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DISCRIMINATION IN HOME FINANCE

*Daniel A. Searing**

Banks dictate where the Negroes can live¹

Discrimination in home finance, like its parent, discrimination in housing, is certainly not new. What is new is that the federal agencies which regulate the financial institutions engaged in home mortgage financing are beginning to respond to pressures to end this problem. Public interest organizations and agencies such as the United States Civil Rights Commission are now seeking some effective steps to provide minority citizens with equal opportunities to obtain financing for their homes. In this article an outline of discrimination in home finance is presented and the different types of such discrimination are discussed. The four federal financial regulatory agencies and their supervisory jurisdictions are reviewed along with the legal responsibilities and authority of these agencies to act. Recent steps taken to impel action and the response of each agency conclude the article.

I. The Problem

Most concerned citizens have a good notion of what *discrimination in housing* means; far fewer understand that discrimination in home financing is an equally serious barrier to minority citizens who wish to purchase a home of their own. This is due partly to the complex, almost mysterious, world of home finance and partly to the different types of discrimination that are often grouped under this heading. The following review of discriminatory practices does not purport to be exhaustive, only instructive.

The first type is the outright denial of housing credit in the form of mortgage loans to black citizens and members of other minorities solely because of their race, color, creed or national origin. Today, of course, this forthright refusal is seldom practiced. The same message can be delivered much more subtly through the practices outlined below. A second form easily spotted is the refusal to extend credit to black citizens for homes in residential areas occupied exclusively by whites. Somewhat more subtle but just as easy to understand is the refusal to extend credit to white citizens for the purchase of homes in residential areas occupied by blacks or in transition from white to black. Another overt (and perhaps more widespread) practice is the designation of certain residential areas, principally in central cities or suburban pockets occupied largely by black citizens, as wholly ineligible for mortgage credit. This is the infamous practice of redlining, in which entire blocks or neighborhoods are simply declared off limits for lending, either by having a line drawn around them, or by custom and practice. A variation of this practice is the designation of a certain area of a city as the

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¹ U.S. COMM'N ON CIVIL RIGHTS, REPORT 4, HOUSING 29 (1961), citing OHIO ADVISORY COMMITTEE HOUSING CONFERENCE 19 (1961).

only area in which loans will be made to minorities—reverse redlining.² Other discriminatory practices include applying more stringent conditions on loans made to minorities, such as higher interest rates, shorter terms or larger down payment requirements or simply applying different standards in evaluating applications for mortgage credit.

While the above represents an onerous gauntlet to be run by minority citizens, even more subtle means exist to prevent them from obtaining housing credit on an equal basis with whites. These are practices which may have a discriminatory *effect* upon minority citizens although the restrictions are apparently fair on their face. Such practices include the arbitrary discounting of all or part of a working wife's income in computing total family income for lending purposes. This obviously has a sharp discriminatory impact on minority groups. The wife's income often represents a significant contribution to the family's standard of living. Also included is the refusal to consider stable income from overtime, production bonuses and part-time work as a part of normal income. This obviously again discriminates unfairly against many minorities and working people who rely on such income as a basic part of their family income. The use of isolated difficulties or credit problems in the distant past as an absolute bar to obtaining a loan is another example. Minorities often have had credit difficulties or have been the victims of harsh credit practices in the past.

Overt practices, covert acts, and decisions which may appear fair and justifiable for reasons of business necessity and sound judgement, but which in reality hurt minorities in disproportionate numbers—these three factors have operated to exclude minorities from home ownership opportunities.

II. The Financial Regulatory Agencies

If each financial institution handling home mortgages had to be approached individually as to its policies, or if total reliance were placed on the complaint process, hope for reform in the lending area would be slim indeed.³ However, home mortgage financing is carried out in this country largely through savings and loans and banks which for the most part are regulated extensively by federal agencies.⁴ The majority of home mortgages are made by savings and loan associations and most of these associations come under the supervision of the

2 Such a situation appeared to have occurred in Boston during 1969-70. *Hearings on S. Res. 32 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 92d Congress, 2d Session, pt. 1, at 8 (1972).

3 The fact that almost no complaints of discrimination in mortgage lending have been received has been used by the agencies to argue that this is not a problem. The total score for complaints as of March, 1970, was FHLBB—4, FDIC—2, Federal Reserve—0, Comptroller of the Currency—1, U.S. COMM'N ON CIVIL RIGHTS, FED. CIVIL RIGHTS ENFORCEMENT EFFORT 170 (1971). The situation had not improved a year later. U.S. COMM'N ON CIVIL RIGHTS, FED. CIVIL RIGHTS ENFORCEMENT EFFORT: ONE YEAR LATER 77 (1971) [hereinafter cited as COMMISSION REPORT: ONE YEAR LATER]. There are reasons for this poor showing: lack of knowledge about the agencies, reluctance to become "involved," lack of knowledge that one has been discriminated against.

4 Savings and loans clearly hold more mortgages than other institutions. As of June 1972, savings and loans held \$188,884,000 in mortgage debts, mutual savings, \$64,333,000, commercial banks, \$90,114,000, and life insurance companies, \$75,547,000. 6 FED. HOME LOAN BANK BOARD J. 51 (January, 1973). Life insurance companies do not come under federal regulation and so are beyond the scope of this paper.

Federal Home Loan Bank Board⁵ (FHLBB). The banks in the United States are supervised by three different federal agencies: national banks are chartered and supervised by the Comptroller of the Currency;⁶ the Federal Reserve Board supervises state chartered banks which are members of the Federal Reserve System;⁷ and finally, the Federal Deposit Insurance Corporation⁸ (FDIC) supervises insured state banks which are not members of the Federal Reserve System.

Each federal agency has a responsibility to insure that its supervised institutions are in sound financial condition. This is done through an examination and supervision process. At certain times during the year examiners visit each institution and inspect its financial condition. Unsatisfactory practices or policies are discussed by the examiner with the chief executive officer of each institution. If results satisfactory to both parties cannot be achieved, the level of supervision moves higher. Very rarely does this procedure appear for public view. Thus, the best "handle" on discrimination in the mortgage activities of the banks and savings and loans is through effective regulation by the federal agencies followed by examination and supervision to insure compliance. The theory has been recognized for some time. Putting the principles into practices has been a long and frustrating task. A brief review of federal involvement over the past decade and a compilation of further evidence documenting the nature of the problem follow.

III. A Decade of Neglect

It is easy to conclude from a review of the discriminatory practices outlined above that discrimination in lending has been a factor in perpetuating residential segregation. This was so stated in a major report issued by the U.S. Commission on Civil Rights in 1961.⁹ The report covered discrimination in housing, and its third chapter was devoted to government and housing credit. Part B of the chapter covered the supervision of mortgage lenders and serves as a bench mark in this area. Not for a decade was financial institution involvement in civil rights to be covered as comprehensively.

In preparing the document, all four federal agencies were surveyed as to their activities in preventing discrimination in mortgage lending. Of the four, only the Home Loan Bank Board was responsive. In June of 1961, the Board had passed a resolution, stating:

It is hereby resolved that the Federal Home Loan Bank Board, as a matter of policy, opposes discrimination, by financial institutions over which it has

5 12 U.S.C. § 1437 (1970). This permits one federal authority to have supervisory powers over all federally chartered and most state chartered savings and loans. This reason alone has made the Board a principal target of civil rights groups.

6 12 U.S.C. § 1 *et seq.* (1970). See especially 12 U.S.C. § 21 *et seq.* (1970).

7 12 U.S.C. §§ 248(a), 325 (1970).

8 12 U.S.C. §§ 1815-1819 (1970). Thus bank supervision is fragmented. FDIC, because of a requirement that national banks and state chartered member banks have their deposits insured by FDIC, does have jurisdiction over banks actually supervised by other federal agencies.

9 U.S. COMM'N ON CIVIL RIGHTS, REPORT 4, HOUSING 141 (1961).

supervisory authority, against borrowers solely because of race, color, or creed.¹⁰

Board examiners finding evidence of discrimination were to report the facts, and supervisory action would be initiated.¹¹

The other agencies took a harder line. The Federal Reserve and the Federal Deposit Insurance Corporation demurred on their authority to regulate against discrimination in mortgage lending. They, along with the Comptroller, doubted whether they should pursue such action, as they had concern about the nature of the regulation required, and because they believed that factors such as color or creed might indeed affect the value of property.¹²

The Civil Rights Commission had by then detailed the problem and suggested remedial action. Yet meaningful remedies were a long way off. The next major federal pronouncement in the area was Executive Order 11063,¹³ which did not include conventionally financed housing in its coverage. Presidential Commissions and other bodies continued throughout the middle 60's to amass evidence of segregation and inferior housing, although discussion of discrimination in financing was strangely absent.¹⁴ Title VIII of the 1968 Civil Rights Act was enacted with section 805 prohibiting discrimination in home finance.¹⁵ It did not provide an instant solution to the problems of minority citizens in obtaining equity in home finance. But, starting with this legislation, events began moving slowly, gradually picking up momentum.

Shortly after the passage of Title VIII the Federal Home Loan Bank Board directed a letter to its member associations describing the requirements of the law and indicating that sanctions could be applied if an individual association were found to be discriminating in issuing mortgages.¹⁶ This initial step

10 *Id.* at 36.

11 *Id.*

12 *Id.* at 39-52.

13 Exec. Order No. 11063, 3 C.F.R. 261 (Supp. 1962). The Kennedy Administration did consider covering conventionally financed housing, but rejected supporting arguments. See Taylor, *HANGING TOGETHER, EQUALITY IN AN URBAN NATION* 91 (1971).

14 See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 259 (1968); REPORT OF THE PRESIDENT'S COMM. ON URBAN HOUSING, *A DECENT HOME* 96 (1968); REPORT OF THE NATIONAL COMM'N ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY* 40-55. The redlining and segregated housing policies of FHA are discussed at 100-103. Lenders desiring FHA guarantees on their mortgages would have followed those policies.

15 Civil Rights Act of 1968, 42 U.S.C. § 3605 (1970). Titled "Discrimination in the Financing of Housing" this section states:

After December 31, 1968, it shall be unlawful for any bank, building and loan association, insurance company or other corporation, association, firm or enterprise whose business consists in whole or in part in the making of commercial real estate loans, to deny a loan or other financial assistance to a person applying therefor for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against him in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of the race, color, religion, or national origin of such person or of any person associated with him in connection with such loan or other financial assistance or the purposes of such loan or other financial assistance, or of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given.

Meaningful legislative history on this provision is nonexistent.

16 U.S. COMM'N ON CIVIL RIGHTS, *FED. CIVIL RIGHTS ENFORCEMENT EFFORT* 168 (1971).

was also taken by the other agencies in early 1969 as a result of a series of meetings initiated by the Department of Housing and Urban Development.¹⁷

That department again took the initiative in June, 1969, by preparing a list of concrete actions that each financial agency could undertake as affirmative action under the requirements of Title VIII.¹⁸ Such recommendations included:

1. The issuance of regulations or binding instructions requiring that each institution keep on file all loan applications, indicating the race or color of the applicant, together with other relevant information, such as the character and location of the neighborhood in which the property involved is located, and if the application is disapproved the reason why.

2. A requirement that each lending institution post a notice in its lobby stating that the institution does not discriminate in mortgage lending and informing the public that such discrimination is in violation of section 805.

3. The development of a special form of examining documents for use by examiners in checking on discriminatory lending practices covered by Title VIII.

4. Development of a data collection system designed to reveal patterns or practices of discrimination in home mortgage lending operations covered by Title VIII.¹⁹

The agencies were not delighted at these recommendations, especially those calling for racial data collection. The major result of this effort was an agreement to send a questionnaire to all supervised institutions. This was to be a one-time effort to determine the policies and practices lenders use in making residential loans, showing to what degree discrimination in lending really existed. After a period of study and evaluation corrective steps were to be recommended²⁰ if such discrimination were found. The questionnaire was initiated in July, 1971; preliminary results were not made available to interested groups until May 26, 1972.²¹ These are discussed in more detail below.

Slowly, additional evidence began to trickle in. The Civil Rights Commission in hearings held in Baltimore, Maryland, in August, 1970, introduced a staff report summarizing information the Commission had gathered on the impact of lending institutions on minorities.²² Testimony was taken from representatives of the savings and loan industry in Baltimore, at one point indicating that blacks had a more difficult time obtaining mortgage loans.²³

In June of 1971 President Nixon issued a major Administration statement

17 *Id.* at 168-69, 220.

18 Civil Rights Act of 1968, 42 U.S.C. § 3608(c), (d) (1970). The full implications of this "affirmative action" requirement are discussed in the section on authority and responsibility.

19 U.S. COMM'N ON CIVIL RIGHTS, *FED. CIVIL RIGHTS ENFORCEMENT EFFORT* 169 (1971).

20 U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT, OFFICE OF EQUAL OPPORTUNITY, *PRIVATE LENDING INSTITUTIONS QUESTIONNAIRE, INITIAL REPORT ON RETURNS 2* (1972).

21 Letter from Samuel J. Simmons, Assistant Secretary for Equal Opportunity, Department of Housing and Urban Development, to William L. Taylor, Director, Center for National Policy Review, Washington, D.C., May 26, 1972.

22 *Hearing Before the United States Commission on Civil Rights*, Baltimore, Maryland, 194-196, 589-620 (Staff Report) (August, 1970).

23 *Id.* at 201.

on federal policies relative to equal housing opportunities. The President noted that "the denial of equal housing opportunity to a person because of race is wrong, and will not be tolerated . . . whether practiced directly and overtly, or under cover of subterfuges, or indirectly through such practices as price and credit discrimination."²⁴

Further federal recognition of the problem came on June 16, 1971, in testimony by Attorney General Mitchell before the U.S. Civil Rights Commission. Commissioner Maurice B. Mitchell asked: "Do you run into situations where there is a credit—form of credit discrimination? I notice the President made reference to credit discrimination in his recent statement. Have you run into instances where you could document credit discrimination?" Attorney General Mitchell then answered: "I don't doubt for a moment that it exists. Our history in it has not been very extensive. . . . It's not an easy subject matter to document. . . . I think that the better way of getting at credit discrimination, or at least some forms of it, is through the regulatory bodies that control these lending institutions, and I know that Secretary Romney has taken some action in that field."²⁵

The federal agencies were not alone in revealing discriminatory practices by the nation's lending institutions. A survey conducted by the National Association of Real Estate Brokers found that minority brokers encountered "hardships" in obtaining mortgage financing.²⁶ A state legislative committee on real estate practices received testimony that lending institutions in Baltimore generally refuse loans to individuals purchasing in integrated neighborhoods.²⁷ These hearings were stimulated by a privately prepared report on savings institutions' exploitations of black families during the 60's.²⁸ Similar findings and studies were made in St. Louis, Missouri.²⁹ The problems of poor people obtaining housing and consumer loans from banks was the subject of a documentary shown on educational television channels.³⁰

24 Statement by the President on Federal Policies Relative to Equal Housing Opportunity, Office of the White House Press Secretary, June 11, 1971, at 2. Reprinted in, *Hearing Before the U.S. Comm'n on Civil Rights*, Washington D.C., 573, 574 (June, 1971).

25 *Hearing Before the U.S. Comm'n on Civil Rights*, Washington, D.C., 372 (June, 1971).

26 NATIONAL ASSOCIATION OF REAL ESTATE BROKERS, SURVEY ON RACIAL DISCRIMINATION IN MORTGAGE FINANCING OF MINORITY REAL ESTATE BROKERS IN THE UNITED STATES 26 (May, 1971). This report illustrated some of the difficulties in obtaining reliable information. On page 27, the report stated: "The fear that possible identity would close the door to their limited source of finance kept many brokers from responding to the questionnaire."

27 *Hearings Before the Real Estate Practices Comm. of the Legislative Council of Maryland*, as reported in *The Washington Post*, October 7, 1971 at 7, col. 5.

28 ACTIVISTS, INC., BALTIMORE UNDER SIEGE: THE IMPACT OF FINANCING ON THE BALTIMORE HOME BUYER 1960-1970 (September, 1971) (mimeograph from ACTIVISTS, INC., 2316 W. North Avenue, Baltimore, Md. 21216). Such reports and the hearings noted in note 27 *supra* moved the Maryland State Commission on Human Relations to propose guidelines regarding discrimination in lending and to hold hearings on such guidelines on September 27, 1972, in Baltimore. Housing finance guidelines were adopted on March 13, 1973.

29 GREATER ST. LOUIS COMMITTEE FOR FREEDOM OF RESIDENCE: PATTERNS OF DISCRIMINATION (February, 1970) mimeograph from the Committee, 5868½ Delmar Boulevard, St. Louis, Missouri 63112. See also *A Place to Live — Limited Options*, 2 PROUD 16 (April, 1971).

30 NATIONAL EDUCATIONAL TELEVISION, REALITIES — BANKS AND THE POOR (November, 1970).

Scholars also were beginning to make their contribution to the principle that discrimination for noneconomic reasons constitutes an unsafe, unsound business practice in that it results in an economic cost—not only to those discriminated against but also to those who do the discriminating.³¹

The preliminary analysis of the Private Lending Institution Questionnaire provided the best evidence of widespread discriminatory practices. For instance, data from 582 savings and loan associations in the 50 cities with the largest minority populations indicated that 39 per cent had never provided notice to customers that loan applications are considered without regard to race;³² 18 per cent refused to make residential loans in one or more areas of high concentrations of minority citizens.³³ Seventeen per cent or 99 savings and loan associations admitted to considering the racial and ethnic characteristics of neighborhoods and 15 per cent or 89 considered the proximity of low-rent or public housing projects.³⁴

A large number of associations, 171 or 29 per cent were making fewer than 5 per cent of their loans to minorities, although doing business in cities having from 16 - 74 per cent minority population.³⁵ Data on individual cities was even more revealing:

In Cleveland blacks are 28% of all homeowners (data for other minority homeowners are not available) but not a single savings and loan of 9 reporting stated that it made more than 25% of its loans to minorities. In Detroit, where blacks are 33% of all homeowners, no savings and loan reported making more than 15% of its loans to minorities. In Washington, D. C., where blacks are 61% of all homeowners, no savings and loan reported making more than 50% of its loans to minorities and only 2 exceeded 25%.³⁶

Management data was no less illustrative. In the 50 cities, 507 associations, or 87 per cent, had no minority Board or Loan Committee members.³⁷ For all lending institutions (15,627 responding), 14,729 had no such members.³⁸

IV. The Legal Issues and Remedies

A. Invoking the Administrative Process—The Petitions

Despite the mounting evidence that home finance discrimination was creating a highly effective barrier to the ownership aspirations of minorities, it was becoming obvious by early 1971 that without additional impetus the four financial regulatory agencies were not likely to move more rapidly in ending such discrimination. The sum total of action at this time consisted of a resolu-

31 G. BECKER, *THE ECONOMICS OF DISCRIMINATION* (1970).

32 U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT, OFFICE OF EQUAL OPPORTUNITY, *PRIVATE LENDING INSTITUTIONS QUESTIONNAIRE, INITIAL REPORT ON RETURNS 4* (1972).

33 *Id.*

34 *Id.* at 5.

35 *Id.*

36 *Id.*

37 *Id.* at 6.

38 *Id.* at 8.

tion by the Federal Home Loan Bank Board (FHLBB), and letters from all four agencies notifying supervised institutions of the need to heed the pronouncements in Title VIII. The HUD questionnaire that was later to provide much valuable evidence was winding its way through the bureaucracy.

Therefore, in March of 1971 the Center for National Policy Review (a race relations and urban problems legal research organization affiliated with the Law School at Catholic University) on behalf of 13 public interest organizations³⁹ formally invoked the administrative process available for each agency⁴⁰ by filing petitions requesting each agency to invoke its rulemaking authority "for the purpose of establishing a fair and effective system of preventing racial discrimination in home mortgage finance."⁴¹

Each petition contained the statement of interest of the organizations which were filing the petitions and the factual allegations of the petitioners which included inferior and segregated housing available to minorities, the discriminatory practices of the housing and home finance industry, the consequences and persistence of such practices, and the failure of the agencies to correct and prevent such practices.⁴² The petitions also contained a statement of the obligations and authority of each agency⁴³ and a requested remedy.⁴⁴ The remedies were in part modeled on the suggestions of the various federal agencies which had been involved in this field. The responses of each agency will be discussed later in this article; however, the remedies requested will be detailed here. They were divided into two major sections, first, regulations affecting each supervised institution, and second, steps to be taken by the regulating agency.

39 The petitioning organizations are:

The American Friends Service Committee, Inc.	National Association of Real Estate Brokers
The Housing Association of Delaware Valley	The National Committee Against Discrimination in Housing, Inc.
The Housing Opportunities Council of Metropolitan Washington	National Urban Coalition
The Leadership Council for Metropolitan Open Communities	National Urban League, Inc.
Metropolitan Washington Planning and Housing Association, Inc.	The Rural Housing Alliance
National Association for the Advancement of Colored People	The Washington Center for Metropolitan Studies
	The League of Women Voters of the United States

40 All four agencies provide similar procedures for interested parties desiring to have the agency issue, amend or repeal a regulation of the agency. Normally such procedures are used by the regulated institutions to effect a change. To the best of my knowledge, this is the first time such procedures have been attempted by public interest groups. The relevant provisions for each agency are: Federal Home Loan Bank Board, 12 C.F.R. § 508.13 (1964); the Comptroller of the Currency, 12 C.F.R. § 4.16 (1967); The Federal Reserve Board, 12 C.F.R. §262.3 (1968); the Federal Deposit Insurance Corp., 12 C.F.R. § 302.4 (1950).

41 CENTER FOR NATIONAL POLICY REVIEW, PETITION 1 (1971) [hereinafter cited as Petition].

42 *Id.* at 2-3.

43 *Id.* at 3-4.

44 *Id.* at 4-7.

Initially, each agency was asked to issue a regulation expressly prohibiting discrimination on the basis of race, color, religion, or national origin in the conduct of all association business. The discrimination prohibited would include: (1) the denial of services; (2) the provision of services in a different manner; and (3) the offering of services in a manner which excludes or discriminates against particular individuals on the basis of race, color, religion, or national origin. Violations of the regulation were to be subject to the sanctions available to each agency.

In *implementation* of the general nondiscrimination regulation, the petitioners next requested each agency to issue regulations requiring that each supervised institution:

a. Keep on file a record of all loan applications, specifying the following:

1. race, color or minority group identification of each applicant;
2. date of the application;
3. date of the decision with respect to the loan;
4. if the application is disapproved, the reasons therefor;
5. the character and location of the property, surrounding properties, and general neighborhood in which the property is located, including racial and economic characteristics of the area and such other information as the agency may determine is relevant.

b. Maintain a written log of oral inquiries about loans which are made in person, but do not result in a written application, such log to indicate the date upon which each inquiry was made, the nature of the inquiry; the name and address, and the race, color or minority group identification of the person making inquiry.

c. Publish and post a clear statement of the standards and criteria which the financial institution uses in reviewing and deciding on loan applications.

d. Take affirmative action to inform customers and potential customers of its nondiscriminatory lending policies by means including but not limited to: prominently posting a notice in its lobby, and including in its brochures and other advertising material a statement that the institution does not discriminate in mortgage lending, that any such discrimination is in violation of Section 805 of the Civil Rights Act of 1968, and that if any applicant for a mortgage loan encounters such discrimination, a complaint may be filed by writing to the Secretary, or the appropriate official of the particular agency involved, such as FDIC, stating the facts upon which the allegations of a discriminatory practice are based; advertising the availability of its thrift and home financing services in media (press, radio, t.v., etc.) with demonstrated impact on the minority market; establishing working relationships with brokers and other agents who serve members of minority groups.

e. Require that each builder or developer to whom a short-term construction or long-term mortgage loan is made file with the lender a written assurance that the dwellings financed will be sold or leased without discrimination. This assurance should also include a statement of the affirmative actions the builder or developer will undertake to inform minority group members of equal housing opportunities in the building or buildings and developments he is constructing. Further, that each builder and developer, upon completion of the occupancy of the dwellings financed, file a statement with the lender indicating the total number of units purchased

and occupied, and the total number of units purchased and occupied by members of minority groups.

f. Designate an officer of such institution to exercise overall control, supervision, coordination and development of the nondiscrimination policies and affirmative action programs of his institution and to assure that all personnel of the institution comply with these policies and programs.⁴⁵

In addition to the steps each institution was asked to take, *each supervisory agency* was asked to: 1) develop the necessary procedures and forms for periodic compliance reporting; 2) develop a national data collection system for comparative analysis of lending practices in the several regions; 3) undertake to determine how current practices and procedures in processing loan applications should be revised to remove impediments to home purchase by minority members; and 4) develop an in-service training program for institution officers. The petitioners also requested each agency to hold a hearing on the rulemaking requests.⁴⁶

Thus the petitioners had presented a *system* to halt lending discrimination—a series of steps designed not only to prohibit the practice and to determine whether or not such a prohibition is effective but also to reach out *affirmatively* to insure minorities that they are welcome customers. It is now time to examine more closely the “why,” or the legal obligation, and the “how,” or authority of each of these financial agencies.

B. *The Legal Responsibility and Authority of the Agencies*

The petitioners asserted that:

[T]he right of citizens not to be discriminated against in the acquisition of housing and the obligation of the Federal Home Loan Bank Board to protect citizens against racial discrimination by lending institutions arise under the Thirteenth Amendment and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.⁴⁷

The federal government comes under the restraints of the fourteenth amendment through the due process clause of the fifth amendment.⁴⁸ Thus the four regulatory agencies can look directly to the Constitution for a determination of their responsibility. The national policy of nondiscrimination was made crystal clear by the Civil Rights Act of 1866, which provided that: “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and

⁴⁵ *Id.*

⁴⁶ *Id.* at 7. It is noteworthy that the petitioners could request a hearing under regular procedures for the Comptroller, the Federal Reserve Board and the FDIC. *Supra* note 40. The FHLBB, however, provides a different method. At 12 C.F.R. § 507 (1964) it is stated that requests for hearings must come from seven members of the Federal Savings and Loan Advisory Council, or four of the Federal Home Loan Banks, or 25 members of the Federal Home Loan Bank System. So the petitioners could only request a Board hearing “because of the public importance of this petition.”

⁴⁷ Petition, *supra* note 41, at 3.

⁴⁸ *Bolling v. Sharpe*, 347 U.S. 497 (1954).

personal property.”⁴⁹ Although the language was available for many decades, it was not to render its fullest protection of the rights of minority citizens until *Jones v. Mayer Co.* in 1968, in which it was held that this language “bars *all* racial discrimination, private as well as public, in the sale or rental of property. . . .”⁵⁰

Without more, it would not be difficult to construct fully a position that each agency has a duty to insure that its institutions are not contributing to the curtailment of the rights of minorities.

But there is more, much more. First, Congress in 1949 stated as a national objective “a decent home and a suitable living environment for every American family.”⁵¹ More to the point, it also provided that:

[O]ther departments or agencies of the Federal Government having powers, functions, or duties with respect to housing, shall exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act and in such manner as will facilitate sustained progress in attaining the national housing objective hereby established, and in such manner as will encourage and assist . . . the development of well-planned, integrated, residential neighborhoods. . . .⁵²

The “decent home” commitment was reaffirmed by the Congress in 1968.⁵³ A practice or practices which arbitrarily deny access to housing operate against this national goal. Failure to act by an agency which has home finance as its major function can in no way be viewed as an exercise of powers consistent with the national housing policy which such agency is under a special duty to implement.

Executive Order 11063, Equal Opportunity in Housing, provided further guidance in this area, although its coverage was limited to housing financed through federal assistance.⁵⁴ The directive was clear: the executive branch had an obligation to assure that laws relating to federal financial assistance to housing were “to take all action necessary and appropriate to prevent discrimination. . . .”⁵⁵ The agency to which this applies the best is, of course, the FHLBB. Any advances (money loaned by a Federal Home Loan Bank to an association), or loans or grants from the Federal Savings and Loan Insurance Corporation (FSLIC) or loans secured by a federal agency certainly fall within the provisions of the Executive Order. That Order made the Chairman of the FHLBB a member of the President’s Committee on Equal Opportunity in Housing; yet his agency took no action to insure that the programs coming within the bounds of the Order were administered as directed. Although section 203 of the Order directed the issuance of rules and regulations, none were forthcoming.

Two civil rights acts were to add yet another layer of federal legislation to

49 42 U.S.C. § 1982 (1970).

50 *Jones v. Mayer Co.*, 392 U.S. 409, 413 (1968).

51 42 U.S.C. § 1441 (1970).

52 *Id.*

53 42 U.S.C. § 1441(a) (1970).

54 Exec. Order No. 11,063 3 C.F.R. 261 (Supp. 1962).

55 *Id.* at 262.

those that were already being ignored. Section 601 of the 1964 Civil Rights Act states that:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.⁵⁶

Section 602 directs any federal agency extending assistance by way of grant, loan or contract—other than a contract of insurance or guaranty—to effectuate the provisions of section 601 by promulgating rules or regulations. Admittedly the great bulk of the activities of the FHLBB, such as insuring of accounts by the FSLIC, falls within the exception, and is thus not covered by Title VI. However, a strong argument can be made that another Board program falls within the confines of Title VI. First, the *advances* made by the twelve home loan banks to member institutions are clearly federal assistance by way of loan⁵⁷ and should be covered by Title VI regulations. This is not the place for dispositive argument of this question, as it is somewhat peripheral to the main topic; however, it is indicative of the *climate* surrounding civil rights at the Board. It was not until pressure was brought in a lawsuit concerning a Board program to assist low-income families with homeownership—obviously within Title VI—that applicable regulations were prepared.⁵⁸ They still have not been published.

The 1968 Civil Rights Act cut far too big a swath to be ignored as the 1964 provisions were; yet, the reluctance with which the agencies have treated the federal mandate on civil rights and housing is astonishing. In addition to section 805, the 1968 Act provides:

All executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner *affirmatively* to further the purpose of this subchapter [Fair Housing] and shall cooperate with the Secretary to further such purposes.⁵⁹

This affirmative action concept provides the principal lever with which to move the agencies. The FHLBB is probably second only to HUD in number and importance of activities relating to housing and urban development. The link is less strong with other agencies, except that to the extent that mortgage loans are made by supervised institutions they are clearly conducting an activity relating to housing.

In addition, the language “in a manner affirmatively to further the purpose of this subchapter,” while broad, has acquired specific meaning in civil rights law. Indeed, other federal agencies have moved to implement affirmative action programs under the authority of language no more detailed than the above. An example can be found in the experience under Executive Order 11246—which is

⁵⁶ 42 U.S.C. § 2000(d) (1970).

⁵⁷ Advances are authorized by 12 U.S.C. § 1430(b) (1970).

⁵⁸ Young v. Federal Home Loan Bank Board, Civil No. 2497-71 (D.D.C., filed Mar. 15, 1972).

⁵⁹ 42 U.S.C. § 3608(c) (1970) (emphasis added).

not based on specific statutory authority. It requires contractors doing construction work with the federal government to include in their contracts the statement: "The contractor will take affirmative action to ensure that applicants are employed . . . without regard to their race, color, religion, sex, or national origin."⁶⁰ The Secretary of Labor, acting under authority of the Executive Order, issued implementing orders requiring the submission of affirmative action programs to include specific goals of minority manpower utilization. The effort to order affirmative actions was unsuccessfully challenged in *Contractors Association of Eastern Pennsylvania v. Shultz*.⁶¹ Executive Order 11246 was also used by the Office of Federal Contract Compliance as authority to issue Order No. 4, requiring nonconstruction federal contractors to develop written affirmative action compliance programs.⁶² Using such precedents as guides, the regulatory agencies have adequate authority to promulgate regulations and to issue similar requirements to financial institutions regarding nondiscrimination in lending.

It is probable that lending institutions will come under a duty to initiate affirmative action programs. As the petitioners attested to the FDIC in follow-up to hearings held on nondiscrimination proposals: "[It] has become increasingly clear in several areas that the failure of a party who is under a statutory duty not to discriminate to take affirmative action to serve minorities constitutes a violation of the law."

Thus, for example, the statutory duty imposed by Title VII of the Civil Rights Act of 1964 is simply a duty not to discriminate. Yet courts have read the requirements of Title VII to hold that a *prima facie* case of discrimination is established by showing that minorities are employed in disproportionately small numbers. The burden then shifts to the employer to show no discrimination, a burden he can meet in most circumstances only by showing that he has taken *affirmative* steps to seek out and employ minorities.⁶³ HUD of course has taken a number of steps in implementing its own affirmative duty under Title VIII, promulgating Advertising Guidelines for Fair Housing, and affirmative Fair Housing Marketing Regulations.⁶⁴ There should be little question that agencies with an affirmative duty under Title VIII can require institutions under their supervision to initiate steps as suggested in the petition.

National policy and the Civil Rights Acts were not the only pillars supporting the requests of the petitioners for action ending discrimination in home finance. The language contained in the enabling statutes of all the agencies provides another support. The Federal Home Loan Bank Board has broad authority to issue regulations. Section 17 of the Federal Home Loan Bank Act authorizes the Board "to adopt, amend, and require observance of such rules, regulations, and orders as shall be necessary" to carry out the purposes of the

60 Exec. Order No. 11,246, 3 C.F.R. 339 (1964-65 Comp.).

61 442 F.2d 159 (3d Cir. 1971).

62 41 C.F.R. 60-2 (1971).

63 See, e.g., *U.S. v. Hayes International Corp.*, 456 F.2d 112 (5th Cir. 1972), *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir., 1971).

64 The Advertising Guidelines for Fair Housing are designed to assist persons advertising dwellings for sale or rent in complying with Title VIII. They are found at 37 Fed. Reg. 6700 (1972). The Affirmative Fair Housing Marketing Regulations, 37 Fed. Reg. 75 (1972) apply to the marketing of FHA subsidized and unsubsidized housing.

Act.⁶⁵ Other parts of the Act provide that membership in the bank system can be denied or withdrawn if "the character of its management or its home financing policy is inconsistent with sound and economical home-financing or with the purposes of this chapter."⁶⁶ Discriminatory practices which arbitrarily deny credit to minority citizens are not "sound" practices, and go against the purposes of the Act.⁶⁷ The legislation authorizing the chartering of federal savings and loans also contains useful language. The Board, in its authority over such associations, is directed to give "primary consideration to the best practices of local mutual thrift and home-financing institutions. . . ."⁶⁸ Financing of homes is a stated purpose of the Act.⁶⁹ The Board can define the concept of "best practices." Title IV of the National Housing Act provides the Board with authority over state-chartered, insured institutions, through the Federal Savings and Loan Insurance Corporation (FSLIC).⁷⁰ The Board's enforcement powers are found in both its authority over federal associations and over state-chartered institutions insured by FSLIC.⁷¹

Several major laws need to be reviewed in establishing the authority of the *banking agencies* because of the fragmented pattern of supervision. The Comptroller of the Currency is charged with the execution of all laws of the United States relating to the organization, operation, regulation and supervision of national banks.⁷² Because they are federal instrumentalities, serving a public purpose,⁷³ national banks should be assuming a leadership position in complying with the national policy against discrimination.

The FDIC, as noted earlier, supervises insured state banks that are not members of the Federal Reserve System.⁷⁴ It must measure the applicant bank against certain factors and examine its financial soundness.⁷⁵ One of the factors to be considered by the Corporation is the "convenience and needs of the community to be served."⁷⁶ It is submitted that this language could be used to determine the willingness of applicant banks to meet the needs of *all* the community, not just the majority portion. The power of examination over supervised banks⁷⁷ and the Corporation's general power to prescribe such rules and regulations needed to effectuate its duties provide sufficient authority to issue rules against discrimination.⁷⁸ In addition, the Corporation is empowered to take a variety of actions, including removal of officers,⁷⁹ cease and desist orders,⁸⁰ and termination of insurance if a bank engages "in an unsafe and unsound practice"

65 Federal Home Loan Bank Act § 17, 12 U.S.C. § 1437(a) (1970).

66 12 U.S.C. § 1424 (1970).

67 Civil penalties are available against lending institutions that discriminate. 42 U.S.C. §§ 3610(d), 3612 (1970).

68 12 U.S.C. § 1464(a) (1970).

69 *Id.*

70 12 U.S.C. § 1725 (1970).

71 See 12 U.S.C. § 1464(d) (1970) and 12 U.S.C. § 1730 (1970).

72 12 U.S.C. § 21 *et seq.*; *Ditrick v. Greaney*, 309 U.S. 190 (1940).

73 *Smith v. Witherow*, 102 F.2d 638 (3d Cir. 1939).

74 12 U.S.C. § 1817 (1970).

75 12 U.S.C. § 1815 (1970).

76 12 U.S.C. § 1816 (1970).

77 12 U.S.C. § 1815 (1970).

78 12 U.S.C. § 1819 (1970).

79 12 U.S.C. § 1818(e) (i) (1970).

80 12 U.S.C. § 1818 (b) (i) (1970).

in conducting bank business, or is violating "a law, rule or regulation."⁸¹ The arguments made in connection with similar language in the laws pertaining to the FHLBB are relevant here.

The Federal Reserve Board has taken a very narrow view of its authority in this area. The Board, in a memorandum of law prepared for the Civil Rights Commission, argued that its authority over state member banks was limited because *primary* regulatory control rested with state chartering authorities.⁸² Further, although examination into the "accounts, books, and affairs"⁸³ of each member is permissible, tradition restricts such authority to financial soundness.⁸⁴ Board power to regulate member bank loan policy is also severely restricted.⁸⁵ The Board recognizes for itself only a supporting role in enforcing the provisions of Title VIII, arguing that the compliance and enforcement language provided HUD *discourages* agencies like the Board from establishing their own standards.⁸⁶ Presumably, this means reliance on the complaint process. Such a narrow view does not necessarily preclude progress. The Board's steps will be detailed below. It is entirely possible that as the other three agencies begin to take affirmative steps in this area, the Board's view of its authority will "loosen up."

In summary, what the petitioners requested in March of 1971 is certainly within the authority of each agency, based on its supervisory powers over regulated institutions. The most difficult task is to persuade the agencies that they have a responsibility to move forward in this area. A major component of this task is arguing successfully that civil rights is a proper concern of financial regulatory agencies. As previously discussed, agency inaction—in some instances simply ignoring the provisions of law—indicates a reluctance to become involved with the enforcement of civil rights laws. The 1968 Civil Rights Act has helped to change that attitude, as have pressures from government and private sources. Yet, there has been no end to discrimination in lending. The nature of the agencies' response to the petitions and the pace of change indicate that the reluctance to *take responsibility* for ending lending discrimination still hangs over these agencies.

V. The Agencies' Response

Each of the four agencies, after some initial prodding, did acknowledge receipt of the petition.⁸⁷ With the exception of the Home Loan Bank Board, with which correspondence was exchanged and meetings were held, there was no further contact with the agencies for some months.⁸⁸

81 12 U.S.C. § 1818(a) (1970).

82 Letter from Robert C. Holland to Theodore M. Hesburgh with appended Federal Reserve Board Memorandum, March 12, 1971 [hereinafter cited as Memorandum].

83 *Id.* at 2; 12 U.S.C. § 248(a) (1970).

84 Memorandum, *supra* note 82.

85 *Id.*

86 *Id.*

87 The Federal Reserve Board had to be asked about its receipt of the petitions. Letter to Dr. Arthur F. Burns, Chairman, Board of Governors, Federal Reserve System, March 24, 1971. The Board responded on March 29, 1971. Letter to William L. Taylor, Director, Center for National Policy Review, Catholic University, Washington, D.C., March 29, 1971.

88 The Home Loan Bank Board was taking its usual approach of being more cooperative on these issues. An Office of Urban Affairs had recently been established, and the petitions

In early June, 1971, the Federal Reserve Board did respond to the petitioners with a letter from the Board secretary. It indicated that the Board was cooperating with HUD in distributing the Private Lending Institution Questionnaire and that the results of that effort would determine whether additional steps, such as a hearing or regulations, would be necessary.⁸⁹ The Board also agreed to initiate a meeting with representatives of the General Counsel's Offices of the Board and of the other three agencies. Such a meeting was held on June 17, 1971.⁹⁰

The letter also indicated that pressure from other sources was being applied. The Civil Rights Commission, as noted above, had reported on the efforts of each agency in its October 1970 report, Federal Civil Rights Enforcement Effort. Follow-up reports were planned, and a series of questions had been sent by the Commission to the head of each agency. The Federal Reserve Board's responses to one of the questions are instructive.

In response to a query regarding the validity of racial data collection, the Board asserted that it did not see the usefulness of keeping a file of loan applications with racial and neighborhood data, and indeed "... cannot envision any kind of bank record keeping that would produce reliable or useful data in this area."⁹¹ The majority of the other answers were not responsive and referred to the HUD questionnaire and the need to await its results before taking any further action.⁹² Although some of the agencies were more responsive than the Federal Reserve Board, the pattern of further delay until additional information had been collected was obvious.⁹³

Other kinds of pressure were at work on the agencies throughout the summer and fall of 1971. Such efforts included the President's Housing Statement, previously noted, and congressional hearings before the Civil Rights Oversight Subcommittee of the House Judiciary Committee.⁹⁴ In addition, in November of 1971 it was revealed that the Federal Deposit Insurance Corporation, in its own preliminary analysis of the Private Lending Institution questionnaire, had found "instances of failure to make loans in certain neighborhoods or areas of high minority concentration."⁹⁵

Finally, very late in December, 1971, there was an affirmative response from all four agencies. Each agency published a "policy statement" on "Civil Rights

were routed to the new director, Robert Powell Sangster, for action. A meeting with Sangster and counsel for petitioners was held on April 2, 1971, and a point-by-point review of the requested remedies was conducted. Although initially encouraging, it is questionable whether this resulted in a faster reaction by the Board.

89 Letter to William L. Taylor, Director, Center for National Policy Review, Catholic University, Washington, D.C., June 4, 1971.

90 Such meetings were useful in acquainting each party with the other position.

91 Letter from Robert C. Holland to Theodore M. Hesburgh, Chairman, U.S. Commission on Civil Rights, Secretary, March 12, 1971.

92 *Id.*

93 COMMISSION REPORT: ONE YEAR LATER, *supra* note 3, at 76-77.

94 See generally *Hearings on Federal Government's Role in the Achievement of Equal Opportunity in Housing Before the Civil Rights Oversight Subcomm. of the House Comm. on the Judiciary*, 92d Cong., Ser. 34 (1972).

95 COMMISSION REPORT: ONE YEAR LATER, *supra* note 3, at 74.

Act Nondiscrimination Requirements in Real Estate Loan Activities.⁹⁶ The Comptroller's will serve as an example:

Statement of Policy on Civil Rights Act Nondiscrimination Requirements in Real Estate Loan Activities

Section 805 of Title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3605) makes it unlawful for any bank, building and loan association, firm, or enterprise whose business consists in whole or in part in the making of real estate loans, to deny a loan or other financial assistance to a person applying therefor for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against him in the fixing of the amount, interest rate, duration, or other terms and conditions of such loan or other financial assistance, because of his race, color, religion, or national origin.

Recognizing that increased public awareness of nondiscrimination requirements and the availability of complaint procedures is necessary for effective implementation of the Civil Rights Act's provisions imposed on financial institutions, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, and the Board of Governors on the Federal Reserve System have adopted the following as minimum procedures to be utilized by all financial institutions subject to their supervisory authority.

1. *Advertisement notice of nondiscrimination compliance.* After March 1, 1972, any financial institution which directly or through third parties engages in any form of advertising of real estate lending services shall prominently indicate, in a manner appropriate to the advertising media and format utilized, that the financial institution makes real estate loans without regard to race, color, religion, or national origin. No words, phrases, symbols, directions, forms, models or other means shall be used to express, imply, or suggest a discriminatory preference or policy of exclusion in violation of the provisions of Title VIII of the Civil Rights Act of 1968. Written advertisements relating to real estate shall include a facsimile of the logotype . . . in order to increase public recognition of the nondiscrimination requirements and guarantees of Title VIII.

2. *Lobby notice of nondiscrimination compliance.* After March 1, 1972, every institution engaged in extending real estate loans shall conspicuously display in the public lobby of each of its offices at which residential real estate loans are made a notice that incorporates a facsimile of the . . . logotype and attests to that institution's policy of compliance, with the nondiscrimination requirements of Title VIII of the Civil Rights Act of 1968. Such notice shall include the address of the Department of Housing and Urban Development as the agency to be notified concerning any complaint alleging a violation of the nondiscrimination provisions of Title VIII.⁹⁷

Thus, each financial institution which advertised *its real estate lending services* (note that this severely restricted the impact of the requirement as most institutions advertise for savings) had to indicate a policy of nondiscrimination

96 Comptroller of the Currency, 36 Fed. Reg. 25167 (1971); Federal Deposit Insurance Corporation, 36 Fed. Reg. 25167 (1971); Federal Reserve Board, 36 Fed. Reg. 25168 (1971); Federal Home Loan Bank Board, 36 Fed. Reg. 25151 (1971). The FHLBB's policy was incorporated under the Rules and Regulations for Insurance of Accounts, 12 CFR § 571 (1971), issued under the authority of the Federal Savings and Loan Insurance Corporation.

97 36 Fed. Reg. 25167 (1971).

and use a "logo" in written ads. Second, institutions making real estate loans had to display in the lobby a notice of nondiscrimination. Note that complaints were to be made to HUD, *not* to the institution. At this point, the actions taken by all four agencies began to diverge. Each agency will be discussed separately.

A. *The Comptroller of the Currency*

The Comptroller published, along with the above policy statement, a "Notice of Intention to Consider Regulations Prohibiting Discrimination Practices."⁹⁸ Noting that "certain public interest groups" had petitioned for a regulation implementing section 805 of Title VIII⁹⁹ the comptroller asserted that:

Petitioners' proposed regulations would inter alia require each National bank to:

a. Keep on file a record of all loan applications, specifying the following:

1. Race, color, or minority group identification of each applicant.
2. Date of the application.
3. Date of the decision with respect to the loan.
4. If the application is disapproved the reason therefor.
5. The character and location of the property, surrounding properties, and general neighborhood in which the property is located, including racial and economic characteristics of the area and such other information as the Comptroller may determine is relevant.

b. Maintain a written log of oral inquiries about loans which are made in person, but do not result in a written application, such log to indicate the date upon which each inquiry was made, the nature of the inquiry, the name and address, and the race, color or minority group identification of the person making inquiry.

c. Publish and post a clear statement of the standards and criteria which the financial institution uses in reviewing and deciding on loan applications.

d. Prominently indicate, in a manner appropriate to the advertising media and format utilized, that the bank makes real estate loans without regard to race, color, religion, or national origin. No words, phrases, symbols, directions, forms, models, or other means shall be used to express, imply, or suggest a discriminatory preference or policy of exclusion in violation of the provisions of Title VIII of the Civil Rights Act of 1968. Such notice shall include the address of the proper enforcement agency to be notified concerning any complaint alleging a violation of the nondiscrimination provisions of Title VIII.

e. Conspicuously display in the public lobby of each of its offices a notice that incorporates a facsimile of the . . . logotype and attests to the institution's policy of compliance with the nondiscrimination requirements of Title VIII of the Civil Rights Act of 1968. Such notice shall include the address of the Department of Housing and Urban Development as the agency to be notified concerning any complaint alleging a violation of the nondiscrimination provisions of Title VIII.¹⁰⁰

⁹⁸ *Id.*

⁹⁹ 42 U.S.C. § 3605 (1970).

¹⁰⁰ 36 Fed. Reg. 25167 (1971).

The notice went on to indicate that because of "the nature of the issues" written comment "prior to promulgation of a proposed rule" was being invited.¹⁰¹

The petitioners were not reluctant to submit comments on this "notice of intention to consider." Comments on the procedural aspects of this publication came first. It must be recognized that the original petition did not contain "proposed regulations," as represented by the Comptroller, but proposed *remedies* to be embodied in regulations to be drafted and proposed by each agency. Second, the publication itself was merely a "bowdlerized" version of the petition.¹⁰² Parts a, b, and c were verbatim from the original petition, and d and e were from the Comptroller's own policy statements. The rest of the requests in the petition were simply dropped from public consideration. Third, the procedure was certainly unusual. These were not proposals but only "intention to consider" regulations. Actual proposals would come later—meaning further delay. Petitioners felt their proposals had been sent up to be "shot down" by adverse comment from the industry. The notices were sent to each supervised institution for comment, but public interest groups had only the *Federal Register* publication.¹⁰³

The petitioners submitted a variety of substantive comments. Indeed, this was the first time since March of 1971 that the petitioners and other groups had an agency initiative upon which to react. One of the major criticisms was a concern that the excisions and revisions of the original petitions, when viewed together, amounted to a denial of agency responsibility for preventing discrimination and insuring effective compliance and enforcement with nondiscrimination policy.¹⁰⁴ The petitioners pointed out that there was no provision for a general regulation prohibiting discrimination in lending or other services, that all complaints were to be referred to HUD, and that no compliance procedure or policy provisions were evident.¹⁰⁵

The petitioners supported the suggestion for racial data collection, noting that since the end of December the FHLBB had proposed a viable data collection system. It was also noted that data collection at the institutional level is being required by the Federal National Mortgage Association, in its Conventional Selling Contract Supplement which states:

A seller shall demonstrate its capabilities and willingness to assure equal treatment in accordance with [Title VIII] by the securing and furnishing to FNMA of racial and ethnic data on FNMA Form 1003 for mortgages submitted to FNMA for purchase. To assure the carrying out of the goals of equal opportunity, FNMA will require sellers to maintain appropriate records for a minimum of one year, whether involving mortgages submitted to FNMA for purchase or not, which records shall be available to FNMA, upon request, in order to determine that the seller's loan production to minorities is consistent with the goal of equal treatment.¹⁰⁶

101 *Id.*

102 Comments of petitioners filed with the Comptroller and FDIC on February 28, 1972.

103 36 Fed. Reg. 25167 (1971).

104 Comments of Petitioners Before the FDIC and the Comptroller of the Currency, Feb. 28, 1972, at 3 [hereinafter cited as FDIC Comments].

105 *Id.* at 3-6.

106 Federal National Mortgage Association, Conventional Selling Contract Supplement.

The petitioners objected to the substitution of the advertising and lobby notice policy for the affirmative action provision of the paragraph. The substitution indicated that the Comptroller had ignored the main thrust of that request which required positive, public action by banks to make minorities more welcomed customers.

Comments to the Comptroller were due and filed on February 28, 1972, and the Comptroller has not been heard publicly on this issue since that time. In August, 1972, the Comptroller did indicate in a letter to counsel for the petitioners that the question of collecting racial data was still being studied in consultation with the other agencies and that use of a special examination form was being considered.¹⁰⁷ It is entirely possible that the Comptroller will act in this area if the other three agencies take similar steps. However, the Comptroller has stated that "public hearings on this emotionally charged and controversial subject would not be the best way to proceed."¹⁰⁸ It is noteworthy that the Chief Counsel of the Office of the Comptroller was present at the two days of public hearings held by the FDIC regarding FDIC's nondiscrimination proposals.

B. The Federal Home Loan Bank Board

The Federal Home Loan Bank Board had published a policy statement at the end of December, 1971, in conjunction with the other agencies. Less than one month later, on January 19, 1972, FHLBB significantly expanded its policy statements by publishing proposed regulations which covered many of the items requested in the petitions.¹⁰⁹ The proposed regulations contained seven major parts. These were (1) general regulations covering nondiscrimination in lending, and (2) in other services and applications; (3) specific provisions prohibiting discriminatory advertising, directing the use of a logotype and "an equal housing lender" legend; (4) requiring an equal housing lender poster in the lobby of each of its offices; (5) maintaining records of racial and ethnic data on written loan applications, and listing the reasons for disapproval if the application is disapproved; (6) requiring nondiscrimination in employment; and (7) establishing directions on forwarding complaints to HUD for lending, and to the Equal Employment Opportunity Commission for employment concerns. A sixty-day comment period was allowed.

More than ten months had passed since the petitions were filed, and the petitioners' comments reflected the frustration brought on by the repeated delays in achieving results. It was clear that the Board's general regulations provided a useful start in prohibiting discrimination—but the petitioners urged that they be strengthened by expanding the list of protected groups to include those who may be discriminated against because of their sex and by

¹⁰⁷ Letter from William B. Camp, Comptroller of the Currency to Theodore M. Hesburgh, Chairman, United States Commission on Civil Rights, August 7, 1972, enclosed in letter from William B. Camp, Comptroller of the Currency to William L. Taylor, Aug. 8, 1972.

¹⁰⁸ Letter from William B. Camp, Comptroller of the Currency to William L. Taylor, Director, Center for National Policy Review.

¹⁰⁹ 37 Fed. Reg. 811 (1972).

prohibiting the use of credit and property underwriting practices which have the effect of discriminating against protected groups, unless such practices are clearly compelled by business necessity.¹¹⁰ The petitioners argued that any meaningful "result-oriented" nondiscrimination program must use as a basic test, not whether the *intent* is to discriminate, but whether the effect is to discriminate.¹¹¹ Thus, unnecessarily restrictive credit and property underwriting criteria which appear neutral but have a discriminatory effect would be prohibited.¹¹²

This "effect" standard has been used in the past in a number of situations to test whether a practice or enactment is discriminatory.¹¹³ In *Griggs v. Duke Power Company*¹¹⁴ the Supreme Court enunciated the test while interpreting Title VII of the 1964 Civil Rights Act, the fair employment law.¹¹⁵ The Court stated that "[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."¹¹⁶ The provisions of Title VIII and the regulations promulgated to implement those provisions should be so interpreted by the financial agencies.

The advertising and poster requirements were taken from the policy statements that had been published in late December, 1971. Although they were an improvement in communicating civil rights information to prospective customers, they were "woefully inadequate in prompting institutions to make known to minority citizens that they are welcome customers."¹¹⁷ Again, restricting the use of the logo and legend to ads *other than for savings* limited its effectiveness.

Most fundamentally, the thrust of paragraph (d) in the petition is that the lending institution must take "affirmative actions" to insure that the availability of its programs and services is communicated to the minority community. Too often, the normal channels of communication are not effective in reaching minorities. The mode of effective affirmative action has been aptly described by the petitioners as follows:

Any affirmative action plan worthy of the name is not an abstract concept, but a set of "specific and result oriented procedures" to which each institution "commits itself to apply every good faith effort." . . . In the

110 Comments of Petitioners Before the Federal Home Loan Bank Board in the Matter of Docket No. 72-783, Proposed Nondiscrimination Requirements, p. 3, March 21, 1972 [hereinafter cited as FHLBB Comments]. Sex had not been included in the original petition because of the lack of clear statutory authority. Since the filing of the petitions in March, 1971, the Supreme Court had decided *Reed v. Reed*, 404 U.S. 71 (1971). This decision provided a basis for arguing that the guarantees of the Equal Protection Clause of the 14th Amendment included a prohibition against discrimination because of sex. Another argument noted that the Federal National Mortgage Association (FNMA) in the warranties section of their new Sellers Guide, banned sex discrimination in the fixing of the terms of the loan and in servicing the loan. See Section 701p, FNMA Conventional Selling Contract Supplement. The point was also made that sex discrimination was an "unsafe and unsound" practice, and certainly not a "best practice."

111 FHLBB Comments, *supra* note 110, at 3.

112 *Id.* at 3-4. The Federal Home Loan Bank Board recently mentioned such practices in an article on discrimination in lending. 5 FEDERAL HOME LOAN BANK BOARD J. 10 (Sept., 1972).

113 See, e.g., *Griffin v. Illinois*, 351 U.S. 12 (1950) (furnishing transcripts to indigents for appellate review of convictions); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (legislative gerrymandering); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (poll tax).

114 401 U.S. 424 (1971).

115 42 U.S.C. § 2000(e) *et seq.* (1970).

116 401 U.S. at 431 (1971).

117 FHLBB Comments, *supra* note 110, at 6.

case of lending institutions, it means requiring that each institution analyze the areas in which its service to minorities has been deficient and then determine and take the necessary steps to remedy the problem. Such steps should include the utilization of press, radio and TV, and the opening of channels of communication with brokers and other agents who serve the minority community. Regulations embodying affirmative action requirements should, to the degree possible, spell out what is expected of each institution and provide examples of ways in which institutions can implement the requirement.¹¹⁸

The petitioners argued that every meaningful civil rights program in the federal government has an affirmative action component as outlined above and that the financial agencies should be no exception.¹¹⁹

The Board's proposals for racial data collection were considered a major step forward by civil rights groups. It had become increasingly obvious that an effective, efficient compliance system built into the existing system of examination and supervision was dependent upon the quality of racial data collected.

The provision for notifying the applicant in writing of the reasons for disapproval only "upon request" was deficient as this should be done routinely. Complaints were to be directed to HUD, not to the Board, perhaps leaving the impression that the Board will not provide direct relief to those discriminated against.¹²⁰

Compliance and sanctions were still uppermost in the petitioners' minds. They advocated that, in addition to examiners:

[T]here should be a group of officials located within the Office of the Chairman who have overall responsibility . . . not only to insure that the civil rights policies of the Board (including regulations and examination, complaint processing and adjudication, education and employment factors) are carried forward with a sense of urgency, but also to assure that information on progress (or lack thereof) in civil rights reaches the Chairman and members of the Board.¹²¹

Such "line" and "staff" arrangements have proven necessary to effective civil rights programs in other agencies.¹²²

The omission of any mention of sanctions for violations was considered material. General sanctions provisions are available to the Board, but the petitioners wanted specific mention of the applicability of the sanctions to the violation of nondiscrimination provisions.¹²³

Other issues were totally ignored by the Board, notably the request that each builder or developer file a written assurance of sale or lease without discrimination prior to obtaining a loan. Nor was there any mention of the builder's or developer's being required to include a statement of his affirmative marketing

118 *Id.* at 7.

119 *Id.*

120 *Id.* at 9.

121 *Id.*

122 *Id.*

123 *Id.* The sanctions, including cease and desist and suspension and removal orders, are contained in 12 C.F.R. 550 (1967).

action or report on unit occupancy. The petitioners were not seeking to have savings and loans operate as "policemen" and enforce the required assurance. They drew an analogy to the securing of financial statements or performance bonds to insure financial soundness; here what was requested was a statement of compliance with an important national policy.¹²⁴

The proposals did not respond to the request that an officer of each institution with overall control for civil rights be appointed and that an in-service training program be developed. An effective program of equal opportunity requires that responsibility be affixed with an officer of each institution. The petitioners reasoned that this facilitates effective compliance with the regulations and allows the examiner to have immediate contact with the person responsible in each instance.¹²⁵

The petitioners' summary to these first regulations could have served for all the agencies:

Guarantees of equal opportunity can only be effective if they are broad enough to prohibit practices which are discriminatory in their *actual operation*, as well as those which are invidiously intended. Discriminatory practices will be ended only if the Board adopts strong compliance procedures, including a requirement that financial institutions adopt affirmative action plans and that data be collected to determine whether these plans are being carried out. Finally, the Board's regulations will be credible only if it demonstrates a willingness to enforce them, by initiating its own examination procedures and investigations and by invoking sanctions where discrimination is not remedied voluntarily.¹²⁶

Among other groups commenting on the Board proposals were 170 economists who filed a statement of principles that applied immediately to the Board's proposals, but which were sent to the other agencies as well. They added a different dimension to the issues under consideration, as the major thrust of their statement concerned the adverse economic consequences of discrimination. They called for the prohibition of obsolete practices which have a discriminatory impact against minorities, women and the elderly; for the institution of affirmative employment programs; for the initiation of advertising to attract minority customers; for the collection and analysis of data needed to identify discrimination; and for the enforcement of nondiscrimination regulations.¹²⁷

On April 27, 1972, the Board published its final nondiscrimination regulations.¹²⁸ They were substantially similar to the original version—with one major exception. That section of the regulations dealing with racial data collection (528.6) had been deleted. The Bank Board did note, however, that the section on record keeping was withdrawn from the regulations it adopted "pending

124 FHLBB Comments, *supra* note 110, at 10.

125 *Id.*

126 *Id.*

127 *Hearings on Federal Government's Role in the Achievement of Equal Opportunity in Housing, Before the Civil Rights Oversight Subcomm. of the House Comm. on the Judiciary*, 92d Cong., ser. 34, at 866 (1971-72).

128 37 Fed. Reg. 8436 (1972).

further staff study of comments received and consultation with the other financial regulatory agencies."¹²⁹

This was especially frustrating to the petitioners because the Board had earlier committed itself to racial data collection. On October 20, 1971, in its response to a follow-up questionnaire from the Civil Rights Commission, the Board stated unequivocally that it would issue nondiscrimination regulations "which will contain provisions relating to maintenance of records of racial data on applicants for loans."¹³⁰ The petitioners, in a follow-up analysis to the Board's final regulations, pointed out that record keeping is absolutely essential to provide a foundation for uncovering and measuring discriminatory practices. Promulgating nondiscrimination regulations without provisions for the collection and analysis of racial and ethnic data is like promulgating regulations for the purpose of financial soundness without provisions for the collection and analysis of data on assets, liabilities and other financial indicators.¹³¹ Some new language was added, however. The Bank Board prohibited discrimination based on the race of the occupants of dwellings in the "vicinity" of the property for which a loan is requested.¹³² This seemed to be an attempt to get at the problem of redlining areas based on the racial composition of the neighborhood. Another improvement in the new regulations was the inclusion of a prohibition against discrimination in the collection and enforcement procedures in the servicing of loans.¹³³ Thus, the Board was making progress in this area; the same could not be said for the other agencies.

C. The Federal Deposit Insurance Corporation

The FDIC published policy statements along with its sister agencies in late December, 1971. It also published a "notice of intention" that was virtually identical to the Comptroller's, previously discussed. For the next eight and one-half months the Corporation was silent. Then on September 20, 1972, the FDIC published a Notice of Proposed Rule Making entitled: Fair Housing Lending Practices. This included two general sections: nondiscrimination in residential lending and other financial assistance and nondiscrimination in applications. These sections covered discriminatory advertising and provided for an equal housing lender poster, racial data collection, a Fair Housing Officer, and a section on enforcement.¹³⁴

A notable difference from the FHLBB proposal was in the data collection provision (termed the Fair Housing Informational Statement), in which each bank was directed to insert the census tract number on every loan application

¹²⁹ *Id.* at 8438.

¹³⁰ Letter from Preston Martin, Chairman, Federal Home Loan Bank Board to Theodore M. Hesburgh, United States Chairman on Civil Rights, Oct. 20, 1971.

¹³¹ Petitioner's Analysis and Comment on Nondiscrimination Lending Regulations Adopted by the Federal Home Loan Bank Board 3 (May 4, 1972). On file at Center for National Policy Review.

¹³² 37 Fed. Reg. 8437 (1972).

¹³³ *Id.*

¹³⁴ 37 Fed. Reg. 19385 (1972). This was a proposed part 38 of title 12 of the Code of Federal Regulations.

involving property located in a Standard Metropolitan Statistical Area.¹³⁵ The proposal also directed the board of directors of every bank engaged in residential real estate lending to appoint from its executive staff a fair housing officer with "responsibility for overall control, supervision, and coordination of the bank's civil rights compliance programs. . . ."¹³⁶ An enforcement provision was added which states that violations of Title VIII and the regulations are violations of law within the meaning of section 8 of the Federal Deposit Insurance Act.¹³⁷ Both of these latter provisions were recommended in the original petition and supported repeatedly in meetings and correspondence with the agencies.

The petitioners, in comments filed on November 1, 1972, made several major points. They stressed (as they had with respect to the FHLBB proposal) that the general regulation should indicate that the operative test of a discriminatory practice should be its effect, not merely whether it is invidiously intended, and that prohibitions against sex discrimination should be included.¹³⁸ They also pointed out that discrimination in the conduct of all bank business should be prohibited to prevent situations in which customers for other bank services (such as consumer loans) who might be discriminated against might be discouraged from applying to the same institution for a home loan.¹³⁹

They again stressed the need for affirmative action requirements, with an emphasis on marketing programs directed toward minority customers, and the need to obtain both assurances of nondiscrimination from builders and developers and follow-up occupancy reports.¹⁴⁰ Data collection was again noted as most vital, with the petitioners expressing disapproval at the failure to deal with the request for a log of oral inquiries.¹⁴¹ It was also felt that certain sentences in the Informational Statement would tend to discourage applicants from completing the form. Sentences such as: "You do not have to fill it out if you don't want to," and "Check here and sign below if you do not want to complete this form" were seen as counterproductive to data collection. Maximum response should be encouraged, while assuring applicants that the information will not be used as a means for discriminating.¹⁴² The need to involve examiners in the enforcement process by making checks for nondiscrimination in the same way as checks are made for financial regularity (*i.e.*, by examination of the files according to a check list of questions, with documentation of findings, positive or negative) was also stressed.¹⁴³

Submitting comments on agency proposals is unquestionably a useful method of attempting to influence public policy through the administrative process. Yet the petitioners had contemplated more and thus had requested each agency to hold a hearing on the regulations being sought. Only the FDIC

135 37 Fed. Reg. 19386 (1972).

136 *Id.*

137 *Id.*

138 Comments Before the FDIC, in the Matter of Fair Housing Lending Practices, Notice of Proposed Rulemaking, 5-6 (Nov. 1, 1972).

139 *Id.* at 8.

140 *Id.* at 9-11.

141 *Id.* at 14.

142 *Id.* at 15.

143 *Id.* at 17.

was responsive to this request. In its September, 1972, announcement of the proposed nondiscrimination requirements, the Corporation noted that a public hearing on the proposed regulation would be scheduled.¹⁴⁴ In late November a hearing was announced for December 19, 1972, in a notice of hearing asking for specific information.¹⁴⁵

Obviously reflecting areas of special concern, the FDIC called for comments on its authority and the desirability of expanding the proposed regulations to prohibit lending discrimination based on sex and against discrimination in any lending practice. Racial data collection drew special attention, as comments from minorities "regarding the attitudes of members of such groups toward providing the information required . . ." were called for. In addition, FDIC wanted discussion of the feasibility of applying data collection on a limited, experimental basis, on exempting banks in areas with low minority concentration, and on constructive alternatives to the Informational Statement.¹⁴⁶

Two days of hearings were held on December 19 and 20, 1972. The Chairman, Board member Sprague, and a representative of the Comptroller's office as well as counsel from the Corporation and from the Office of the Comptroller were present throughout both days. Witnesses included the petitioners, civil rights, public interest and women's groups, as well as national and state agencies supporting promulgation of the regulations.¹⁴⁷ The banking community was represented by the American Bankers Association and the trade associations. The petitioners' testimony had three major focal points: the inclusion of the effects test, the collection of racial and ethnic data, and the expansion of the regulation to include a prohibition of discrimination based on sex. A full exposition of the arguments in support of the latter issue is beyond the scope of this article. (Extensive evidence was presented of the need for including sex in the regulation, and authority was also cited.)¹⁴⁸

The importance of the racial data collection issue warrants a fuller discussion here. Tactically, the lesson of the failure of the FHLBB to include data collection in its final regulations was clear. Data collection would be initiated

144 37 Fed. Reg. 19385 (1972).

145 37 Fed. Reg. 24679 (1972).

146 *Id.*

147 The Department of Housing and Urban Development was represented, as was the Maryland State Human Relations Commission.

148 The testimony on the issue of including in the regulation a prohibition against discrimination based on sex, offered by the Center for National Policy Review before the FDIC on December 19, 1972, is representative of the arguments offered in this area. The Center argued that the national housing goal (42 U.S.C. § 1441 (1970)) clearly included families headed by women, or families with a working wife, and that FDIC functions must be carried out with this goal in mind; that banks which discriminate on the basis of sex can hardly be fulfilling the "needs of the community" (as required by 12 U.S.C. § 1816 (1970)), and indeed are guilty of an "unsound business practice" (forbidden under 12 U.S.C. § 1818 (1970)), because they arbitrarily limit the market and deny themselves potentially profitable loans; that the interrelationship between sex and race discrimination is strong because proportionately more women in minority families work than women in white families, making sex discrimination adversely affect minorities, thus violating Title VIII; and of course that the equal protection clause of the Constitution would prevent arbitrary or unreasonable classifications based on sex. Statement of William L. Taylor before the FDIC, 12-15 (December 19, 1972). Other organizations testifying on behalf of expanding the regulations in this area included the Pennsylvania Commission on the Status of Women, the Women's Legal Defense Fund, Inc., the Women's Equity Action League, the National Organization for Women, and the Women's Law Center.

by all the agencies, or at least by the FHLBB and FDIC, or it probably would not be collected at all. This was the major opportunity to convince the agencies that racial data collection was vital to its civil rights program. That issue is illustrative of an awareness on the part of civil rights groups of the need for some method of determining compliance with nondiscrimination regulations. As previously noted the Bank Board has had resolutions against discrimination since 1961, and examiners have questioned institution officials regarding their awareness of this policy.¹⁴⁹ Yet this alone—or even with the strictures in the 1968 Civil Rights Act—has been virtually ineffective. This is shown conclusively by experience garnered with the complaint process.

One of the reasons for this lack of progress in ending discrimination has been the absence of any method of determining compliance. Unless there is some method for determining how many loans have been made to minorities, where loans have been made, or whether terms or servicing of minority loans is more stringent, any rule, regulation or resolution is merely a restatement of the law. Some incentives for compliance must be provided. This can take many forms, such as education, publicity, leadership—yet providing for the collection of data on loan policies and making the examination of that data part of the official examination and supervision process is certainly the most effective way of insuring compliance. This is why data collection was one of the primary requests in the petition, why it has been repeatedly stressed by the petitioners, why it was initially so encouraging to have a commitment from the Board on this issue, and why the failure to include this provision in the final publication renders the FHLBB rules merely a sophisticated form of the 1961 resolution.

Data collection is not new to civil rights enforcement. It has been an accepted part of equal opportunity in employment for years.¹⁵⁰ In housing discrimination cases courts have included data collection in their remedies.¹⁵¹ What data should be collected and how? This was detailed in the original petition. Clearly, the data collection and analysis must be comprehensive enough to be able to measure the extent of discrimination in its many forms. As an example, one of the most important components of the data system must be information on the characteristics of neighborhoods. This is critical in order to measure many types of neighborhood discrimination, such as redlining of

¹⁴⁹ *Hearings Before the U.S. Comm. on Civil Rights*, Baltimore, Maryland (Aug. 17-19, 1970).

¹⁵⁰ In the Office of Federal Contract Compliance Order No. 4, Subpart B, Required Contents of Affirmative Action Programs, extensive data collection, analysis and reporting are mandated. 41 C.F.R. 60-2.11 (1971). Data has become so important in this area that the courts have found that statistics showing that the numbers of black workers employed at a plant are disproportionately small have been deemed sufficient to constitute a *prima facie* case that Title VII has been violated. *Parham v. Southwestern Bell Telephone Co.*, 443 F.2d 421 (8th Cir. 1970).

¹⁵¹ *United States v. West Peachtree Tenth Corporation*, 437 F.2d 221 (5th Cir. 1971) (name and race of all persons inquiring about renting an apartment); *United States v. HFC*, Civil No. 72C 515 (N.D. Ill., filed Feb. 29, 1972) (consent decree requiring listing of race on all loan applications). The administration also seems to have accepted data collection. In a letter to FDIC concerning the original publication of consideration of regulations, then OMB Director Shultz stated "... sufficient records of the disposition of all loan applications should be maintained so as to enable the Financial Regulatory Agencies to insure that lending institutions comply with all statutes related to real-estate lending." Letter from George P. Shultz to Frank Wille, March 20, 1972.

neighborhoods on the basis of racial composition or average income level or refusal to make loans to minorities in white areas.¹⁵²

Putting the census tract number on loan forms was suggested as one way to easily obtain this type of information. Because tract boundaries are drawn to reflect homogeneity in population characteristics, economic status and living conditions, compilation and comparative analysis of racial and income data on applications and approvals for each tract would go far toward meeting the request for a "national data collection system covering all aspects of individual association, regional and national mortgage lending practices."¹⁵³ This would certainly assist in pinpointing discriminatory patterns. A banking association suggested substituting the zip codes for census tract information.¹⁵⁴ This would be unacceptable because of the wide area such zones cover, and the lack of data on race and income within its boundaries.

The *method* of collection did raise a valid question. Self-identification is used by a number of federal agencies, and yields accurate results.¹⁵⁵ Visual observation is the other alternative and could be utilized as a "back-up" method. With self-identification, the *purpose* must be made clear in order to overcome any resistance to identification. Naturally, safeguards against use of such data in a discriminating manner must be provided.

Several arguments working against data collection, or limiting its usefulness, were raised and met during the course of the hearings. First, wasn't the collection of such information strongly opposed only a short time ago? The petitioners' testimony answers this oft-expressed query:

[We] recognize that for those who recall an era in which civil rights groups opposed almost all forms of racial identification, our advocacy now of racial record keeping may seem a wrenching shift in policy. It results from the dual realization that discriminators *do not* need racial records to carry out their will and that government *does* need such data to uncover and remedy discrimination. So, while we continue to aspire to the ideal of a society that is color blind and that neither knows nor tolerates the making of racial distinctions, we now recognize that until greater progress is made in eliminating racial discrimination government has a responsibility to collect racial data as an aid to enforcing the civil rights laws.¹⁵⁶

152 FHLBB Comments, *supra* note 110, at 7.

153 *Id.* at 8.

154 Letter from Charles R. McNeill, Executive Director, Government Relations, American Bankers Association, to E. F. Downey, Secretary, Federal Deposit Insurance Corporation, November 1, 1972. The American Bankers Association established the importance of data on neighborhood lending patterns by a statement in this same letter that implied that discrimination on the basis of racial composition of the neighborhood is widespread and excused this behavior by rephrasing old myths relating race to resale value:

The racial composition of homeowners and tenants in any one neighborhood should have no bearing on a lending situation *other than as pertains to reasonable anticipated resale of the residence being financed*. To exclude reasonably anticipated marketplace reactions in assessing future resale value would have the net result of denying the availability of credit to those neighborhoods where racial characteristics could have a bearing on value in the future. (Emphasis added.)

155 See material on methods and forms used by federal agencies to collect racial data, submitted to FDIC on January 11, 1973.

156 Statement of William L. Taylor, Co-counsel for Petitioners, Before the Federal Deposit Insurance Corporation 7 (Dec. 19, 1972). The petitioners also asserted that minority groups "are now almost unanimous in the conclusion that racial record-keeping is an essential element

Second, isn't such data collection illegal on the federal or state level? Collection at the federal level has been a part of every effective civil rights program. Courts have passed on the legitimacy of government requirements that such data be maintained.¹⁵⁷ Some states have enacted legislation forbidding racial data collection.¹⁵⁸ Data collection mandated by federal law or regulation would clearly override such state pronouncements, because of federal supremacy. This issue has been passed upon by the courts in the equal employment area.¹⁵⁹

Third, doesn't such record keeping impose an undue burden on banks and other financial institutions? Shouldn't it be limited to areas with minority concentrations? The petitioners argued that, while agreeing that record keeping requirements should be no more onerous than necessary, no institution should be exempt from record keeping in the equal opportunity area unless the policy is to exempt them from normal record keeping and data collection requirements. Further, there is no precedent to limiting collection or for exempting areas of low minority concentration.

Fourth, don't such requirements imply that an institution is guilty of discrimination until proven innocent? The petitioners stated that such an assertion is clearly unfounded, since no such presumption is attached to the keeping of financial records to indicate sound business practice or to examinations to determine compliance with financial standards.¹⁶⁰

The Corporation (FDIC), as evidenced by the notice of hearing and by its attentiveness to this issue during the testimony, perceived, as do civil rights groups, the signal nature of this issue. The requirement of data collection could induce the other agencies to follow suit; its exclusion would greatly damage the prospect of persuading the other agencies to collect information, and obviously cripple enforcement of an effective nondiscrimination program. Racial data has emerged as a pivotal issue.

D. *The Federal Reserve Board*

From the time of the joint issuance of the policy statements on advertising and the lobby poster, the Federal Reserve Board has been off "doing its own thing." In the same announcement with the policy statements the Board indicated that the new policies were a "further step in a series of actions" to encourage banks to lend nondiscriminatorily, and to make the public more aware

of an effective civil rights enforcement program." *Id.* at 8. All of the original petitioners supported the data collection measures as proposed.

¹⁵⁷ *Tancil v. Woolls*, 379 U.S. 19 (1965) *aff'g per curiam*, *Hamm v. Virginia State Board of Elections*, 230 F. Supp. 156 (E.D., Va. 1964).

¹⁵⁸ OHIO REV. CODE ANN. § 4112.02 (Baldwin, 1965).

¹⁵⁹ *Contractor's Association of Eastern Penn. v. Shultz*, 442 F.2d 159 (3rd Cir. 1971).

¹⁶⁰ FDIC Comments, *supra* note 104, at 5. One of the more open statements objecting to racial data collection was sent to the FDIC by the Wisconsin Bankers Association in response to the proposed regulations. The letter said: "We are opposed in principle to the required retention of records having potentially harmful consequences for the retaining institution. . . . [T]he purpose of retaining these records is presumably to assist in establishing violations of Title VIII, for which there are rather severe penalties." Letter to FDIC from Bryan K. Koontz, Executive Director, Wisconsin Bankers Association, Oct. 31, 1972.

of Title VIII and the complaint procedures.¹⁶¹ It indicated that other steps which have been undertaken were:

The use of a civil rights questionnaire in all bank examinations; a special course of study on the requirements of the Civil Rights Act of 1968 in Federal Reserve Schools for bank examiners; and bank examiner inquiry into bank compliance with Equal Employment Opportunity requirements of the Civil Rights Act of 1964.¹⁶²

The civil rights questionnaire is similar in many respects to the questionnaire used by HUD in the one-time survey of all financial institutions. Sample questions include the "estimated number of real estate loans made to minority borrowers, and estimated number of loan applications received from minority group members."¹⁶³ Without adequate institutional data collection these questions are meaningless. Other questions dictate the proper answer, such as "Does the bank refuse to make loans to members of minority groups seeking to purchase residential property in areas where there are no or few minority group residents? If so, specify area and reasons for such refusal."¹⁶⁴ The petitioners questioned the value of answering such questions in examination after examination.

In correspondence with counsel for the petitioners in July, 1972, the Board stated that a review of the questionnaire was contemplated for late 1972 after posters had been in banks for six months and the questionnaire in use a year.¹⁶⁵ The letter also stated that: "The Board has indicated that it will take further steps to strengthen its civil rights nondiscrimination program as experience indicates that proposals are administratively feasible and in the public interest."¹⁶⁶

The Board has recently provided an indication of an emerging concern for racial issues. On May 31, 1972, it approved investment by approved bank holding companies in projects designed primarily to promote community welfare. These specifically included low- and moderate-income housing projects and projects to improve employment opportunities for similar groups.¹⁶⁷

VI. Conclusion

The four agencies responsible for supervision of our financial institutions received in March of 1971 virtually identical documents calling for regulations

161 36 Fed. Reg. 25168 (1972).

162 *Id.*

163 Federal Reserve Board, Civil Rights Questionnaire.

164 *Id.*

165 Letter from Tynan Smith, Secretary, Board of Governors of the Federal Reserve System, to William L. Taylor, Director, Center for National Policy Review, Washington, D.C., July 28, 1972.

166 *Id.*

167 Federal Reserve Board press release (May 31, 1972). In August, 1972, the FDIC took similar action in issuing a "Statement of Policy and Guidelines for Investments" in "Leeway Securities." The statement was designed to relax examination policies regarding investments in corporations "providing capital to minority business enterprises," or corporations "where objectives and purposes are primarily of a civic or community nature or seem socially desirable to the bank's board of directors. . . ." The statement indicated that examinations constraints now being removed might have inhibited banks from ". . . participating effectively in the broad social movements . . ." occurring in the country during the past 10 years. 37 Fed. Reg. 16228 (1972).

to prevent discrimination in home finance. Each has, during the passage of two years, reacted in its own manner, dependent upon its conception of its responsibilities, its jurisdiction, and its leadership.¹⁶⁸

The accompanying chart summarizes the requests made of each agency, and their responses. At first glance, it does not appear that much has been done to end discrimination in home finance. Certainly an immediate end to the problems detailed in the first part of this article is not at hand. Yet, there is room for cautious optimism. General regulations have been adopted by the FHLBB—the agency with primary responsibility for home finance—and proposed by the FDIC. The poster and advertising requirements affecting all agencies represent some tentative affirmative action steps that have been accomplished. Racial data collection and analysis, so vital to any meaningful program, have been proposed by two agencies and are being studied by at least one other. Some method of compliance has been considered by at least two of the agencies. Civil rights has been included in the training program for examiners in two agencies. Practices which have a discriminatory effect—a very important concept in measuring compliance with the general language of the regulations—have been mentioned by one agency.

There is an evident change in attitude and some evidence that financial institutions have been prompted to reexamine practices that had long been followed without question. The steps above represent a sharp departure from a decade ago, from even two years ago, that portends a recognition that civil rights is a responsibility to be met and accepted. Continuing work, encouragement, and pressure will be necessary to insure that the gains made are in fact consolidated and that the agencies move to consider all the issues raised by civil rights groups.

In many ways, the petitions and response represent a microcosm of a question that has existed in the civil rights field since the major legislative victories of the 60's: can civil rights laws be made to work?¹⁶⁹ Can the administrative process be made responsive to minority citizens when it appears that litigation and legislation may be less effective than in the past? The experience with the federal financial regulatory agencies may well prove a bellwether in this area.

168 It is noteworthy that the most effective leadership has been coming from the chairman of the FDIC. In November, Mr. Wille indicated a determination to press ahead with regulations in the nondiscrimination field. The requirements of Title VIII are "... an affirmative action requirement imposed on us by mandate of Congress, and in which the Corporation is not likely to retreat." N.Y. Times, Nov. 13, 1972, § C at 57.

169 For a complete treatment of this question, see Taylor, *Federal Civil Rights Laws: Can They Be Made to Work?*, 39 GEO. WASH. L. REV. 971 (1971).

APPENDIX

SUMMARY OF ACTIONS OF FINANCIAL REGULATORY
AGENCIES IN RESPONSE TO PETITION BY CIVIL RIGHTS GROUPS

<i>Remedy Requested</i>	<i>FHLBB</i>	<i>FDIC</i>	<i>FRB</i>	<i>Comp/Curr</i>
General Regulations	Adopted 5-72	Proposed 9-72	No	No
Application File with Racial & Neighborhood Data	Proposed on 12-29-71 but withdrawn	Proposed 9-72	No	No
Written Log of Oral Inquiries	No	No	No	No
Loan Standard and Criteria Statement	No	No	No	No
Affirmative Action	Advertising & Poster	Advertising & Poster	Advertising & Poster	Advertising & Poster
Builder & Developer Assurances	No	No	No	No
Responsible Officer	No	Proposed	No	No
Compliance Reporting System	Regular Examination	Unknown	6 Month Test of Special Questionnaire	Unknown
Data System for Compara- tive Analysis	No	No	No	No
Effects Study	No Agency has undertaken such a study, although some private research findings are becoming available.			
Civil Rights In-Service Training Program	Partial	Unknown	Yes	Unknown
Hearings	No	Held 12-19-72	No	No