

LOOKING BACK AND LOOKING AHEAD AS THE HOME MORTGAGE
DISCLOSURE ACT TURNS THIRTY-FIVE: THE ROLE OF PUBLIC
DISCLOSURE OF LENDING DATA IN A TIME OF FINANCIAL CRISIS

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I. Introduction

Congress passed the Home Mortgage Disclosure Act (“HMDA”)¹ in 1975 as a tool to end redlining. Redlining is a broad term that covers many different practices. In the context of the passage of HMDA, redlining is a lender’s refusal to lend, or lending on more onerous terms, in urban, older, low-income or predominantly minority neighborhoods, not based on an individualized analysis of the loan applicant’s eligibility for the loan, but on the characteristics of the neighborhood. Unlike other statutes like the Fair Housing Act (“FHA”)² and the Equal Credit Opportunity Act (“ECOA”),³ which target discriminatory behavior, HMDA does not prohibit redlining, create remedies to eliminate it or penalize lenders who practice it. Instead, HMDA relies on the power of public disclosure of lending data to stop lenders from redlining by embarrassing them if they make few or no loans in redlined neighborhoods.

As HMDA turns thirty-five years old, there are four interrelated themes in its history that suggest a role for HMDA in this era of financial crisis. First, HMDA’s mission has expanded significantly from an anti-redlining statute to include anti-discrimination and anti- reverse redlining. In 1989, Congress expanded HMDA’s mission to add detecting and eliminating race discrimination in home mortgage lending to HMDA’s original anti-redlining purpose. In 2002, HMDA came full circle. This time, the problem was reverse redlining—too many high-priced subprime loans in predominantly minority neighborhoods. The Board of Governors of the Federal Reserve System (the “Fed”)—the agency responsible for enforcing HMDA—responded by issuing regulations that expanded HMDA’s

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¹ Home Mortgage Disclosure Act (“HMDA”), 12 U.S.C. §§ 2801-10 (2006).

² Fair Housing Act, 42 U.S.C. §§ 3601-19 (2006).

³ Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (2006).

mission to include detecting and preventing reverse redlining by requiring lenders to disclose information about the location of their subprime loans.

Second, to help accomplish HMDA's expanding mission, both Congress and the Fed increased both the number of lenders that HMDA covers and the amount of information they are required to disclose. Originally, HMDA covered only banks and their majority-owned home mortgage lenders. Now, HMDA covers nearly all home mortgage lenders, whether or not they are owned by banks. Originally, HMDA required covered lenders to disclose only the location of their home mortgage loans. Now, HMDA requires lenders to disclose the geographic source of their home mortgage loan applications, the race of applicants and borrowers, their decisions on applications and the interest rate on subprime loans.

Third, even though Congress and the Fed expanded HMDA's mission and increased the amount of data that lenders are required to disclose to accomplish this mission, they have generally stopped short of requiring lenders to disclose enough information to establish (or not establish) redlining, lending discrimination or reverse redlining. In its original form, HMDA did not require lenders to disclose the number of loan applications they received, which made it difficult to determine whether the absence of lending in allegedly redlined neighborhoods was due to redlining or lack of demand for loans. Congressional amendments to HMDA in 1989 required lenders to disclose the number and geographical source of applications they received, the race of loan applicants and their decisions on the applications—thus addressing the issue of demand for loans. But these amendments did not require lenders to disclose information about the creditworthiness of loan applicants, hampering efforts to determine whether higher rates of rejections of loan applications from minority borrowers than whites were due to relatively weaker creditworthiness or race. In 2002, when the Fed required lenders to disclose the interest rate on subprime loans, it did not require them to disclose the credit score of the borrower. Borrower credit scores would have made it possible to determine whether the higher interest rate was justified by the borrower's risk level or attributable to other factors.

Fourth, HMDA data have shown evidence (although not proof) that lenders are redlining, discriminating and engaging in reverse redlining. After HMDA's passage in 1975, the data showed a lack of lending in allegedly redlined neighborhoods. Following the 1989 amendments, the data showed disproportionately high rejection

rates of loan applications from African-Americans, Latinos and residents of predominantly minority neighborhoods. With the 2002 amendments, the data showed disproportionately high subprime lending to African-Americans, Latinos and residents of predominantly minority neighborhoods. Despite this evidence, the impact of these disclosures has been mixed, in large part because the Fed and other agencies that regulate lenders questioned the weight of the evidence due to the limitations in HMDA data. The only really significant impact took place after the 1989 amendments, when public outcry and the media coverage about the disparate rejection rates based on race was so strong that it forced Congress to take notice and the agencies to take action. This led to significant lending increases to African-Americans, Latinos and residents of predominantly minority neighborhoods.

Looking ahead, perhaps the lesson to be learned from HMDA's history is that unless the data disclosures are, on their face, very compelling—in the form, for example, of highly differentiated rejection rates on home mortgage loan applications based on race—and if the data do not contain sufficient information about the lending practice to be remedied, then the data disclosure will not be effective in eliminating the targeted practice. This lesson may be particularly apt now. The economic crisis—triggered at least in part by losses that lenders incurred as a result of defaults and foreclosures on risky and abusive home mortgage lending practices—has generated several proposals to strengthen regulation of the financial services industry. The most prominent of these is the proposed Consumer Financial Protection Agency Act of 2009 (“CFPAA”).⁴ The CFPAA would expand HMDA's mission once again, this time to detect many of the lending practices that led to the financial crisis and to identify the lenders that engage in them.⁵ HMDA's past seems to be playing itself out in this proposal. The amendments would require lenders to disclose information about risky and abusive home mortgage lending practices, including, for example, the difference between the annual percentage rate on a bank's loans and a benchmark rate for all banks, any interest rate adjustment period, and the terms of any pre-payment penalties.⁶ However, the CFPAA would not require lenders to disclose other information about risky and abusive lending practices,

⁴ Consumer Financial Protection Agency Act of 2009, H.R. 3126, 111th Cong. (2009).

⁵ *Id.* at § 188.

⁶ *Id.* at § 188(c)(1).

including, for example, whether the borrower can afford the loan when originated. Given the catastrophic consequences of unsafe lending and the potential power of public disclosure, Congress should take advantage of the current reform opportunity to give HMDA the tools to identify lending practices that are risky and abusive and the lenders who engage in these practices.

Part II of this article reviews HMDA's early history, from its passage in 1975 to 1988. It reviews the legislative history of HMDA, revealing Congress' intent to use public disclosure to eliminate redlining. Part II also documents the limited nature of HMDA's initial disclosures and the minimal impact the disclosures had. Part III covers the middle period of HMDA's history, from 1989 to 2002. This period includes the expansion of HMDA's mission in 1989 into a tool to detect and prevent home mortgage lending discrimination and the corresponding increased data disclosure requirements. Part III also examines the role that the expanded data had in the increases in lending to African-Americans, Latinos and residents of predominantly minority neighborhoods that followed the 1989 amendments. Part IV examines HMDA's expansion in 2002 into a tool to fight reverse redlining by requiring lenders to disclose the number and location of their subprime loans. The subsequent data disclosure showed significant disproportionate distribution of subprime loans in predominantly minority neighborhoods and to minority borrowers, but the disclosure of this data did not have the same impact as the disclosure of data after 1989. Part V discusses proposals to amend HMDA to expand its mission to include detecting risky and abusive home mortgage lending practices. While the proposals contained in the CFPAA are helpful, they do not require lenders to disclose sufficient information to detect the full range of lending practices that are responsible for high loan default and disclosure rates. HMDA's past shows that insufficient HMDA data disclosure requirements undermine HMDA's mission. Finally, Part VI provides concluding lessons from HMDA thus far. The enormity of the financial crisis and the role that risky and abusive home mortgage lending practices played in it suggest that Congress should learn from HMDA's past and make sure that any amendments to HMDA will result in disclosure of sufficient information to detect and prevent the fullest possible range of unsafe and abusive home mortgage lending practices.

II. The Initial Passage and Subsequent Expansion of HMDA: 1975-1988

Congress' intent in passing HMDA was to use the power of public disclosure to eliminate redlining in low-income, urban and predominantly minority neighborhoods. HMDA's initial provisions were limited, covering only banks and their majority-owned mortgage lenders and requiring them to disclose only the location of their home mortgage loans. Between 1980 and 1988, Congress and the Fed made statutory and regulatory changes to HMDA that improved public access to HMDA data and made the data more helpful in identifying redlining. These changes included aggregating HMDA data for all lenders in each metropolitan area, creating central HMDA depositories in each metropolitan area, requiring lenders to report the census tract of each loan and extending HMDA coverage to more lenders. HMDA data in this period frequently showed that banks made few loans in low-income or predominantly minority neighborhoods, but the Fed discounted this because of the data's limitations, particularly in failing to provide information about the demand for home mortgage loans.

A. Congressional Intent in Passing HMDA

Congress passed HMDA in 1975 in light of evidence that banks had "redlined" certain neighborhoods because of characteristics other than the creditworthiness of the residents.⁷ Redlining is used in HMDA's legislative history as a term to describe several different practices, including failing or refusing to lend, lending at higher interest rates or more onerous loan terms or otherwise making it very difficult for a resident of a particular neighborhood to get a loan regardless of her creditworthiness because the neighborhood in which the loan would be made has characteristics the lender does not like.⁸ Senator William Proxmire stated that a lender "should not arbitrarily reject loan applications from sound credit risks on sound houses simply because he does not

⁷ Congress found that "some depository institutions have sometimes contributed to the decline of certain geographic areas by their failure . . . to provide adequate home financing to qualified applicants on reasonable terms and conditions." 12 U.S.C. § 2801(a) (2006).

⁸ See 121 CONG. REC. 23,935, 25,160-61 (1975) (statement of Sen. Proxmire).

like the neighborhood, or because he fears it may at some future time decline.”⁹

The legislative history of HMDA refers most frequently to redlining in “older” and “urban” neighborhoods.¹⁰ There are also references to redlining based on the racial composition of the neighborhood. Reflecting this, Senator Proxmire stated, “our financial institutions seem to disdain these older communities, especially if they happen to be integrated, or adjacent to poorer neighborhoods.”¹¹ Senator Proxmire cited the example of Oak Park, Illinois, and suburbs like it, which “have trouble finding mortgage money because the housing was built 50 years ago, and the neighborhood has become integrated.”¹²

HMDA’s supporters opposed redlining on several grounds. First, they suggested that it was wrong for banks to take a

⁹ *Id.* at 25,160; *see also id.* at 25,162 (statement of Sen. Brooke) (failing to lend); 121 CONG. REC. 26,645, 27,622 (1975) (statement of Sen. Brooke) (refusing to make loans); 121 CONG. REC. 34,345, 34,576 (1975) (statement of Rep. Stokes) (denying mortgages); *id.* at 34,453 (statement of Rep. Murphy) (refusing to make mortgages to qualified applicants); *id.* at 34,576 (statement of Rep. Stokes) (“Redlining is a process whereby qualified buyers are denied mortgages in certain geographic areas.”).

¹⁰ 121 CONG. REC. 23,935, 25,159-60 (statement of Sen. Proxmire) (“Many, if not most lenders—banks and savings and loan associations alike—tend to be reluctant to lend mortgage money to older urban neighborhoods.”); 121 CONG. REC. 26,645, 27,622 (1975) (statement of Sen. Brooke) (“[M]any mortgage lending institutions were not making mortgage loans in older neighborhoods”); H.R. REP. NO. 94-561, at 12 (1975); S. REP. NO. 94-187, at 3, 5 (1975); 121 CONG. REC. 39,861, 40,606 (statement of Sen. Proxmire) (discussing the refusal to lend mortgage money in older urban neighborhoods); S. REP. NO. 94-187, at 1 (1975) (redlining is a “reluctan[ce] to make mortgage loans on existing homes in older urban neighborhoods. There is ample demonstration that credit-worthy persons are sometimes denied loans on sound homes solely because of the location of the property.”).

¹¹ *See* 121 CONG. REC. 23,935, 25,160 (1975) (statement of Sen. Proxmire).

¹² 121 CONG. REC. 41,103, 41,709 (1975) (statement of Rep. St. Germain) (discussing redlining in “ethnic” neighborhoods); *id.* (statement of Rep. St. Germain) (stating that redlining occurs “when certain institutions refuse to lend mortgage money in our Nation’s older urban and ethnic neighborhoods.”); H.R. REP. NO. 94-561, at 11 (1975); S. REP. NO. 94-187, at 3 (1975).

community's deposits without lending to that community.¹³ Senator Proxmire expressed this judgment, stating, "[t]he extreme irony is that often the banks and savings and loan associations located in these older neighborhoods draw their deposits from precisely those communities that cannot get loans."¹⁴ HMDA's supporters in the House felt the same way. Representative Badillo stated, "[t]hey took the money of depositors who resided in central city areas, redlined their neighborhoods, and invested the funds in new housing in the suburbs."¹⁵

Second, supporters of HMDA argued that redlining was inconsistent with banks' charter responsibilities. The basis of this position was that entry into the banking industry was restricted to entities that had a charter granted by a governmental entity, and that in return for the privilege to do business granted by the charter, banks had an obligation to serve the needs of their communities by making loans there.¹⁶ Senator Brooke was clear about this: "These institutions operate under charters issued by financial regulatory agencies which restrict entry into the business on a geographic basis. They are supposed to serve the area in which they are located, not only to obtain deposits but also to make loans."¹⁷

¹³ This sentiment was expressed in the Report of the House Committee on Banking, Currency, and Housing:

In many instances, after years of placing their savings in local financial institutions, they [the citizens of redlined neighborhoods] are now confronted with the inability to improve their property, or for prospective neighbors to purchase homes. In many instances, the dollars they have been saving are being used to develop newer areas, not to preserve, maintain and enhance their local ones.

H.R. REP. NO. 94-561, at 12 (1975).

¹⁴ 121 CONG. REC. 23,935, 25,160 (1975) (statement of Sen. Proxmire).

¹⁵ 121 CONG. REC. 34,345, 34,577 (1975) (statement of Rep. Badillo).

¹⁶ Congress stated, "depository institutions" have "chartering responsibilities to provide adequate home financing to qualified applicants on reasonable terms and conditions," and "to serve the housing needs of the communities and neighborhoods in which they are located." Home Mortgage Disclosure Act, 12 U.S.C. § 2801(a)-(b) (2006). Senator Proxmire stated, "[a]t the same time, a lender that is chartered to serve a community does have an obligation to give some service to that community." 121 CONG. REC. 23,935, 25,160 (1975) (statement of Sen. Proxmire). *See* S. REP. NO. 94-187, at 11 (1975); H.R. REP. NO. 94-561, at 19 (1975).

¹⁷ 121 CONG. REC. 23,935, 25,162 (1975) (statement of Sen. Brooke).

Third, HMDA proponents argued that redlining was a cause of the deterioration of urban neighborhoods.¹⁸ Senator Proxmire described the cycle of disinvestment and deterioration: “When the neighborhood cannot get mortgage credit, property values drop; new homeowners cannot move in because they cannot get mortgages. Eventually, the neighborhood starts to deteriorate and so the lender can say: See, I told you so.”¹⁹ Representative Badillo was even more graphic: “Potential buyers in search of housing left the cities. Their going reduced the tax base. Landlords could obtain no funds for rehabilitation. The neighborhoods continued to deteriorate. Housing values declined, and redlined areas drifted inexorably toward the status of demoralizing, dehumanizing, slums.”²⁰

Fourth, the corollary to the idea that redlining led to deterioration—that lack of credit prevented the rebuilding of redlined neighborhoods—was also reflected in HMDA’s legislative history.²¹ Representative Mitchell stated: “I think that if the lending institutions would give us some mortgage money and stop redlining, we would be ble [sic] to make our communities much more attractive.”²² The lack of private credit in redlined neighborhoods made it more difficult for public housing programs designed to rehabilitate these areas to work effectively.²³ The report of the House Committee on Banking, Currency, and Housing expressed this sentiment clearly: “No federal housing program can ever hope to fulfill our twenty-five year old national housing goal of a ‘decent home and a suitable living environment for every American’ without a firm commitment from the private sector and, most importantly, from our nation’s financial institutions.”²⁴

¹⁸ According to Congress, redlining “contributed to the decline of certain geographic areas.” 12 U.S.C. § 2801(a). See 121 CONG. REC. 34,345, 34,453 (1975) (statement of Rep. Murphy); H.R. REP. NO. 94-561, at 12 (1975); S. REP. NO. 94-187, at 1, 3 (1975).

¹⁹ 121 CONG. REC. 23,935, 25,160 (1975) (statement of Sen. Proxmire).

²⁰ 121 CONG. REC. 34,345, 34,577 (1975) (statement of Rep. Badillo).

²¹ See *id.* at 34,576 (statement of Rep. Stokes) (“This bill would thereby remove a major obstacle facing decent citizens trying to stabilize and revitalize their neighborhoods.”).

²² See *id.* at 34,567 (statement of Rep. Mitchell).

²³ According to the House Committee on Banking, Currency, and Housing, redlining also “exacerbates the problem of providing public sector investments to stabilize and rehabilitate essentially older neighborhoods within our cities.” H.R. REP. NO. 94-561, at 4 (1975).

²⁴ *Id.* at 11 (1975).

Congress' primary purpose in passing HMDA was to end redlining and encourage lenders to make loans in redlined neighborhoods through the disclosure of information about the location of their home mortgage loans.²⁵ Senator Proxmire described the means and ends Congress had in mind when it passed HMDA: “[HMDA] provides a very gentle remedy—disclosure—to a very serious national problem, the extreme difficulty of obtaining mortgage credit in older urban neighborhoods.”²⁶

HMDA is thus an unusual statute in that it does not implement Congressional intent the way that proscriptive or ameliorative statutes usually do: identify undesirable conduct, prohibit it, create remedies and proscribe penalties.²⁷ HMDA does identify redlining as undesirable conduct, but it does not prohibit redlining, create remedies or proscribe penalties. It does not deprive a bank of its charter if it practices redlining,²⁸ require a bank to make a loan,²⁹ or allocate credit.³⁰ Instead, HMDA relies on the power of public

²⁵ Senator Tunney stated:

It is clear that our present efforts, both at the State and Federal level, represent a start, but only a start, in dealing with the phenomenon of urban decay as it results from lending practices. However, we must start somewhere, and the efforts to collect and analyze information about “redlining” represent an intelligent and natural starting point.

121 CONG. REC. 26,645, 27,621 (statement of Sen. Tunney). *See id.* at 27,612 (statement of Sen. Proxmire) (discussing the rights of depositors). Representative Mitchell stated, “the private sector will never do its job if [HMDA is not passed],” 121 CONG. REC. 34,345, 34,567 (1975) (statement of Rep. Mitchell); 121 CONG. REC. 26,645, 27,622 (1975) (statement of Sen. Brooke); 121 CONG. REC. 34,345, 34,576 (1975) (statement of Rep. Stokes). *See* H.R. REP. NO. 94-561 at 11, 14, 20 (1975); S. REP. NO. 94-187, at 1, 10 (1975).

²⁶ 121 CONG. REC. 23,935, 25,159 (1975) (statement of Sen. Proxmire).

²⁷ *See, e.g.*, Fair Housing Act, 42 U.S.C. §§ 3601-3619 (2006); Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (2006). These statutes prohibit lending discrimination, provide for private and governmental remedies, and proscribe penalties. *See infra* notes 63-64 and accompanying text.

²⁸ 121 CONG. REC. 26,645, 27,612 (1975) (statement of Sen. Proxmire).

²⁹ *Id.* (“It would not require a bank to make any loan at all.”).

³⁰ HMDA states: “Nothing in this title . . . is intended to, nor shall it be construed to, encourage unsound lending practices or the allocation of credit.” 12 U.S.C. § 2801(c) (2006). Senator Brooke stated, “[n]or does any member of our committee urge a system of credit allocation under which

disclosure to remedy the undesirable conduct. HMDA's purpose is to "provide the citizens and public officials of the United States with sufficient information to enable them to determine whether depository institutions are fulfilling their obligations to serve the housing needs of the communities and neighborhoods in which they are located"³¹

Congress hoped that requiring banks to disclose the location of their home mortgage loans would help end redlining.³² Senator Proxmire cited evidence that disclosure has this effect, noting, "disclosure in Baltimore produced a 50-percent increase in mortgage lending. Similar patterns have been shown in Chicago and in Los Angeles, as the consequence of disclosure programs in those areas."³³

Disclosure could help in several ways. First, public disclosure would help community groups in their efforts to pressure banks to make home mortgage loans in their communities.³⁴ Representative Stokes described how this would work:

mortgage lending institutions are directed to invest a certain percentage of their funds in older neighborhoods." 121 CONG. REC. 23,935, 25,162 (1975) (statement of Sen. Brooke). According to Senator Proxmire, "we are not telling the banks they have to make a loan. We are just saying, disclose what you do; just let us know." 121 CONG. REC. 26,645, 27,612 (1975) (statement of Sen. Proxmire). Senator Tunney stated that HMDA "does not force the allocation of credit by our Nation's lending institutions, nor does it represent a first step in such credit allocation." *Id.* at 27,621 (statement of Sen. Tunney).

³¹ 12 U.S.C. § 2801(b). Senator Brooke stated that under HMDA, banks' "depositors and the public at large will be given an opportunity to assess the lending policies of these institutions by looking at the areas in which they make mortgage loans." 121 CONG. REC. 23,935, 25,162 (1975) (statement of Sen. Brooke).

³² According to the Senate Committee on Banking, Housing, and Urban Affairs, "disclosure is a mild remedy that will have the effect of encouraging institutions to become more community-minded." S. REP. NO. 94-187, at 10 (1975).

³³ 121 CONG. REC. 26,645, 27,606 (1975) (statement of Sen. Proxmire).

³⁴ According to Senator Proxmire, "[t]he intent here is that citizens and public officials will be more successful in discouraging the practice of 'red-lining' or the refusal to lend mortgage money in older urban neighborhoods if they are armed with the facts." 121 CONG. REC. 40,047, 40,606 (1975) (statement of Sen. Proxmire). According to Representative St. Germain, "[b]y requiring financial institutions to publicly disclose by geographic area the number and dollar amount of home mortgage loans we will enable citizens and public officials—by arming them with the facts—to combat

[HMDA data] will give people the tools to identify the problems in their neighborhoods and to begin to solve them. It will allow people to have a voice in what happens to their neighborhoods It will give people a fighting chance to maintain their most valuable asset—their homes.³⁵

Second, community residents could refuse to place deposits with banks that did not lend in their neighborhoods.³⁶ Senator Brooke described how this would work:

In some cities, neighborhood groups have organized to persuade their local lending institutions to make more mortgage credit available in their areas. They argue persuasively that they should be able to make an educated judgment about where they will deposit their savings based on the probability of their being able to obtain mortgage loans from the institutions in which they have made deposits.³⁷

what has come to be known as ‘redlining’” 121 CONG. REC. 41103, 41,709 (1975) (statement of Rep. St. Germain). *See* H.R. REP. NO. 94-561, at 14, 20 (1975); S. REP. NO. 94-187, at 1-2 (1975); *see also* Richard D. Marsico, *Fighting Poverty Through Community Empowerment and Economic Development: The Role of the Community Reinvestment and Home Mortgage Disclosure Acts*, 12 N.Y.L. SCH. J. HUM. RTS. 281, 293 (1995) (describing the purpose of HMDA and the public’s use of HMDA data).

³⁵ 121 CONG. REC. 34,345, 34,576 (1975) (statement of Rep. Stokes).

³⁶ HMDA “would use the power of market competition—competition for the saver’s dollar—to encourage lenders to do a better job in their own backyards.” 121 CONG. REC. 23,935, 25,160 (1975) (statement of Sen. Proxmire). Senator Proxmire stated, “I think the time has come to let some sunshine in; to provide information to consumers in these neighborhoods that have been arbitrarily denied credit, and to let the marketplace decide which lenders deserve their business. That is all . . . [HMDA] does.” *Id.* at 25,166 (statement of Sen. Proxmire). He further stated, “I believe that if depositors are able to learn, through disclosure, which local lenders are treating the community fairly, lenders will become more accountable. They will have a kind of competition for responsibility and for community service, community availability.” *Id.* at 25,160. According to Representative Stokes, HMDA will allow people “to know how their money is being used, and to channel their own financial resources back into their communities.” 121 CONG. REC. 34,345, 34,576 (1975) (statement of Rep. Stokes).

³⁷ 121 CONG. REC. 23,935, 25,162 (1975) (statement of Sen. Brooke).

Third, government officials could distribute public sector investments in a way that would promote private investment.³⁸ Finally, banks would be shamed by being publicly identified as practicing redlining. Senator Proxmire suspected that one of the reasons the banking industry opposed public disclosure of the home mortgage lending data was “the embarrassment once this data is publicly available. . . . I think it is the potential embarrassment and the accountability to depositors that the industry truly fears”³⁹

B. Initial Provisions of HMDA

As initially passed, HMDA was limited in scope. It covered banks and non-bank mortgage lenders that were majority-owned by banks. HMDA required these lenders to report only the location of their home mortgage loans. It did not, however, require lenders to disclose any information about the demand for loans, including, for example, the number of loan applications they received. Although amendments to HMDA in 1980 and 1988 expanded its coverage and usefulness, the amendments did not address this issue. As a result, HMDA was limited as a tool to detect and deter redlining because lenders defended small numbers of home mortgage loans in low-income and predominantly minority neighborhoods as the result of the lack of home mortgage loan applications from those neighborhoods, and the Fed accepted these arguments.

³⁸ 12 U.S.C. § 2801(b). HMDA “would also provide information to municipal officials concerned with housing, on the effects of local credit flows.” 121 CONG. REC. 23,935, 25,160 (1975) (statement of Sen. Proxmire). “Additionally, . . . [HMDA] will help the Congress in making some decisions about where various community development funds should go.” 121 CONG. REC. 34,345, 34,567 (1975) (statement of Rep. Mitchell). See H.R. REP. NO. 94-561, at 14 (1975); 121 CONG. REC. 34,345, 34,455 (1975) (statement of Rep. St. Germain) (“[T]he purpose of . . . [HMDA] is to provide at long last the information necessary for the private citizens, financial institutions, all levels of government working cooperatively to devise ways and means to stabilize neighborhoods in virtually every city so that the day will soon come again when private capital essential for ordinary economic growth once again returns to our cities.”).

³⁹ 121 CONG. REC. 23,935, 25,161 (1975) (statement of Sen. Proxmire).

1. Initial HMDA Coverage

As originally passed, HMDA covered “depository institutions,” defined as commercial banks, savings banks, savings and loan associations and credit unions that made federally related mortgage loans.⁴⁰ The Fed issued regulations that deemed majority-owned subsidiaries of depository institutions as part of their parent institutions.⁴¹ Depository institutions were required to report data if they had a branch or home office in a standard metropolitan statistical area,⁴² made federally related mortgage loans⁴³ and had assets of \$10,000,000 or more.⁴⁴

2. Initial Reporting Requirements

Initially, HMDA required covered lenders to report several categories of information about their home mortgage loans. First, HMDA required covered lenders to report the total number and dollar value of mortgage loans they originated or purchased each year.⁴⁵ Second, for mortgage loans within a metropolitan area in which the lender had a home or branch office, the lender was required to report the total number and dollar value of mortgage loans by census tract when census tract information was available at

⁴⁰ Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, § 303(2), 89 Stat. 1124, 1125 (1975) (codified as amended at 12 U.S.C. § 2802(2) (2006)).

⁴¹ 12 C.F.R. § 203.2(c) (1978).

⁴² Home Mortgage Disclosure Act § 304(a)(1) (1975); 12 C.F.R. § 203.3(a)(2) (1978).

⁴³ Home Mortgage Disclosure Act § 303(2) (1975). The Fed defined a “federally related mortgage loan” as any loan, other than temporary financing such as a construction loan, that is secured by a first lien on one-to-four family residential property and is made in whole or in part by an institution whose deposits are insured by the federal government or that is regulated by the federal government; or that was guaranteed or insured by the federal government; or a loan intended to be sold to a government-sponsored enterprise. 12 C.F.R. § 203.2(d) (1978).

⁴⁴ 12 C.F.R. § 203.3(a)(1) (1978).

⁴⁵ Home Mortgage Disclosure Act § 304(a)(1) (1975). Mortgage loans were defined as loans secured by a first lien on residential real property, including first lien refinancing loans and home improvement loans. *Id.* at § 303(1); 12 C.F.R. §§ 203.2(f)-(i) (1978). Residential real property included one-to-four family homes and multi-family dwellings. *Id.* at § 203.2(i).

reasonable cost, otherwise by zip code.⁴⁶ Finally, HMDA required lenders to report the total number and dollar value of their mortgage loans on one-to-four family homes that were insured or guaranteed by the federal government, made to borrowers who did not intend to occupy the property, or for home improvement.⁴⁷

C. HMDA Expansion from 1980 to 1988

In 1980, Congress amended HMDA to make the data more accessible and useful. Perhaps the most significant amendment required the Federal Financial Institutions Examination Council (“FFIEC”) to compile aggregate HMDA data for all HMDA reporters in each metropolitan area.⁴⁸ The legislation required the FFIEC to provide the aggregate information by census tract and by groups of census tracts categorized by income level and racial composition (for example, less than 10 percent minority, 10-75 percent minority and greater than 75 percent minority).⁴⁹ These aggregate tables were intended to make HMDA much more useful as a tool for identifying overall lending patterns in a metropolitan area, identifying the lending patterns of individual lenders, measuring improvement and helping public officials develop housing and community development programs.⁵⁰ Additionally, the aggregate tables allowed for evaluations of the performance of an individual lender compared with all lenders.⁵¹

Congress passed three additional important amendments during these years. First, it required covered lenders to report the geographic distribution of most of their HMDA loans by census tract.⁵² Previously, zip code reporting was permitted if reporting by

⁴⁶ Home Mortgage Disclosure Act § 304(a)(2)(A) (1975); 12 C.F.R. § 203.4(a)(1) (1978).

⁴⁷ Home Mortgage Disclosure Act § 304(b) (1975); 12 C.F.R. § 203(a)(1)(i)-(vi) (1978).

⁴⁸ Housing and Community Development Act of 1980, Pub. L. No. 96-399, § 340(c), 94 Stat. 1614 (1980) (codified as amended at 12 U.S.C. § 2809(a) (2006)).

⁴⁹ See S. REP. NO. 96-736, at 33-34 (1980).

⁵⁰ *Id.*

⁵¹ See *id.*

⁵² Housing and Community Development Act § 340(a) (1980). The legislation required banks to report their home mortgage loans by census tract in counties with a population of greater than 30,000 and by county name in counties with a population less than 30,000. *Id.*

census tract was unreasonably expensive. Census tracts are generally smaller than zip codes, and more accurately reflect the racial composition and economic level of the neighborhoods where a lender made its loans. This change thus made it easier to identify lending patterns by race and income. Second, Congress required the FFIEC to create central HMDA data depositories in each metropolitan area.⁵³ These central depositories would contain all HMDA data for all HMDA reporters in each metropolitan area, allowing residents easier access to all the lending data for all lenders in their metropolitan area.⁵⁴

In 1988, Congress amended HMDA once again, expanding it by increasing the number of lenders subject to its disclosure requirements. The 1988 amendments expanded HMDA to cover mortgage banking subsidiaries of bank holding companies or savings and loan holding companies and savings and loan service corporations that originate or purchase mortgage loans.⁵⁵ Previously, HMDA covered mortgage banks only if they were majority-owned by banks.⁵⁶

D. Uses of HMDA Data from 1975 to 1988

The data released during this first phase of HMDA's history were useful but had limitations. This data could be analyzed in many ways, frequently in conjunction with other publicly available data such as the median income and racial composition of census tracts and the amount of deposits in bank branches. For example, the data could show: 1) the total number and dollar value of home mortgage loans that the bank made in low-income or predominantly minority neighborhoods compared with its number and dollar value of loans in upper-income or white neighborhoods; 2) the percentage of the

⁵³ *Id.*

⁵⁴ Home Mortgage Disclosure; Revision of Regulation C and Aggregation Tables, 46 Fed. Reg. 11,780, 11,786 (Feb. 10, 1981) (to be codified at 12 C.F.R. pt. 203). Before the Internet, which now gives access to all HMDA data for all covered lenders and all metropolitan areas, these central depositories were the only place to collect such data. HMDA data are now available at the website of the Federal Financial Institutions Examination Council, www.ffiec.gov.

⁵⁵ Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 565(a)(1), 101 Stat. 1815 (1987) (codified as amended at 12 U.S.C. § 2802).

⁵⁶ *See supra* notes 40-41 and accompanying text.

bank's loans in low-income or predominantly minority neighborhoods compared with its percentage in upper-income or white neighborhoods; and 3) the percentage of the bank's loans in low-income or predominantly minority communities compared with other banks' percentages.⁵⁷ HMDA data could also be used to calculate a bank's "loan-to-deposit ratio" ("LDR")⁵⁸ and compare the bank's LDR with the LDRs of other banks. Frequently, these analyses showed that a bank made proportionately fewer loans in low-income and predominantly minority communities than in upper-income or white communities, its percentages of loans in low-income and minority communities was lower than other banks', or that it had a low LDR either in absolute terms or relative to other banks.⁵⁹

The Fed, however, questioned whether any of these findings showed redlining. The Fed stated that HMDA data were limited in their ability to show redlining because the data did not show the creditworthiness of the loan applicant, the level of the demand for loans or any other information about the bank's other types of loans.⁶⁰ The Fed also questioned the meaning of a low LDR, stating that there may be many reasons a neighborhood might generate more deposits than loans.⁶¹

The irony with this is that the Fed found that the data that Congress required lenders to disclose to show whether they were redlining were insufficient to determine whether they were in fact redlining—even though on their face the data showed evidence that lenders were redlining as Congress suspected. The Fed's approach, although perhaps ironic, was not entirely unreasonable because the data, standing alone, were insufficient to prove redlining. Notably lacking was information about the demand for loans, the borrower's creditworthiness and the value of the collateral.

Even though the Fed's view of HMDA data was not unreasonable, the problem with the Fed's response to the data was that the Fed did not treat disproportionately low lending in predominantly minority or low-income neighborhoods as evidence

⁵⁷ See Richard Marsico, *A Guide to Enforcing the Community Reinvestment Act*, 20 FORD. URB. L. J. 165, 230-32 (1993) [hereinafter *CRA Guide*].

⁵⁸ The LDR measures the dollar amount of a bank's home mortgage loans in a community as a percentage of the community's deposits in the bank's branches in that community. *Id.* at 234.

⁵⁹ See *id.* at 233-35.

⁶⁰ See *id.* at 238-39.

⁶¹ *Id.* at 235.

that redlining might exist and that further investigation was necessary. The Fed did not take the next step and investigate whether lower lending rates in predominantly minority neighborhoods were the result of redlining. The Fed and the other federal agencies responsible for enforcing statutes intended to address redlining or lending discrimination—including the Community Reinvestment Act of 1977 (“CRA”),⁶² the FHA,⁶³ and the ECOA⁶⁴—did not pursue

⁶² 12 U.S.C. §§ 2901-08 (2006). The CRA requires banks to meet the credit needs of the local communities they serve, including low- and moderate-income neighborhoods. *Id.* at § 2901(b). Four federal agencies—the Fed, the Comptroller of the Currency, the Federal Deposit Insurance Corporation and the Office of Thrift Supervision—divide CRA enforcement responsibility by periodically reviewing the record of the banks they supervise to determine whether they meet community credit needs and then taking that record into account when considering bank expansion applications. *Id.* at §§ 2901(1), 2903(a)(1)-(2).

⁶³ 42 U.S.C. §§ 3601-19 (2006). The FHA prohibits discrimination in the sale, rental or terms and conditions of the sale or rental of housing on the basis of race, color, religion, sex, familial status, national origin or disability. *Id.* at § 3604(a), (b), (f). FHA also prohibits discrimination in residential real estate-related transactions, including making such transactions available and their terms and conditions, on the basis of race, color, religion, sex, handicap, familial status or national origin. *Id.* at § 3605(a). Residential real estate-related transactions include making loans or providing other financial assistance for purchasing, constructing, improving, repairing or maintaining a dwelling. *Id.* at § 3605(b). The FHA has been construed to prohibit redlining. *See Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 494 (S.D. Ohio 1976). The Secretary of Housing and Urban Development has broad enforcement authority over FHA, including commencing administrative complaints, 42 U.S.C. § 3610(a), initiating investigations, issuing subpoenas and ordering discovery in aid of investigations. *Id.* at § 3611. The Attorney General of the United States has the authority to commence lawsuits challenging a pattern or practice of discrimination. *Id.* at § 3614(a).

⁶⁴ 15 U.S.C. §§ 1691-1691f (2006). The ECOA prohibits any creditor from discriminating in any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status or age. *Id.* at § 1691(a). General enforcement authority of the ECOA is in the hands of the Federal Trade Commission, *id.* at § 1691c(c), but several other agencies, including the agencies that enforce the CRA, are authorized to enforce the ECOA with respect to entities under their jurisdiction, *id.* at §§ 1691c(a), (a)(1). The Attorney General of the United States also has the authority to commence lawsuits challenging a pattern and practice of discrimination. *Id.* at § 1691e(h).

additional data or remedies, which were available to them as enforcement agencies, that could have shown whether the lending disparities were the result of discrimination. Nor did they use their enforcement authority to bring discrimination lawsuits under the FHA or the ECOA, or to deny bank mergers under the CRA.⁶⁵ It was not until 1992, after the 1989 amendments to HMDA expanded its disclosure requirements, that these agencies took a more aggressive stance toward disproportionately low lending in minority and low-income communities.

III. HMDA Revolution: 1989-2002

The year 1989 was a watershed year for HMDA. Congress passed three significant amendments to HMDA that year, which helped trigger a revolution in the home mortgage lending market. The amendments increased the number of lenders subject to HMDA's reporting requirements and expanded the data disclosure requirements to include the number of home mortgage loan applications lenders received, the race and income of each applicant and the location of the neighborhood in which the property that was the subject of the loan application was located. With this amendment, not only did Congress expand HMDA's coverage, but it expanded HMDA's mission to include detecting and preventing lending discrimination. Within a few years of these amendments, the market share of loans to African-Americans, Latinos, low-income individuals, and low-income and predominantly minority neighborhoods had increased dramatically.

A. 1989 Amendments to HMDA

First, Congress expanded HMDA to cover "other lending institutions," which are defined to include "any person engaged for profit in the business of mortgage lending."⁶⁶ Under this amendment,

⁶⁵ RICHARD D. MARSICO, *DEMOCRATIZING CAPITAL: THE HISTORY, LAW, AND REFORM OF THE COMMUNITY REINVESTMENT ACT* 58-59 (2005) [hereinafter *DEMOCRATIZING CAPITAL*].

⁶⁶ Financial Institution Recovery, Reform, and Enforcement Act, H.R. 1278, 101st Cong. § 1211(d)-(e) (1989) (codified as amended at 12 U.S.C. § 2802(4) (2006)). The Fed subsequently issued regulations that defined a non-bank lending institution as an institution whose home purchase loan originations equaled or exceeded 10 percent of its loan originations,

non-depository home mortgage lenders that were not subsidiaries of banks or savings and loan holding companies were now covered by HMDA. The Fed stated that Congress passed this amendment in an attempt “to cover a wide range of lenders in order to capture the fullest possible information regarding mortgage lending patterns.”⁶⁷

Second, the amendments required lenders to report the total number and dollar amount of home mortgage applications they received.⁶⁸ Regulations issued by the Fed required lenders to disclose their decision on each application.⁶⁹

Third, the amendments required lenders to disclose the total number and dollar amount of their home mortgage loan originations and applications, grouped according to census tract and the income level, racial characteristics and gender of each applicant and borrower.⁷⁰ Congress passed this amendment to make HMDA a more effective tool in identifying lending discrimination and enforcing the antidiscrimination laws.⁷¹ The Fed reflected this in the regulations it issued to implement the amendments, stating in the preamble that one of the purposes of HMDA is “[t]o assist in identifying possible discriminatory lending patterns and enforcing antidiscrimination statutes.”⁷² Congress passed these amendments as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989,⁷³ an earlier version of the 2008 financial bailout. Representative Joseph Kennedy, in a statement expressing the purpose of HMDA amendments, and relevant to current proposals to reform HMDA, stated:

[I]t is 2 to 3 times harder if the color of your skin happens to be black or brown than if the color of your skin is white . . . to receive a home mortgage. It does seem to me if we are pumping in over \$200

measured in dollars. 54 Fed. Reg. 51,356, 51,363 (Dec. 15, 1989) (to be codified at 12 C.F.R. pt. 203).

⁶⁷ *Id.* at 51,359.

⁶⁸ H.R. 1278, § 1211(c) (codified as amended at 12 U.S.C. § 2803(a)(1)(2)).

⁶⁹ 54 Fed. Reg. at 51,356.

⁷⁰ H.R. 1278, § 1211(a)(3) (codified as amended at 12 U.S.C. § 2803(b)(4)).

This requirement did not apply to lenders with \$30 million or less in assets. *Id.* at § 1211(j) (codified as amended at 12 U.S.C. § 2803(i)).

⁷¹ H.R. REP. NO. 101-222, at 458 (1989) (Conf. Rep.), *reprinted in* 1989 U.S.C.C.A.N 432, 497. *See* 54 Fed. Reg. at 51,357.

⁷² 54 Fed. Reg. at 51,362.

⁷³ Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989).

billion into the savings and loan industry and into our nation's financial institutions, that the very least we could expect is that we do not continue a pattern of discrimination that may exist"⁷⁴

B. Additional HMDA Amendments: 1991-1996

Between 1991 and 1996, Congress made four amendments to HMDA; three expanded HMDA and one contracted it. In 1992, the Fed, acting pursuant to Congressional amendment, once again increased the number of non-depository home mortgage lenders subject to HMDA by adding an alternative test for determining whether such a lender was covered. These lenders would be subject to HMDA if their assets, combined with any corporate parent, met the existing \$10 million asset test, or, in the alternative, if they made 100 home mortgage loans, including refinancings, in the previous year.⁷⁵ This amendment was intended to include within HMDA more non-depository mortgage lenders that sell the loans they originate rather than hold them in their portfolios, thus limiting their total assets.⁷⁶

In 1992, Congress amended HMDA to require covered lenders to make available to the public a list of all the loan applications they received, organized by census tract, and including all data required by HMDA (the "loan application register"), to require lenders to make their HMDA data available to the public within three days of receiving them from the FFIEC, and to require the FFIEC to make HMDA data available to the public by September 1 of each year.⁷⁷ The purpose of these provisions was "to encourage the relevant federal agencies to expedite the processing, analysis, and dissemination of HMDA data and make it [sic] available to the public at the earliest possible time."⁷⁸ Congress wanted to "ensure that the public receives useful and timely information regarding the lending record of financial institutions" that would "assist in efforts

⁷⁴ 135 CONG. REC. H.2739-03 (1989) (statement of Rep. Kennedy).

⁷⁵ 57 Fed. Reg. 56,963, 56,963 (Dec. 2, 1992) (to be codified at 12 C.F.R. § 203.3(a)(2)).

⁷⁶ *Id.* at 56,964.

⁷⁷ Housing and Community Development Act of 1992, H. 5334, 102nd Cong. § 932(a)-(b) (codified as amended at 12 U.S.C. § 2803(j)-(l)).

⁷⁸ H.R. REP. NO. 102-760, at 160 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3281, 3440.

to enforce the fair lending laws.”⁷⁹ Congress also believed that organizing loan application registers by census tract would “significantly add to their utility as a research tool”⁸⁰

In 1995, the Fed amended its HMDA regulations to require banks that are obligated under the CRA to report their small business loans to collect and report the geographic location of the applications and loans on any property outside the Metropolitan Statistical Areas (“MSAs”) in which they had a home or branch office, or outside any MSA.⁸¹ The Board adopted these expanded reporting requirements to “provide information about lenders’ overall mortgage lending activity that will assist in developing a more accurate CRA assessment.”⁸²

In 1996, Congress contracted HMDA’s coverage; this was the first, and remains the only, time Congress or the Fed decreased the number of lenders covered by HMDA. Congress made a one-time adjustment in the lending asset threshold that triggered reporting obligations for depository institutions, increasing the \$10 million threshold by the percentage increase in the Consumer Price Index (“CPI”) from 1975 through 1996.⁸³ For each year after 1996, the asset threshold would increase by that year’s CPI percentage increase.⁸⁴

C. New Uses of HMDA Data and the Fed’s Response

The amendments to HMDA during the second phase of its history, particularly the 1989 HMDA amendments, made several new analyses of HMDA data possible. One analysis compares a bank’s rate of rejecting home mortgage loan applications for property in predominantly minority neighborhoods or from minority applicants with its rate of rejecting applications for property in predominantly

⁷⁹ *Id.* at 159.

⁸⁰ *Id.*

⁸¹ 60 Fed. Reg. 22,223, 22,225 (May 4, 1995) (codified at 12 C.F.R. § 203.4(e)).

⁸² *Id.* at 22,224.

⁸³ See H.R. 3610, 104th Cong. § 110(a) (1996) (codified as amended at 12 U.S.C. § 2808(b)(2)).

⁸⁴ 12 U.S.C. § 2808(b)(1) (2006). The 2009 threshold is \$39 million. 73 Fed. Reg. 78,587, 78,616 (Dec. 23, 2008).

white neighborhoods or from white applicants.⁸⁵ A second common analysis compares a bank's minority neighborhood/white neighborhood or minority applicant/white applicant loan application rejection rate ratio with the same ratio for all lenders in the bank's community.⁸⁶ A third common analysis compares the percentage of a bank's loans to predominantly minority neighborhoods or minority borrowers with the aggregate percentages for all lenders in the bank's community.⁸⁷

Once again, the Fed was initially hesitant to use the new HMDA data the way Congress intended—to detect discriminatory home mortgage lending. If, for example, a bank made a lower percentage of loans to predominantly minority neighborhoods than the aggregate percentage, or if it had a higher African-American/white denial rate ratio than the aggregate, this was rarely enough to give the bank a failing CRA rating or to derail its merger application.⁸⁸ The Fed explained, “HMDA data . . . provide only limited information about the covered loans. HMDA data, therefore, have limitations that make them an inadequate basis, absent other information, for concluding that an institution has not assisted

⁸⁵ Congress had this sort of comparison in mind when it passed the 1989 HMDA amendments: “An especially significant change to HMDA is the new requirement for disclosure of information on completed applications. Collection of data on completed applications will permit comparison of acceptance and rejected statistics.” H.R. REP. NO. 101-222, at 459 (1989) (Conf. Rep.).

⁸⁶ See, e.g., Richard D. Marsico, *Patterns of Lending to Low-Income and Minority Persons and Neighborhoods: The 1999 New York Metropolitan Area Mortgage Lending Scorecard*, 17 N.Y.L. SCH. J. HUM. RTS. 199, 239-45 (2000) [hereinafter *Patterns of Lending*]. For example, if a bank rejects forty percent of applications from African-Americans and twenty percent from whites, its rejection rate ratio is two. This ratio is then compared to the aggregate ratio for all lenders in the bank's community.

⁸⁷ *Id.* For example, the data make it possible to determine the percentage of a lender's loans to African-Americans or to predominantly minority neighborhoods and compare it with the percentage of loans to the same groups by all lenders in the bank's community.

⁸⁸ See DEMOCRATIZING CAPITAL, *supra* note 65, at 106-13; *CRA Guide*, *supra* note 57, at 237-41. Under the CRA, all banks are evaluated periodically for their record at meeting the credit needs of their community. 12 U.S.C. § 2903(a)(1) (2006). A bank must apply to the federal banking agency that regulates it for permission to merge with another bank. 12 U.S.C. §§ 2902(3)(e), 2903(a)(2) (2006). The bank's CRA record is relevant to the agency's consideration of its application. 12 U.S.C. § 2903(a)(2).

adequately in meeting its community's [sic] credit needs or has engaged in illegal lending discrimination."⁸⁹ According to the Fed, the reason HMDA data is inadequate is that they do not contain information about the creditworthiness of the borrower, the value of the collateral or other important information about the loan.⁹⁰

Nevertheless, by the mid-1990s, the Fed no longer completely discounted the evidence of lending discrimination derived from HMDA data. The Fed finally stated that HMDA data could be used to help identify banks to investigate for possible lending discrimination, something it had not been willing to admit prior to the 1989 amendments.⁹¹ The Fed conceded, for example, that if a bank's HMDA data showed significant differences in rejection rates or lending percentages based on race, further analyses, such as comparative analyses of loan application files of minorities and whites, would be merited.⁹²

C. The Impact of the New HMDA Data⁹³

Data under the 1989 HMDA amendments were released in late 1991. The data showed that in 1990 lenders rejected home mortgage loan applications from African-Americans more than twice as frequently as from whites, nearly 1.5 more frequently from Latinos, and twice as frequently for property in predominantly minority neighborhoods than for property in predominantly white neighborhoods.⁹⁴ These disclosures triggered a chain reaction. Journalists, community groups, and academics published studies that

⁸⁹ DEMOCRATIZING CAPITAL, *supra* note 65, at 110 (quoting Legal Developments, Wells Fargo & Co., 86 FED. RESERVE BULLETIN 832, 845 (2000)).

⁹⁰ *CRA Guide*, *supra* note 57, at 238-39.

⁹¹ *Id.* at 239.

⁹² *Id.*

⁹³ For a more detailed discussion of the impact of the release of this data, see Richard D. Marsico, *Shedding Some Light on Lending: The Effect of Expanded Disclosure Laws on Home Mortgage Marketing, Lending, and Discrimination in the New York Metropolitan Area*, 27 FORDHAM URB. L. J. 481 (1999) [hereinafter *Shedding Some Light on Lending*]; DEMOCRATIZING CAPITAL, *supra* note 65, at 168-72.

⁹⁴ Glenn B. Canner et al., *Home Mortgage Disclosure Act: Expanded Data on Residential Lending*, 77 FED. RESERVE BULLETIN 859, 870 tbl.6 (1991).

confirmed the results in their localities.⁹⁵ Community groups increased their advocacy efforts with banks and government agencies.⁹⁶

Governmental agencies followed these disclosures with strengthened enforcement of the CRA, the FHA, and other related laws.⁹⁷ For example, the federal banking agencies tightened their review of bank CRA records and bank merger applications by issuing fewer passing grades on CRA examinations of banks and denying more merger applications on CRA grounds.⁹⁸ They also adopted stronger CRA regulations that focused more scrutiny on bank lending, investment and service records as opposed to focusing on lending efforts and procedures, as the previous regulations had done.⁹⁹ The Attorney General filed its first lending discrimination case against a bank, followed by twelve more lending discrimination cases that covered all aspects of the home mortgage lending process and a wide range of lenders.¹⁰⁰

Lenders, in response to the negative publicity and the increased governmental enforcement efforts, took several steps to increase their lending to minority and low-income persons and neighborhoods, including creating new lending programs, adopting different loan eligibility criteria and increasing their outreach efforts.¹⁰¹ The results were dramatic. From 1991 to 1998, the overall

⁹⁵ Jaret Seiberg, *Banks Making Good Progress In Their Fair-Lending Efforts*, 166 AM. BANKER 1, 10 (Sept. 16, 1996) (“The first year’s [HMDA] data, which covered 1990, focused public attention on disparate rejection rates for whites and minorities. The numbers were publicized on the front pages of newspapers across the country—and immediately drew charges of bias from activists.”). See, e.g., Joel Glenn Brenner & Liz Spayd, *A Pattern of Bias in Mortgage Loans*, WASH. POST, June 6, 1993, at A1; David R. Sands, *D.C. Banks Said to Favor White-Area Investments*, WASH. TIMES, June 5, 1992, at A2.

⁹⁶ See *Shedding Some Light on Lending*, *supra* note 93, at 499-502.

⁹⁷ See *id.* at 502-11 for a more complete description of these efforts.

⁹⁸ *Id.* at 507, 507 n.95. The federal banking agencies awarded satisfactory CRA ratings to 89% of banks in 1992, down from 98% prior to June 30, 1990. *Id.* at 507 n.94. They also denied at least ten applications on CRA grounds between 1992 and 1995, at least as many as they had denied in the previous history of the CRA. *Id.* at 506 n.95.

⁹⁹ *Id.* at 508-09.

¹⁰⁰ See *Shedding Some Light on Lending*, *supra* note 93, at 503-05 & nn.73-83 for a complete list and description of these cases.

¹⁰¹ *Id.* at 511-13.

market share of home mortgage loan approvals held by African-Americans, Latinos, LMI individuals, predominantly minority neighborhoods and low-income neighborhoods increased by 68%, 20%, 36%, 8% and 28%, respectively.¹⁰²

IV. 2002–2010: HMDA Comes Full Circle—Detecting and Preventing Reverse Redlining

In 2002, the Fed made several significant amendments to HMDA regulations—effective for data collected in 2004—that increased the number of lenders HMDA covers and expanded and enhanced the information they must disclose.¹⁰³ The purposes of the 2002 amendments were to improve HMDA’s effectiveness as a tool for fair lending enforcement and to gather data that would more comprehensively and accurately describe the home mortgage market, including the subprime home loan market.¹⁰⁴ Once again, the Fed expanded HMDA’s coverage and its mission, this time to include detecting and preventing reverse redlining in the form of disproportionately higher rates of higher cost subprime loans in predominantly minority neighborhoods. In some ways, HMDA’s purpose had come full circle, from detecting and eliminating redlining in the form of a bank’s failure to lend, to detecting and preventing reverse redlining in the form of too many high-cost loans.

A. Interest Rates on Loans

The late 1990s and early 2000s saw tremendous growth in subprime lending.¹⁰⁵ With this growth came allegations that subprime

¹⁰² DEMOCRATIZING CAPITAL, *supra* note 65, at 171 tbl.7.7.

¹⁰³ Home Mortgage Disclosure, 67 Fed. Reg. 7222, 7222 (Feb. 15, 2002) (to be codified at 12 C.F.R. pt. 203) (amending Regulation C (Home Mortgage Disclosure) to increase disclosure requirements under HMDA and “expand the coverage of nondepository lenders by adding a \$25 million dollar volume test to the existing percentage-based coverage test”). The amendments became effective for data collected after January 1, 2004. Home Mortgage Disclosure, 67 Fed. Reg. 30,771, 30, 771 (May 8, 2002) (to be codified at 12 C.F.R. pt. 203).

¹⁰⁴ Subprime loans are loans at higher interest rates to borrowers whom lenders deem to be higher default risks because of factors such as a weak credit history. *Patterns of Lending*, *supra* note 86, at 200.

¹⁰⁵ See Home Mortgage Disclosure, 67 Fed. Reg. at 7228; Robert B. Avery & Glenn B. Canner, *New Information Reported Under HMDA and its*

loans were disproportionately distributed among borrowers by race, with African-Americans and Latinos receiving higher shares.¹⁰⁶ There was suspicion that this distribution pattern was not based on creditworthiness but on race.¹⁰⁷ In essence, this claim was one of reverse redlining. Now, low-income and predominantly minority communities were not receiving too few loans, they were receiving too many. The most important of the Fed's 2002 regulatory amendments addressed this issue. It required lenders to report the annual percentage rates ("APR") on first lien home mortgage loans when the APR is at least three percentage points higher than the yield on Treasury securities with comparable periods of maturity, and it required lenders to report the APR on subordinate lien home mortgage loans when the APR is at least five percentage points higher.¹⁰⁸ These amendments were intended to provide information about the subprime lending market. The Fed, in creating the interest rate reporting requirements, determined that most first and second lien loans that met the APR reporting triggers were subprime.¹⁰⁹

The new data allow researchers to analyze subprime lending distribution patterns based on the race or income of borrowers and the racial composition or income level of the neighborhoods in which the property is located. For example, it is now possible to compare the percentage of home mortgage loans that African-Americans or Latinos receive that are subprime with the percentage of loans that whites receive that are subprime. It is also possible to identify lenders whose percentage of subprime home mortgage loans to minorities or predominantly minority neighborhoods are higher than the aggregate

Application in Fair Lending Enforcement, 91 FED. RES. BULL. 344, 349 (2005) (discussing one industry source's estimate that the annual dollar volume of subprime lending increased from \$5 billion in 1994 to over \$530 billion in 2004).

¹⁰⁶ See, e.g., *Patterns of Lending*, *supra* note 86, at 200-01, 235, 268.

¹⁰⁷ See, e.g., JIM CAMPEN, *BORROWING TROUBLE? V: SUBPRIME MORTGAGE LENDING IN GREATER BOSTON, 2000-03* (2005). See generally CALVIN BRADFORD, *RISK OR RACE? RACIAL DISPARITIES AND THE SUBPRIME REFINANCE MARKET* (2002); DANIEL IMMERGLUCK & MARTI WILES, *TWO STEPS BACK: THE DUAL MORTGAGE MARKET, PREDATORY LENDING, AND THE UNDOING OF COMMUNITY DEVELOPMENT* (1999); U.S. DEP'T OF HOUS. AND URBAN DEV., *UNEQUAL BURDEN: INCOME AND RACIAL DISPARITIES IN SUBPRIME LENDING IN AMERICA* (2000).

¹⁰⁸ Home Mortgage Disclosure, 67 Fed. Reg. 43,217, 43,219-20, 43,223 (June 27, 2002) (to be codified at 12 C.F.R. § 203.4(a)(12)).

¹⁰⁹ *Id.* at 43,219-20.

percentage for all lenders. The results of these analyses can help indicate whether there is reverse-redlining in the home mortgage loan market and whether particular lenders might be engaging in reverse-redlining. Up until this amendment, studies of subprime lending were much less precise. Analysts could not use HMDA data to determine whether a loan was subprime, so they generally counted a loan as subprime if it was made by a subprime lender as identified by the Department of Housing and Urban Development (“HUD”) and counted loans by all other lenders as prime.¹¹⁰ The problem with such studies was that subprime lenders also make prime loans and prime lenders also make subprime loans.

When the Fed required lenders to disclose the APR on home mortgage loans, it decided not to require them to disclose the borrower’s credit score, which would have made the APR data a much more useful tool for detecting unfair lending practices in the subprime lending market, one of the Fed’s stated reasons for requiring APR disclosure.¹¹¹ Because the justification for charging higher interest rates on subprime home mortgage loans is that the borrower has a higher risk of default, disclosure of a borrower’s credit score—which helps establish the borrower’s risk level—would have helped to explain differences in subprime lending patterns based on race. The Fed declined to require lenders to report credit scores because it found that the burden on lenders of producing the information would outweigh any additional benefit the credit score would provide.¹¹²

B. Other Changes

The Fed made several other significant amendments to HMDA in 2002. First, the Fed once again increased the number of non-depository home mortgage lenders subject to HMDA by adding a third alternative test to the \$10 million total assets test and the 100-home mortgage loan test. The Fed required non-depository lenders

¹¹⁰ See *Patterns of Lending*, *supra* note 86, at 215 n.30.

¹¹¹ Home Mortgage Disclosure, 65 Fed. Reg. 78,656, 78,661 (proposed Dec. 15, 2000).

¹¹² *Id.* at 78,657 (“The Board believes that, taken as a whole, the proposed changes to Regulation C strike an appropriate balance between benefit and burden.”).

that made at least \$25 million in loans to report data under HMDA.¹¹³ The Fed stated that one of the purposes for this change was to cover more non-depository mortgage lenders because they were “particularly active in the subprime market.”¹¹⁴

In another change related to subprime lending, the Fed required lenders to disclose whether a home mortgage loan was covered by the Homeownership Equity Protection Act (“HOEPA”).¹¹⁵ A loan is covered by the HOEPA if the interest rate on a first lien home mortgage loan is more than eight percentage points higher than the yield on Treasury Bills of comparable maturity and ten points higher for second lien loans.¹¹⁶

The Fed made several additional changes to HMDA to make it more useful in identifying discrimination in the home mortgage market. First, the Fed required lenders to disclose whether a particular home mortgage loan application or origination was for a manufactured home.¹¹⁷ The Fed made this change because applications for loans to purchase manufactured homes have higher denial rates than loans for traditional homes.¹¹⁸ Loans to purchase manufactured homes are underwritten differently, and thus reporting whether an application or loan was for a manufactured home would improve the usefulness of HMDA data for understanding the home mortgage loan market and for detecting lending discrimination.¹¹⁹

The Fed also required lenders to disclose denials of requests for preapproval of a loan application and whether an application that was originated was initiated as a request for preapproval.¹²⁰ According to the Fed, “preapproval data will allow comparisons of minority and non-minority populations that will serve as useful

¹¹³ Home Mortgage Disclosure, 67 Fed. Reg. 7222, 7225, 7237 (Feb. 15, 2002) (to be codified at 12 C.F.R. § 203.2(e)(2)(i)(B)).

¹¹⁴ Home Mortgage Disclosure, 65 Fed. Reg. at 78,657.

¹¹⁵ Home Mortgage Disclosure, 67 Fed. Reg. at 7229-30, 7237 (to be codified at 12 C.F.R. § 203.4(a)(13)).

¹¹⁶ Federal Financial Institutions Examination Council, HMDA 2004: Revisions to Regulation C—A Training Presentation, <http://www.ffiec.gov/hmda/pdf/hmdatraining2003.pdf> (last visited Nov. 22, 2009).

¹¹⁷ Home Mortgage Disclosure, 67 Fed. Reg. at 7227 (to be codified at 12 C.F.R. § 203.4(a)(5), app. A ¶ I.A.4).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 7223-24, 7237 (to be codified at 12 C.F.R. § 203.4(a)(4)).

screening devices to help identify underwriting processes and practices that may warrant scrutiny.”¹²¹

Additionally, the Fed required lenders covered by HMDA to inquire about the race, ethnicity and gender of individuals who applied for loans by telephone.¹²² The Fed made this change in an effort to increase the percentage of loans for which the race, ethnicity and gender of individuals was reported; the percentage of applications for which this data was not reported had increased from 8% in 1993 to 28% in 2000.¹²³ The Fed suspected that one of the reasons for this was an increase in the percentage of applications taken by phone.¹²⁴ The Fed stated that requiring lenders to inquire about ethnicity, race and gender in phone applications will “serve the fair lending enforcement purpose of HMDA by improving the data obtained on ethnicity, race, and sex; the [Fed] believes this benefit outweighs the costs of compliance.”¹²⁵

Finally, in a move designed to help understand subprime lending and potential lending discrimination, the Fed required lenders to report whether a home mortgage loan was a first or subordinate lien.¹²⁶ The Fed instituted this requirement to help interpret the new pricing data and to better understand differences in denial rates.¹²⁷ The Fed stated that interest rates and denial rates varied based on whether a loan was a first lien or a second lien and that knowing the lien status of a loan was an important part of understanding pricing and denial rate data.¹²⁸

C. Current HMDA Reporting Requirements

The current HMDA coverage and reporting requirements are significantly different from what they were in 1975. Before examining the data released after the 2002 amendments, it is helpful to summarize HMDA’s current reporting requirements. This section is divided into two parts: 1) the rules relating to the lenders that

¹²¹ *Id.* at 7224.

¹²² Home Mortgage Disclosure, 67 Fed. Reg. 43,218, 43,221, 43,223 (June 27, 2002) (to be codified at 12 C.F.R. pt. 203, app. A ¶ I.D.2.).

¹²³ Home Mortgage Disclosure, 67 Fed. Reg. at 7228.

¹²⁴ *Id.*

¹²⁵ Home Mortgage Disclosure, 67 Fed. Reg. at 43,221.

¹²⁶ *Id.* at 43,220-21 (to be codified at 12 C.F.R. § 203.4(a)(14)).

¹²⁷ *Id.* at 43,221.

¹²⁸ *Id.*

HMDA now covers and 2) the rules relating to the data that covered lenders are required to disclose.

1. Covered Lenders

HMDA rules regarding the lenders that must report loans are divided into two parts. The first part applies to banks, savings associations and credit unions (“depository institutions”) and the second part applies to other for-profit home mortgage lenders (“non-depository institutions”).¹²⁹ A depository institution must report data if during the preceding calendar year it: 1) had assets above an annually adjusted inflation-based threshold;¹³⁰ 2) had a home or branch office in an MSA;¹³¹ and 3) either a) was federally insured or regulated;¹³² or b) originated one home purchase or home refinance loan secured by a first lien on a one-to-four family home that was:¹³³ 1) federally insured, guaranteed or supplemented;¹³⁴ or 2) intended for sale to Federal National Mortgage Association (“Fannie Mae”) or Federal Home Loan Mortgage Corporation (“Freddie Mac”).¹³⁵ A non-depository institution must report data if during the previous calendar year it:¹³⁶ 1) originated home purchase loans that equaled at least a) ten% of its dollar volume of loan originations¹³⁷ or b) \$25 million;¹³⁸ 2) had a home or branch office in an MSA;¹³⁹ and 3) either a) had total assets of more than \$10 million, including the assets of any parent corporation;¹⁴⁰ or b) originated at least 100 home purchase loans.¹⁴¹

¹²⁹ 12 U.S.C. §§ 2802(2), (4), 2808(b) (2006); 12 C.F.R. §§ 203.2(e)(1), (e)(2) (2008).

¹³⁰ 12 C.F.R. § 203.2(e)(1)(i) (2008). In 2009, the asset threshold was \$39 million. 73 Fed. Reg. 78,616 (Dec. 23, 2008).

¹³¹ 12 C.F.R. § 203.2(e)(1)(ii) (2008).

¹³² *Id.* at § 203.2(e)(1)(iv)(A).

¹³³ *Id.* at § 203.2(e)(1)(iii).

¹³⁴ *Id.* at § 203.2(e)(1)(iv)(B).

¹³⁵ *Id.* at § 203.2(e)(1)(iv)(c).

¹³⁶ *Id.* at § 203.2(e)(2)(i).

¹³⁷ 12 C.F.R. § 203.2(e)(2)(i)(A) (2008).

¹³⁸ *Id.* at § 203.2(e)(2)(i)(B).

¹³⁹ *Id.* at § 203.2(e)(2)(ii).

¹⁴⁰ *Id.* at § 203.2(e)(iii)(A).

¹⁴¹ *Id.* at § 203.2(e)(iii)(B).

2. Disclosure Requirements

HMDA requires covered lenders to disclose the total number and dollar amount of their home purchase,¹⁴² home refinance¹⁴³ and home improvement¹⁴⁴ loan applications,¹⁴⁵ originations and purchases each year.¹⁴⁶ For each application or origination, the lender must report several items of information, including the 1) type of application or loan;¹⁴⁷ 2) purpose of the application or loan;¹⁴⁸ 3) type of property;¹⁴⁹ 4) owner-occupancy status of the property;¹⁵⁰ 5) action taken;¹⁵¹ 6) property location;¹⁵² 7) borrower income;¹⁵³ 8) borrower

¹⁴² A home purchase loan is “a loan secured by and made for the purpose of purchasing a dwelling.” 12 C.F.R. § 203.2(h) (2008).

¹⁴³ A home refinance loan is “a new obligation that satisfies and replaces an existing obligation by the same borrower,” in which “the existing obligation is a home purchase loan” and both obligations “are secured by first liens on dwellings.” *Id.* at § 203.2(k)(1).

¹⁴⁴ A home improvement loan is “a loan secured by a lien on a dwelling” to be used, at least in part, to repair, rehabilitate, remodel or improve a dwelling or the real property on which it is located, or a loan not secured by a dwelling that is for the same purpose and classified by the lender as a home improvement loan. *Id.* at § 203.2(g).

¹⁴⁵ An application is “an oral or written request for” a home mortgage loan “that is made in accordance with procedures used by a financial institution for the type of credit requested.” *Id.* at § 203.2(b)(1).

¹⁴⁶ 12 U.S.C. § 2803(a)(1) (2006); 12 C.F.R. § 203.4(a) (2008).

¹⁴⁷ 12 C.F.R. § 203.4(a)(2) (2008). Loan or application types include: 1) applications insured by the Federal Housing Administration; 2) applications guaranteed by the Veterans Administration, Farm Services Agency or Rural Housing Service; and 3) conventional applications. 12 U.S.C. § 2803(b)(1) (2006); 12 C.F.R. pt. 203, app. A, § I.A.3 (2008).

¹⁴⁸ 12 C.F.R. § 203.4(a)(3) (2008). Purposes include: 1) home purchase; 2) home improvement; and 3) home refinance. *Id.* at pt. 203, app. A § I.A.5.

¹⁴⁹ *Id.* at § 203.4(a)(5); *id.* at pt. 203, app. A, § I.A.4. Property types include: 1) 1-4 family dwellings; 2) manufactured housing; and 3) multi-family dwellings.

¹⁵⁰ *Id.* at § 203.4(a)(6).

¹⁵¹ *Id.* at §§ 203.4(a)(4), (8). Actions include: 1) loan originated, including whether the loan began as a preapproval request; 2) application approved by the bank but loan not accepted by the applicant; 3) application denied; 4) preapproval request denied; 5) application withdrawn; and 6) application file closed because incomplete. *Id.* at pt. 203, app. A, § I.B.1. A request for a preapproval must be reported if the financial institution analyzed the creditworthiness of the applicant and issued a written commitment to the

race;¹⁵⁴ 9) borrower ethnicity;¹⁵⁵ 10) borrower gender;¹⁵⁶ 11) difference between the loan's interest rate and the yield on Treasury securities of comparable terms of maturity if the difference is three points or more for loans secured by a first lien or five points or more

applicant valid for a specific period of time to extend a home purchase loan up to a particular amount. 12 C.F.R. § 203.2(2).

¹⁵² 12 U.S.C. §§ 2803(a)(2)(A), (a)(2)(B), (b)(4); 12 C.F.R. § 203.4(a)(9). A lender must report property location by: 1) Metropolitan Statistical Area ("MSA") or Metropolitan Division ("MD"); 2) state; 3) county; and 4) census tract if the loan is in a county with a population of 30,000 or more. *Id.* at pt. 203, app. A, § I.C.1.-4. An MSA is a geographical area that has at least one urbanized area of 50,000 or more people and includes any adjacent area that has a high degree of social and economic integration with the urbanized area as measured by commuting patterns. Federal Financial Institutions Examination Council, Home Mortgage Disclosure Act Glossary, <http://www.ffiec.gov/hmda/glossary.htm> (last visited Nov. 22, 2009). An MSA with a population of 2.5 million or more may be subdivided to form smaller groupings of counties called Metropolitan Divisions. *Id.*

¹⁵³ 12 U.S.C. § 2803(b)(4) (2006); 12 C.F.R. § 203.4(a)(10) (2008); 12 C.F.R. pt. 203, app. A, § I.D.6 (2006).

¹⁵⁴ 12 U.S.C. § 2803(b)(4); 12 C.F.R. § 203.4(a)(10); 12 C.F.R. pt. 203, app. A, § I.D.4. The racial categories are: 1) "American Indian or Alaska Native," meaning a "person having origins in any of the original peoples of North or South America (including Central America) and who maintains tribal affiliation or community attachment;" 2) "Asian," meaning a "person having origins in any of the peoples of the Far East, Southeast Asia, or the Indian subcontinent;" 3) "Black or African American," meaning a "person having origins in any of the black racial groups of Africa;" 4) "Native Hawaiian or Other Pacific Islander," meaning a "person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands;" and 5) "White," meaning "a person having origins in any of the original peoples of Europe, the Middle East, or North Africa." Federal Financial Institutions Examination Council, *supra* note 116, at 6-7.

¹⁵⁵ 12 C.F.R. § 203.4(a)(10); *id.* at pt 203, app A, § I.D.3. Ethnic groups include "Hispanic or Latino" and "not Hispanic or Latino." Federal Financial Institutions Examination Council, *supra* note 116, at 7. Hispanic or Latino includes a "person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race." *Id.*

¹⁵⁶ 12 U.S.C. § 2803(b)(4); 12 C.F.R. § 203.4(a)(10); *id.* at pt. 203, app. A, § I.D.5.

for loans secured by a subordinate lien;¹⁵⁷ 12) whether the loan is subject to the HOEPA;¹⁵⁸ and 13) lien status of the loan.

D. Subprime Lending Data and Its Impact

In late 2005, the Fed released a study based on data lenders reported pursuant to the 2002 amendments.¹⁵⁹ The study showed that in 2004, African-Americans, Latinos and residents of predominantly minority neighborhoods were more likely than whites or residents of predominantly white neighborhoods to receive “subprime” home mortgage loans.¹⁶⁰ The report showed that the incidence of subprime conventional first-lien home purchase loans was 32.4% for African-Americans, 20.3% for Latinos and 8.7% for whites.¹⁶¹ The Fed concluded that some of the difference in the subprime lending rates could be explained by differences in creditworthiness and other factors, but even after taking these factors into account, there were unexplained differences.¹⁶² The Fed did not conclude that these differences were based on race, but did not eliminate this possibility either.¹⁶³ The Fed’s report confirmed earlier studies, based on less precise data, that showed that a higher percentage of the home mortgage loans that African-Americans, Latinos and residents of predominantly minority neighborhoods received were subprime as compared with whites.¹⁶⁴ Additionally, several studies by researchers and community groups and other advocates confirmed the Fed’s finding at the local level.¹⁶⁵ For example, in 2005 in New York City,

¹⁵⁷ 12 C.F.R. § 203.4(a)(12).

¹⁵⁸ 12 C.F.R. § 203.4(a)(13). A loan is covered by HOEPA if the interest rate exceeds the yield on Treasury securities of comparable periods of maturity by eight points for first liens and ten points for second liens or the points and fees exceed greater of eight percent of the loan amount or an annually adjusted dollar threshold. Federal Financial Institutions Examination Council, *supra* note 116, at 9.

¹⁵⁹ Avery & Canner, *supra* note 105.

¹⁶⁰ *Id.* at 379.

¹⁶¹ *Id.*

¹⁶² *Id.* After taking these factors into account, the incidence of subprime loans decreased to 15.7% for African-Americans and 11.6% for whites.

¹⁶³ *Id.* at 379-80.

¹⁶⁴ See *supra* note 107 and accompanying text.

¹⁶⁵ WILLIAM C. APGAR, JR. & CHRISTOPHER E. HERBERT, U.S. DEP’T OF HOUS. & URBAN DEV., SUBPRIME LENDING AND ALTERNATIVE FINANCIAL SERVICE PROVIDERS: A LITERATURE REVIEW AND EMPIRICAL ANALYSIS viii

45.9% of all home mortgage loans to African-Americans were subprime, and 39% of all home mortgage loans to Latinos were subprime.¹⁶⁶ African-Americans were nearly three times more likely than whites to receive a subprime loan; Latinos were more than twice as likely.¹⁶⁷ Of all of the home loans in predominantly minority neighborhoods, 42.1% were subprime, nearly four times higher than in predominantly white neighborhoods.¹⁶⁸

Nevertheless, in contrast to the firestorm that the disclosure of HMDA data pursuant to the 1989 amendments caused, the

(2006); DEBBIE GRUENSTEIN BOCIAN, ET AL., CTR. FOR RESPONSIBLE LENDING, UNFAIR LENDING: THE EFFECT OF RACE AND ETHNICITY ON THE PRICE OF SUBPRIME MORTGAGES 3 (2006); CALIFORNIA REINVESTMENT COALITION, ET AL., PAYING MORE FOR THE AMERICAN DREAM: A MULTI-STATE ANALYSIS OF HIGHER COST HOME PURCHASE LENDING 1 (2007); JIM CAMPEN, BORROWING TROUBLE VII: HIGHER-COST MORTGAGE LENDING IN BOSTON, GREATER BOSTON AND MASSACHUSETTS, 2005 6 (2007); JIM CAMPEN, BORROWING TROUBLE? VI: HIGHER-COST MORTGAGE LENDING IN GREATER BOSTON, 2004 4 (2006); RICHARD MARSICO, THE ECON. JUSTICE PROJECT OF THE JUSTICE ACTION CTR. N.Y. LAW SCH., THE HIGHER COST OF BEING AFRICAN-AMERICAN OR LATINO: SUBPRIME HOME MORTGAGE LENDING IN NEW YORK CITY, 2004-2005 3 (2007); NATIONAL COMMUNITY REINVESTMENT COALITION, FAIR LENDING DISPARITIES BY RACE, INCOME, AND GENDER IN ALL METROPOLITAN AREAS IN AMERICA 3 (2005); NATIONAL COMMUNITY REINVESTMENT COALITION, THE CRA AND FAIR LENDING PERFORMANCE OF FINANCIAL INSTITUTIONS IN THE CITY OF PHILADELPHIA 4 (2006); NATIONAL COMMUNITY REINVESTMENT COALITION, ET AL., HOMEOWNERSHIP AND WEALTH BUILDING IMPEDED 1 (2006); NATIONAL COMMUNITY REINVESTMENT COALITION, INCOME IS NO SHIELD AGAINST RACIAL DIFFERENCES IN LENDING: A COMPARISON OF HIGH-COST LENDING IN AMERICA'S METROPOLITAN AREAS 5 (2007); NATIONAL COMMUNITY REINVESTMENT COALITION, PREAPPROVALS AND PRICING DISPARITIES IN THE MORTGAGE MARKETPLACE: A NCRC FOLLOW-UP REPORT FOR NATIONAL HOMEOWNERSHIP MONTH 5 (2005); NATIONAL COMMUNITY REINVESTMENT COALITION, THE 2004 FAIR LENDING DISPARITIES: STUBBORN AND PERSISTENT 5-6 (2005); NATIONAL COMMUNITY REINVESTMENT COALITION, THE 2005 FAIR LENDING DISPARITIES: STUBBORN AND PERSISTENT II 7 (2006); WOODSTOCK INSTITUTE, NEW MORTGAGE PRICING DATA SHEDS LIGHT ON SUBPRIME MARKET 2 (2005); *NCRC Fair Lending Testing Reveals Discrimination by Mortgage Brokers*, NCRC REINVESTMENT WORKS 1 (National Community Reinvestment Coalition), Summer, 2006, at 4.

¹⁶⁶ See MARSICO, *supra* note 164, at 3-4.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 4.

disclosure of the data under the 2002 amendments, while controversial, did not have the same impact. Although community advocates published numerous studies showing these disparities,¹⁶⁹ headlines across the nation did not materialize. Despite some noteworthy exceptions, government investigation and enforcement efforts have been sluggish. Highlights include former New York State Attorney General Elliot Spitzer's investigation of subprime lending disparities using 2004 HMDA data. He subsequently brought and settled a claim against Countrywide in 2006.¹⁷⁰ Between January 1, 2004 and June 30, 2007, the four federal banking regulatory agencies referred 134 potential discrimination cases to the Department of Justice.¹⁷¹ However, the Department has not filed any cases.

Private enforcement efforts were also slow to develop, but recently the efforts have increased. For example, the National Community Reinvestment Coalition filed an administrative complaint with HUD alleging that Allied Home Mortgage Capital Corporation often steered minority "mystery shoppers" to subprime loans even though they were qualified for prime loans, while Allied referred white comparison "mystery shoppers" to prime loans.¹⁷² In July 2007, the NAACP filed a class-action lawsuit against eleven mortgage lenders, alleging that African-Americans received higher percentages of subprime loans than whites.¹⁷³

V. *Looking Ahead: The Role of HMDA in Detecting and Deterring Risky, Unsafe, and Predatory Lending*

Although many factors contributed to the economic crisis of 2008, one common denominator is the high loan default rate on risky, unsafe, and abusive loans. There were several efforts to regulate such lending prior to the crisis, most notably through laws requiring disclosure of loan terms. These efforts, however, were generally not successful in either protecting the victims of such

¹⁶⁹ See *supra* note 165 and accompanying text.

¹⁷⁰ Kate Berry, *Countrywide Spitzer Deal A Disclosure Precedent?*, 171 AM. BANKER 1, 1 (Dec. 6, 2006).

¹⁷¹ Cheyenne Hopkins, *HMDA Suits Backdrop for Committee Hearings*, 172 AM. BANKER 1, 3 (July 25, 2007).

¹⁷² Complaint at 5, National Community Reinvestment Coalition v. Allied Home Mortgage Capital Corporation, (U.S. Dep't of Hous. and Urb. Dev. filed June 14, 2006).

¹⁷³ Hopkins, *supra* note 170, at 1.

lending practices or preventing the economic collapse. The onset of the economic crisis has given rise to proposals to reform regulation of the financial services industry, including a proposal to amend HMDA by expanding the disclosures it requires. This amendment would require lenders to disclose a significant amount of information about risky, unsafe, and abusive lending that harms borrowers and contributed to the economic crisis. However, the proposed amendment does not quite require sufficient information to deter and detect the full range of harmful and risky lending practices. In particular, the amendment does not require lenders to disclose enough information about whether a loan is suitable for a borrower. Without requiring sufficient disclosure, the proposed amendment runs the risk of previous insufficient HMDA amendments—failing to persuade government decision makers that the underlying problem exists.

A. The Role of Risky, Unsafe and Abusive Lending in the Current Economic Crisis

The causes of the economic collapse of 2008 are complex and will likely not be fully understood for years. Yet by now, the story of the collapse has been told numerous times and it has become sadly familiar: the sharp fall in housing prices in 2006 was followed by the “subprime meltdown” in 2007, characterized by high rates of defaults and foreclosure on homes secured by subprime loans.¹⁷⁴ This meltdown resulted in the collapse of several financial institutions in 2008 and the bare survival of others, followed by the freezing of the credit markets, widespread layoffs, and displacement in all areas of the American economy.¹⁷⁵ Also well-documented are the wrenching human consequences of millions as people have lost their homes and jobs, and nearly all have lost their sense of well-being and security.

¹⁷⁴ Raymond H. Brescia, *Capital in Chaos: The Subprime Mortgage Crisis and the Social Capital Response*, 60 S.C. L. REV. 271, 295 (2009).

¹⁷⁵ See, e.g., *Id.* at 295-96; Gerald Korngold, *Legal and Policy Choices in the Aftermath of the Subprime and Mortgage Financing Crisis*, 60 S.C. L. REV. 549, 728-33 (2009); Allan N. Krinsman, *Subprime Mortgage Meltdown: How Did it Happen and How Will it End?*, 13 J. STRUCTURED FIN. 13, 14-16 (2007); Steven L. Schwarcz, *Understanding the Subprime Financial Crisis*, 60 S.C. L. REV. 549, 549-53 (2009). For a general overview of the securitization process, see Amy L. Festante, *Securitization's Role in the Collapse of the Subprime Mortgage Market* (Justice Action Center Student Capstone Journal, Project No. 07/08-02B, 2008).

Many are implicated in the collapse, from borrowers who could not afford to repay their loans, to mortgage brokers who made loans they knew were unaffordable, to lenders who provided the funds for the loans they knew were unsafe, to investment bankers who pressured lenders to reduce credit standards and purchased and packaged the loans for sale as securities to the secondary market without proper scrutiny, to rating agencies that overrated the securities, and to investors who were hungry for high returns. In the aftermath of the collapse, there has been much finger pointing among and at them.¹⁷⁶

Regardless of the ultimate causes and who the responsible parties are, the use of risky, unsafe, and abusive loans¹⁷⁷ are part of the picture, if not the ultimate cause, of the collapse. These loans were too risky to withstand economic displacement and once the displacement occurred, defaults on these loans certainly helped spark the causal chain that led to the current crisis.¹⁷⁸ These risky, unsafe,

¹⁷⁶ See Brescia, *supra* note 174, at 291-300; Korngold, *supra* note 174, at 728-33; Ruth S. Uselton, *Exotic Loan Products & the Collapse of the Subprime Mortgage Market* 12-13 (Justice Action Center Student Capstone Journal, Project No. 07/08-02A, 2008).

¹⁷⁷ These three terms for characterizing loans that are not part of the prime market, although often interchangeable when applied to a particular loan, are meant to capture three different ways of looking at non-prime loans. “Risky” loans include loans that carry more than the normal amount of risk, such as a loan that does not document the borrower’s income or assets. “Unsafe” loans include loans that the borrower does not have a realistic chance of repaying, including a loan whose monthly interest payments are too high a percentage of the borrower’s monthly income. See Baher Azmy, *Squaring the Predatory Lending Circle: A Case for States as Laboratories of Experimentation*, 57 U. FLA. L. REV. 295, 355 (2005) (stating that “certain practices are inherently dangerous when connected with very high-cost loans . . .”). “Abusive” loans are based on misrepresentation, fraud, or exploitation. For examples of abusive lending practices, see *id.* at 333; Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1267-68 (2002); Celeste M. Hammond, *Predatory Lending—A Legal Definition and Update*, 34 REAL EST. L. J. 176, 180 (2005). A non-prime loan may contain a combination of aspects of all three of these characteristics or just one. An effective HMDA disclosure regime would capture as many of the characteristics of risky, unsafe, and abusive loans as possible.

¹⁷⁸ See Krinsman, *supra* note 175, at 14 (“Once the housing market slowed, the credit risk of the subprime mortgage market could no longer be masked by surging home prices.”).

and abusive loans are often characterized by the terms “subprime” or “predatory” loans. Subprime loans, as described earlier, are loans that charge higher interest rates and fees to reflect higher borrower risk factors.¹⁷⁹ While there is no standard definition of predatory lending,¹⁸⁰ loans with certain characteristics are generally deemed predatory. Predatory loans occur when the terms provide no benefit to the borrower and are simply an excuse for extracting profit, the borrower has no real chance of repaying the loan, the terms are confusing or misleading, the terms are not related to the borrower’s level of risk, the borrower’s risk is not properly assessed, or the loan was made based on fraud or misrepresentation of the terms.¹⁸¹ A non-exhaustive list of these predatory loan characteristics includes prepayment penalties,¹⁸² balloon payments,¹⁸³ negative amortization,¹⁸⁴ asset-based loans,¹⁸⁵ high housing debt/income and overall

¹⁷⁹ See *supra* note 104 and accompanying text.

¹⁸⁰ See Hammond, *supra* note 177, at 178.

¹⁸¹ Cf. Engel & McCoy, *supra* note 177, at 1260, stating that predatory lending is:

[A] syndrome of abusive loan terms or practices that involve one or more of the following five problems: 1) loans structured to result in seriously disproportionate net harm to borrowers; 2) harmful rent seeking; 3) loans involving fraud or deceptive practices; 4) other forms of lack of transparency in loans that are not actionable as fraud; and 5) loans that require borrowers to waive meaningful legal redress.

¹⁸² A prepayment penalty is a penalty for repaying a loan before it is due. See Azmy, *supra* note 177, at 338; Uselton, *supra* note 176, at 9.

¹⁸³ A balloon payment is a payment due at a certain point in the life of the loan that could represent the outstanding balance of the loan or another amount that is much higher than the minimum monthly payment. See Azmy, *supra* note 177, at 340; Uselton, *supra* note 176, at 9-10.

¹⁸⁴ A negatively amortizing loan is a loan whose monthly interest payments are not high enough to pay the monthly balance due, resulting in an increased loan balance (negatively amortizing) rather than a decreased loan balance. See Azmy, *supra* note 177, at 340-41; Engel & McCoy, *supra* note 177, at 1263-64.

¹⁸⁵ An asset-based loan is a loan that is based on the value of the collateral for the loan rather than the borrower’s ability to repay the loan. See Azmy, *supra* note 177, at 337; Engel & McCoy, *supra* note 177, at 1262.

debt/income ratios,¹⁸⁶ excessively high fees, interest rates, and points,¹⁸⁷ high loan-to-value ratios,¹⁸⁸ confusing adjustable rate periods,¹⁸⁹ and little or no documentation of the borrower's income, employment, source of funds, or assets.¹⁹⁰

B. Past Efforts to Regulate Risky, Unsafe and Abusive Lending

Since the onset of the economic collapse, there have been many proposals to deal with this crisis and prevent another one.¹⁹¹ Enhanced regulation of the financial services industry is one idea, and the Obama administration has introduced legislation that would overhaul the regulation of the industry.¹⁹² Even prior to the economic collapse, however, risky, unsafe, and abusive lending was the subject

¹⁸⁶ These ratios, which measure the borrower's monthly housing debt and overall debt payments against the borrower's monthly income, are often used as measures of the borrower's ability to repay a loan.

¹⁸⁷ Lenders charge fees for things like their attorneys, the property appraisal and a credit check. Points are fees charged as percentage "points" of the overall loan, often shared by a mortgage broker if one is involved in the loan.

¹⁸⁸ The loan-to-value ratio compares the amount of the loan to the value of the property that is the collateral for the loan. Generally, the higher the ratio, the riskier the loan.

¹⁸⁹ Adjustable rate mortgages establish an initial interest rate that adjusts to a different level, often based on an index, after a certain time period. *See* Krinsman, *supra* note 175, at 15; Uselton, *supra* note 176, at 3-4.

¹⁹⁰ Compare this list of characteristics with Hammond, *supra* note 177, at 180, listing prepayment penalties, balloon payments, high interest rates, negative amortization, high appraisal costs, up front credit insurance, mandatory pre-dispute resolution clauses and prohibited "kickbacks" to brokers in the guise of yield spread premiums as characteristic terms of predatory loans. *See also* CALIFORNIA REINVESTMENT COALITION, ET AL., PAYING MORE FOR THE AMERICAN DREAM III: PROMOTING RESPONSIBLE LENDING TO LOWER-INCOME COMMUNITIES AND COMMUNITIES OF COLOR ii (2009) (listing adjustable rates, negative amortization, interest-only loan payments, prepayment penalties, yield spread premiums and no-income documentation as loan terms associated with risky loans).

¹⁹¹ *See, e.g.,* Brescia, *supra* note 174, at 304-11 (suggesting mortgage broker accountability, community-based pre-loan counseling, and specialized foreclosure courts).

¹⁹² Consumer Financial Protection Agency Act of 2009, H.R. 3126, 111th Cong. (2009).

of legislation and many other reform proposals because of the harm it caused to borrowers.¹⁹³ Congress passed or amended legislation such as the Truth in Lending Act (“TILA”)¹⁹⁴ and the Real Estate Settlement Procedures Act (“RESPA”),¹⁹⁵ with the intention of curbing predatory lending by requiring lenders to disclose the costs and terms of loans to borrowers. Congress also passed HOEPA,¹⁹⁶ which banned certain terms on specific types of home mortgage loans whose interest rates passed a certain threshold or whose points and fees were higher than a fixed percentage of the loan amount or a specific dollar amount.¹⁹⁷ Several states attempted to regulate predatory lending as well, although federal legislation preempted many of their efforts.¹⁹⁸

Among the previously passed legislation, TILA and RESPA have frequently been considered unsuccessful¹⁹⁹ or even harmful.²⁰⁰ HOEPA’s attempt to curb abusive lending practices directly has received similar criticism.²⁰¹ Comprehensive laws regulating

¹⁹³ See, e.g., Azmy, *supra* note 177, at 84; Engel & McCoy, *supra* note 177, at 1305.

¹⁹⁴ Truth in Lending Act, 15 U.S.C. §§ 1601-1667 (2006).

¹⁹⁵ Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §§ 1831b, 2601-17 (2006).

¹⁹⁶ Homeownership and Equity Protection Act of 1994, 15 U.S.C. §§ 1639, 1648 (2006).

¹⁹⁷ See Azmy, *supra* note 177, at 352-55. Prohibited terms and practices include negative amortization and in certain instances balloon payments, prepayment penalties and asset-based lending.

¹⁹⁸ See *id.* at 361-90; Hammond, *supra* note 177, at 189-203.

¹⁹⁹ See Azmy, *supra* note 177, at 351-52 (arguing that disclosure of loan terms has not worked because there is little price competition in the predatory lending market, predatory loans are usually so complex that comparing loan products is virtually impossible and disclosures come too late in the process to make a difference); Engel & McCoy, *supra* note 177, at 1306-09 (arguing that TILA has not worked because it exempts too many fees from disclosure and RESPA has not worked because it has resulted in lengthy and confusing disclosure statements).

²⁰⁰ See Azmy, *supra* note 177, at 352 (arguing that the lending industry recognizes the legal and political advantages of complying with disclosure rules, including allowing them to mask the complexity of the underlying loans, defending against allegations of oral misrepresentations, and providing political cover against charges that their loans are too expensive or abusive and are a shield against calls for more regulation of loan terms).

²⁰¹ See *id.* at 355-57 (arguing that HOEPA’s points and fees triggers are too high causing very few loans fall under its coverage, that the triggers are high

predatory lending have not been passed, perhaps because they tend to contradict market-based solutions to risky, unsafe and abusive lending.²⁰² Efforts to impose direct curbs on abusive lending practices are opposed by arguments that the government should not interfere with individual credit transactions, that regulation would limit the amount of available credit, that people should take individual responsibility for their financial decisions and that the market will self-correct.²⁰³

One proposal to regulate the terms of predatory lending that merit continuing attention—and that differs from the TILA’s and the RESPA’s disclosure rules and the HOEPA’s limited efforts to regulate loan terms—is imposing a “suitability” requirement on home mortgage loans.²⁰⁴ Based on similar requirements for investors in the securities industry, a suitability requirement for home mortgage loans would establish criteria for determining whether a loan is suitable for the borrower. One suitability proposal would prohibit lenders from making a loan that was not consistent with the borrower’s financial circumstances, needs and objectives.²⁰⁵ Another

enough to allow room for abuse and exploitation in loans that do not trigger HOEPA coverage and that lenders have discovered loopholes to avoid falling within HOEPA’s coverage); Engel & McCoy, *supra* note 177, at 1307-08, 1349 (arguing that HOEPA is easy to evade because of its narrow coverage and high interest and fee triggers and that to avoid these triggers, lenders create complex pricing mechanisms that make non-prime loans more complex than they otherwise might have been).

²⁰² See Engel & McCoy, *supra* note 177, at 1299 (“From the standpoint of neoclassical economics, market solutions are the preferred answer to predatory lending.”).

²⁰³ *Id.* at 1334, 1358-60. For a discussion of the difficulties of balancing regulation with individual freedom and the risks of mistakes see Korngold, *supra* note 174, at 733 (noting the difficulty in striking the proper balance between “personal responsibility and paternalism in . . . setting the ground rules for the overall system”).

²⁰⁴ See Daniel S. Ehrenberg, *If the Loan Doesn’t Fit, Don’t Take It: Applying the Suitability Doctrine to the Mortgage Industry to Eliminate Predatory Lending*, 10 J. AFFORDABLE HOUS. & CMTY. DEV. 117, 125-27 (2001); Engel & McCoy, *supra* note 177, at 1317-66.

²⁰⁵ Ehrenberg, *supra* note 204, at 125. To make this determination, lenders would be expected to inquire into several factors, including the borrower’s age, occupation, estimated income, employment status, assets and net worth, marital status, number of dependents, credit references and history, ability to repay the loan, other debts, and the condition and appraised value of the collateral and the amount of the owner’s equity in the collateral. *Id.* at 126.

proposal suggests several standards for suitability, including prohibiting lenders from making loans that borrowers cannot reasonably be expected to repay and basing loan fees, charges and points on legitimate pricing functions.²⁰⁶ Suitability would thus go beyond disclosure of loan terms to ensure that loans are not overly risky, unsafe or abusive. A suitability requirement could both protect the borrower from the consequences of taking such a loan and protect the economy as a whole from collapse if overall economic conditions result in dangerously high levels of default on risky and unsafe loans.²⁰⁷ Despite the merits of the suitability proposal, Congress has not passed legislation imposing it, perhaps because of the power of the market-based arguments that underlie the current disclosure regime.²⁰⁸

C. The Role of HMDA in Regulating Risky, Unsafe and Abusive Lending

In the context of the current economic crisis, efforts to avert the next one and previous efforts and proposals to regulate risky, unsafe and abusive lending, the question is whether the sort of public disclosure of lending reflected in HMDA can play a meaningful role. HMDA's history has shown that when compelling data about lending practices are disclosed to the public, real change can occur. The converse is also true. Insufficient data has resulted in limited change. So the question for any proposals to amend HMDA is whether the proposal incorporates this lesson from HMDA's history and contains sufficient information to detect and deter risky, unsafe and abusive lending and the lenders that engage in it.

The proposed CFPAA,²⁰⁹ among several provisions that would overhaul the regulation of the financial services industry, proposes several changes to HMDA that would help it detect risky, unsafe and abusive lending by requiring several additional

²⁰⁶ Engel & McCoy, *supra* note 177, at 1343.

²⁰⁷ *But see* Schwarcz, *supra* note 175, at 566 (suggesting that imposing suitability requirements on mortgage loans and otherwise restricting predatory lending may have restricted externalities but would “almost certainly not address the next crisis”).

²⁰⁸ *See* Engel & McCoy, *supra* note 177, at 1334, 1358, 1360.

²⁰⁹ Consumer Financial Protection Agency Act of 2009, H.R. 3126, 111th Cong. (2009).

disclosures.²¹⁰ The first group of proposed disclosures would require a lender to disclose the total number and dollar value of home mortgage loans grouped according to: 1) the total points and fees payable at origination; 2) the difference between the APR associated with the loan and a benchmark APR for all loans; and 3) the term in months of any prepayment penalty. The second group of disclosures requires the lender to disclose the total number and dollar volume of home mortgage loans and the total number of completed applications for loans grouped according to the following characteristics: 1) the age of the applicant or borrower; 2) the value of the collateral; 3) the term in months of any introductory period after which the rate of interest may change; 4) the presence of mortgage terms that would allow the borrower or applicant to make payments other than fully-amortizing payments during any portion of the loan term; 5) the term in months of the mortgage loan; 6) the channel through which the application was made, including retail and broker; and 7) the credit score of mortgage applicant or borrower.

These proposed amendments would improve HMDA's ability to accomplish its current tripartite mission of detecting and counteracting redlining, lending discrimination and reverse redlining. In particular, requiring disclosure of a loan's total points and fees and the difference between the loan's APR and a benchmark APR would help detect and deter lending discrimination. Likewise, the disclosure of the applicant's and borrower's credit score would help to identify discrimination and reverse redlining.²¹¹ The amendments, if passed, would also mark the beginning of another significant era in HMDA's history by adding another task to its mission: detecting and deterring risky, unsafe and abusive lending. The goal would be to help prevent another economic collapse fueled by risky and unsafe lending and also to help prevent several of the predatory lending practices that harm individual borrowers.²¹²

In combination with the information HMDA currently requires lenders to disclose, the proposed HMDA amendments would identify many of the risky, unsafe and abusive lending practices that were at the heart of the economic crisis. The disclosures were

²¹⁰ H.R. 3126 §§ 1086(g)(1), (4).

²¹¹ See *supra* notes 111-12 and accompanying text.

²¹² See CALIFORNIA REINVESTMENT COALITION, ET AL., *supra* note 190, at ii (“Improving HMDA data disclosure to include risky loan features . . . will improve the quality of lending in low- and moderate-income communities and communities of color.”).

proposed as intentionally broad in an attempt to identify past and existing undesirable practices and new and unanticipated practices as well.²¹³

There are several examples of the impact these disclosures would have. First, adjustable rate loans with prepayment penalties have been identified as having contributed to the economic crisis.²¹⁴ Borrowers who took a loan at an affordable rate that would become unaffordable once the rate adjusted with the promise that they could refinance were unable to do so when the rate adjusted once housing prices dropped and the value of their collateral decreased.²¹⁵ The proposed HMDA amendments would likely capture many of these loans by requiring disclosure of the APR, prepayment penalty terms and interest rate adjustment periods. Second, by requiring disclosure of points, fees, APR and the borrower's credit score, the amendments would help evaluate whether the interest rate is tied to the borrower's risk level, and thus possibly excessive. Excessive fees and rates are not only arguably harmful to the borrower, but in times of crisis make it more difficult to repay. And if, as demonstrated by the requirement that the lender's APR be compared with a benchmark, the lender's APR is higher than the aggregate, this can be an indication that the lender is engaged in predatory or discriminatory practices not justified by overall market conditions. Third, another proposed amendment would help detect negatively amortizing loans, which by increasing the loan amount relative to the collateral become especially risky when housing prices drop. Finally, requiring disclosure of the age of the borrower and the channel through which the loan was made, combined with the other proposed disclosures, would help detect and deter abusive practices aimed at elderly home

²¹³ See Schwarcz, *supra* note 175, at 560 ("It is impossible to know how future financial crises will arise. Ultimately, the key to protecting against future crises is to remain open, flexible, and aware of changing circumstances. To this end, the government should take a broad and flexible approach.").

²¹⁴ See Uselton, *supra* note 176, at 4-6.

²¹⁵ See Brescia, *supra* note 174, at 296; Schwarcz, *supra* note 175, at 550-51.

mortgage loan applicants and borrowers²¹⁶ and identify lending channels that are more likely to lead to predatory loans.²¹⁷

Despite the breadth of these proposals to amend HMDA, the added disclosures do not cover many of the other practices identified as having contributed to the economic crisis. In addition, they do not require sufficient information to determine whether a loan is suitable for the borrower. For example, two types of loans—stated income loans, in which the borrower’s income is not verified, and “low-doc” and “no-doc” loans, which require little or no documentation of other information relevant to the lending decision—have been associated with predatory and risky lending and implicated in the economic crisis,²¹⁸ but the proposed amendments do not require lenders to disclose the total number of such loans.

Another phenomenon associated with unsafe and abusive lending is “loan flipping,” in which the lender makes several loans in a short period of time to the same borrower—each with increasingly higher balances and each with higher fees and each less affordable to the borrower—resulting in high rates of foreclosure.²¹⁹ One piece of information that would be helpful in detecting loan flipping would be the period in months between the borrower’s last loan and the current one. The proposed amendments also do not require disclosure of loans with balloon payments, which could have the same effect as adjustable interest rates and prepayment penalties by forcing a borrower to refinance at a time of personal or overall economic difficulty and increasing the probability of default or foreclosure.²²⁰

Most notably, the proposed HMDA amendments do not contain enough information to determine whether a loan is suitable for the borrower. In the context of expanding HMDA data to detect and deter unsafe and abusive lending that is harmful to borrowers and could lead to another economic crisis, “suitability” should be defined at the very least to include loans that the borrower has a reasonable likelihood of repaying. Many of the proposed disclosures

²¹⁶ See, e.g., Azmy, *supra* note 177, at 334 (identifying the elderly as frequent victims of predatory lending).

²¹⁷ See, e.g., Brescia, *supra* note 174, at 295 (citing a study showing that in 2004, nearly half of all subprime loans went through a broker compared with 28% of all prime loans).

²¹⁸ See *id.* at 296; Krinsman, *supra* note 175, at 15.

²¹⁹ See Azmy, *supra* note 177, at 335-36; Ehrenberg, *supra* note 204, at 181; Engel & McCoy, *supra* note 177, at 1263.

²²⁰ See Uselton, *supra* note 176, at 9-10.

will help determine whether there is a reasonable likelihood that a loan can be repaid, including the loan's points and fees, APR, interest rate adjustment period, prepayment penalty and the value of the collateral. However, several other disclosures are necessary, including disclosure of low- and no-doc loans and information relating to loan flipping. Most importantly, the borrower's housing debt/income and overall debt/income ratios should be disclosed, as they are crucial in determining whether the borrower can repay a loan and whether the loan is suitable.

The main potential arguments against these proposals to expand HMDA's disclosures are that they would cost too much and undermine market operations. In addressing the cost of these disclosures, several factors should be taken into account. As the history of HMDA shows, if the information that HMDA disclosures elicit is insufficient to describe or demonstrate the harm the disclosures are intended to address, the impact of the disclosure will be limited, wasting at least some of the cost of such disclosures. The marginal cost of the added disclosures increases the value of the entire investment in information disclosure. The cost of the added disclosures should also be measured against the potential cost of failing to disclose the information. If the marginal cost of the additional information can help prevent the risky, unsafe, and abusive lending that helped spark the economic crisis—and there is a good argument based on HMDA's history that comprehensive disclosure does have an impact on lending behavior—then the marginal cost of the disclosures could potentially save trillions of dollars of evaporated wealth and government spending that have accompanied the current crisis.

Regarding the market-based arguments, reference to the legislative history accompanying HMDA's passage is relevant. As Senator Proxmire pointed out, HMDA's required disclosures are a "gentle remedy" that do not prohibit or penalize anything.²²¹ Disclosure of complete information about risky, unsafe and abusive loan practices does not prohibit any lending, does not impose lending terms and does not penalize predatory lending. Instead, as made clear in HMDA's original legislative history, disclosure simply provides consumers and government officials with facts about lending, facts that promote rather than inhibit the market. These facts can, in turn, assist community groups in identifying lenders that may be engaging in abusive tactics so they can work with them to change their

²²¹ See *supra* note 29 and accompanying text.

practices,²²² alert consumers about lenders to avoid²²³ and assist government officials in making decisions about how to enforce the law and whether the level of risk in the home mortgage lending market is too high.

VI. Conclusion

As HMDA enters its thirty-fifth year, looking back at its history can help chart its course ahead. HMDA uses the power of public disclosure of information about lending to accomplish its various goals, including detecting and deterring redlining, lending discrimination and reverse redlining. HMDA's overall success is in direct proportion to the amount and sufficiency of the information it requires lenders to disclose in connection with the practices to be eliminated. With the economic crisis of 2008 have come numerous proposals to reform regulation of the financial services industry, including a proposal to amend HMDA to detect and deter many of the risky, unsafe and abusive lending practices that have harmed borrowers and helped fuel the crisis. The proposals are helpful but do not go quite far enough in requiring sufficient data disclosure. Based on HMDA's prior history, Congress would be wise to make HMDA as effective a tool as possible in regulating home mortgage lending to the benefit of affected borrowers and the economy.

²²² See CALIFORNIA REINVESTMENT COALITION, ET AL., *supra* note 190, at ii (“Additionally, expanding data collection would give communities the tools to better understand the lending occurring in their neighborhoods.”). This use of HMDA is also a part of its original justification. See *supra* notes 34-35 and accompanying text.

²²³ This theme is also familiar in HMDA's legislative history, which suggested that HMDA data would enable communities to detect and deter redlining. See *supra* notes 36-37 and accompanying text.