations.

We shall use examples from the specific guidelines for the Comptroller of the Currency, the Federal Reserve, or the Office of Thrift Supervision.[32]

First, in order to use the results of the most recent fair lending exam, there must be a recent exam. In the OCC process, some lenders are not identified for a regular exam and are only selected through a random process. This means that it may be many years before some lenders receive an exam.

Even if the lenders are chosen, the examinations are designed to be directed toward one or a few selected "focal points" rather than a full review.[33] Focal points relate to different types of discrimination issues such as redlining, marketing, steering, etc. In some cases these focal points can be determined by statistical analysis, though this requires that the lender have enough files of different loan types by different racial and ethnic groups to fit the requirements of the statistical models. Then, even within the selected focal points, the exam may be limited in scope and breadth. The Comptroller's procedures, for example indicate that only a limited exam may be done if there are "no unresolved fair lending complaints, administrative proceedings, litigation or similar factors" (at page 22).

This seems to suggest that if consumers do not actually file complaints, the regulatory agencies may do only a limited fair lending examination. Of course, lending is an area where consumers are often unaware of whether they have been treated differently from other applicants, so uncovering discrimination depends upon the regulatory agencies using their investigative powers to search for such differential treatment.

Where a lender operates in several metropolitan markets, the regulators are instructed to limit the exam to only what "can be reviewed readily in depth, rather than selecting proportionally to cover every market"[34] Thus, all the market areas for large lenders are not covered in the exam.

There are several sections of the exam procedures, such as the sections on loan product steering and marketing where the examination procedures refer to patterns that may segment the market between the lender and affiliates. For example, the Comptroller's procedures state that, "Institutions that make FHA and conventional loans and those that lend in both prime 'A' markets and in subprime markets (either directly or through affiliates), present opportunities for loan officers to refer or 'steer' applicants

[32] These are the *Federal Reserve Consumer Compliance Handbook*, "Federal Fair Lending Regulations and Statues – Examination Procedures" (updated to January 2006), and *Comptroller's Handbook – Consumer Compliance Examination*, "Fair Lending Examination Procedures" (updated to April 2006), and Office of Thrift Supervision, *Examination Handbook*, Section 1200 (updated to March 2007).

[33] See, for example, pages 12 and 69 in the Comptroller's examination procedures.

[34] See, for example, page 3 in the Federal Reserve's examination procedures.

from one product or market to another" (at pages 45-46).[35] Nonetheless, the fair lending examinations specifically instruct the examiners to "limit the inquiry to what can be learned in the institution and do not contact the affiliate" (at page 15).[36]

This creates two issues. One issue is that affiliates are simply not examined. As the mortgage lending markets have changed dramatically over the past three decades since the CRA was passed, holding company affiliates often are the primary mortgage lenders. Moreover, some holding companies channel different loan products (FHA, subprime, jumbo, GSE conforming) through different affiliate companies. Therefore, the lack of any review of affiliates leaves a massive hole in the fair lending examination process. Second, at the election of the lender, CRA exams may include all of the affiliates of a lender's holding company. This creates a serious mismatch between the lending patterns subject to review in the fair lending exam and the aggregate patterns used in the CRA exam.

In the CRA exam, lending is only reviewed within the CRA assessment area, while no such restrictions are defined in the fair lending examinations. Therefore, the results of the fair lending exams are likely to reflect patterns that do not conform to the areas for the CRA exam. In addition to these inconsistencies and mismatches, the fair lending examinations provide very little guidance in how examiners are to compare the underwriting or marketing practices of a lender to the legal standards of the fair lending laws.

In quite uniform ways, the fair lending examination procedures for the regulatory agencies specifically cover redlining – and with specific references to the CRA. Taking references from the Federal Reserve procedures, examiners are told to look at recent CRA evaluations and "identify and delineate any minority areas within the lender's CRA assessment area or market area for residential loan products that are of a racial or national origin minority character." Examiners are then instructed to determine whether any such area "appears to be excluded, underserved, selectively excluded from marketing efforts, or otherwise treated less favorably in any way by the lender" (at page 16). On the same page, the procedures contain a special note indicating that while "the CRA assessment area can be a convenient unit for redlining analysis", examiners should look to all areas where the lender "could reasonably be expected to have marketed and provided credit"

[35] A specific problem in the examination procedures relating to steering of FHA loans are the uniform comments that in reviewing steering between conventional and FHA products, the examiner should focus on loans greater than $100,000. Given the focus of FHA lending on lower valued homes, this seems odd. Perhaps in markets like California, DC, New York City or Boston, the high home values blind people to the reality that there are still vast markets where loans are under $100,000. This examination directive would eliminate many minority markets where loan values are disproportionately below $100,000 and where steering to FHA loans has historically been a major issue.

[36] In the interpretive introduction to the 1995 CRA regulations, the agencies also indicate how affiliates are not to be examined, stating that, "although lending by affiliates may be treated as lending by an institution, this treatment for CRA purposes will not permit a regulatory agency to examine any institution or its affiliate if it does not otherwise have such authority."

and that "some of those might be beyond or otherwise different from the CRA assessment area". This is reflective of introductory comments at the beginning of the examination procedures that reminded the examiner that, "In thinking about an institution's credit market, examiners should recognize that these markets may or may not coincide with the institution's CRA assessment area(s)" (at page 2).

As part of the redlining analysis, examiners are directed to review the lender's marketing procedures. The procedures states that, "A clear exclusion of the suspected redlined area from the lender's marketing of residential loan products supports the view that the lender did not want to do business in the area. *Marketing decisions are affirmative acts to include or exclude areas*" (at page 19, emphasis added). No marketing practice could be more clear and intentional that the delineation of the assessment area that the lender defines as its local community where it will be evaluated for CRA purposes.

Finally, the examination procedures indicate that redlining violates both the Fair Housing Act and ECOA whether the redlining results from purposeful actions or the effect of policies and practices.[37] Even if the exclusion of minority areas were unintended, it would have a discriminatory effect. The only defense against such effects is that there is a business necessity. In the exam procedures for the Federal Reserve this is defined as a "compelling business justification" (at page 21). The examination procedures for the Comptroller state that the "Justification must be manifest and may not be hypothetical or speculative" (at pages 8-9).

Above the Law: High CRA Ratings for Fair Lending Violations

In sum, the regulatory agencies have revised the CRA regulations to eliminate specific fair lending rating factors, to weaken citizen participation, to help lenders inflate their ratings, and to provide extreme flexibility in defining the CRA assessment area. Still, in the language of the regulators themselves, it seems clear that violations of the fair lending laws should automatically result in a failing rating.

The interpretive comments for the original 1978 CRA regulations stated that evidence of discrimination could be found by examiners even without a determination by a court. One would have every reason to believe that racial redlining would certainly be taken into account. The guidelines published in 1990 for disclosure of the CRA evaluations indicated that in reviewing evidence of discrimination, "the institution is evaluated in this category on its compliance with antidiscrimination and other related credit laws, *including efforts to avoid doing business in particular areas"* (emphasis added). These guidelines also indicated that even isolated cases of substantive violations of the fair lending laws would result in a failing CRA rating. Moreover, in the interpretive introduction to the present regulations, the agencies stated flatly that

[37] See, for example, page 53 of the Comptroller's procedures or page 15 of the Federal Reserve's procedures.

“evidence of willful discrimination should result in an automatic “substantial noncompliance” CRA rating.”

The Fair Lending Examination process is defined as the source for seeking evidence of discrimination. Therefore, the CRA regulations recognize the standards of the fair lending laws as the basis for evidence of illegal discrimination to be used in the CRA rating process. The fair lending examination guidelines for all the agencies indicate that racial redlining violates the fair lending laws in either treatment or effect and that examiners should look beyond the CRA assessment area to see if redlining has occurred. Moreover, the fair lending examination guidelines specifically reference the CRA assessment areas in the sections on redlining.

The question, then, is how to explain the cases where the Department of Justice has filed discrimination claims against a lender or a lender has been found to have violated the fair lending laws in court while the regulatory agencies continue to give these institutions the high CRA ratings and continue to grant them branching, merging, and acquisition rights. A review of these cases illustrates the issue.

Basic Redlining Cases

In this context, we provide the following examples of racial redlining allowed by the CRA regulators but found by the Department of Justice (DOJ) to be in violation of the Fair Housing and Equal Credit Opportunity Acts, as well as in violation of the CRA:

The OTS and Mid America Federal

The Chicago metropolitan area is the largest African-American home lending market in the United States, and one of the largest Hispanic markets outside of the Southwest as well. Mid America is the largest independent thrift institution in the entire Chicago market. It is one of the largest mortgage lenders in the Chicago markets. Mid America is regulated by the Office of Thrift Supervision (OTS). Since 1994, the OTS has given Mid America four Outstanding ratings and one Satisfactory rating.

In 2002, DOJ filed suit against Mid America for violating the Fair Housing Act and the Equal Credit Opportunity Act.[38] In specifically citing Section 228 of the CRA regulations (Reg BB), the suit stated that, “In establishing its assessment area, also known as its community service area, boundaries under the Community Reinvestment Act of 1977, 12 U.S.C. §§2901-2906 ("CRA"), Mid America has, since at least 1996, excluded nearly all predominantly African American and African American/Hispanic neighborhoods in the Chicago MSA, even those located in close proximity to its branch offices.” [See the attached map which reproduces the exhibit from the DOJ complaint.]

[38] Copies of the complaints and consent decrees for this and the other DOJ cases cited in this statement can be found on the DOJ website at http://www.usdoj.gov/crt/housing/caselist.htm#lending.

Even though it was a major lender in the white communities along Lake Michigan in the City of Chicago and in the northern suburbs, it defined its assessment area largely as a suburban area west of Chicago. Essentially, Mid America eliminated the minority communities within the City of Chicago and the southern suburbs.

Even if the OTS ignored the racial composition of Chicago, the regulations require lenders not to exclude low- and moderate- income census tracts from their CRA communities. According to the 2000 census, 91% of the low- and moderate-income census tracts in the City of Chicago, for example, are also minority census tracts. Looked at from another perspective, 86% of all the minority census tracts in Chicago are also low- or moderate-income census tracts. Thus, for many years, the Office of Thrift Supervision has allowed this major Chicago metropolitan area lender to exclude both low- and moderate-income and minority areas from its defined service area.

The DOJ suit cites the pattern of expansion of Mid America through the opening of branches in the Chicago metropolitan area. The complaint states that, "Mid America has engaged in a race-based pattern of locating or acquiring new offices. It has located or acquired new branch and other offices to serve the residential lending and credit needs of predominantly white areas but not those of predominantly African American or African American/Hispanic neighborhoods. Mid America has never opened any new full-service branch office in a majority African American or African American/ Hispanic neighborhood. As of March 1, 2002, of Mid America's 33 branch offices, only one, Broadview, is located in a census tract in which a majority of the residents are African American. However, the Broadview branch is the only non-traditional office operated by Mid America. In contrast to all its other branch offices, the Bank's Broadview office consists solely of an ATM machine and a lobby area located inside a K Mart. Moreover, the level of services offered at the Broadview branch is substantially less than that offered at Mid America's other branches. Every other branch office offers mortgage lending or investment services, or both; neither is offered at the Broadview branch."

Opening branches is a privilege that should be granted only to institutions that have satisfied their CRA obligations. By continually allowing Mid America to expand, the OTS was rewarding a major lender in the nations largest African-American mortgage market for engaging in racial redlining – the very practice that led to the creation on the CRA in the first place.

While DOJ settled the case by requiring the lender to open minority branches, to pay $10 million for special minority loans to compensate for past discrimination, and to develop outreach programs and to participate in existing special loan programs, the OTS still gave the lender a rating of Satisfactory after noting the lawsuit (the only rating below Outstanding that the OTS gave this lender since 1992). The OTS noted that in light of the lawsuit it could "not find the lender had not violated the fair lending laws". As the lender complied with the settlement order, the OTS gave the lender credit for expanded lending and raised the rating to Outstanding. Thus, the actions that Mid America was forced to take as the result of a consent order by a Federal court were used to raise its rating to Outstanding.

The Federal Reserve Board and Old Kent Bank

Between 1997 and 2001, the Federal Reserve Board had given three Satisfactory CRA ratings to Old Kent Bank, a major lender in the Detroit metropolitan area.[39] During this period, Old Kent defined its assessment area in terms of several counties and parts of counties that encircled the City of Detroit, but excluded the City of Detroit itself. A review of the Public CRA Evaluation reports indicates that the Federal Reserve Board was clearly aware of this exclusion and that it accepted this exclusion of Detroit and evaluated Old Kent based on the service it provided to the predominantly white suburban areas only.

In 2006, DOJ filed suit against Old Kent for violating the Fair Housing Act and the Equal Credit Opportunity Act. In specifically citing Section 228 of the CRA regulations (Reg BB), the suit stated that, "Instead of defining its assessment area in accordance with Regulation BB, Old Kent Bank circumscribed its lending area in the Detroit MSA to exclude most of the majority African American neighborhoods by excluding the City of Detroit." [See the attached map which reproduces the exhibit from the DOJ complaint.] The complaint also indicates that "As of March 2000, Old Kent Bank still did not have a single branch in the City of Detroit, where the population is more than 81% African American."

Even if the Federal Reserve ignored the racial composition of Detroit, the regulations require lenders not to exclude low- and moderate- income census tracts from their CRA communities. According to the 2000 census, 93% of the low- and moderate-income tracts in Detroit, are also minority census tracts. Looked at from another perspective, 86% of all the minority census tracts in Detroit are also low- or moderate-income census tracts. Thus, for many years, the Federal Reserve Board had allowed this major Detroit metropolitan area lender to exclude both low- and moderate-income and minority areas from its defined service area.

The DOJ suit cites the pattern of expansion of Old Kent through the opening of branches in the Detroit metropolitan area. The complaint states that, "As of January 1996, Old Kent Bank operated at least 18 branches in the Detroit MSA. Not a single one of these branches was located in the City of Detroit. As of March 2000, Old Kent Bank had expanded its business presence in the Detroit MSA to include a branch network of at least 53 branches, located in every county of the Detroit MSA. Virtually all of Old Kent Bank's branches were located in predominantly white suburbs." Opening branches is a privilege that should be granted only to institutions that have satisfied their CRA obligations. By continually allowing Old Kent to expand (and by later allowing the merger of Old Kent and Fifth Third), the Federal Reserve Board was rewarding a major lender for engaging in racial redlining.

The DOJ complaint also cited Old Kent for failing to provide equal lending services for both home mortgage and small business loans to the minority areas that were

[39] The 2001 rating was given after the FRB had approved the merger of Old Kent into First Third Bank.

illegally excluded from its CRA lending community. As a result, DOJ engaged in a consent order requiring corrective actions that had not been ordered by the Federal Reserve Board.

<u>The FDIC and Centier Bank</u>

Centier Bank is regulated by the FDIC. It serves a regional market in Northwest Indiana. The FDIC examined Centier four times between 1993 and 2003. Each time the bank was given a Satisfactory rating. This rating allowed the bank to continue to engage in branching and expansion activities which should have been denied had the institution bee given a failing CRA rating. Indeed, it has become clear that even when community challenges are made, a passing CRA rating provides the lender with a safe harbor. Therefore, challenges become a fruitless gesture for lenders with passing CRA ratings – and almost all lenders have passing CRA ratings.

While Centier's delineated service area literally surrounded the City of Gary (a predominantly African-American city), through at least most of 1999, almost all of the City of Gary, and all of Gary's predominantly minority census tracts, were excluded from the delineated community. In this year (according to the DOJ complaint), "the FDIC informed the Bank that its assessment area violated the CRA and its regulations." Even at this point, the FDIC continued to give the bank a Satisfactory rating.

In 2006, DOJ filed suit against Centier for violating the Fair Housing Act and the Equal Credit Opportunity Act. In specifically citing Section 228 of the CRA regulations (Reg BB), the suits stated that, "Instead of defining its assessment area in accordance with Reg BB, Centier long circumscribed its lending area in the Gary PMSA to exclude most majority-minority neighborhoods, including having two geographically separate assessment areas for many years. Until late 1999, Centier's CRA assessment area included only three majority-minority census tracts from Gary, East Chicago, and Hammond, despite the fact that a large number of minority tracts were adjacent to the non-minority tracts included in the assessment area." [See the attached map which reproduces the exhibit from the DOJ complaint.]

According to the 2000 census, 93% of the low- and moderate-income tracts in Gary, Indiana, are also minority census tracts. Looked at from another perspective, 87% of all the minority census tracts in Gary are also low- or moderate-income census tracts. Thus, for many years, the FDIC had allowed this major Northwest Indiana lender to exclude both low- and moderate-income and minority areas from its defined service area. In allowing the institution to continue to open branches in the areas outside of Gary, the FDIC was actually rewarding Centier for its discrimination.

The DOJ complaint also cited Centier for failing to provide equal lending services for both home mortgage and small business loans to the minority areas that were illegally excluded from its CRA lending community. As a result, DOJ engaged in a consent order requiring corrective actions that had not been ordered by the FDIC.

First American Bank – Can You Pass the CRA by Switching Regulators?

First American Bank serves the markets of the Chicago and Kankakee MSAs in Illinois. In 2001, the Federal Reserve Board gave the First American Bank a Substantial Noncompliance rating based on evidence of illegal discrimination. That evidence was turned over to the Department of Justice. In July of 2004, DOJ filed suit against First American Bank for violating the Fair Housing Act and the Equal Credit Opportunity Act. First American Bank was accused of serving only predominantly white areas in its markets. This complaint was a pattern or practice case based on both marketing and lending. According to the complaint, this evidence included "comments made by American Bank officials to examiners from the Federal Reserve Bank of Chicago with respect to the Bank's lending practices which are based on racial and ethnic stereotypes."

Meanwhile, First American Bank operated under a Cease and Desist Order from the Federal Reserve based on the prior evidence of discrimination. In November of 2003, First American Bank changed its regulator to the FDIC. In March of 2004, the FDIC gave First American Bank a Satisfactory rating, thus reinstating its privileges to engage in branching and other activities while the DOJ investigation was still ongoing. In July of 2004, four months *after* the passing CRA rating, DOJ settled the case with American Bank with a series of remedial actions that were to be taken in the future to correct past discriminatory behavior. The FDIC public CRA evaluation mentioned the Cease and Desist Order with the Federal Reserve, but did not mention the DOJ investigation.

While the analysis in the CRA public disclosure showed some signs of more lending in low- and moderate- income areas for some loan products, none of this dealt with the issues of the lack of service and lending in minority areas. With the DOJ investigation still ongoing, the FDIC could have recognized some improvement by the bank in upgrading its rating to Needs to Improve, which would have been clearly in line with the need to carry out more fully the remedies for its past discriminatory behavior. Instead, the FDIC granted the bank a full Satisfactory rating prior to the imposition of the remedies in the DOJ settlement.

Flagstar – Violating Your Way to an Outstanding Rating

If the regulatory agencies can't identify discrimination as blatant as that described in these examples of DOJ cases, then there is a fundamental problem that surely requires Congressional action to be corrected. Still, one might try to set aside these cases by claiming that these all involved settlements where the lenders claimed that they did no wrong. That is, these cases did not involve court decisions that fair lending violations occurred. Let us turn, then, to a case where there were such legal findings.

The case of Flagstar Bank, FSB, represents that rare exception where we actually have proof of fair lending violations that we can compare to the public comments of the institution's regulator and to the CRA ratings given to the bank before and after the violations occurred. This case illustrates how even multiple legal findings of discrimination can lead a lender to an Outstanding CRA rating.

- Between February of 1994 and November of 2005, during which time the OTS gave Flagstar Bank "Satisfactory" and "Outstanding" CRA ratings, this lender was sued several times in federal court for issues related to discrimination in lending. Flagstar, in contrast, was found liable for discrimination at trial or by the court in at least two of these cases.

- In 1999, a jury in Detroit found Flagstar liable for discrimination against minority borrowers, and plaintiffs were awarded damages. Later the Sixth Circuit Court of Appeals upheld one of these findings. In 2003, in a national class action suit, a federal court in Indianapolis found a written pricing policy developed by Flagstar management in 2001 so overtly discriminatory that the court ruled against Flagstar on summary judgment. The policy explicitly stated that pricing would be different for minority and non-minority borrowers. It appears that the discriminatory pricing policy was developed and implemented by Flagstar *while* the OTS was conducting its consumer compliance examination.

- The OTS conducted five CRA examinations and never found Flagstar in violation of discrimination laws. During this time period, Flagstar was given a "Satisfactory" CRA rating four times and was elevated to an "Outstanding" rating after the summary judgment finding in 2003.

Flagstar was one of the nation's twenty largest mortgage lenders during the period covered by this litigation. It sold loans to both Fannie Mae and Freddie Mac and was one of the largest underwriters of FHA loans through certification granted by HUD.

Moreover, Flagstar was allowed to expand significantly during this time period by opening numerous branches, expanding into a new state, and expanding to additional metropolitan areas in these states. The approval of its applications to expand was based, in part, on its CRA ratings. As a result, during the period from 1994 through 2005, Flagstar grew from just over $500 million in assets to nearly $13 billion in assets.

The actions taken by Flagstar as a result of the settlement of suits in Detroit were actually used to raise its later CRA rating. After the Federal Court in Indiana forced the elimination of its written racial pricing policy, the OTS gave Flagstar an Outstanding rating, finding no violation of fair lending laws in spite of two legal decisions. *As bizarre as it seems, Flagstar seems to have literally violated its way to an Outstanding rating.*

First National Bank of Pontotoc, Mississippi – Skipping the Exam

The final case concerns the First National Bank of Pontotoc, a small bank in Mississippi. DOJ filed suit against the bank and one of its vice presidents claiming that this person had engaged in sexual harassment of female loan applicants while serving at the bank in 2003 and 2004 (though the lawsuit was filed in April of 2006). The claim stated that this person had sought sexual favors in return for favorable loan decisions. This person left the bank in May of 2004.

The Comptroller released a public disclosure of the CRA exam for the bank in June of 2004. The claims of sexual harassment in the DOJ suit took place during the time period covered by the CRA exam. In the comment on evidence of discrimination, the Comptroller's report reads:

> An analysis of public comments and consumer complaint information was performed according to the OCC's risk based fair lending approach. Based on its analysis of the information, the OCC decided that a comprehensive fair lending examination would not need to be conducted in connection with the CRA evaluation this year. The latest comprehensive fair lending examination was performed in 1998. (at page 5)

Therefore, no fair lending examination had been done for this bank in six years. Moreover, the Comptroller's "risk based" approach to determining if an examination should be done was essentially based on consumers having to file complaints. Complaints may be useful in those cases where the victim has some sound factual evidence for believing that they have been discriminated against (which is unlikely in most lending cases) or in those cases where the victim does not feel threatened by the perpetrator (which would have been unlikely in the case of this alleged sexual harassment). On the other hand, the examination process is not designed to be a complaint driven process - yet that is what it seems to have become for the Comptroller in this case, and presumably in the cases of other institutions subject to the "risk based" process for selecting institutions for fair lending examinations.

Are the Regulators Above the Civil Rights Laws?

How can the regulatory agencies enforce the fair lending laws, follow their own regulations and examination guidelines and interpretations, and still reward institutions engaged in discrimination with high CRA ratings and continued banking privileges? I must admit, that for my own sense of logic and reason, I cannot see how this can be done. Unfortunately, the ways in which I can imagine that an agency might justify this behavior require the agencies to act is if the discretion they have given to themselves under their own regulations places them above the civil rights laws.

There are two key provisions of the CRA regulations that could be used in this perverse way. First, the current regulations allow institutions great flexibility in defining their assessment areas. Given a very narrow reading of the regulations, an institution is no longer required to serve the areas where they make most of their loans and all other areas "equidistant" from those areas, nor are they required to serve entire counties or metropolitan areas. Institutions may define their assessment areas as clusters of census tracts around their offices or where they choose to make loans. It would seem from the cases reviewed that these assessment areas can even adopt amorphous and amoeba-like shapes within metropolitan areas. While institutions are prohibited from making an assessment area delineation that involves illegal discrimination or one that arbitrarily excludes low- and moderate-income areas, this depends purely upon the discretion and subjective view of the examiner as to what the definition of "reasonable" is.

It would seem that any large urban lender that excluded minority census tracts from its assessment area by delineating an area that was less than an entire MSA or that represented only parts of counties or other major political divisions would at least be violating the fair lending laws based on the discriminatory effect of the assessment area. Even without a discriminatory intent, such an exclusionary assessment area would have to meet the disparate impact standard of providing a business necessity for failing to include the minority areas. As the fair lending guidelines of the Comptroller note, such a business necessity would have to be "manifest and may not be hypothetical or speculative".

In the case of Old Kent, for example, this would mean showing that no lender in Detroit could serve these markets without some substantial economic harm. Yet, Shorebank has a bank whose assessment area is the City of Detroit itself – and it survives well and receives Outstanding ratings for a broad penetration of loans in this market. Surely there are other lenders in the minority areas of Chicago and Gary that serve these communities at a profit as well – including, the original South Shore Bank in Chicago.

One would not suggest that the regulatory agencies are so ignorant that they do not know where the minority census tracts are located. Indeed, they attach racial data to the HMDA loan data and use these data in their fair lending examination procedures. Also, one would not suggest that the agencies do not understand their own fair lending regulations and examination procedures. This, unfortunately, leaves only the explanation that the agencies realize fully what these institutions are doing and that they consider this an appropriate business plan. In effect, the regulators are treating the discretion that they have given themselves in their own CRA regulations as a kind of "signing statement" indicating that they allow themselves to make decisions that are above and beyond the limits of the Federal civil rights laws that they are required to enforce. The business practices of a lending institution may, therefore, at the discretion of the regulator, trump any illegal discrimination.

This same unfortunate logic applies to the cases of Flagstar and First American Bank, and the general treatment of evidence of illegal discrimination. The current regulations require the agencies to take evidence of discrimination into account, after consideration of whatever they may deem corrective actions of the institution. Again, it is left to the pure discretion of the examiners as to how to treat discrimination – especially when it has no numerical value in the CRA rating system.

While the internal findings of CRA examinations are not part of the public disclosure, in one of the lawsuits against Flagstar, the internal examination by the OTS was entered into evidence. It revealed that the OTS had identified a minimum appraisal amount in a loan program as having a potential disparate impact. Indeed, the OTS had analyzed census data to make this point. Nonetheless, in the public evaluation, there was no mention of this issue. In some of the proprietary documents I have read in other lending cases I have worked on, I have also found internal comments about discriminatory practices that were not reflected in the public disclosures for the institutions. This represents the discretion of the regulators for fair lending examination results that are never made public.

As for the example of Pontotoc National Bank, the CRA examination depends upon the most recent fair lending examination to provide evidence of illegal discrimination. If there is no recent fair lending examination, then there can be no evidence of discrimination – and the consideration of this factor is meaningless.

Is this what Congress intended?

<u>Where Are We Now?</u>

Thus, the regulatory agencies and the CRA "sunshine" requirements have twisted the CRA by:

(1) removing the obligation of depository institutions to define a local service in a way that eliminates racial redlining;
(2) removing the separate assessment of discriminatory actions from the formal rating process and;
(3) failing to develop and implement a sound fair lending examination process that includes both the subsidiaries and affiliates of a covered institution;
(4) relegating compliance with the fair lending laws to an undefined appendage of the rating process subject to the pure discretion of the regulatory agencies such that institutions can receive Outstanding CRA ratings while they violate the fair lending laws;
(5) removing the review of the institution's assessment of local credit needs from the evaluation process;
(6) removing the assessment of the institution's efforts to communicate with its community in defining credit needs;
(7) threatening community organizations and individuals who dare to comment on credit needs and who develop reinvestment programs;
(8) granting an institution a passing CRA rating if they have an Outstanding in the lending test (even if the lending area redlines minority communities);
(9) making challenges futile by granting an institution with a passing CRA rating a presumptive bias in favor of approving applications; and
(10) failing to regularly hold hearings when an application is challenged.

<u>What Can We Do?</u>

In reviewing the failure of the regulatory agencies, there are eleven recommendations that NTIC wants to make.

- First, the CRA should be amended to specifically include prohibitions against avoiding providing banking services (depository services, loans, and investments) in minority neighborhoods.

- Second, the CRA assessment area should specifically be defined to include full metropolitan areas or counties with a strict application of the fair lending laws to any areas that exclude minority areas. The definition of the delineated area should specifically exclude ringing or skipping over minority areas as well as low- and moderate-income areas.

- In the lending and investment tests, all affiliates of the institution's holding company should be included.

- Examinations should be made of all assessment areas and not just a sample or a selection of the largest.

- Evidence of discrimination by any affiliate or subsidiary of a holding company – or as a result of an overall (composite) lending or investment pattern or practice in any location in the United States should be counted as evidence of discrimination in every assessment area of all the lending institutions of the holding company covered by the CRA.

- Evidence of discrimination should require an automatic rating of Needs to Improve or worse for all CRA covered institutions within the holding company where evidence of discrimination is found.

- No institution with a Needs to Improve or worse rating should be granted any of the applications covered by the CRA until there has been a demonstrated change to overcome of the discrimination, including compensation of victims, payment of any penalties or award of damages, and any ordered or agreed to changes in practices or policies.

- While these recommendations will provide for a serious consideration of fair lending within the institutions and areas covered by the CRA and its examinations, these measures can only be effective if the fair lending examination process, itself, includes all affiliates, is subject to a regular schedule for all lenders, and results from clear revisions in the process to eliminate the failure to adequately cover such areas as marketing, steering, underwriting, and pricing.

- These measures, however well implemented, still leave independent lenders without fair lending regulation and accountability. This issue needs to be addressed additionally by oversight of the enforcement efforts of DOJ, the FTC, and HUD with an eye toward basic reforms and the allocation of appropriate resources to these agencies.

- Most fair housing and fair lending issues are presently detected and addressed through training and/or direct negotiation or litigated by private community-based fair housing and community and not-for-profit organizations. Appropriate resources need to be provided to these organizations so that their dominate role in fair lending enforcement and fair housing enforcement can be maintained and grow.

- Finally, the "Sunshine" provisions of the Gramm-Leach-Bliley Act should be repealed.