



Office of the Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

December 3, 2010

Jennifer L. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Re: Docket No. OP-1388

Dear Ms. Johnson:

The Federal Trade Commission (“FTC” or “Commission”) appreciates the opportunity to provide comments to the Federal Reserve Board (“Board”) regarding the Home Mortgage Disclosure Act (“HMDA”) and its implementing Regulation C, which require certain mortgage lenders located in metropolitan statistical areas (“MSAs”) to collect and report to the government data regarding their housing-related loans and applications for such loans.¹

The Commission has wide-ranging responsibility regarding consumer financial issues, including those involving mortgage lenders and brokers. With respect to fair lending, the Commission enforces the Equal Credit Opportunity Act (“ECOA”), which prohibits discrimination against applicants for credit on the basis of race, national origin, sex, marital status, age, or other prohibited factors.² The FTC also enforces a number of other federal laws governing mortgage lending, including the Truth in Lending Act (“TILA”)³ and the Home Ownership and Equity Protection Act (“HOEPA”).⁴ In addition, the Commission enforces Section 5 of the Federal Trade Commission Act (“FTC Act”), which more generally prohibits

¹ 12 U.S.C. §§ 2801-2810; 12 C.F.R. § 203. HMDA’s specific goals are three-fold: (1) to help determine whether financial institutions are serving the housing needs of their communities; (2) to assist public officials in distributing public-sector investment so as to attract private investment to areas where it is needed; and (3) to assist in identifying possible discriminatory lending patterns and enforcing antidiscrimination statutes.

² 15 U.S.C. §§ 1691-1691f.

³ 15 U.S.C. §§ 1601-1666j (requiring disclosures and establishing other requirements in connection with consumer credit transactions).

⁴ 15 U.S.C. § 1639 (amending TILA to provide additional protections for consumers who enter into certain high-cost refinance mortgage loans).

unfair or deceptive acts or practices in the marketplace.⁵ Moreover, the Commission conducts research on home mortgage lending and related topics,⁶ develops consumer and business education materials,⁷ responds to inquiries about these matters from consumers, industry, and the media, and works with other federal and state law enforcement entities to protect consumers from unfair, deceptive, or discriminatory mortgage practices.

The following comment is based on the Commission's experience in enforcing the ECOA and other statutes. First, the comment provides background on the Commission's ECOA enforcement actions. Then it reviews the issues the Board identified in its request for comments and makes several recommendations for amendments to Regulation C. The recommended amendments include: (1) expanding coverage with respect to lenders that report data and types of loans reported; (2) expanding the data reported for loans that are covered; and (3) ensuring consumer privacy in connection with HMDA reporting.

I. BACKGROUND ON THE COMMISSION'S FAIR LENDING ENFORCEMENT

The Commission has an active law enforcement program directed at discrimination in mortgage lending. To that end, the Commission uses the HMDA data as a screening or targeting tool for fair lending compliance investigations.

⁵ 15 U.S.C. § 45(a). The Commission has brought cases against a number of the nation's largest subprime mortgage lenders and servicers challenging various unfair or deceptive practices. *See, e.g., FTC v. Countrywide Home Loans*, No. CV10-4193 (C.D. Cal. 2010) (\$108 million in consumer redress); *FTC v. EMC Mortgage Corp.*, No. 4:08-CV-338 (E.D. Tex. Sept. 9, 2008) (\$28 million in redress); *United States v. Fairbanks Capital Corp.*, No. 03-12219 DPW (Nov. 12, 2003) (\$40 million in redress), *judgment modified sub nom., United States v. Select Portfolio Servicing, Inc.*, No. 03-12219-DPW (D. Mass. 2007) (additional fee refunds to consumers); *FTC v. Associates First Capital Corp.*, No. 1:01-CV-00606-JTC (N.D. Ga. 2002) (\$215 million in redress).

⁶ *See, e.g., "Consumer Information and the Mortgage Market,"* <http://www.ftc.gov/be/workshops/mortgage/index.shtml> (conference regarding economic assessment of information regulation, mortgage choice, and mortgage outcomes); James M. Lacko & Janis K. Pappalardo, *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms*, FTC Bureau of Economics Staff Report (June 2007), available at <http://www.ftc.gov/os/2007/06/P025505MortgageDisclosureReport.pdf>.

⁷ Consumer education materials on mortgage issues are available at the Commission's Consumer Information web page, at <http://www.ftc.gov/bcp/menus/consumer/credit/mortgage.shtm>. The web page includes consumer education materials such as "Mortgage Discrimination: A Guide to Understanding Your Rights & Taking Action," "Mortgage Payments Sending You Reeling? Here's What to Do" and "Reverse Mortgages: Get the Facts Before Cashing In On Your Home's Equity." The Commission also created a Money Matters web site, at <http://www.ftc.gov/moneymatters>, to help educate consumers about mortgage and other financial matters.

A. Law Enforcement Actions

In September 2010, the Commission announced a settlement with mortgage lender Golden Empire Mortgage, Inc. and its owner Howard D. Kootstra. The FTC had alleged that Defendants violated the ECOA by charging Hispanic borrowers higher prices for mortgage loans than similarly situated non-Hispanic white borrowers. In the settlement, Defendants agreed to limit discretionary pricing, implement a fair lending monitoring program, conduct employee fair lending training, ensure data integrity, and conduct regular compliance reporting. The settlement imposes a \$5.5 million judgment, all but \$1.5 million of which is suspended based on Defendants' financial situation. This money will be used to provide redress to consumers who were harmed by Defendants' pricing policy.

Previously, in December 2008, the FTC reached a settlement with Gateway Funding Diversified Mortgage Services, L.P. and its general partner, Gateway Funding Inc. ("Gateway"). The Commission alleged that Gateway violated the ECOA by charging African-American and Hispanic consumers higher prices for mortgage loans than non-Hispanic white consumers. The settlement bars Gateway from discriminatory lending practices and requires it to implement a fair lending training program, a comprehensive data integrity program designed to ensure accuracy and completeness of loan data, and a fair lending monitoring program that includes a system for performing periodic analyses to monitor for disparities in loan prices. The settlement imposed a judgment of \$2.9 million, all but \$200,000 of which was suspended based on inability to pay. The FTC used this money to provide redress to African-American and Hispanic consumers who were harmed by Gateway's practices. In January 2010, the Commission entered into a modified settlement with Gateway that required them to hire a third-party consultant to assist them in developing this fair lending compliance and monitoring program.

In addition to these two recent settlements,⁸ the Commission has brought over three dozen other cases alleging that large subprime lenders, major nonmortgage creditors, and smaller finance companies violated the ECOA.⁹ The Commission's enforcement actions have addressed both substantive and procedural protections afforded by the statute, from failures to comply with

⁸ The FTC also investigated Homecomings Financial, LLC ("Homecomings"), a wholesale mortgage lender that originated the vast majority of its loans through independent brokers. The FTC staff's analyses showed that, on average, Homecomings charged African-American and Hispanic borrowers substantially more than similarly-situated non-Hispanic whites, and the price differences could not be explained by any legitimate underwriting or credit characteristics. The FTC staff closed its investigation in January 2009 because Homecomings ceased originating mortgage loans and stated it had no intention of resuming mortgage lending; the Commission did not make a determination whether Homecomings violated the law. *See* <http://www.ftc.gov/os/closings/090122homecomingfinancialclosingletter.pdf>.

⁹ Pursuant to ECOA, a violation of ECOA is deemed to be a violation of the FTC Act, and the FTC is authorized to enforce compliance with ECOA's Regulation B as if it were a violation of an FTC Trade Regulation Rule. 15 U.S.C. § 1691c(c) (violations of a trade regulation rule are subject to civil penalties of up to \$16,000 per violation).

the adverse action notice requirement¹⁰ and the record-keeping requirements necessary for determining fair lending compliance in the first instance¹¹ to discrimination on the basis of race,¹² marital status,¹³ sex,¹⁴ age,¹⁵ and receipt of public assistance.¹⁶ In a coordinated effort in 2000, the Commission, the Department of Justice, and the Department of Housing and Urban Development obtained a joint settlement with Delta Funding Corporation, a national subprime mortgage lender, resolving alleged violations of ECOA, HOEPA, and the Real Estate Settlement

¹⁰ *United States v. Sprint Corp.*, No. 04-00361 (N.D. Fla. 2004); *United States v. Action Loan, Inc.*, No. 3:00CV-511-H (W.D. Ky. 2000); *United States v. Franklin Acceptance Corp.*, No. 99-CV-2435 (E.D. Penn. 1999); *FTC v. Capital City Mortgage Corp.*, No. 98-00237 (D.D.C. 1998); *United States v. Bonlar Loan Co., Inc.*, No. 97C-7274 (N.D. Ill. 1997); *United States v. J.C. Penney Co.*, No. CV-96-4696 (E.D.N.Y. 1996).

¹¹ *FTC v. Assocs. First Capital Corp.*, No. 1:01-CV-00606 (N.D. Ga. 2001); *United States v. Action Loan, Inc.*, No. 03-511 (W.D. Ky. 2000); *United States v. Franklin Acceptance Corp.*, No. 99-2435 (E.D. Penn. 1999); *FTC v. Capital City Mortgage Corp.*, No. 98-00237 (D.D.C. 1998); *United States v. Paine Webber*, No. 92-2921 (D. Md. 1992); *United States v. Academic Int'l*, No. 91-2738 (N.D. Ga. 1991); *United States v. Barclays Am.*, No. 91-14 (W.D.N.C. 1991); *United States v. Tower Loan of Miss.*, No. 90-0447 (S.D. Miss. 1990); *United States v. Blake*, No. 90-1064 (W.D. Okl. 1990); *United States v. Chesterfield*, No. 90-0347 (N.D. Al. 1990); *United States v. City Fin.*, No. 90-246 (N.D. Ga. 1990).

¹² *United States v. Delta Funding Corp.*, No. 00-1872 (E.D.N.Y. 2000); *United States v. Shawmut Mortgage Co.*, No. 93-2453 (D. Conn. 1993); *United States v. Academic Int'l*, No. 91-2738 (N.D. Ga. 1991).

¹³ *United States v. Ford Motor Credit Co.*, No. 99-75887 (E.D. Mich. 1999); *United States v. Franklin Acceptance Corp.*, No. 99-2435 (E.D. Penn. 1999); *FTC v. CIT*, No. 94-4092 (D.N.J. 1994); *United States v. Barclays Am.*, No. 91-14 (W.D.N.C. 1991); *United States v. Blake*, No. 90-1064 (W.D. Okl. 1990); *United States v. Chesterfield*, No. 90-0347; *United States v. City Fin.*, No. 90-246 (N.D. Ga. 1990).

¹⁴ *United States v. Delta Funding Corp.*, No. 00-1872 (E.D.N.Y. 2000); *United States v. Franklin Acceptance Corp.*, No. 99-2435 (E.D. Penn. 1999); *United States v. Barclays Am.*, No. 91-14 (W.D.N.C. 1991); *United States v. Blake*, Nos. 90-1064 (W.D. Okl. 1990) and 90-2470 (W.D. Tenn. 1990); *United States v. Chesterfield*, No. 90-0347 (N.D. Al. 1990); *United States v. City Fin.*, No. 90-246 (N.D. Ga. 1990).

¹⁵ *United States v. The Money Tree, Inc.*, No. 97-007 (M.D. Ga. 1997); *United States v. Tower Loan of Miss.*, No. 90-0447 (S.D. Miss. 1990); *United States v. Chesterfield*, No. 90-0347 (N.D. Al. 1990); *United States v. City Fin.*, No. 90-246 (N.D. Ga. 1990).

¹⁶ *United States v. Franklin Acceptance Corp.*, No. 99-2435 (E.D. Penn. 1999); *United States v. The Money Tree, Inc.*, No. 97-007 (M.D. Ga. 1997).

Procedures Act.¹⁷ Currently, the Commission is engaged in several ongoing, non-public fair lending investigations of mortgage lending companies.

B. Fair Lending Investigations

Although the variables contained in current HMDA data alone are insufficient to establish a law violation, the Commission uses the reported data to identify targets for fair lending violations.¹⁸ Because disparities may be explained by information on the many credit characteristics and loan terms that are not contained in the HMDA data, the principal goal of a fair lending investigation is to determine whether or not the differences in outcomes persist after legitimate credit characteristics, underwriting criteria, and other relevant factors are taken into account.

Typically, an investigation begins with substantial requests for information directed to the target lender, such as documents reflective of the target's lending operations, including its underwriting and pricing policies and procedures, the extent and nature of the loan products offered, and the role of discretion in any underwriting and pricing decisions. The Commission staff also obtains from the target all of the criteria and data used by the lender to underwrite and price the mortgage loans. The FTC staff then analyzes the data, employing rigorous statistical protocols, to determine whether the disparities persist after credit risk and other legitimate factors are taken into account. The staff also investigates whether the lender engages in fair lending compliance monitoring and may conduct interviews of current and former employees or officers of the target and other related entities possessing relevant information.

II. RECOMMENDATIONS FOR AMENDING REGULATION C

Effective implementation of HMDA is crucial to the Commission's work to combat discriminatory practices in mortgage lending. The recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") amended HMDA to require mortgage lending institutions to report certain data elements that HMDA does not currently require, and these changes will aid fair lending enforcement.¹⁹ The Commission recommends further

¹⁷ *United States v. Delta Funding Corp.*, No. 00-1871 (E.D.N.Y. 2000). The complaint alleged that Delta had engaged in a pattern or practice of asset-based lending and other practices in violation of HOEPA, that higher broker fees were charged to African American females than to white males in violation of the ECOA and the Fair Housing Act, 42 U.S.C. §§ 3601-3619, and that few or no services were performed in exchange for certain broker charges in violation of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607. To settle the case, Delta agreed to take specific steps to prevent future violations of ECOA, FHA, RESPA and HOEPA; it also agreed to adopt a new monitoring and compliance system.

¹⁸ For example, the current data do not include the many other criteria lenders typically use to evaluate the risk of a loan, such as borrower credit scores, loan-to-value ratios, debt-to-income ratios, loan type, or the term of the loan.

¹⁹ The amended HMDA requires covered mortgage lenders to report total points and fees, rate spread, prepayment penalty, property value, loan term, existence of certain loan features, origination

changes to HMDA's coverage and requirements to facilitate fair lending analysis. In addition, the Commission recommends that the Board takes steps to protect consumer privacy in connection with the expanded HMDA reporting requirements.

A. Coverage

Under current regulations, many non-depository institutions are not required to report data under HMDA at all. Regulation C provides that non-depository institutions need only report data under HMDA if they (1) originated mortgage loans equaling at least 10 percent of their loan-origination volume or equaling at least \$25 million in total dollar volume in the preceding calendar year; (2) had a home or branch office in an MSA on the preceding December 31; and (3) had total assets of more than \$10 million on the preceding December 31, counting the assets of any parent corporation, or originated at least 100 mortgage loans in the preceding calendar year.²⁰

The Commission recommends expanding HMDA's coverage to require mortgage lenders to report based on the number of applications they receive instead of the number of loans they originate or their asset size. The Board should establish a reasonable cut-off as to a minimum number of applications. In addition, reporting should not be limited only to lenders that have branches in an MSA. This would ensure that all non-depositories that make significant numbers of mortgage decisions (as opposed to just originations) report these essential data, providing the government and the public an accurate, timely picture of mortgage lending activity.²¹

The Board should require additional types of loans to be reported as well. Reverse mortgages and home equity lines of credit (HELOCs) are particularly important. The number of reverse mortgages is expected to grow as the U.S. population ages, and having the tools to track this evolving market will help us protect seniors and other consumers of this product. Lenders are not currently required to report HELOCs even though the possibility of discrimination is no

channel (that is, retail or wholesale), borrower age, and borrower credit score. Pub. L. No. 111-203, §1094, 124 Stat. 1376 (2010).

²⁰ 12 C.F.R. § 203.2(e)(2). The Board staff reports that while HMDA data covers over 90 percent of mortgage loans by depository institutions, it is difficult to know the HMDA data coverage of non-depository lenders because there is no comprehensive list of independent mortgage lenders. Robert V. Avery et al., *The 2008 HMDA Data: The Mortgage Market During A Turbulent Year*, *Federal Reserve Bulletin*, Apr. 2010, at A169, A171 n. 12.

²¹ To be sure, accurate data depends on lenders' processes for data reporting, including verifying the data before reporting it. In its investigations, the Commission has found serious problems with the accuracy of loan data reported under HMDA. The Commission encourages the Board and the Department of Housing and Urban Development, which has oversight of HMDA reporting for nonbank lenders, to take steps to improve the accuracy of data reporting.

different for HELOCs than for other mortgage loans. Notably, the Commission has seen instances of lenders using HELOCs to avoid regulatory requirements.²²

Although increasing HMDA's coverage would increase the burden on certain lenders, it is justified by the data's importance. Moreover, the increase in burden would be reduced by making the test for whether a lender is required to report simpler by focusing solely on the number of applications. Furthermore, because virtually all lenders maintain the relevant data in electronic formats, reporting additional data fields is unlikely to result in much additional work for lenders.

B. Additional Data

The Commission also recommends that the Board should require all reporting lenders to report additional data elements pursuant to HMDA. In response to concerns related to discriminatory loan pricing, the Board amended Regulation C to require lenders to report certain pricing and loan information in 2002.²³ This information allows for improved monitoring and understanding of lending activity in the higher-priced segment of the home loan market, which has been particularly susceptible to illegal lending practices. The data, however, are not sufficient to conduct a complete fair lending analysis because they do not include the many criteria lenders typically use to evaluate the risk of a loan.

To make the targeting process described in Section I.B more precise, the Commission recommends that the Board require mortgage lenders to report combined loan-to-value ratio and debt-to-income ratio, as these are crucial determinants of underwriting and pricing that the recent Dodd-Frank Act amendments do not require to be reported.²⁴ The Commission also recommends that lenders be required to identify any automated underwriting systems used, such as Fannie Mae's Desktop Underwriter, Freddie Mac's Loan Prospector, or the FHA TOTAL Scorecard, and to report the results from such systems. This information is often crucial to isolating and examining discretion in a lender's loan approval and denial decisionmaking.

²² See, e.g., *FTC v. Wasatch Credit Corp.*, No. 99-579 (D. Utah 1999) (in making HOEPA mortgage loans, defendant represented to consumers that the credit offered and extended was open-end credit, but it in fact involved extensions of closed-end credit subject to HOEPA).

²³ Specifically, lenders must report the difference (or rate spread) between the annual percentage rate ("APR") and the applicable benchmark rate if the difference is over certain thresholds. The 2002 revision, which took effect on December 1, 2004, used the Treasury rate as the benchmark rate and set the thresholds to 3 and 5 points for first- and second-lien loans, respectively. In 2009, the benchmark rate was changed to the average prime offer rate, and the thresholds were changed to 1.5 and 3.5 points for first- and second-lien loans, respectively. See 12 C.F.R. § 203 Appendix A(I)(G)(1)(a) (Jan. 1, 2010). In calculating and setting these thresholds, the Federal Reserve Board seeks to exclude the vast majority of prime-rate loans and include the vast majority of subprime-rate loans.

²⁴ In issuing implementing regulations related to underwriting criteria such as credit score, the Board should require lenders to report the information that they relied on in making their lending decisions, rather than a metric that is standardized across lenders. For fair lending enforcement, the Commission needs the data the lender relied on in its decision-making.

In order to enable a more complete fair lending screen, the Board also should require lenders to report: (1) whether the loan is part of a multiple-loan purchase money transaction (a “piggyback loan”) and, if so, a means to identify the other loan(s) that were part of the same transaction; (2) revised categories for loan purpose/type (purchase, refinance, cash out refinance, reverse mortgage, home equity line of credit); and (3) whether the loan is a fixed rate or an adjustable rate mortgage. If the Board requires HELOCs to be reported, as recommended above, the total amount of the line of credit and the amount drawn at the time the line of credit is issued should be reported. These data elements would improve the HMDA data’s usefulness for fair lending analysis.

C. Consumer Privacy

Institutions must make their HMDA data available to the public, with certain fields redacted to preserve applicants’ privacy. The data reporting requirements in the Dodd-Frank Act, as well as any underwriting data that the Board adds to Regulation C, raise serious concerns about consumer privacy.²⁵ Because sophisticated researchers can match loans reported in the HMDA data with individual consumers in many cases, the Commission recommends that the Board look at ways to report the data so that it cannot be matched to individuals, or even a small group of individuals.²⁶

If the Board cannot report the data in a way that allows academics and researchers to effectively use the data while protecting consumer identities, the Commission recommends that the sensitive data fields be provided to law enforcement entities but redacted from the public data set. In addition, the Board could establish a system for researchers, including researchers working on behalf of community groups, to access data fields that are not available in the public data set.²⁷ Any such system must comply with the privacy requirements of HMDA²⁸ and the Privacy Act of 1974,²⁹ governing the disclosure or use of any individual-level consumer data.

²⁵ Protecting consumer privacy is an important part of the FTC’s consumer protection mission. The FTC’s Division of Privacy and Identity Protection oversees issues related to consumer privacy, credit reporting, identity theft, and information security.

²⁶ See, e.g., John M. Abowd, Bryce E. Stephens & Lars Vilhuber, “Confidentiality Protection in the Census Bureau’s Quarterly Workforce Indicators,” U.S. Census Bureau Technical Paper No. TP-2006-02 (2006), <http://lehd.did.census.gov/led/library/techpapers/tp-2006-02.pdf>.

²⁷ One possible model for the Board to consider is how the U.S. Census Bureau controls access to its confidential data by researchers. To access confidential Census Bureau data, researchers must have their research proposals approved, obtain Special Sworn Status from the Census Bureau (which requires security checks and subjects them to legal penalties if they disclose confidential information), access confidential data only from specific locations, and have any research output reviewed by the Census Bureau prior to disclosure. See <http://www.ces.census.gov/index.php/ces/researchprogram>.

²⁸ See, e.g., 12 U.S.C. § 2803(h), as amended by Pub. L. No. 111-203, § 1094.

²⁹ 5 U.S.C. § 552a.

III. CONCLUSION

The Commission is strongly committed to enforcing the fair lending laws, and it believes that amendments to Regulation C would strengthen its ability to do so effectively. If any other information would be useful regarding these matters, please contact Allison I. Brown, Acting Assistant Director, Division of Financial Practices, at (202) 326-3224.

By direction of the Commission.

Donald S. Clark
Secretary