

EMBARGOED UNTIL DELIVERY

STATEMENT OF

**SANDRA L. THOMPSON
DIRECTOR
DIVISION OF SUPERVISION AND CONSUMER PROTECTION
FEDERAL DEPOSIT INSURANCE CORPORATION**

on

**ROOTING OUT DISCRIMINATION IN MORTGAGE LENDING:
USING HMDA AS A TOOL FOR FAIR LENDING ENFORCEMENT**

before the

OVERSIGHT AND INVESTIGATIONS SUBCOMMITTEE

of the

**FINANCIAL SERVICES COMMITTEE
U.S. HOUSE OF REPRESENTATIVES**

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Chairman Watt, Congressman Miller and members of the Subcommittee, I appreciate the opportunity to testify today on behalf of the Federal Deposit Insurance Corporation (FDIC) regarding actions to enforce fair lending laws. With the pervasive use of credit in today's society, discrimination that prevents access to financial resources or raises the cost for certain individuals or groups also denies them the opportunity to participate fully in our economy and society.

Data collected under the Home Mortgage Disclosure Act (HMDA)¹ have consistently revealed that certain minorities are more likely to receive high-cost mortgages than other racial or ethnic groups. These data indicate that recent subprime lending practices are likely to have a disproportionate impact on these minorities. For example, a 2006 Federal Reserve study relying on HMDA data from 2005 found that 55 percent of African-Americans and 46 percent of Hispanics received "higher-priced" conventional home purchase loans where higher-priced refers to first-lien mortgages with interest rates that exceeded the equivalent maturity Treasury rate by 3 percentage points.² This compared to only 17 percent for non-Hispanic whites. The study indicated that borrower-related factors, such as income, loan amount, and gender, accounted for only one-fifth of this disparity measured relative to non-Hispanic whites.³

¹ Home Mortgage Disclosure Act, 12 U.S.C. § 2801 et seq.

² For subordinate liens, the HMDA-reportable higher-priced loan spreads indicate loans having interest rates that exceeded equivalent maturity Treasury yields by more than five percentage points.

³ See Robert B. Avery, Kenneth P. Brevoort, and Glenn B. Canner, "Higher-Priced Home Lending and the 2005 HMDA data," *Federal Reserve Bulletin*, September 2006, at A159.

The FDIC is strongly committed to protecting consumers and ensuring adherence to the letter and spirit of the fair lending laws, including the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act (FHA),⁴ by the banks we supervise. When the FDIC finds practices that violate fair lending laws, we take action to ensure that the illegal practices cease and that harm to consumers is remedied. To achieve these results, the FDIC has a range of supervisory and enforcement options available to address fair lending violations and to effect corrective actions at FDIC-supervised institutions.

Information collected under HMDA, including pricing data, serves as a useful tool to identify potential discrimination and to support implementation of the fair lending laws. The FDIC uses HMDA data as an integral part of its fair lending examinations. We also utilize the data to identify institutions that warrant close scrutiny because of pricing disparities for minorities or females in one or more product areas that vary significantly from the norm for FDIC-supervised institutions. Reviews of some of these institutions have suggested the possibility of discriminatory pricing on the basis of race.

Although most fair lending violations are promptly corrected at the direction of examiners, the FDIC takes progressively stronger informal and formal enforcement action to address violations depending on the severity of a bank's conduct and its willingness to take corrective action. The FDIC also makes referrals to the Department of Justice (DOJ). Further, the FDIC is currently reviewing all cases involving possible discriminatory practices that have been referred to DOJ for appropriate enforcement

⁴ Equal Credit Opportunity Act, 15 U.S.C. § 1691et seq., and Fair Housing Act, 42 U.S.C. § 3605 et seq.

action. We intend to pursue these cases aggressively and to move forward in a timely manner.

My testimony will detail how the FDIC examines institutions for violations of fair lending laws. In particular, the testimony will focus on the use of HMDA data to identify institutions for more detailed examinations based on their lending performance. Finally, I will discuss the actions the FDIC takes when examinations reveal discriminatory lending activity.

Fair Lending Laws

The key fair lending laws applicable to FDIC-supervised institutions are ECOA and FHA. ECOA applies to all credit transactions, while FHA applies to housing-related credit. ECOA and FHA prohibit creditors from discriminating against any applicant in any stage of a credit transaction on the basis of race, color, religion, national origin, or sex. In addition, FHA prohibits discrimination on the basis of familial status and handicap, while ECOA includes prohibitions against discrimination based on age, marital status, public assistance income, and the exercise of rights under the Consumer Credit Protection Act.⁵

⁵ ECOA also requires that a creditor take or refrain from taking certain actions regarding what information can be sought in an application process, what notices are mandated to be provided to an applicant, and when a spouse can be required to be a co-signer.

ECOA grants specific enforcement authority to ten different federal agencies, including the FDIC.⁶ The FDIC is authorized to enforce the statute's anti-discrimination provisions as to the institutions we supervise with the same remedies and powers we have to enforce other laws under our jurisdiction. In addition, ECOA mandates that where an agency has reason to believe that one or more creditors has engaged in a pattern or practice of discouraging or denying applicants for credit in violation of the statute, the agency shall refer the matter to DOJ with a recommendation that an appropriate civil action be instituted.⁷ The FDIC enforces FHA under its Federal Deposit Insurance Act Section 8 enforcement authority⁸ and also refers violations of FHA to DOJ and the Department of Housing and Urban Development.⁹

HMDA

HMDA is a disclosure statute that facilitates enforcement of the antidiscrimination statutes. Under HMDA, mortgage lending institutions situated in metropolitan areas and with assets above an annually adjusted dollar threshold¹⁰ are required to disclose specified data on applications for home loans and for home loans originated or purchased during each calendar year. The Federal Financial Institutions Examination Council (FFIEC) is required to summarize the data by metropolitan area and

⁶ 15 U.S.C. § 1691c.

⁷ 15 U.S.C. § 1691e(g).

⁸ 12 U.S.C. § 1818

⁹ 15 U.S.C. § 1691e(k)

¹⁰ The HMDA reporting requirements apply to federally insured or regulated lenders or to loans which are insured by a federal agency or which the lender intends to sell to Fannie Mae or Freddie Mac. *See* 12 C.F.R. § 203.2(e)(iv). A lender must have a home or branch office in a metropolitan statistical area (MSA), originate at least one home purchase loan or refinancing loan secured by a first lien or a one-to-four family dwelling, and have total assets of more than \$36 million.

lending institution, and make it available to the public.¹¹ It is the responsibility of the Federal Reserve Board (FRB) to write the rules, known as Regulation C,¹² to implement HMDA. The FRB also assists the FFIEC in both processing and summarizing the data each year.

HMDA Data

As previously noted, FDIC examiners use the HMDA data to review lending for potential discrimination, relying on the data to flag institutions and products for more intense scrutiny. Only about 54 percent of the banks supervised by the FDIC are HMDA data reporters. The remaining FDIC-supervised banks are not required to submit HMDA data either because their assets are below the threshold for HMDA filing or they are not located in a metropolitan area. The 2,817 FDIC-supervised institutions that reported 2004 HMDA data accounted for 31.8 percent of all institutions reporting, but only 6 percent of the loan data. In 2005, 2,822 FDIC-supervised banks reported HMDA data, accounting for 31.9 percent of reporting institutions, but only 5.2 percent of the loan data.

The HMDA Submission Process

Because of the time necessary to report and compile the data, it takes approximately eight months before the federal financial institution regulators have all the

¹¹ See 12 U.S.C. 2809.

¹² 12 C.F.R. Part 203.

HMDA data for the previous calendar year. All HMDA information for a calendar year is transmitted from the individual lender to the FRB in a report called the Loan Application Register (LAR). The LAR is due at the FRB by March 1 following the year of the reporting period. Lenders must make their LAR available to the public within thirty days of receiving a request, after removing certain information to protect the privacy of applicants and borrowers. By approximately mid-June, the FRB completes its quality and data integrity edits and provides the “raw” data to each of the federal financial institution regulatory agencies.

In addition to the edited raw HMDA data, the FRB (through the FFIEC) provides each banking agency with tables of aggregated data showing every mortgage lender, broken down by each metropolitan area in which it does business; and for every metropolitan area, aggregated data about different lenders’ activity in the area and for the nation as a whole. The 2004 aggregate data was made available to the regulators in September 2005. The 2005 aggregate data was provided to the regulators in August 2006 and the 2006 aggregated data is expected to be released to the regulators in August of this year.

Review of HMDA Pricing Data for Potential Discrimination

Detailed analysis of additional information beyond the HMDA data must be conducted to determine whether disparities in the HMDA pricing data actually result from illegal discrimination. Loan pricing can be affected by many non-discriminatory

factors that HMDA does not require lenders to report. Such factors may include borrower credit scores, loan-to-value ratios, debt-to-income ratios, credit and deposit history with the lending institution, and competing offers. Thus, while the HMDA pricing data is extremely useful for targeting disparities that mandate further review, the HMDA data alone cannot be used to conclude that such disparities result from discriminatory lending.

To properly use the HMDA pricing data to detect illegal discrimination, a series of careful steps are required. These steps include careful statistical analysis of the data, the identification of disparities in individual institutions and targeted reviews of the institutions' lending operations.

Initial Statistical Screening

Once the FDIC receives the HMDA pricing data from the FRB, we begin our analysis of the raw data by applying a set of statistical screens to the information. First, the FDIC assigns the HMDA-reported loans to product categories characterized by loan purpose (home purchase, refinance, and home improvement), lien-status, property type (1-4 family, multi-family, or manufactured housing), owner occupancy, and by whether the loan is a conventional loan or a loan extended under a government-sponsored loan program (such as FHA loans). Use of these categories ensures that loan products that

share similar characteristics are compared as pricing is analyzed. These categories are then further refined into eight specific loan products.¹³

HMDA Outliers

After loans are classified by product type, the FDIC screens compare the loan pricing within each product type to determine if there are pricing differences between the loans to members of the prohibited basis target groups and loans to members of the control group.¹⁴ Pricing disparities are analyzed separately for each target group and for each of the eight different types of mortgage loans, comparing the target and control groups' average rate-spread, incidence of higher price loans, and loans identified under the Home Ownership and Equity Protection Act (HOEPA). The FDIC's screens analyze pricing in loan product categories for the bank as a whole, rather than within a bank's specific branch or local market, because most FDIC-supervised banks are small, operate in fairly localized markets, and originate a relatively modest number of loans.

¹³ The eight loan products are: (1) Conventional, owner-occupied, home purchase, 1st lien, 1-4 family; (2) Government-sponsored, owner-occupied, home purchase, 1st lien, 1-4 family; (3) Conventional, owner-occupied, home improvement, 1st lien, 1-4 family; (4) Conventional, owner-occupied, refinance, 1st lien, 1-4 family; (5) Government-sponsored, owner-occupied, home improvement and refinance, 1st lien, 1-4 family; (6) All 1st lien, owner-occupied, manufactured housing (conventional and government-insured; home purchase, refinance and home improvement); (7) All owner-occupied, home purchase, 2nd lien (conventional and government-insured; 1-4 family and manufactured housing); (8) All owner-occupied, home improvement and refinance, 2nd liens (conventional and government-insured; 1-4 family and manufactured housing).

¹⁴ Target groups are specific minority groups or females, and control groups are Non-Hispanic whites or males.

The FDIC HMDA pricing screens are designed to identify disparities in the types of institutions supervised by the FDIC. The FRB also has developed screens that it applies to the raw HMDA data. The FDIC HMDA screens and the FRB HMDA screens use somewhat different statistical techniques to identify FDIC-supervised banks with pricing and underwriting disparities on loans to racial/ethnic minorities and to females that raise potential fair lending concerns. The FDIC and the FRB screens may identify different institutions. Each set of screens provides different insights into pricing disparities, which can be informative for different types of institutions.

Banks with the largest, statistically significant, pricing disparities in any one or more of the loan types for any one or more of the target groups are flagged as “outliers” for intensified review. Institutions not identified as Outliers under the FDIC screens still undergo fair lending examinations, including review of the HMDA pricing data, and loan file reviews to determine if any identified discrepancies resulted from discrimination. FDIC examiners reviewed all of the FDIC-supervised institutions identified as Outliers by the FRB screens but not by the FDIC screens and did not find any discriminatory conduct.

FDIC Response to Outliers

Once Outlier banks have been identified from the HMDA data, the FDIC begins the process of ascertaining whether the observed statistical pricing disparities are likely to be the result of discrimination, rather than legitimate non-discriminatory pricing factors.

First, each Outlier bank is asked to explain all dimensions of its credit operations for the product, including both the customer referral and application decision-making processes. As part of this, the bank is required to provide details on its pricing of the loan product(s) at issue, including available rate sheets, and a description of the degree of discretion allowed to loan officers. Also, the bank is asked to provide HMDA data for the year-to-date (that is, the data not yet filed with the FRB) so that the additional data can be analyzed to determine if the pattern of disparity continues.

If the Outlier bank's responses and subsequent examiner verification do not resolve the pricing disparity issues, specially trained FDIC fair lending examiners use the bank's answers to focus a fair lending review for the bank. For the FDIC's review of 2005 Outliers, if an examination was not already scheduled in the first two quarters of 2006, it was accelerated or a special fair lending review was scheduled.

The fair lending review focuses on the loan product(s) and target group(s) that the screening process identified as having pricing disparities. The examiners conduct in-depth interviews of bank management and key loan officers to identify the specific criteria the bank used to price loans, and review individual loan files and document the criteria information for each one. Common criteria include debt-to-income or loan-to-value ratios, and credit scores.

After the file review is complete, FDIC economists and statisticians conduct a detailed statistical analysis of the criteria information from the files. The analysis seeks

to verify whether or how much of the loan pricing disparity is explained by the pricing criteria the Outlier bank asserts it utilizes. If, after accounting for the bank's pricing criteria, there remains an unexplained, statistically significant¹⁵ disparity between prices charged to target and control group borrowers, then an inference can be drawn that the disparities resulted from pricing discrimination.

As with any fair lending examination where apparent illegal discrimination is detected, the FDIC notifies the Outlier bank when the statistical analysis finds evidence of discrimination. The bank may then provide additional information to refute that finding. If the FDIC finds that the bank's information does not convincingly refute the preliminary finding of discrimination, we finalize the examination and refer the case to DOJ.¹⁶ DOJ may then conduct its own investigation and go forward with a case, or it may defer to the FDIC's supervisory and enforcement process.

Disposition of 2004 and 2005 HMDA Data Outliers

The FDIC's screening of the 2004 HMDA data identified 47 FDIC-supervised Outlier banks, while FRB screening identified 16. Nine of the 47 FDIC-identified Outlier banks were part of the 16 Outlier banks identified by the FRB screens. In screening the 2005 HMDA pricing data, the FDIC found that a number of banks exhibiting pricing

¹⁵ Statistically significant is defined as a significance level of at least 5 percent. Statistical significance is the probability that an observed disparity would occur if there was no underlying systematic difference in treatment (that is, differences were truly random). Statistical significance levels of at least 5 percent are considered, by economists and statisticians, to be a strong indicator that the observed disparity is not likely to be due to random chance. A statistical significance level of 5 percent is also accepted by many courts as sufficient to rule out chance. *See Waisome v. Port Auth.*, 948 F.2d 1370, 1376 (2d Cir. 1991).

¹⁶ By its nature, a finding of discrimination based on statistical analysis of a bank's loan data is a pattern or practice that must be referred under ECOA.

disparities had already been identified as Outliers using the 2004 HMDA data and so were already being reviewed. The FDIC identified an additional 16 FDIC-supervised Outlier banks, while the FRB identified a total of eight additional banks, three of which were included in the 16 banks identified by the FDIC. For both 2004 and 2005, the FDIC screens did not flag the other FRB-identified Outlier banks because there were too few loans from which to draw statistical inferences, disparities were not statistically significant under the FDIC screens or because the identified disparities, using the FDIC screens, were smaller relative to the pricing disparities for other FDIC-supervised banks.

With regard to the 47 institutions the FDIC identified as Outlier banks based on the 2004 HMDA pricing data, the following actions were taken:

- Two banks were referred to DOJ following completion of the review process described above. In one instance, the outlier screening process identified disparities in the average rate spread on higher-priced loans and in the incidence of HOEPA loans for African-American borrowers compared to non-Hispanic white borrowers for manufactured housing loans. In the other case, the screening process identified disparities in the average rate spread on higher-priced conventional residential refinance loans for African-American borrowers compared to non-Hispanic whites.
- Nine reviews were closed following the pricing criteria interviews conducted with bank management, a full file review, and a statistical analysis, controlling for each specific pricing variable. The statistical analyses for eight banks revealed that the disparity was explained by the banks' objective credit-quality criteria and there was no statistically significant disparity due to race, ethnicity, or gender. At the ninth bank, the statistical analysis of the data gathered by the examiners found that the disparity could not be explained. After notice of the FDIC's findings, the bank provided additional information about its loan pricing. The information reduced the statistical significance of the previous findings below that necessary to support a finding of discrimination and the matter was closed.
- At eight of the banks, the FDIC determined there was no discretion in loan pricing, and factors used to set prices were non-discriminatory. Examiners

verified this through a sample loan file review during the on-site fair lending review.

- Five of the 2004 Outlier banks were no longer supervised by the FDIC and fair lending reviews were therefore the responsibility of the current federal supervisory agency.
- During the HMDA data validation process, examiners determined that the disparities for three of the 2004 HMDA Outliers resulted from the banks' filing of incorrect HMDA data. After the data was corrected, the disparities disappeared.
- For the remaining 17 Outlier banks, additional information supplied by the institution or gathered by examiners during on-site reviews, and verified by statistical analysis when required, resulted in a finding that the pricing disparity was no longer statistically significant.
- Three 2004 Outliers remain under review.

Of the additional 16 pricing Outliers identified by the FDIC screens from the 2005 HMDA data, the following actions have been taken:

- The FDIC initiated fair lending reviews of all 16 Outliers during the first two quarters of 2007.
- One of the 2005 Outliers was no longer regulated by the FDIC, and the fair lending review was therefore the responsibility of the current federal supervisory agency.
- One 2005 Outlier demonstrated that a valid special purpose credit program caused the disparity.
- Three Outlier reviews were resolved after the statistical analysis showed that the pricing disparity was caused by the application of non-discriminatory pricing criteria, such as the amount of the loan, credit score, debt-to-income ratio, the cost of private mortgage insurance, or loan-to-value requirements.
- One institution allowed no discretion in pricing the loans at issue, and the factors used to set prices were non-discriminatory. The FDIC verified this through a sample loan file review during the on-site fair lending review.

- Additional information supplied by two institutions and verified by statistical analysis resulted in a determination that the pricing disparity was no longer statistically significant.
- The FDIC is continuing to review the eight remaining Outlier institutions.

In addition to the two referrals to date resulting from the HMDA Outlier review, the FDIC made a referral to DOJ of a bank where examiners reviewed the HMDA data in the course of a regularly scheduled compliance examination. The examiners initially found that African-American borrowers were more likely than non-Hispanic whites to have reportable higher-priced home purchase or refinance loans. The examiners also found that loan officers were compensated in large measure by “overages” on the loans they made. While the bank tracked the overages for compensation purposes, the bank did not monitor to determine whether the discretionary pricing resulted in disparate treatment.

Fair Lending Examinations

FDIC examiners conduct a fair lending exam in conjunction with each scheduled compliance examination. In conducting the fair lending exams, examiners follow the Interagency Fair Lending Examination Procedures.¹⁷ All compliance examiners also receive in-depth, specialized training in how to conduct fair lending examinations.

Examiners first target their analysis based on a review of the bank’s lending operations and judgment about the areas most at risk for potential discrimination.

¹⁷ Incorporated in the FDIC Compliance Examination Handbook, <http://www.fdic.gov/regulations/compliance/handbook/html/chapt04.html>.

Examiners next analyze the bank's reasons for approving and denying loans, including conducting interviews to determine the bank's underwriting criteria – both as written and as actually implemented. As necessary, examiners also perform file reviews to collect loan and application data. If a file comparison shows apparent differences in treatment, the examiner conducts additional interviews, and attempts to verify the bank's explanation for the findings.

Review of HMDA data is an important component of fair lending examinations, and provides examiners with valuable information about a bank's home mortgage operations. Even if a bank is not required under the terms of HMDA to be a HMDA data reporter, all banks are required under ECOA to retain the information mandated under HMDA (including race, sex, and ethnicity), as well as information on the applicant's marital status and age.¹⁸ This requirement is particularly significant for the FDIC because it regulates many small banks that are not subject to HMDA. The ECOA data is available to examiners who retrieve the information from loan files during the fair lending review.

For banks that report HMDA data, FDIC examiners review any HMDA pricing data as a part of each fair lending exam, in addition to considering application approval information. As described above, the FDIC uses HMDA pricing data to identify institutions that warrant close scrutiny because of larger pricing disparities for minorities or females in one or more product areas than is evident for other FDIC-supervised institutions. Examinations of these Outlier institutions have suggested the possibility of

¹⁸ See 12 C.F.R. §§ 202.12 and 202.13(a).

discriminatory pricing in a few institutions on the basis of race, especially in some cases where loan officers enjoyed broad unmonitored pricing discretion. In these cases, the FDIC takes all appropriate enforcement action as described below, and makes referrals to DOJ.

Finally, the FDIC reviews all consumer complaints of discrimination to determine the facts regarding the matter. A complaint may trigger an on-site investigation, including interviewing the person alleging the discrimination, to verify the actions of the financial institution and to conduct a comparative loan file analysis of similarly situated credit applicants.

When examiners preliminarily identify fair lending violations, they consult with an FDIC fair lending specialist and legal staff. If FDIC regional staff concurs with the finding of a violation, a formal letter is sent to the bank apprising its management of the finding and offering the bank an opportunity to respond. In the event the institution's response does not provide credible nondiscriminatory reasons that refute the finding of discrimination, the FDIC cites the violation in the examination report and begins further corrective action. If the fair lending violation appears to involve a pattern or practice, a referral is made to DOJ.

If the fair lending violation does not constitute a pattern or practice that must be referred to DOJ, the FDIC will require any necessary corrective action as an immediate follow-up to the examination. Most often, the bank takes immediate corrective action,

with FDIC follow-up and verification. For example, the supervisory response to isolated, technical violations of ECOA that do not involve discrimination might well consist of explaining the violations to bank management and working informally with the bank to ensure correction. In other cases, the FDIC may seek prospective corrective relief from the bank such as requiring a bank to change any policies and procedures that contributed to the discrimination, to further train bank employees, to establish community outreach programs, to change marketing strategy or loan products to better serve all sectors of the community being served, and/or to improve oversight and compliance systems.

If a violation involved harm to individual consumers, the FDIC also will seek retrospective relief. This includes requiring the bank to identify customers who may have been subject to discrimination and offering them credit if they were improperly denied. In addition, we may require restitution by the bank to its customers for out-of-pocket expenses incurred as a result of the violation (including the payment of fees or expenses in connection with an application) and require the bank to pay customers the difference between any greater fee or expense of another loan granted elsewhere after the improper denial. If loans were granted on disparate terms, we require the bank to modify those terms and refund any excess amounts paid by customers.

As indicated, when a violation detected during the examination appears to be a pattern or practice, and the bank does not convincingly refute the finding, the matter is fully reviewed by FDIC supervisory and legal staff and referred to DOJ. If DOJ does not take action and refers the case back to the FDIC, the FDIC uses its supervisory authority

to ensure the bank takes appropriate corrective action and implements any appropriate additional remedies.

Enforcement Actions

In addition to the corrective action described above, the FDIC enforces consumer and fair lending laws through administrative enforcement actions and appropriate referrals to law enforcement. In addressing fair lending violations, the FDIC has the same range of enforcement options available as it has in addressing any statutory violations under its jurisdiction.

Widespread or serious violations merit stronger informal or formal enforcement action. An informal enforcement action includes the use of a Memorandum of Understanding or a Board Resolution to document the problem and the bank's commitment to fix it. Formal enforcement actions, such as civil money penalties and cease-and-desist orders, which may include restitution, are generally pursued for repeat and very significant violations.

Since 2004, the FDIC has cited 170 banks for substantive violations of ECOA or FHA. These violations have included discrimination on the basis of race, ethnicity, gender, religion, marital status, and other prohibited bases. With regard to marital status, the FDIC has identified a significant number of instances where institutions require an applicant's spouse to sign a loan or guaranty in contravention of fair lending laws.

Corrective action was obtained in all instances of discrimination. In addition, the FDIC issued one cease and desist order at a bank with substantive discrimination violations. The FDIC also took informal enforcement actions, including accepting 34 Board Resolutions and 18 Memoranda of Understanding at banks with substantive discrimination violations.

In addition to these substantive violations, since 2004, the FDIC has identified 2,225 non-substantive violations of ECOA and FHA, as well as 1,354 violations of HMDA reporting requirements. These violations reflected deficiencies in banks' compliance management systems, including issues related to the more technical aspects of the fair lending laws and HMDA. These violations were corrected at the FDIC's direction as part of the examination process. In the case of repeated or egregious HMDA reporting violations, the FDIC imposed civil money penalties in 40 cases, totaling \$230,750.

Referral to DOJ

When the FDIC finds reason to believe a bank has engaged in a pattern or practice of discriminatory lending subject to ECOA, such conduct is required by statute to be referred to DOJ with a recommendation that an appropriate civil action be instituted. The FDIC also refers violations of FHA to DOJ. The FDIC is currently reviewing all cases involving possible discriminatory practices that have been referred to DOJ, including

those cases identified as Outliers through the HMDA screening process, for appropriate enforcement action that we can take. We intend to pursue these cases aggressively and to move forward in a timely manner.

Following a referral, DOJ conducts its own independent investigation, which may be broader in scope than the investigation conducted by the FDIC. The FDIC's evidentiary threshold for referral is lower than the evidentiary standard for DOJ to proceed with an action. The "reason to believe" standard required for an FDIC referral does not require that the FDIC have sufficient evidence to prove a violation with certainty. Instead, a "regulatory agency has reason to believe that an ECOA violation has occurred when a reasonable person would conclude from an examination of all credible information available that discrimination has occurred."¹⁹

The statutory remedies available to DOJ exceed those available to the FDIC. While the FDIC can order the bank to cease and desist from a discriminatory practice and order the bank to pay restitution to those injured by the discrimination, DOJ can seek these same remedies and, in addition, can seek punitive damages.²⁰ Pursuant to the statutory scheme established for the enforcement of ECOA, once a case has been referred to DOJ, it has jurisdiction to address the violation. In the Policy Statement on Discrimination in Lending,²¹ the FDIC and other federal regulators agreed that when a

¹⁹ See Policy Statement on Discrimination in Lending, April 15, 1994, 59 FR 18266-01 at 18271 (The Policy Statement was adopted by ten federal regulators, including the FDIC and DOJ).

²⁰ 15 U.S.C. §1691e(h).

²¹ See footnote 20.

referral has been made, the “agencies will coordinate their enforcement actions and make every effort to eliminate unnecessarily duplicative actions.”

Since 2004, the FDIC has referred to DOJ 115 findings of illegal discrimination under ECOA. DOJ immediately deferred to the FDIC’s administrative handling of the matter in 103 of the cases during that time frame.²² In those cases, the bank was required by the FDIC to remedy the harm experienced by affected consumers, to advise the consumers of their right to pursue legal action, and ordered to stop engaging in illegal discrimination. Three of the referrals to DOJ resulted from findings based on the 2004 and 2005 HMDA pricing data.

Conclusion

The FDIC takes seriously our responsibility to protect consumers and enforce the fair lending laws. When the FDIC identifies discriminatory practices, we require corrective action, including financial restitution to parties harmed by the conduct, and makes referrals to the DOJ in appropriate cases. The FDIC is continually assessing our supervisory practices for identifying fair lending violations and how to maximize the value of the HMDA data to ensure effective examinations and enforcement.

Thank you for the opportunity to testify. I look forward to answering any questions.

²² The examination date where a discrimination violation is cited, the referral to DOJ, and any subsequent referral back to the FDIC for administrative handling may not occur in the same calendar year.