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Richard D. Marsico

New York Law School, richard.marsico@nyls.edu

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SHEDDING SOME LIGHT ON LENDING: THE EFFECT OF EXPANDED DISCLOSURE LAWS ON HOME MORTGAGE MARKETING, LENDING AND DISCRIMINATION IN THE NEW YORK METROPOLITAN AREA

*Richard D. Marsico**

INTRODUCTION

In 1991, conventional home mortgage lenders disclosed vastly expanded information about their lending for the first time. The newly amended Home Mortgage Disclosure Act (the "HMDA")¹ required lenders to disclose information regarding the number of applications received, the race and income of applicants, the location of the property for which the loan was sought and the disposition of each application.² The federal government intended the disclosure of this information to impact the private allocation of credit – that is, to have an impact on to whom, where and on what terms private lenders make loans – without directly allocating credit through lending quotas or specific lending mandates.³

The HMDA is a federal home mortgage lending disclosure law that provides a significant amount of the data the federal banking regulatory agencies (collectively the "federal banking agencies") that enforce the Community Reinvestment Act ("CRA")⁴ use to

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1. 12 U.S.C. §§ 2801-2810 (1999).

2. *See id.*

3. *See infra* note 8 and accompanying text.

4. 12 U.S.C. §§ 2901-2906 (1999). The CRA states that banks have an affirmative obligation to meet the credit needs of their local communities, including low- and moderate neighborhoods. *See id.* §§ 2901(a), 2903(1), 2906(a)(1). The CRA does not

evaluate a bank's lending record in its local community.⁵ The HMDA is broader in its coverage than the CRA, covering banks, bank affiliates and subsidiaries, mortgage lenders that are not banks or related to banks, credit unions, mortgage companies and finance companies that make home mortgage loans.⁶ The HMDA contains no lending mandate; in fact it explicitly states that Congress did not intend that the HMDA allocate credit.⁷ Nevertheless, the HMDA's Congressional sponsors did intend that disclosure of

cover lenders other than banks, thus exempting bank subsidiaries or affiliates or non-bank lenders from scrutiny, although the lending record of a bank's subsidiaries or affiliates may be considered as part of the bank's CRA record. *See* 12 C.F.R. §§ 25.22(c), 25.23(c) (1999). Four federal banking agencies share regulatory jurisdiction over the CRA, and they have promulgated virtually identical CRA regulations. The agencies, the banks they regulate and their CRA regulations are:

Agency	Jurisdiction	Regulations
Office of the Comptroller of the Currency ("OCC")	National banks	12 C.F.R. pt. 25 (1999)
Board of Governors of the Federal Reserve System ("Federal Reserve")	State-chartered banks that are members of the Federal Reserve System	12 C.F.R. pt. 228 (1999)
Federal Deposit Insurance Corporation ("FDIC")	State-chartered banks that are not members of the Federal Reserve System	12 C.F.R. pt. 345 (1999)
Office of Thrift Supervision ("OTS")	Savings and loans	12 C.F.R. pt. 563e (1999)

The four federal banking agencies enforce the CRA through conducting periodic examinations of banks' CRA records, issuing public written evaluation reports that include performance ratings, and taking a bank's CRA record into account when the bank seeks permission from the agency to merge or otherwise expand. *See* 12 U.S.C. §§ 2903, 2906. Although the CRA requires banks to meet the credit needs of their local communities, including low- and moderate-income neighborhoods, the legislative history of the CRA indicates that Congress did not intend the CRA to allocate credit. Because the federal banking agencies fear that quantitative standards for evaluating bank lending under the CRA would allocate credit, they have not established such standards. For example, although the federal banking agencies evaluate bank lending using numerical indicia such as loan-to-deposit ratios and dollar amount of loans outstanding, they rely on subjective criteria such as "excellent," "good" or "poor" to evaluate those numbers. *See, e.g.*, 12 C.F.R. pt. 25, app. A (1999) (stating the OCC's standards for evaluating a bank's lending, investments and services).

5. *See* 12 U.S.C. § 2903(a)(1).

6. *See infra* note 17.

7. *See* 12 U.S.C. § 2801(c) (1999). *See also* S. REP. NO. 94-187, at 11 (1975); 121 Cong. Rec. 25,161, 26,162 (1975).

lending data would goad lenders into lending more money in low-income and inner-city areas.⁸

As originally enacted, the HMDA covered only banks, and it required banks to disclose the location, by state, county and census tract, of each residential real estate-related loan they made.⁹ In 1989, Congress amended the HMDA to cover lenders other than banks and to expand the HMDA's disclosure requirements significantly.¹⁰ Starting with loans made in 1990, the HMDA would require banks to disclose additional information about their residential real estate-related loans, including the number of applications they received, the race, income and gender of each applicant, the census tract in which the property that was the subject of the loan application was located, and the disposition of each application.¹¹ The goal of these amendments was to spur lenders to do more to meet the credit needs of certain individuals and communities, including African Americans, Latinos, low- and moderate-income ("LMI") persons, predominantly minority neighborhoods and LMI neighborhoods (collectively, the "subject communi-

8. See H.R. REP. NO. 94-561, at 14, 20-21 (1975); S. REP. NO. 94-187, at 1, 2, 9 (1975); 121 Cong. Rec. 25,154 to 25,161, 25,162, 34,455 (1975). The disclosure provisions of the federal securities laws and regulations are another example of governmental efforts to influence the behavior of private actors via disclosure rather than establishing specific behavioral rules or mandates. See James A. Fanto, *Investor Education, Securities Disclosure, and the Creation and Enforcement of Corporate Governance and Firm Norms*, 48 CATH. U. L. REV. 15 (1998); Cynthia Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999). For example, disclosure of the countries in which a company does business, the background of directors and the salaries of top management may induce corporations to behave in a certain way, even though their underlying behavior is not necessarily subject to specific rules of conduct. See Fanto, *supra*, at 24-25. See also Williams, *supra*, at 1227, 1297. Disclosure rules such as the HMDA and the SEC's rules thus may be seen as an effort to create and enforce norms of behavior beyond those required by law. See Fanto, *supra*, at 23-25; Williams, *supra*, at 1227.

9. The HMDA was originally enacted as Pub. L. No. 94-200, §§ 301-310, 89 Stat. 1125-1128 (1975). The disclosure provisions were at § 304, 89 Stat. 1125-26. A census tract is a small geographic unit within a larger jurisdiction that is designated by the Bureau of the Census for purposes of compiling census data. See <<http://www.census.gov/dmd/www/glossary.html#T>>.

10. See Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 744.

11. Pub. L. No. 101-73, §§ 1211(a), (b), (c)(1), (c)(2)(a)-(c), (f), (i), (j), 103 Stat. 524-526 (1989) (codified at 12 U.S.C. § 2803(b)(4)). See also 12 C.F.R. § 203.4(a) (1999). Depository institutions with assets of \$30 million or less are not required to report information about the race, gender and income of applicants. 12 U.S.C. § 2803(i) (1999); 12 C.F.R. § 203.4(b)(2)(ii) (1999). Other lenders did not begin to disclose their lending until 1993. See *infra* note 17.

ties").¹² Despite the HMDA's proviso that Congress did not intend it to allocate credit,¹³ lending to the subject communities nationally surged beginning in 1992, following the disclosure in 1991 of the first set of expanded HMDA data.¹⁴

This article is a study of the expanded HMDA's impact on conventional home mortgage lending in the New York City metropolitan area from 1991, when the expanded data was first released, until 1998, the last year for which the lending data is available. This study grows out of the author's broader examination into the various ways that the federal government allocates credit and influences its allocation.¹⁵ The goal of this larger investigation is to develop quantitative standards without establishing quotas, for evaluating the sufficiency of bank lending under the CRA.¹⁶

Part I of this study examines several ways to determine whether the disclosure of expanded HMDA data in 1991 influenced private lenders'¹⁷ allocation of credit in the New York City metropolitan

12. See H.R. REP. NO. 101-54(I), at 497-99 (1989). For purposes of the HMDA data collection and analysis, a predominantly minority neighborhood has a minority population of 80 percent or higher. See, e.g., *Financial and Business Statistics*, 85 FED. RES. BULL. A65, tbl. 4.37 (Sept. 1999). A predominantly minority neighborhood may include, in its minority population, Native Americans, Asians/Pacific Islanders, African Americans and/or Latinos. See *id.* An LMI neighborhood has a median family income of less than 80 percent of the area median income ("AMI"). See *id.* at n.3. An LMI individual has an income less than 80 percent of the AMI. See *id.*

13. See 12 U.S.C. § 2801(c); 12 C.F.R. § 203.1(b)(2) (1999).

14. See discussion *infra* Part II.A.2.

15. The working title of this investigation is "A Law in Search of Standards: The Evolution of Community Reinvestment Act Enforcement Policy and a Proposal for Change."

16. Besides the HMDA, some other governmental attempts to allocate credit or influence its allocation of credit include bank safety and soundness regulations, lending targets for the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation and loan-to-deposit ratio requirements for interstate banks.

17. The HMDA covers depository institutions, which include banks, savings associations and credit unions. See 12 U.S.C. § 2802(2) (1999). Depository institutions with assets of \$10 million or less are exempt from the HMDA's disclosure requirements as are institutions that do not have a home or branch office in an MSA. See *id.* §§ 2808, 2803(a)(1). In 1996, Congress created an annual inflation-adjusted asset-based exemption. See Pub. L. No. 104-208, § 2225(a), 110 Stat. 3009-415-16 (1996) (codified at 12 U.S.C. § 2808(b) (1999); 12 C.F.R. § 203.3(a) (1999)). The 1999 threshold is \$28 million. Federal Reserve System, Press Release, December 18, 1998, at 1-3.

In 1989, Congress also amended the HMDA to extend its coverage to "other lending institutions," which it defined as "any person engaged for profit in the business of mortgage lending." Pub. L. No. 101-73, § 1211(d), (e)(4), 103 Stat. 525-26 (1989) (codified at 12 U.S.C. § 2802(2)(B), (4) (1999)). In 1992, the Federal Reserve issued regulations requiring such "other lending institutions" that had total assets combined with any parent corporation of more than \$10 million or made 100 loans the previous calendar year to start reporting their 1993 lending under the HMDA. See 57 Fed.

area.¹⁸ First, it measures the annual change in the overall market share of applications for conventional home mortgage loans¹⁹ from each subject community from 1991 to 1997. Second, this Part analyzes lenders' actual lending performance by measuring the annual change in conventional home mortgage loan market share each subject community held from 1991 to 1997. Third, Part I examines lenders' treatment of applicants from the subject communities compared to their treatment of applications from control communities. It does this by deriving a "denial rate ratio" for each subject community.²⁰

Part II then evaluates the results from Part I to determine the actual effect of expanded HMDA disclosure. It begins by exploring the strong growth in the market share of applications from and

Reg. 56,965 (1992) (codified at 12 C.F.R. § 203.3(a)(2) (1999)). The inflation-adjusted asset threshold does not apply to these other lending institutions. 12 U.S.C. § 2808(a) (1999).

18. More precisely, this study examines conventional home mortgage lending in Metropolitan Statistical Area 5600 ("MSA 5600"), which includes New York City and Putnam, Rockland and Westchester Counties. An MSA is a central city of at least 50,000 people and its surrounding suburbs. See U.S. Census Bureau, *Decennial Management Division Glossary* (visited Nov. 19, 1999) <<http://www.census.gov/dmd/www/glossary.html#M>>.

19. The HMDA requires lenders to disclose information about four different types of applications for home mortgage loans: 1) conventional home mortgage loans; 2) federally-insured home mortgage loans; 3) home mortgage refinancing loans; and 4) home improvement loans. See 12 U.S.C. § 2803(b) (1999); 12 C.F.R. § 203.4(a) (1999); 12 C.F.R. pt. 203, app. A, §§ V.A.3-4. (1999). The HMDA also requires lenders to report whether the property that is the subject of the application has four or fewer residential units, or more than four residential units. See 12 C.F.R. pt. 203, app. A, §§ V.A. 4-5. (1999). If the property has four or fewer residential units, the HMDA requires the lender to report whether the property is owner-occupied. 12 U.S.C. § 2803(b)(2) (1999); 12 C.F.R. 203.4(a)(3) (1999).

This study examines only one type of loan covered by the HMDA: conventional home purchase loans on residential dwellings with one to four units ("conventional home mortgage loans"). Such loans represent a high percentage of all the HMDA-covered loans in MSA 5600. Of the 516,346 loans reported under the HMDA from 1992 to 1997 in MSA 5600, 42.9 percent were conventional home mortgage loans. See *infra* note 30 (containing the source of this data). A conventional home mortgage loan also represents a significant financial stake for both the lender and the borrower and serves as a strong indicator of the lender's and borrower's willingness to invest in a community.

20. This study calculates the denial rate ratio by dividing the denial rate on applications from a subject community by the denial rate on applications from a control community. The control communities are white applicants for African American and Latino applicants, predominantly white neighborhoods (white population greater than 80 percent) for predominantly minority neighborhoods, upper-income ("UI") applicants (income greater than 120 percent of AMI) for LMI applicants, and UI neighborhoods (median income greater than 120 percent of AMI) for LMI neighborhoods. See *Financial and Business Statistics*, *supra* note 12.

loans to four of the five subject communities in the New York metropolitan area from 1992 to 1995, followed by its general decline from 1996 to 1997.²¹ This study does not analyze enough data to conclude definitively that the disclosure of expanded data caused these increases. However, the release of expanded HMDA data in 1991 focused attention on lending in the subject communities, which lead to changes in the regulatory environment, sparked community activism and changed lenders' attitudes, thus suggesting that the expanded HMDA disclosure had a powerful impact. While this study cannot prove that the disclosure of expanded data began a chain reaction that resulted in the increase in the market share of applications from and loans to the subject communities, the increases are certainly consistent with this conclusion.

Part II then turns to the increase in the denial rate ratio for three of the subject communities between 1991 and 1997, and the high levels for all five subject communities.²² This Part examines whether the high denial rate ratios for three of the subject communities in particular – African Americans, Latinos and predominantly minority neighborhoods – indicate that lenders in the New York metropolitan area discriminate against these communities.²³ Although high denial rate ratios based on HMDA data are consistent with discrimination, they are not sufficient to prove discrimination. The HMDA does not control enough information to reach a definite conclusion about discrimination. The denial rates are high enough, however, to merit further analysis by the federal and state governmental agencies that have enforcement jurisdiction over home mortgage lenders and access to the data.

Finally, Part III of this study examines the apparent inconsistency in the conclusions of Parts I and II that, while the disclosure

21. This means that these subject communities' share of the conventional home mortgage loan "pie" increased from 1992 to 1997 and decreased from 1996 to 1997, although the 1997 share remained higher than the 1991 share. The change in share does not indicate whether the total number of loans they received increased or decreased.

22. This means that from 1991 to 1997, the ratio of the denial rate in three subject communities to the denial rate in their respective control groups increased. This, in turn, means that lenders rejected members of these subject communities more frequently than members of the control groups. It is important to note that these are ratios only; actual denial rates might have increased or decreased.

23. "Discrimination" against members of the subject communities may take many forms at different stages of the lending process, including discouraging them from applying for loans, failing to provide them with equal levels of information and assistance in applying for loans, utilizing race-neutral criteria for evaluating creditworthiness that have a disparate impact based on race, and intentionally denying them loans. For a discussion of these forms of discrimination, see *infra* notes 73, 74, 151, 153.

of expanded HMDA data influenced lenders to allocate more credit to four of five of the subject communities, lenders may be discriminating based on race. Lenders' allocation of more credit to the subject communities is not inconsistent with discrimination against them, however, because changes in lending were more directly correlated with marketing than differential treatment.

I. MEASURING THE EFFECTS OF THE DISCLOSURE OF EXPANDED HMDA DATA

This part examines three ways that the disclosure of expanded HMDA data in late 1991 may have influenced private lenders' allocation of credit in the New York metropolitan area. It begins by examining lenders' efforts to market loans in the subject communities following the disclosure of expanded HMDA data in 1991.²⁴ The study uses changes in the market share of conventional home mortgage loan applications filed by members of the subject communities from 1991 to 1997 as a proxy for marketing efforts.²⁵ The theory behind examining marketing is that if lenders desired to increase lending to the subject communities following the disclosure of expanded HMDA data in 1991, one way they could have done so was by increasing their marketing to the subject communities.²⁶

This part then examines lenders' actual lending performance by examining changes in the market share of conventional home mortgage loans each subject community held from 1991 to 1997.

24. In this context, marketing includes anything a bank does to sell its loans, from television advertising to conducting first-time homebuyer seminars.

25. This study uses 1991 as a baseline for measuring change because the first set of expanded HMDA data – covering 1990 – was disclosed in late 1991; therefore, the first year that the disclosure of the actual expanded HMDA data itself could have had an impact on lenders' behavior was 1992. The study uses the market share of applications and loans instead of total applications and loans because the total number of applications and loans fluctuates from year to year, distorting the relative changes in lending to each subject community. Relying on relative market share controls for these fluctuations.

26. For studies that use the market share of applications to examine the lending record of individual banks, see KARL FLAMING & RICHARD ANDERSON, *MORTGAGE PRACTICES IN COLORADO* (1993); SAMUEL L. MYERS, JR. & BILL MILCZARSKI, *APPROPRIATE USES OF THE HMDA DATA IN MEASURING AND DETERMINING DISCRIMINATION IN LOCAL MARKETS: THE CASE OF CHICAGO* (1997); NATIONAL COMMUNITY REINVESTMENT COALITION, *AMERICA'S BEST AND WORST LENDERS* (1998); NATIONAL COMMUNITY REINVESTMENT COALITION, *WHO'S FINANCING THE AMERICAN DREAM* (1998); NATIONAL COMMUNITY REINVESTMENT COALITION, *AMERICA'S WORST LENDERS!: A COMPREHENSIVE ANALYSIS OF MORTGAGE LENDING IN THE NATION'S TOP 20 CITIES* (1995); WASHINGTON LAWYERS' COMM. FOR CIVIL RIGHTS AND URBAN AFFAIRS, *RANKING THE LENDERS: INVESTIGATING FOR PATTERNS OF RACIAL DISCRIMINATION IN THE MAKING OF HOME LOANS* (1994).

An increase in the market share of loans from the subject communities is consistent with the hypothesis that lenders responded to the disclosure of expanded data by making relatively more loans to members of the subject communities.²⁷

Finally, this part examines the relative treatment lenders gave to applicants from the subject communities compared to applicants from control groups by comparing annual changes in the denial rate ratio for each subject community, which is the rate lenders denied applications from a subject community divided by the rate they denied applications from a control community. The reason for examining denial rate ratios is that if lenders wanted to increase lending in the subject communities following the disclosure of expanded HMDA data, one way they could have done so was by treating applicants from the subject communities more favorably – or at least less unfavorably – than previously, and a good measure of this is the change in lenders' treatment of applicants from each subject community relative to their treatment of applicants from a control community.²⁸

27. For a discussion of this methodology and examples of studies that use the market share of loans to evaluate overall lending in a community and the lending record of individual lenders, see JONATHAN BROWN & CHARLES BENNINGTON, *RACIAL REDLINING: A STUDY OF DISCRIMINATION BY BANKS AND MORTGAGE COMPANIES IN THE UNITED STATES* (1993); JIM CAMPEN, *CHANGING PATTERNS IV: MORTGAGE LENDING TO TRADITIONALLY UNDERSERVED BORROWERS & NEIGHBORHOODS IN BOSTON, 1990-1996* (1997); MYERS & MILCZARSKI, *supra* note 26; FAIR LENDING ANALYSIS: A COMPENDIUM OF ESSAYS ON THE USE OF STATISTICS (Anthony M. Yezer ed. 1995); AMERICA'S BEST AND WORST LENDERS, *supra* note 26; WHO'S FINANCING THE AMERICAN DREAM, *supra* note 26; PETER SKILLERN & MAGRIT BERGHOLZ, *AN ANALYSIS OF 1992 MORTGAGE LENDING ACTIVITY TO AFRICAN AMERICANS AND LOW-INCOME HOUSEHOLDS IN WILMINGTON, NORTH CAROLINA* (1994); Robert B. Avery et al., *Trends in Home Purchase Lending: Consolidation and the Community Reinvestment Act*, 86 FED. RES. BULL. 81, 93 (1999); Katharine L. Bradbury et al., *Geographic Patterns of Mortgage Lending in Boston, 1982-1987*, NEW ENG. ECON. REV., Sept.-Oct. 1989, at 3; Glenn B. Canner, *Redlining: Research and Federal Legislative Response*, FED. RES. BULL. (Oct. 1982); Bill Dedman, *The Color of Money*, ATL. J.-CONST. (May 1-4, 1989) (reprint of four part series).

28. For example, if the denial rate for African American applicants in a given year is 50 percent, and the denial rate for white applicants in the same year is 25 percent, the denial rate ratio is 2 (50/25=2). If the denial rate ratio in the next year is 2.5, this means the denial rate ratio increased by 25 percent, indicating that lenders treated African Americans less favorably than whites in the second year than in the first year. Thus, in contrast to changes in the market share of applications and loans, where increases in the subject communities indicate more favorable treatment, increases in the denial rate ratio indicate less favorable treatment. For studies that use the denial rate ratio, see MYERS & MILCZARSKI, *supra* note 26; AMERICA'S BEST AND WORST LENDERS, *supra* note 26; WHO'S FINANCING THE AMERICAN DREAM, *supra* note 26.

A. Marketing and Applications

Table One depicts the market share of conventional home loan mortgage applications each subject community submitted from 1991 to 1997, the percentage change each year and the overall percentage change in share from 1991, when expanded HMDA data was first disclosed, to 1997.²⁹

TABLE ONE³⁰

	1991		1992		1993		1994		1995		1996		1997		1991-1997
	Share	Change	Share	Change	Share	Change	Share	Change	Share	Change	Share	Change	Share	Change	Change
African Americans	10.9	10.7	(1.8)	12.1	13.1	14.3	18.2	16.0	11.9	14.2	(11.3)	12.3	(13.4)	12.8	
Latinos	6.2	6.4	3.2	6.4	0.0	7.7	20.3	8.6	11.7	8.3	(3.5)	8.2	(1.2)	32.3	
LMI Applicants	6.9	6.8	(1.4)	8.1	19.1	6.7	(17.3)	4.7	(29.9)	4.7	0.0	9.3	97.9	34.8	
Minority Neighborhoods	8.9	11.3	26.9	11.2	(0.9)	12.5	11.6	13.5	8.0	12.6	(6.7)	13.3	5.6	49.4	
LMI Neighborhoods	11.9	8.8	(26.1)	8.4	(4.5)	8.9	5.9	9.5	6.7	8.9	(6.3)	9.9	11.2	(16.8)	

Table One shows that the market share of applications for conventional home mortgage loans increased overall from 1991 to 1997 in four of the five subject communities. The subject communities experienced the strongest growth in market share of applications from 1992 to 1995. During these four years, for all subject communities, the market share of applications grew in twelve of twenty observations, decreased in seven and remained the same in one.³¹ By 1995, the market share of applications from three subject

29. This study is not attempting to determine whether lenders are meeting the demand for loans in the subject communities, and therefore does not rely on proxies for demand such as the percentage of the population a subject community constitutes. Instead, this study analyzes what happened to lending in the subject communities following the disclosure of expanded the HMDA data in late 1991. This study does this by using relative changes in the market share of applications and loans and denial rate ratios in the subject communities to evaluate whether lenders are improving their lending records.

30. Unless otherwise indicated, the source of the HMDA data in this study is the Center for Community Change, which publishes "the HMDA Works," a software program for analyzing the HMDA data, and the website of the Federal Financial Institutions Examination Council, <www.ffiec.gov>. All numbers are rounded to the nearest tenth, except where that would result in a change of the integer. In this and subsequent tables, "share" represents the percentage market share, "change" represents the percentage change in market share from the previous year, and a number in parentheses indicates a decrease in the relevant share or ratio.

31. This means that during this three-year period, there were twenty opportunities for the market share of applications to change ("observations"): one observation in each of the five subject communities each year, for a total of five observations per year for four years, or twenty observations. This terminology will be used in the rest of this study.

communities – African Americans, Latinos and predominantly minority neighborhoods – had reached post-1991 highs. These gains slowed or eroded in 1996 and 1997, however. In those two years, for all subject communities, the market share of applications dropped in six of ten observations, increased in three and remained the same in one.

The largest increase in the market share of conventional home mortgage loan applications was in predominantly minority neighborhoods, for which the share grew 49.4 percent from 1991 to 1997, from 8.9 to 13.3 percent. The market share of applications also increased significantly for LMI applicants – 34.8 percent, from 6.9 percent in 1991 to 9.3 percent in 1997. Similarly, Latinos' market share of applications increased 32.3 percent, from 6.2 percent in 1991 to 8.2 percent in 1997. African Americans' market share of applications increased 12.8 percent, from 10.9 percent in 1991 to 12.3 percent in 1997. In contrast to these increases, LMI neighborhoods' market share of applications declined 16.8 percent, from 11.9 percent in 1991 to 9.9 percent in 1997.

B. Lending

Table Two depicts the market share of loans held by each subject community from 1991 to 1997, the percentage change in share for each year and the overall change in share from 1991, when expanded HMDA was first disclosed, to 1997.

TABLE TWO³²

	1991			1992			1993			1994			1995			1996			1997			1991-1997 Change
	Share	Share	Change	Share	Share	Change	Share	Share	Change	Share	Share	Change	Share	Share	Change	Share	Share	Change	Share	Share	Change	
African Americans	9.3	9.2	(1.1)	11.1	20.7	13.4	20.7	14.8	10.4	12.2	(17.6)	10.3	(15.6)	10.8								10.8
Latinos	5.5	6.2	12.7	5.9	(4.8)	7.6	28.8	8.1	6.6	7.8	(3.7)	7.6	(2.6)	38.2								38.2
LMI Persons	6.3	5.7	(9.5)	6.8	19.3	5.5	(19.1)	3.8	(30.9)	3.5	(7.9)	7.4	111.4	17.4								17.4
Minority Neighborhoods	7.4	9.8	32.4	9.9	1.0	11.2	13.1	12.1	8.0	10.1	(16.5)	10.2	0.9	37.8								37.8
LMI Neighborhoods	10.2	7.9	(22.5)	7.6	(3.8)	8.1	6.6	8.6	6.2	7.3	(15.1)	7.9	8.2	(22.5)								(22.5)

Table Two shows that the market share of conventional home mortgage loans increased in four of the five subject communities from 1991 to 1997. Lending grew strongly from 1992 to 1995, the first four years after the disclosure of expanded HMDA data. In these four years, in all subject communities, the market share of loans increased in thirteen of twenty observations and decreased in

32. See *supra* note 30 (containing the source of this data).

seven. The strongest gains came from 1993 to 1995. In these three years, the market share of loans increased in eleven of fifteen observations. By 1995, the market share for all subject communities, except LMI persons, had reached their post-1991 highs. These gains nearly reversed themselves for African Americans from 1996 to 1997, however, and the market share of loans held by all the subject communities decreased in seven of ten observations in these two years.

The largest increases in the market share of loans were for predominantly minority neighborhoods and Latinos. The market share of loans held by predominantly minority neighborhoods grew from 7.4 percent in 1991 to 10.2 percent in 1997, an increase of 37.8 percent. The market share of loans held by Latinos increased 38.2 percent from 1991 to 1997, from 5.5 percent to 7.6 percent. The market share of loans held by African Americans and LMI persons grew at smaller rates, 10.8 and 17.4 percent, respectively. In contrast to these increases, the market share of loans held by LMI neighborhoods declined from 10.2 percent in 1991 to 7.9 percent in 1997, a decrease of 22.5 percent.

C. Relative Treatment of Applicants

Table Three shows the denial rate ratios³³ on conventional home mortgage loan applications for the five subject communities and their corresponding control groups from 1991 to 1997. It also shows the percentage change in denial rate ratios in each year starting in 1992, and the overall percentage change from 1991 to 1997.

33. As a reminder, the denial rate ratio is the conventional home mortgage loan application denial rate for applicants from one of the subject communities divided by the denial rate for applicants from its control community. For example, if the denial rate for Latino conventional home loan mortgage applicants is 40 percent, and the denial rate for white conventional home loan mortgage applicants is 20 percent, the denial rate ratio is 2. ($40/20=2$)

TABLE THREE³⁴

	1991	1992	1993	1994	1995	1996	1997	1991-1997						
	Ratio	Ratio	Change	Ratio	Change	Ratio	Change	Change						
African American/ White Applicants	1.9	1.9	0.0	1.7	(10.5)	1.9	11.8	1.8 (5.3)	2.1	16.7	2.2	4.8	15.8	
Latino/White Applicants	1.9	1.5	(21.1)	1.6	6.7	1.6	0.0	1.6	0.0	1.7	6.3	1.7	0.0	(10.5)
LMI/UI Applicants	1.5	1.9	26.7	2.1	10.5	2.5	19.0	2.8	12.0	2.5	(10.7)	2.3	(8.0)	53.3
Minority/White Neighborhoods LMI/UI	1.9	1.9	0.0	1.7	(10.5)	1.9	11.8	1.7	(10.5)	2.0	17.6	2.0	0.0	5.3
Neighborhoods	1.8	1.7	(5.6)	1.6	(5.9)	1.8	12.5	1.5	(16.7)	1.9	26.7	1.8	(5.3)	0.0

Table Three shows that denial rate ratios were higher in 1997 than in 1991 for three of the five subject communities, lower for one, and unchanged for the remaining community. The denial rate ratio increased most significantly for LMI applicants, increasing from 1.5 percent in 1991 to 2.3 percent in 1997, an increase of 53.3 percent. The denial rate ratio increased modestly for African Americans and predominantly minority neighborhoods: 15.8 percent for African Americans, from 1.9 in 1991 to 2.2 in 1997; and 5.3 percent for predominantly minority neighborhoods, from 1.9 in 1991 to 2.0 in 1997. The denial rate ratio decreased 10.5 percent for Latinos, from 1.9 in 1991 to 1.7 in 1997. The denial rate ratio did not change for LMI neighborhoods, starting at 1.8 in 1991 and ending at 1.8 in 1997.

II. THE IMPACT OF THE DISCLOSURE OF EXPANDED THE HMDA DATA

This part explores the effect of expanded HMDA disclosure. It examines the overall growth in the market share of applications from and loans to four of the five subject communities following the disclosure and the factors that suggest that these increases correlate directly to the expanded HMDA disclosure. While this study cannot definitively conclude that the disclosure of expanded HMDA data alone resulted in these increases, the extent, timing and context of the increases and changes in the activist and regulatory environment following the disclosure point to a direct correlation.

This part then examines the connection between continually high denial ratios and the existence of discrimination in the lending market. This part concludes that strong evidence of discrimination

34. See *supra* note 30 (containing the source of this data).

exists that merits further analysis. The data, however, required for the confirmation or refutation of the existence of discrimination is not commonly available. The evidence of discrimination is strong enough that the federal and state governmental agencies with enforcement jurisdiction over home mortgage lenders should gather the necessary data to conduct a comprehensive study of jurisdiction.

A. The Allocative Effects of the Disclosure of Expanded the HMDA Data

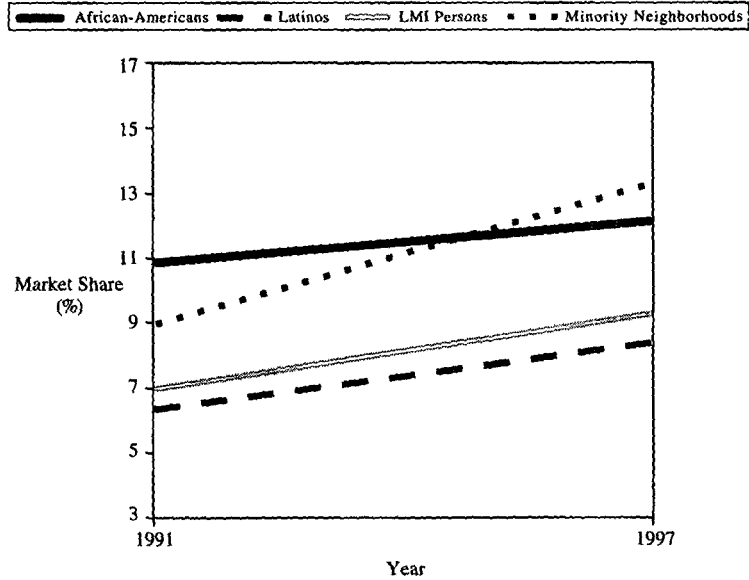
As the above data shows,³⁵ the market share of applications from and loans to four of the five subject communities increased significantly from 1991 to 1997. This study does not analyze sufficient data to conclude definitively that the disclosure of expanded HMDA data in 1991 caused these increases. Many other factors could have had a role in these increases, particularly the economic expansion in the United States and New York City. The extent and timing of the changes in market share, both locally and nationally, however, strongly suggest that the disclosure of expanded data influenced private lenders' decisions about allocating credit. In addition, direct evidence exists that the disclosure of expanded HMDA data changed the regulatory and activist environment, and that lenders attempted to increase lending to subject communities in explicit response to these changing circumstances.

1. *Extent and Timing of the Increases in the Market Share of Applications and Loans*

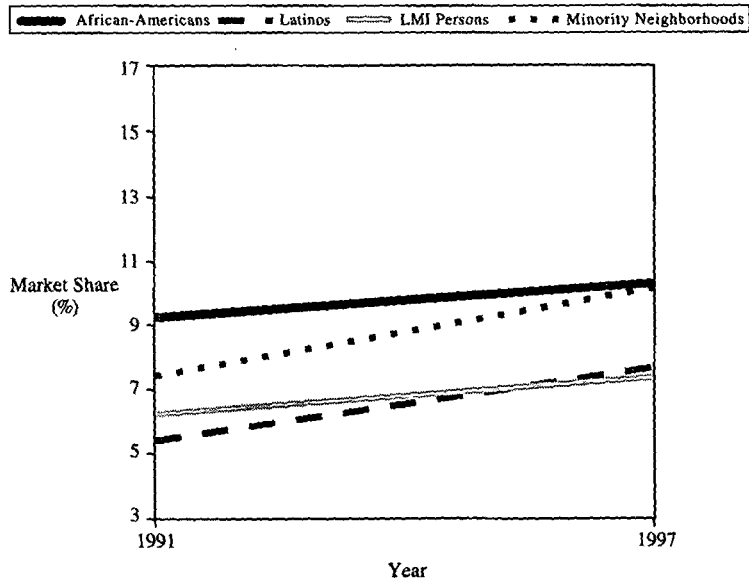
By 1997, the market share of conventional home mortgage loan applications from and loans to four of the five subject communities had increased from their 1991 levels. These increases are depicted graphically as follows:

35. See *supra* Parts I.A-B.

GRAPH ONE
OVERALL INCREASES IN MARKET SHARE OF APPLICATIONS, 1991-1997



GRAPH TWO
OVERALL INCREASES IN MARKET SHARE OF LOANS, 1991-1997



The increases were concentrated most strongly in the four years following the disclosure of expanded HMDA data, from 1992 to

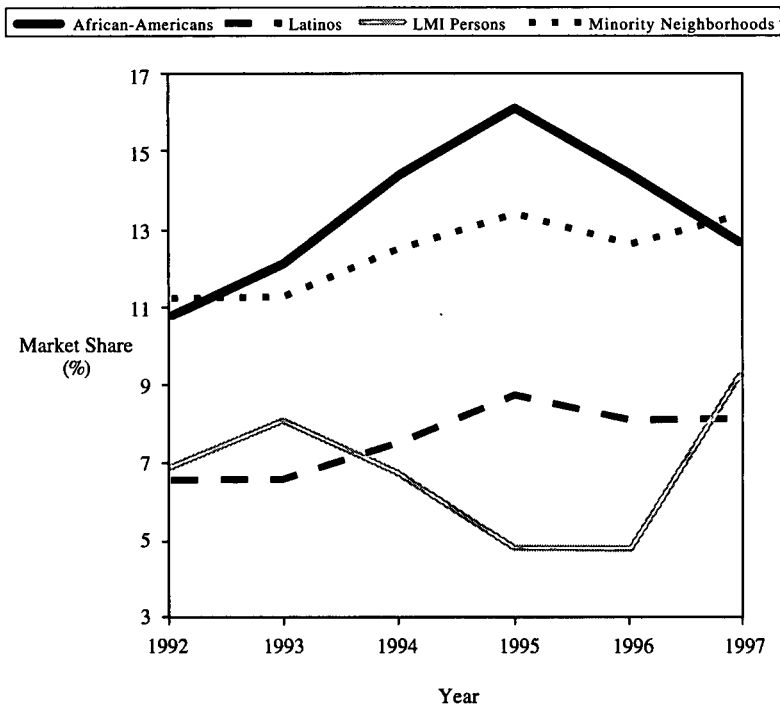
1995, but they trailed off from 1996 to 1997. As Table Four shows, during the period of the strongest increases, from 1992 to 1995, the market share of applications increased in twelve instances, decreased in seven and remained the same in one, for all subject communities in all years. The market share of loans increased in thirteen of twenty observations.

TABLE FOUR³⁶

	Increases	Decreases	No Change
Market Share of Applications	12	7	1
Market Share of Loans	13	7	0

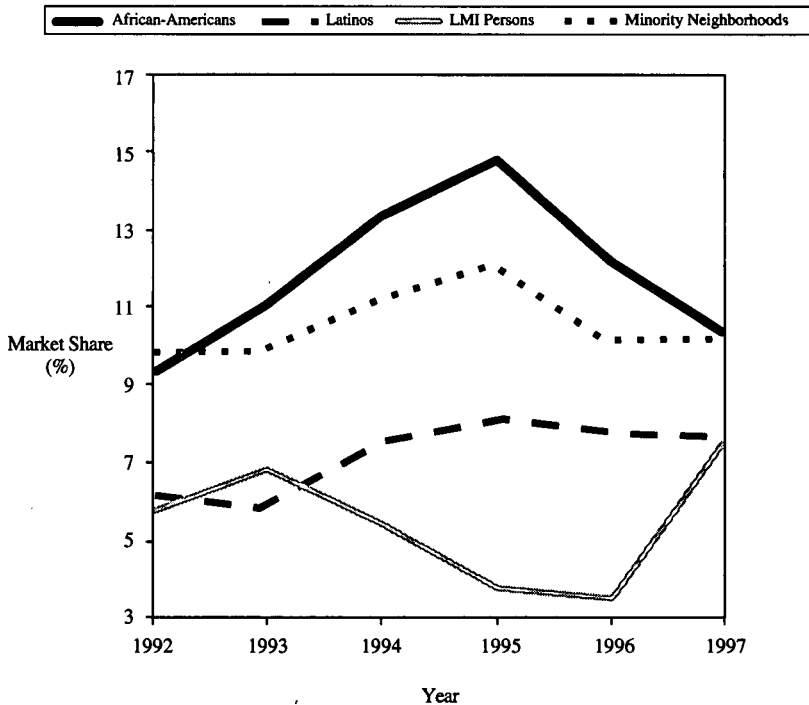
These results are depicted graphically as follows:

**GRAPH THREE
ANNUAL CHANGE IN MARKET SHARE OF
APPLICATIONS, 1992-1997**



36. See *supra* note 30 (containing the source of this data).

GRAPH FOUR
ANNUAL CHANGE IN MARKET SHARE OF
LOANS, 1992-1997



As Graphs Three and Four show, the most significant growth in the market share of applications and loans occurred from 1993 to 1995. In these three years, the market share of applications from and loans to the subject communities increased in eleven of fifteen observations. The timing of these increases provides further evidence that the disclosure of expanded HMDA data influenced private lenders' allocation of credit. The expanded HMDA was not disclosed until late 1991,³⁷ so presumably it would have taken lenders until well into 1992 to strengthen their efforts to lend more to the subject communities. These efforts would have been partially reflected in the 1992 HMDA data, but not fully until the 1993 data.

In the subject communities, two trends in the market share of loans appear inconsistent with the conclusion that the disclosure of expanded HMDA data had a strong influence on private lenders' allocation of credit: the overall decline in the market share of applications from and loans to LMI neighborhoods from 1991 to 1997; and the general decline in the market share of applications

37. See *infra* text accompanying note 48.

from and loans to the subject communities from 1996 to 1997. Despite this apparent inconsistency, however, two hypotheses about these trends, if correct, would indicate that the decreases are actually consistent with the conclusion that the disclosure of expanded HMDA data in 1991 had an allocative impact.

As to the general decline from 1996 to 1997, the hypothesis is that if lenders were under serving the credit needs of the subject communities before 1991, there would have been significant unsatisfied demand for loans in these communities. Lenders may have satisfied this accumulated demand between 1992 and 1995, after which demand returned to a more normal level. Under this hypothesis, the decline in lending from 1996 to 1997 was just a leveling after lenders satisfied this unfulfilled demand from 1992 to 1995. Consistent with this hypothesis, from 1990 to 1991, after the legislation requiring disclosure of expanded HMDA data was passed but before any data was released, the market share of loans to all five subject communities declined significantly.³⁸ Following the disclosure of the expanded data, lending increased.³⁹

The hypothesis regarding the decline in market share of applications from and loans to LMI neighborhoods is that the greater availability of credit to members of the subject communities opened previously unaffordable housing markets in higher income neighborhoods for them, allowing them to move there. According to this hypothesis, members of the subject communities who lived in LMI neighborhoods and received loans would have moved in disproportionate numbers to middle income ("MI") neighborhoods, and members of the subject communities who received loans and lived in MI neighborhoods, would have moved in disproportionate numbers into UI neighborhoods. It may be possible, through a combination of analyses of deed transfers, demographic patterns, home value changes and surveys, to determine whether this was the case. As for this study, the following data suggests that this hypothesis is correct. The hypothesis would predict, for example, that while loans grew in predominantly minority neighborhoods overall from 1991 to 1997, the strongest growth would have been in MI and UI predominantly minority neighborhoods. In fact, this is what happened. From 1991 to 1997, the market share of loans in all predominantly minority neighborhoods grew by 37.8 percent.⁴⁰ The growth in LMI predominantly minority neighbor-

38. *See supra* note 30 (containing the source of this data).

39. *See supra* Table Two.

40. *See id.*

hoods was only twenty percent,⁴¹ while the increase in MI predominantly minority neighborhoods was 167 percent⁴² and the increase in UI predominantly minority neighborhoods was 222 percent.⁴³

If these hypotheses prove correct, which seems likely from the data, no inconsistency exists between these two trends in the market share of loans in the subject communities and the conclusion that expanded HMDA disclosure had a strong influence on private lenders' allocation of credit.

2. *Local Results in National Context*

Examining the New York results in the context of national results also suggests that the increases in applications and loans resulted directly from the HMDA disclosure, rather than other anomalous local factors. Nationally, the market share of applications from and loans to all five subject communities increased,⁴⁴ in fact, the increases were greater than in the New York metropolitan area.⁴⁵ As Table Five shows, by 1997, the national market shares of conventional home mortgage applications from all five subject communities had increased significantly from their 1991 levels.⁴⁶

TABLE FIVE

	Market Share of Applications		
	1991	1997	% Change
African Americans	4.2	8.8	109.5
Latinos	4.9	5.9	20.4
LMI persons	23.0	31.7	37.8
Predominantly minority neighborhoods	2.3	3.5	52.2
LMI neighborhoods	10.2	14.2	39.2

As Table Six shows, the market share of approved loans also increased nationally in all five subject communities from 1991 to 1997.⁴⁷

41. See *supra* note 30 (containing the source of this data).

42. See *id.*

43. See *id.*

44. See Glenn B. Canner & Dolores S. Smith, *Home Mortgage Disclosure Act: Expanded HMDA Data on Residential Lending: One Year Later*, 78 FED. RES. BULL. 801, 806, 808, 810 (1991); *Financial and Business Statistics*, *supra* note 12, at A65, A67.

45. See sources cited *supra* note 44.

46. See *id.*

47. See sources cited *supra* note 44. The "Market Share of Loan Approvals" depicted in Table Six includes both loans originated and applications the lender approved but that the borrower did not accept. This differs from Table Two, which

TABLE SIX

	Market Share of Loan Approvals		
	1991	1997	% Change
African Americans	3.1	5.6	80.6
Latinos	4.1	5.0	21.9
LMI persons	18.6	25.1	34.9
Predominantly minority neighborhoods	1.9	2.6	36.8
LMI neighborhoods	9.2	11.6	26.1

Although the increases in the market share of applications and loans were greater nationally than in the New York metropolitan area, these national results show that the increases in New York were part of a national trend, providing support for the hypothesis that the increases were not the result of factors unique to New York.

3. *Efforts to Force Lenders to Increase Lending in Response to the Disclosure of Expanded HMDA Data*

In addition to the statistical increases in the market share of loans in the subject communities following the disclosure of expanded HMDA data, other evidence suggests that the disclosure of expanded HMDA data had an allocative effect. There is direct evidence – in the form of public outcry over the initial disclosure of expanded HMDA data in late 1991, followed by increased community activism and governmental efforts to strengthen enforcement of the fair lending laws, followed in turn by lenders' efforts to increase their lending in the subject communities in explicit response to the disclosure of expanded HMDA data and changed environment – that the disclosure of expanded HMDA data had an allocative effect.

(a) *The Public Response to the Disclosure of Expanded the HMDA Data*

In late 1991, the Federal Reserve released the first set of expanded HMDA data.⁴⁸ The data showed that in 1990, lenders across the nation denied conventional home mortgage loan applications from African Americans more than twice as frequently and

shows changes in the market share of loans in the New York metropolitan area, which included only loans originated.

48. For a description of the expanded data, see *supra* text accompanying note 11. See also *supra* notes 17, 19 and text accompanying notes 6-12 (providing a more complete description of the HMDA).

from Latinos nearly 1.5 times as frequently as from whites.⁴⁹ Lenders denied applications for conventional home mortgage loans from predominantly minority neighborhoods more than twice as frequently as from predominantly white neighborhoods.⁵⁰

The disclosure of this data immediately created a tremendous amount of negative publicity for lenders in New York and around the country.⁵¹ Community leaders called on banks to investigate the reasons for the rejection rate disparities and improve their lending records.⁵² Community groups, activists and journalists published numerous studies of bank lending records that generally confirmed the national data at the local level.⁵³

49. Denial rates were 33.9 percent for African Americans, 21.4 percent for Latinos and 14.4 percent for whites. See Glenn B. Canner & Dolores S. Smith, *Home Mortgage Disclosure Act: Expanded Data on Residential Lending*, 77 FED. RES. BULL. 859, 870 (1991). African Americans were denied 2.35 times as frequently as whites and Latinos were denied 1.4 times as frequently. See *id.*

50. See *id.* (stating that the denial rate was 24.0 percent for predominantly minority neighborhoods and 11.5 percent for predominantly white neighborhoods).

51. See John I. Douglas, *Banking Law*, NAT. L.J., October 24, 1994, at B4 ("This disparity created a tremendous amount of unfavorable publicity for banks and thrifts."); Jaret Seiberg, *Banks Making Good Progress in Their Fair-Lending Efforts*, AM. BANKER, Sept. 16, 1996, at 1 ("The first year's the HMDA data, which covered 1990, focused public attention on disparate rejection rates for whites and minorities. The numbers were publicized on the front pages of newspapers across the country - and inevitably drew charges of bias from activists.").

52. See Seiberg, *supra* note 51; see also Leslie Wayne, *New Hope in Inner Cities: Banks Offering Mortgages*, N.Y. TIMES, Mar. 14, 1992, at A1.

53. See Seiberg, *supra* note 51. Examples of such studies include ACORN, TAKE THE MONEY AND RUN: THE SIPHONING OF DEPOSITS FROM MINORITY NEIGHBORHOODS IN 14 CITIES (1992); BROWN & BENNINGTON, *supra* note 27; FLAMING & ANDERSON, *supra* note 26; WHERE THE MONEY ISN'T FLOWING, A PRELIMINARY REPORT ON MORTGAGE LENDING IN THE CITY OF ROCHESTER, NEW YORK (1994); JOHN E. LIND, EXPANDED METHOD FOR ANALYZING HOME MORTGAGE DISCLOSURE ACT DATA FOR THE EVALUATION OF A LENDER'S COMMUNITY REINVESTMENT (1993); AMERICA'S WORST LENDERS, *supra* note 26; CHARLES SCHUMER, HOME MORTGAGE REDLINING DENIES AMERICAN DREAM TO MINORITIES (1997); SKILLERN & BERGHOLZ, *supra* note 27; WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, *supra* note 26; Joel Glenn Brenner & Liz Spayd, *A Pattern of Bias in Mortgage Loans*, WASH. POST, June 6, 1993, at A1; Ford Fessenden et al., *Race and Mortgages*, NEWSDAY, Apr. 28-May 1, 1996 (four-part series); Michelle A. Hill & Paul D'Ambrosio, *Race Counts in Home Loans*, ASBURY PARK SUNDAY PRESS, May 22, 1994, at 1; David R. Sands, *D.C. Banks Said to Favor White Area Investment*, WASH. TIMES, June 5, 1992, at C1; Paulette Thomas, *Minority-Area Lenders Faulted in Acorn Study*, WALL ST. J., June 5, 1992, at A2; Sean Webby, *Mortgage Discrimination?, No Equal Treatment, and Unequal Lending*, GANNETT SUBURBAN NEWSPAPERS, Nov. 25-27 (1991).

(b) Increased Community Activism

Community activism regarding lending to the subject communities increased substantially following the disclosure of expanded HMDA data. The rallying point for CRA activists is the "CRA challenge," which is a community group's attempt to block a bank's expansion or merger plan on the grounds that the bank had not satisfied its CRA obligations.⁵⁴ These challenges frequently end with commitments by the bank to lend millions—if not billions—of dollars, to the subject communities.⁵⁵ The pace of these challenges increased after 1991, and by the end of the 1990s, banks had committed several billion dollars of loans to subject communities around the country.⁵⁶

A CRA challenge operates as follows: When a bank seeks to engage in several different types of expansion activities, it must file an application for permission to do so with the federal banking agency that has jurisdiction over it.⁵⁷ The bank must give notice of the application to members of the public, who can submit comments to the federal banking agency on the application.⁵⁸ When a bank files any one of six types of expansion applications, including applications to merge with another bank or open a new branch, the relevant federal banking agency must take the bank's CRA record into account when deciding the application.⁵⁹ The federal banking

54. See Allen J. Fishbein, *The Community Reinvestment Act After Fifteen Years: It Works, But Strengthened Federal Enforcement is Needed*, 20 *FORDHAM URB. L.J.* 293, 294, 296 (1993); Robert C. Art, *Social Responsibility in Bank Credit Decisions: The Community Reinvestment Act One Decade Later*, 18 *PAC. L.J.* 1071, 1073-74 n.10 (1987).

55. See NATIONAL COMMUNITY REINVESTMENT COALITION, *CRA COMMITMENTS* (1999).

56. See *id.*

57. See, e.g., 12 U.S.C. § 36 (1994 & Supp. 1997) (opening a new branch – national bank); 12 U.S.C. § 215a (1999) (merger and consolidation of national banks with state banks or national banks); 12 U.S.C. § 1464(i), (o), (p) (1999) (conversion of federal savings association to state savings association or banks and vice versa); 12 U.S.C. § 1467a(c)(4) (1991) (business expansion plans of savings and loan holding companies); 12 U.S.C. § 1842 (1999) (bank holding company applications to form a bank holding company, acquire a subsidiary bank, merge bank holding companies or acquire bank assets); 12 U.S.C. § 1467a(e) (1999) (acquisition by savings and loan holding companies); 12 U.S.C. § 1816 (1994 & supp. 1999) (factors to consider in application for deposit insurance); 12 U.S.C. § 1828(c) (1999); 12 U.S.C. § 1831a (1999) (activities of insured state banks).

58. See 12 C.F.R. §§ 5.4, 5.8, 5.10 (1999) (OCC); 12 C.F.R. §§ 225.14, 262.3 (1998) (Federal Reserve); 12 C.F.R. Pt. 303 (1999) (FDIC).

59. See 12 U.S.C. §§ 2903, 2902(3) (1999).

agencies can deny an application on the grounds that the bank has a poor CRA record.⁶⁰

From the earliest days of the CRA, this opportunity for the public to comment on or challenge a bank's application on the ground that it had not satisfied its CRA obligations has been a crucial part of the CRA's enforcement.⁶¹ Frequently, after a community group files a CRA challenge, the bank and the community group enter an agreement in which the bank commits to increase its lending in the group's community.⁶² After 1991, the number of CRA challenges and the amount of money banks committed increased significantly.⁶³ The National Community Reinvestment Coalition (the "NCRC") has published a catalogue of CRA agreements.⁶⁴ The NCRC has counted 360 agreements totaling approximately \$1 trillion.⁶⁵ The NCRC estimates that prior to 1992, banks had made commitments in connection with actual or threatened CRA challenges, totaling approximately \$8.8 billion.⁶⁶ After 1991, the total dollars committed was approximately \$1.028 trillion.⁶⁷ CRA challenge activity in New York City reflects this national trend. Between 1977 and 1992, the NCRC lists five commitments by banks in New York City, totaling approximately \$565 million.⁶⁸ After 1991, the NCRC counts eleven commitments, totaling approximately \$900 million.⁶⁹

(c) *Strengthened Enforcement of Fair Lending Laws*

The disclosure of expanded HMDA data in late 1991 and the subsequent calls for action were followed by strengthened governmental enforcement of the laws prohibiting lending discrimination and promoting lending in LMI communities.⁷⁰ The laws the gov-

60. See 12 C.F.R. § 563e.29 (1999) (OTS); 12 C.F.R. § 345.29(d) (1999) (FDIC); 12 C.F.R. §§ 5.13, 25.29(d) (1999) (OCC); 12 C.F.R. § 228.29 (1999) (Federal Reserve).

61. See Fishbein, *supra* note 54; Art, *supra* note 54.

62. See Avery et al., *supra* note 27, at 86; Fishbein, *supra* note 54, at 298-300.

63. See CRA COMMITMENTS, *supra* note 55.

64. See *id.*

65. See *id.* at 1.

66. See *id.* at 3.

67. See *id.*

68. See *id.* at 10.

69. See *id.*

70. See Jo Ann S. Barefoot, *Lending Analysis Must Include Discrimination Check*, A.B.A. BANKING J., Aug. 1, 1992, at 24; Steve Cocheo, *ABA Takes Constructive Tack on the HMDA Numbers*, A.B.A. BANKING J., July 1, 1992, at 13; Mary Colby, *Learning to be Colorblind*, BANK MGMT., Jan. 1993, at 27; Scott B. Schreiber & Beth S. DeSimone, *Avoiding Liability for Alleged Discriminatory Lending Practices*, BANKING L. REV., Winter 1992, at 3; Saul Hansell, *Shamed by Publicity, Banks Stress Mi-*

ernment began to enforce more strictly included the CRA, the Fair Housing Act ("FHA"),⁷¹ and the Equal Credit Opportunity Act ("ECOA").⁷² These efforts included the first serious steps by the Department of Justice ("DOJ") to enforce the FHA and ECOA against banks and other mortgage lenders in connection with their real estate-related lending, tightened enforcement of the fair lending laws and improved CRA regulations.

In 1992, the DOJ filed *United States v. Decatur Federal Savings & Loan Ass'n*,⁷³ the first case ever filed accusing a bank of engaging in a pattern and practice of home mortgage lending discrimination in the twenty-four years since the FHA had given the DOJ the authority to file such cases. Since then, the DOJ has filed twelve cases against home mortgage lenders around the country alleging a pattern of home mortgage lending discrimination.⁷⁴ The cases have

nority Mortgages, N.Y. TIMES, Aug. 30, 1993, at D1; Phil Roosevelt, *Justice Dept. In Probing Loan Bias At Banks*, AM. BANKER, May 29, 1992, at 1; Warren R. Stern et al., *Meeting the Challenge of Loan Bias Scrutiny*, AM. BANKER, Aug. 21, 1992, at 4; John R. Wilke, *Home Loans to Blacks, Hispanics Soared in '94*, WALL ST. J., July 19, 1995, at A2.

71. 42 U.S.C. §§ 3601-3613 (1999). The FHA prohibits discrimination on the basis of race, color, religion, sex, handicap, familial status and national origin in residential real estate-related transactions, including making loans in connection with such transactions. See *id.* § 3605. The Department of Justice ("DOJ") has the authority to institute a civil action in federal court to challenge a pattern or practice of behavior that violates the FHA. See 42 U.S.C. § 3614(a) (1999). The Secretary of the Department of Housing and Urban Development ("HUD") has the authority to file administrative complaints on its own behalf with HUD alleging FHA violations and to investigate and prosecute administrative complaints filed with HUD by individuals. See 42 U.S.C. §§ 3610, 3612. Individuals can also commence administrative or court proceedings under the FHA to challenge discriminatory lending practices. See *id.* § 3613.

72. 15 U.S.C. §§ 1691 to 1691f (1999). The ECOA prohibits discrimination on the basis of race, color, religion, national origin, sex, marital status or age with respect to any credit transaction. See *id.* § 1691(a). Various federal agencies have authority to enforce compliance with the ECOA, including the federal banking agencies, the DOJ, and the Federal Trade Commission ("FTC"). See *id.* §§ 1691c, 1691e(g). Individuals can also commence court proceedings to challenge ECOA violations. See *id.* § 1691e(f).

73. Fair Housing-Fair Lending Rptr. ¶ 19,377, No. 1-92-CV-2198 (N.D. Ga. filed Sept. 17, 1992).

74. See *United States v. Albank*, Fair Housing-Fair Lending Rptr. ¶ 19,401, No. 97-CV-1206 (N.D.N.Y. filed Aug. 8, 1997); *United States v. First Nat'l Bank of Doña Ana*, Fair Housing-Fair Lending Rptr. ¶ 19,395, No. CV97-96HB/JHG (D.N.M. filed Jan. 29, 1997); *United States v. Long Beach Mortgage Co.*, Fair Housing-Fair Lending Rptr. ¶ 19,392, No. CV 96-6159 (C.D. Cal. filed Sept. 5, 1996); *United States v. Fleet Mortgage Corp.*, Fair Housing-Fair Lending Rptr. ¶ 19,391, No. CV 96 2279 (E.D.N.Y. filed May 7, 1996); *United States v. First Nat'l Bank of Gordon*, Fair Housing-Fair Lending Rptr. ¶ 19,398, No. 96-5035 (W.D.S.D. filed Apr. 15, 1996); *United States v. Huntington Mortgage Co.*, Fair Housing-Fair Lending Rptr. ¶ 19,390, No. 1:9555-CV-2211 (N.D.O. filed Oct. 18, 1995); *United States v. Security State Bank of*

covered all stages of the real estate-related lending process. The DOJ accused lenders of establishing lending territories that excluded predominantly minority communities,⁷⁵ failing to advertise in minority communities,⁷⁶ discriminating against borrowers on the basis of their race,⁷⁷ placing more onerous application burdens on minority loan applicants than white applicants⁷⁸ and charging higher interest rates to minority borrowers.⁷⁹ The DOJ settled all of these cases. The consent decrees, which the mortgage lending industry and the DOJ have treated as informal legal precedent,⁸⁰ required the lenders to establish multi-million dollar loan pro-

Pecos, No. SA95CA0996 (W.D. Tex. filed Oct. 18, 1995); *United States v. Northern Trust Co.*, Fair Housing-Fair Lending Rptr. ¶ 19,388, No. 95-C3239 (N.D. Ill. filed June 1, 1995); *United States v. Chevy Chase Fed. Sav. Bank*, Fair Housing-Fair Lending Rptr. ¶ 19,385, No. 94-1824 (D.D.C. filed Aug. 22, 1994); *United States v. Blackpipe State Bank*, Fair Housing-Fair Lending Rptr. ¶ 8.10 No. 93-5115 (D.S.D. filed Jan. 21, 1994); *United States v. First Nat'l Bank of Vicksburg*, Fair Housing-Fair Lending Rptr. ¶ 19,384, No. 5:94CV6 (S.D. Miss. filed Jan. 21, 1994); *United States v. Shawmut Mortgage Co.*, Fair Housing-Fair Lending Rptr. ¶ 19,383, No. 3:93 CV-2453 (AVC) (D.Conn. filed Dec. 13, 1993).

75. See *Decatur* Compl. ¶ 14; *Blackpipe* Compl. ¶¶ 7-8, 13; *Chevy Chase* Compl. ¶¶ 11, 16; *Albank* Compl. ¶¶ 8, 14, 16-18.

76. See *Decatur* Compl. ¶¶ 10, 13; *Chevy Chase* Compl. ¶¶ 17, 18c; *Blackpipe* Compl. ¶ 13.

77. See *Decatur* Compl. ¶ { }; *Blackpipe* Compl. ¶ { }; *Shawmut* Compl. ¶ { }; *Northern Trust* Compl. ¶ { }; *Doña Ana* Compl. ¶ { }.

78. See *Northern Trust* Compl. ¶¶ 13-15; *Decatur* Compl. ¶ 17; *Blackpipe* Compl. ¶ 12.

79. See *Huntington* Compl. ¶¶ 6-9; *Fleet* Compl. ¶¶ 6-7, 9; *Bank of Gordon* Compl. ¶¶ 7-8.

80. See Steve Cocheo, *Fair Lending Won't Go Away*, ABA BANKING J., Jan., 1995, at 26; Barbara Ellis & Leonard Bernstein, *DOJ to Mortgage Lenders: Monitor Branches for Fair Lending*, INSIDE FAIR LENDING, Nov. 1996, at 6; *Justice Department Explains Fair Lending Enforcement Program*, 14 BANKING POL'Y REP., Mar. 20, 1995, at 7; William J. Sweet, Jr., *Fair Lending Pressures Spread to Regulations and Private Litigation*, 14 BANKING POL'Y REP., Feb. 6, 1995, at 2; Douglas, *supra* note 51; Robert M. Garsson, *Capital Account: Justice Dept.'s Firm Grip on Banking Industry Appears to be Loosening*, AM. BANKER, Oct. 28, 1994, at 3; Saul Hansell, *Stretching the Borders*, N.Y. TIMES, Aug. 25, 1994, at D1; Robert D. Hershey, Jr., *Wider Attack on Loan Bias Seen in Accord With S. & L.*, N.Y. TIMES, Aug. 23, 1994, at D1; Robyn Meredith, *Bank and Thrift Groups Ask U.S. to Spell Out Fair-Lending Policy*, AM. BANKER, Nov. 16, 1994, at 3; Christopher Rhoads, *Community Bankers Worried Over Justice Dept. Bias Push*, AM. BANKER, Oct. 31, 1994, at 1; Jaret Seiberg, *Huntington's Loan Bias Settlement With Justice Department Stirs Debate*, AM. BANKER, Oct. 25, 1995, at 1; Jaret Seiberg, *Chief Departs with a Legacy of Deterring Loan Bias*, AM. BANKER, Jan. 21, 1997, at 4; Jaret Seiberg, *Settlement of Bias Case Against California Lender Criticized for Vagueness*, AM. BANKER, Sept. 16, 1996, at 3; Jaret Seiberg, *California Lender Paying \$4M to Settle U.S. Bias Charges*, AM. BANKER, Sept. 6, 1996, at 1; Jaret Seiberg, *When the Justice Dept. Eases Up, Look Out*, AM. BANKER, Jan. 3, 1996, at 4; Jaret Seiberg, *Justice Department Says It Will Focus on Patterns of Bias, Not Single Instances*, AM. BANKER, Feb. 28, 1995, at 2; Jaret Seiberg, *Industry Sees Dangerous Extension of Basis for Discrimination Complaints*, AM. BANKER, Aug. 23, 1994, at 4.

grams,⁸¹ adopt new procedures to eliminate alleged discrimination⁸² and create compensation funds for alleged victims.⁸³

In addition to the DOJ's efforts, the federal banking agencies tightened their enforcement of the CRA and the fair lending laws against banks.⁸⁴ Upon releasing the expanded HMDA data in October 1991, Federal Reserve Governor John LaWare said the federal banking agencies would use the expanded HMDA data as an additional tool to evaluate bank compliance with the CRA and the fair lending laws.⁸⁵ Following this, the OCC targeted 266 banks for investigation whose HMDA data raised questions about their lending records.⁸⁶ Soon after this, the OCC announced that it was beginning to conduct matched-pair tests of the banks it regulated to determine whether they were engaging in discriminatory lending practices.⁸⁷

For the first time, the federal banking agencies began to use their authority to refer potential lending discrimination cases to the DOJ and HUD, many of which became the DOJ complaints and consent

81. See *Chevy Chase* Cons. Dec. §§ I., V.; *Doña Ana* Cons. Dec. §§ IV.8.b.d., V.13, 17; *Vicksburg* Cons. Dec. § VIII.

82. See, e.g., *Decatur* Cons. Dec. § II.E; *Blackpipe* Cons. Dec. § II.D.; *Northern Trust* Cons. Dec. § C; *Doña Ana* Cons. Dec. § III.2-4, 6-8.

83. See, e.g., *Decatur* Cons. Dec. § IV; *Blackpipe* Cons. Dec. § IV.

84. See *supra* note 4. As stated earlier, the federal banking agencies regulate banks only. A large number of conventional home mortgage loans are made by lenders not subject to federal banking agency scrutiny.

85. See Board of Governors of the Federal Reserve System, *Release of 1990 HMDA Data 1* (1991).

86. See *National Banks Need More Work on the HMDA*, NAT'L MORTGAGE NEWS, June 1, 1992, at 8; Schreiber & DeSimone, *supra* note 70; Paulette Thomas, U.S., *Some Bankers Sharply Boost Use of "Testers" to Find Racial Bias in Loans*, WALL ST. J., May 27, 1992, at B6; Paulette Thomas, *U.S. Is Intensifying Inquiry Into Bias In Lending Practices at Banks, Thrifts*, WALL ST. J., May 15, 1992, at A3.

87. See Fair Housing-Fair Lending Rptr. ¶ 12.5 (June 1, 1993). In a matched-pair test, the testing agency sends pairs of undercover "testers," posing as loan applicants, to apply for a loan. Each member of the pair has identical characteristics except for the characteristic that is the subject of the test. For example, if the test is investigating whether a lender is discriminating against African American loan applicants, one tester would be African American and the other would be white. The testing agency would supply each member of the pair with a profile that contained identical credit-related characteristics. By eliminating all differences other than race, the test can determine whether any subsequent differential treatment is the result of race discrimination.

decrees described earlier.⁸⁸ Prior to 1991, they rarely, if ever, used this authority.⁸⁹

The federal banking agencies also changed their procedures for examining banks for fair lending compliance, and in doing so adopted a theory of discrimination more likely to uncover violations. Previously, the agencies examined files of individual minority applicants to see if denials were based on credit-related reasons.⁹⁰ By 1992, they changed their procedures so that they compared the application files of minorities and whites to see if lenders were treating them equally.⁹¹

The federal banking agencies also notified banks about their concerns regarding HMDA data and urged them to review their own data and lending practices for evidence of differential treatment.⁹² In March 1992, the federal banking agencies issued a statement suggesting ways that banks could reduce their rejection rate disparities, including establishing second review procedures for denied applicants, implementing matched-pair testing, offering credit

88. See FEDERAL DEPOSIT INS. CORP., REVISED EXAMINATION PROCEDURES FOR FAIR HOUSING ¶ 5287 (Apr. 1993); *OCC Report Lists Lending Discrimination Referrals to HUD, DOJ*, Fair Housing-Fair Lending Rptr. ¶ 3.7 (Mar. 1, 1996); Claudia Cummins, *Fed Using New Statistical Tool to Detect Bias*, AM. BANKER, June 8, 1994, at 3.

89. See *Discrimination in Home Mortgage Lending: Hearing before the Subcomm. on Consumer and Regulatory Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs*, 101st Cong. 1-119 (1989) (federal banking agencies reported finding few violations of the FHA or ECOA by banks); *Federal Financial Regulators Conducting the HMDA Follow-up Study*, BNA'S BANKING REP., May 18, 1992, at 863, 864 (describing study by Rep. Joseph Kennedy finding one referral to the DOJ in the previous ten years); *HUD to Fund \$1 Million Lending Testing Program*, Fair Housing-Fair Lending Rptr. ¶ 1.2 (July 1, 1992).

90. BNA'S BANKING REP., May 18, 1992, at 863-64 (including Federal Governor Lawrence Lindsey explanations that credit history was the single most commonly cited reason for credit denial of a mortgage loan).

91. See OFFICE OF THE COMPTROLLER OF THE CURRENCY, INTERIM PROCEDURES FOR EXAMINING FOR RACIAL AND ETHNIC DISCRIMINATION IN RESIDENTIAL LENDING, Fair Housing-Fair Lending Rptr. ¶ 5247 (1993); Stephen R. Steinbrick, *Remarks before the Federal Financial Institution Examination Council's Emerging Issues Conference on New Procedures for Examining National Banks for Mortgage Loan Discrimination*, reprinted in 12-2 OCC Q.J. 23 (1993), 1993 OCC Q.J. Lexis 85. See also FEDERAL DEPOSIT INS. CORP., REVISED EXAMINATION PROCEDURES FOR FAIR HOUSING ¶ 5287 (Apr. 1993).

92. See *Statement of Susan F. Krause, Senior Deputy Comptroller for Bank Supervision Policy, Before the House Banking Subcomm. on Housing and Community Dev. and the Subcomm. on Consumer Affairs and Coinage, on Home Mortgage Lending by National Banks*, Washington, D.C., 11-3 OCC Q.J. 49, 54 (1992), 1992 OCC Q.J. Lexis 227.

counseling and examining lending criteria that might have a disparate impact.⁹³

In addition, the federal banking agencies toughened their enforcement of the CRA. From June 30, 1990 to July 1, 1992, they awarded 89 percent of banks a CRA rating of satisfactory or higher, down from 98 percent prior to June 30, 1990.⁹⁴ They also denied several bank expansion applications and commenced enforcement proceedings against banks based on CRA, HMDA and fair lending concerns more frequently than they had prior to 1991.⁹⁵

93. See Glenn B. Canner & Dolores S. Smith, *Expanded the HMDA Data on Residential Lending: One Year Later*, 78 FED. RES. BULL. 801, 813, 815 (1992).

94. HOUSING SUBCOMM. OF THE SENATE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, 102D CONG., REPORT ON THE STATUS OF THE COMMUNITY REINVESTMENT ACT 33-35 (1992) [hereinafter REPORT ON THE STATUS OF THE CRA].

95. Prior to 1991, there are few reported instances of the federal banking agencies denying bank expansion applications on CRA or fair lending grounds or commencing administrative proceedings against banks for violating the fair lending laws. See Richard Marsico, *Fighting Poverty Through Community Empowerment and Economic Development: The Role of the Community Reinvestment and Home Mortgage Disclosure Acts*, 12 N.Y.L. SCH. J. HUM. RTS. 281, 295-96 (1995) (observing that between 1977 and 1989, federal banking agencies denied less than 10 of 50,000 banking applications on CRA grounds); Richard Marsico, *A Guide to Enforcing the Community Reinvestment Act*, 20 FORDHAM URB. L.J. 165, 274 (1993) [hereinafter Marsico, *Enforcing the CRA*] (observing that Federal Reserve denied only one bank expansion application on CRA grounds between 1977 and 1991).

Starting in late 1991, the federal banking agencies denied bank expansion applications on CRA and fair lending grounds and commenced administrative proceedings against banks to enforce the fair lending laws with greater frequency.

The Federal Reserve denied at least seven applications on CRA or fair lending grounds. See Totalbank Corp., 81 FED. RES. BULL. 876 (1995); Johnson Int'l, Inc., 81 FED. RES. BULL. 507 (1995); Shawmut Nat'l Corp., 80 FED. RES. BULL. 47 (1994); Farmers & Merchants Bank of Long Beach, Fed. Res. Press Release (Feb. 9, 1993); First Colonial Bankshares Corp., 79 FED. RES. BULL. 706 (1993); Gore-Bronson Bancorp, Inc., 78 FED. RES. BULL. 784 (1992); First Interstate BancSyst. of Montana, Inc., 77 FED. RES. BULL. 1007 (1991). The Federal Reserve also reached consent decrees in administrative proceedings with at least four banks requiring them to improve their CRA and fair lending records. See Equitable Bank, Fed. Res. Sys., Doc. No. 94-083-WA/RB-SM (1995); First Bank of Berne, Indiana, Fed. Res. Sys., Doc. No. 92-110-WA/RB-SM (1992); Columbus Junction State Bank, Fed. Res. Sys., Doc. No. 92-076-WA/RB-SM (1992); Farmers and Merchants Bank of Long Beach, Fed. Res. Sys., Doc. No. 91-080-B-SM (1991).

The OCC denied at least three applications on CRA grounds. See Application to establish a CBCT branch, Mayde Creek Bank, App. No. 93-SW-06-148, OCC, Dec. (CRA) No. 66 (Dec. 9, 1993); Application to establish a domestic branch facility, National Bank of Commerce, App. No. 92-SW-05-035, OCC, Dec. (CRA) No. 56 (Nov. 20, 1992); Application to merge First City National Bank into First Commercial Bank, App. No. 92-SW-02-045, OCC, Dec. (CRA) No. 55 (Nov. 20, 1992). The OCC also brought several enforcement proceedings. See First Nat'l Bank of Vicksburg, OCC EA No. 94-220, 1994 OCC Enf. Dec. Lexis 271 (Jan. 21, 1994); Davis Nat'l Bank of Mullins, OCC EA No. 94-81, 1994 OCC Enf. Dec. Lexis 113 (Apr. 21, 1994); First

In 1993, the federal banking agencies announced that they intended to strengthen their CRA regulations to focus more on a bank's lending record than its lending efforts.⁹⁶ They issued proposals in 1993 and 1994, and finally announced the amended CRA

Nat'l Bank of Bar Harbor, OCC EA No. 205, 1993 OCC Enf. Dec. Lexis 285 (Aug. 6, 1993); Lake Area Nat'l Bank, OCC EA No. 93-150, 1993 OCC Enf. Dec. Lexis 241 (June 21, 1993); Metrobank of Philadelphia, N.A., OCC EA No. 93-117, 1993 OCC Enf. Dec. Lexis 169 (Mar. 18, 1993); Ka Wah Bank, Ltd., OCC EA No. 93-89, 1993 OCC Enf. Dec. Lexis 141 (Apr. 29, 1993); Metrobank of Philadelphia, N.A., OCC EA No. 93-68, 1993 OCC Enf. Dec. Lexis 120 (Mar. 18, 1993); First Nat'l Bank of Downsville, OCC EA No. 93-65, 1993 OCC Enf. Dec. Lexis 117 (Mar. 22, 1993); First Nat'l Bank of Polk County, OCC EA No. 93-22, 1993 OCC Enf. Dec. Lexis 73 (Feb. 25, 1993); First United Nat'l Bank, OCC EA No. 93-8, 1993 OCC Enf. Dec. Lexis 11 (Jan. 19, 1993); Tupper Lake Nat'l Bank, OCC EA No. 92-848, terminated by OCC EA No. 93-319, 1992 OCC Enf. Dec. Lexis 569 (Apr. 29, 1992); Consumer Nat'l Bank, OCC EA No. 92-760, 1992 OCC Enf. Dec. Lexis 492 (Oct. 28, 1992); Continental Nat'l Bank of Miami, OCC EA No. 92-757, 1992 OCC Enf. Dec. Lexis 490 (Nov. 10, 1992); City Nat'l Bank, OCC EA No. 92-745, 1992 OCC Enf. Dec. Lexis 480 (Nov. 18, 1992); South Branch Valley Nat'l Bank, OCC EA No. 92-731, 1992 OCC Enf. Dec. Lexis 465 (Oct. 7, 1992); First Philson Bank, N.A., OCC EA No. 92-728, 1992 OCC Enf. Dec. Lexis 464 (Oct. 13, 1992); Downingtown Nat'l Bank, OCC EA No. 92-532, 1992 OCC Enf. Dec. Lexis 210 (May 6, 1992); Superior Nat'l Bank, OCC EA No. 92-708, 1992 OCC Enf. Dec. Lexis 182 (Sept. 3, 1992); The Nat'l Republic Bank of Chicago, OCC EA No. 92-710, 1992 OCC Enf. Dec. Lexis 180 (Sept. 22, 1992); Addison Nat'l Bank, OCC EA No. 92-680, 1992 OCC Enf. Dec. Lexis 121 (Aug. 27, 1992); First Nat'l Bank of Brooksville, OCC EA No. 92-674, 1992 OCC Enf. Dec. Lexis 115 (July 15, 1992); First National Bank of Logan, OCC EA No. 673, 1992 OCC Enf. Dec. Lexis 114 (July 7, 1992); Palmer Nat'l Bank, OCC EA No. 92-488, 1992 OCC Enf. Dec. Lexis 38 (Mar. 11, 1992); Vinings Bank and Trust, OCC EA No. 435, 1992 OCC Enf. Dec. Lexis 19 (Jan. 8, 1992).

The FDIC also brought several enforcement proceedings against banks with poor CRA or fair lending records. See *Louisiana Bank Ordered to Reimburse Minority Borrowers*, Fair Housing-Fair Lending Rptr. ¶ 3.2 (Mar. 1, 1995); Sunniland Bank, FDIC 95-13b, 1995 FDIC Enf. Dec. Lexis 1 (Jan. 30, 1995); New England Savings Bank, FDIC 95-156e, 1995 FDIC Enf. Dec. Lexis 368 (July 14, 1995); Bank of Hollandale, FDIC 95-526, 1995 FDIC Enf. Dec. Lexis 155 (May 11, 1995); Bank of Pullman, FDIC 94-146b, 1994 FDIC Enf. Dec. Lexis 399 (Nov. 7, 1994); Pine Banking Corp., FDIC 94-146b, 1994 FDIC Enf. Dec. Lexis 371 (Nov. 18, 1994); First Scotland Bank, FDIC 94-115b, 1994 FDIC Enf. Dec. Lexis 277 (Aug. 29, 1994); American State Bank, FDIC 94-112b, 1994 FDIC Enf. Dec. Lexis 281 (Aug. 26, 1994); First State Bank, FDIC 94-79b, 1994 FDIC Enf. Dec. Lexis 217 (July 12, 1994); Bank of Coffey, FDIC-94-55b, 1994 FDIC Enf. Dec. Lexis 146 (May 27, 1994); Buckner State Bank, FDIC 94-38b, 1994 FDIC Enf. Dec. Lexis 127 (Apr. 6, 1994); Golden Security Thrift and Loan, FDIC 93-187b, 1993 FDIC Enf. Dec. Lexis 688 (Sept. 7, 1993). The FDIC also penalized eight banks for failing to file timely the HMDA reports. See *Fair Housing-Fair Lending Rptr.* ¶ 16.15 (Oct. 1, 1994).

96. Office of the Comptroller of the Currency, FDIC, Board of Governors of the Federal Reserve System, and the Office of Thrift Supervision, *Federal Regulators to Hold Hearings in New York on Community Lending by Financial Institutions*, Joint Release, Aug. 23, 1993, at 2.

regulations in 1995.⁹⁷ The amendments were fully effective as of July 1, 1997.⁹⁸ The new regulations are more demanding than the previous ones, in that they evaluate a bank's CRA record according to its record of lending, investing and providing banking services in low-income communities.⁹⁹ The old regulations placed a greater emphasis than they should have on a bank's efforts to lend, as opposed to its actual lending record.¹⁰⁰

Other federal agencies increased their efforts to enforce the fair lending laws as well. In 1994, a federal interagency task force comprised of nine federal agencies with fair lending law enforcement authority adopted a policy statement on lending discrimination.¹⁰¹ The policy statement describes practices that the agencies believe constitute lending discrimination and the enforcement actions the agencies would take against lenders who violated the law.¹⁰² The policy statement indicates that both the ECOA and the FHA prohibit lenders from engaging in several forms of discrimination, including providing different information and services about credit, discouraging or selectively encouraging credit applicants, refusing to extend credit and using different standards in determining whether to extend credit or varying the terms of credit offered.¹⁰³ The policy statement also indicates that the various agencies would take several actions to enforce the law, including commencing administrative and court enforcement proceedings, seeking civil

97. See 58 Fed. Reg. 67,466 (1993); 59 Fed. Reg. 51,232 (1994); 60 Fed. Reg. 22,156 (1995).

98. See 60 Fed. Reg. 22,156 (1995).

99. Under the new regulations, the CRA record of banks with more than \$250 million in assets is evaluated according to three tests: the lending, investment and service tests. See 12 C.F.R. § 25.21(a)(1) (1999) (citing only the OCC's CRA regulations). The result of the lending test has twice the weight of the other tests in assigning a performance rating to a bank. See 60 Fed. Reg. 22,156, 22,168-70 (1995). Banks with less than \$250 million in assets are evaluated according to their loan-to-deposit ratio, percentage of loans in assessment area, lending to borrowers at different income levels, lending to small businesses and farms and geographic distribution of loans. See 12 C.F.R. § 25.26(a)(1)-(5) (1999). Wholesale banks that do not serve retail customers are evaluated according to their community development lending, investment and service record. See 12 C.F.R. § 25.25(c) (1999).

100. REPORT ON THE STATUS OF THE CRA, *supra* note 94, at 61; 60 Fed. Reg. 22,156, 22,157 (1995); Marsico, *Enforcing the CRA*, *supra* note 95, at 200-11; *Former OCC Official: Some CRA Assessment Categories "More Equal than Others," Fair Housing-Fair Lending Rptr.* ¶ 7.2 (Jan. 1, 1991).

101. See Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266 (1994) [hereinafter Policy Statement]. The task force was composed of representatives of the DOJ, OCC, OTS, Federal Reserve, FDIC, Federal Housing Finance Board, FTC, National Credit Union Administration and HUD.

102. See *id.* at 18,267.

103. See *id.* at 18,268.

money penalties, damages and credit extensions for victims and requesting injunctive relief.¹⁰⁴

The Secretary of HUD, who has the authority to enforce the FHA on its own initiative by filing an administrative complaint with HUD,¹⁰⁵ used this authority to enforce the FHA against non-bank mortgage lenders more aggressively. In 1994, HUD signed a "best practices" agreement with the Mortgage Bankers Association, the trade organization that represents non-bank mortgage lenders, outlining "best" lending practices for such lenders to undertake to prevent or eliminate lending discrimination.¹⁰⁶ By November 1997, HUD had signed individual "best practices" agreements with 114 mortgage lenders.¹⁰⁷ HUD also reached consent decrees with several home mortgage lenders in cases involving allegations of lending discrimination, including at least two agreements to lend more than \$1 billion to minority borrowers.¹⁰⁸

Several states and municipalities also began initiatives to create or enforce their own versions of the CRA and the FHA more strictly.¹⁰⁹ In New York, the New York City Banking Commission tightened its rules for designating banks eligible to provide banking services to the City by requiring them to achieve a higher level of compliance with New York State's CRA and by assigning weights to the various evaluative criteria, assigning the highest weight to the bank's community lending programs.¹¹⁰ The New York State

104. See *id.* at 18,272-73.

105. See 24 U.S.C. §§ 3610, 3612 (1999).

106. Mortgage Bankers Ass'n of Am. and the U.S. Dept. of Housing and Urban Dev., Fair Lending — Best Practices Master Agreement, Sept. 14, 1994; *MBA, HUD Reach New Agreement On New 'Best Practices' Pact*, INSIDE FAIR LENDING, Nov. 1997, at 3; *MBA, HUD Sign New Pact on Fair Lending, Best Practices*, INSIDE FAIR LENDING, Jan. 1998, at 13.

107. *MBA, HUD Near Agreement on "Best Practices" Pact*, INSIDE FAIR LENDING, Nov. 1997, at 3.

108. See Michael Janofsky, *Texas Lenders Pledge \$1.4 Billion in Housing Case*, N.Y. TIMES, March 10, 1998, at A13; Snigdha Prakash, *Accubanc in \$2B Settlement of Fair Lending Charges*, AM. BANKER, April 6, 1998, at 2; Warren W. Traiger, *New Fair Lending Initiatives*, REV. BANKING AND FIN. SERVICES, Mar. 4, 1998, at 51; Jaret Seiberg, *Lender Assails Implication it Broke Bias Law*, AM. BANKER, Jan. 20, 1999, at 1.

109. See Ellen Braitman, *6 N.Y. Banks Pass City's Account As Burden*, AM. BANKER, June 1, 1992, at 6; Teresa Carson, *California May Join States Mandating Deep Disclosure*, AM. BANKER, June 8, 1992, at 11; Teresa Carson, *L.A. May Seek Bias Data Before Placing City Deposits*, AM. BANKER, Nov. 12, 1991, at 8; Jeffrey Marshall, *City Deposits - CRA Weapon*, U. S. BANKER, Apr. 1991, at 18; Rick Del Vecchio, *Oakland Urges Banks to Invest*, SAN FRAN. CHRON., May 19, 1992, at A12; Phil Roosevelt, *N.J. Prods Banks on Lending Bias*, AM. BANKER, May 18, 1992, at 6.

110. THE CITY OF NEW YORK BANKING COMMISSION, AMENDMENT TO THE RULES RELATING TO REQUIREMENTS FOR DESIGNATION OF DEPOSITORY RULES BY THE

Superintendent of Banks sent a letter to banks urging them to adopt more flexible lending standards for low-income borrowers, publicize their willingness to make loans in low-income and minority communities and provide credit counseling.¹¹¹ Subsequently, the Superintendent proposed regulations that would have strengthened New York State's CRA law by requiring banks to devote at least fifteen percent of their assets to lending, investments and other services for low-income communities.¹¹² After New York State issued its proposal, the federal banking agencies commenced their CRA amendment process, and New York State held its proposal in abeyance. Eventually, the State adopted CRA regulations that essentially matched the federal CRA regulations.¹¹³ In 1997, the New York State Banking Department settled a lending discrimination case against Roslyn Savings Bank for \$3 million.¹¹⁴

4. *Lenders' Increased Efforts to Lend to LMI and Minority Individuals and Neighborhoods Resulting from Publicity, Activism and Enforcement*

In response to the public controversy, increased activism and strengthened law enforcement that followed the 1991 HMDA data disclosures, lenders took several steps to increase their conventional home mortgage lending to low-income and minority borrowers and communities.¹¹⁵ These steps included adopting new

BANKING COMMISSION (1992). See Braitman, *supra* note 109; Alan C. Emdin & Warren W. Traiger, *New York City's Bank Regulations*, N.Y. L.J., Apr. 22, 1992, at 1.

111. See Andree Brooks, *Removing Barriers to Loans*, N.Y. TIMES, Apr. 5, 1992, § 10, at 5; Paulette Thomas, *Federal Data Detail Pervasive Racial Gap in Mortgage Lending*, WALL ST. J., Mar. 31, 1992, at A1.

112. See NEW YORK STATE BANKING DEP'T, PROPOSED CRA REGULATIONS (1993); Thomas J. Lueck, *Banking Department Proposes Changes in Rating Rules*, N.Y. TIMES, Sept. 10, 1992, at B3; Warren W. Traiger, *New York State's CRA Plan*, N.Y. L.J., Dec. 21, 1992, at 1.

113. See Warren W. Traiger, *New York Adopts Community Reinvestment Act Rules*, N.Y. L.J., Dec. 5, 1997, at 1. New York's CRA regulations are codified at Part 76 of the General Regulations of the Banking Board.

114. See John T. McQuiston, *Loan Rate Discrimination Case is Settled by Long Island Bank*, N.Y. TIMES, Feb. 18, 1998, at B7; *Governor Pataki Announces Historic \$3 Million Settlement With Roslyn Savings Bank on Fair Lending Laws* (visited Oct. 15, 1999) <<http://www.banking.state.ny.us/prfeb17.htm>>.

115. See Canner & Smith, *supra* note 93, at 817-18; J. Linn Allen, *Banks, Activists Tailor Loans to Communities*, CHIC. TRIB., Sept. 1, 1992, at 1; Bill Atkinson, *ABA Admits Bias by Home Lenders*, AM. BANKER, May 22, 1992, at 1; Andree Brooks, *Mortgage Outreach Efforts*, N.Y. TIMES, Oct. 30, 1994, § 9, at 5; Brooks, *supra* note 111; Claudia Cummins, *Riegle: Congress Will Crack Down On Loan Bias if Regulators Don't*, AM. BANKER, Oct. 29, 1992, at 1; Charles H. Grice, *The Challenge of Lending Disparities*, AM. BANKER, Oct. 24, 1991, at 4; Cocheo, *supra* note 70; Timothy R. Dougherty, *Closing the Gap: Stung by Charges of Bias Against Minorities, Lenders*

lending programs designed to make loans to low-income persons,¹¹⁶ implementing new lending procedures such as a second review of rejected loan applications,¹¹⁷ examining and changing loan underwriting criteria,¹¹⁸ creating lending consortia with other banks,¹¹⁹ increasing outreach to minority and low-income communities¹²⁰ and working with community groups to design credit counseling programs to assist low-income home buyers to qualify for

are Trying to do Right Thing, NEWSDAY, Jan. 30, 1993, at 30; Joanne Johnson, *Mortgage Lenders Re-Examining Their Methods*, HARTFORD COURANT, Nov. 17, 1991, at C1; Albert R. Karr, *Loan-Denial Rate is Still High for Blacks*, WALL ST. J., Dec. 21, 1993, at A2; Edward Kulkosky, *Low-Income Lending Tips: Use Local Groups*, AM. BANKER, Feb. 22, 1995, at 11; Paulette Thomas, *Persistent Gap*, WALL ST. J., Nov. 30, 1992, at A1; *U.S. Probes Bank Records for Race Bias*, WALL ST. J., May 19, 1992, at A2; Thomas, *supra* note 86; Heather Timmons, *Improving Minority Lending a Hands-On Proposition*, AM. BANKER, Sept. 17, 1996, at 1; John R. Wilke, *Home Loans to Blacks, Hispanics Soared in '94*, WALL ST. J., July 19, 1995, at A2.

Theorists who argue that disclosure rules such as the SEC's corporate disclosure rules help to create and enforce norms suggest that publicity about the disclosed information is crucial because it alerts affected individuals that the norms exist and are important and helps affected individuals identify actors who are not following the norm, allowing affected individuals to take appropriate action. See Fanto, *supra* note 8, at 24. For a discussion of the role of publicity in norm creation and enforcement, see Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 362-64, 388, 399 (1997). In the case of the disclosure of expanded HMDA data, theory about publicity would mean that banks responded to the negative publicity and expanded enforcement efforts following the disclosure of expanded HMDA data in order to comply with the norm expressed by the 1989 amendments to the HMDA – that they should lend to the subject communities – because they were embarrassed and worried about the consequences of violating this norm following disclosure that they were doing so.

116. See Glenn B. Canner & Wayne Passman, *Residential Lending to Low-Income and Minority Families: Evidence from the 1992 the HMDA Data*, 80 FED. RES. BULL. 79, 87 (1994); Allen, *supra* note 115; Keith Bradsher, *Minority Home Loans Rise, But Many Are Still Rejected*, N.Y. TIMES, Oct. 27, 1994, at D1; Brooks, *supra* note 111; Cummins, *supra* note 115; John R. Wilke, *Giving Credit*, WALL ST. J., Feb. 13, 1996, at A1. For example, in 1990, only 70 lenders nationwide participated in Fannie Mae's Community Homebuyer's Program, which provides loans with flexible terms to low-income borrowers. By 1992, 700 lenders participated, and lending increased from \$130 million to \$3.5 billion. See Dougherty, *supra* note 115.

117. See Karr, *supra* note 115; Jaret Seiberg, *Greenspan Says Banks Reaching Out To Minorities*, AM. BANKER, July 20, 1995, at 1.

118. See Canner & Passman, *supra* note 116, at 88; Karr, *supra* note 115. For example, some banks changed their underwriting criteria relating to employment and credit history, the definition of family members and the percentage of a down payment that could be from gifts. See Brooks, *supra* note 111.

119. See Canner & Smith, *supra* note 93, at 817-18; *New York Banks Form Mortgage Coalition*, NEWS RELEASE, May 11, 1992.

120. See Canner & Smith, *supra* note 93, at 817-18; Dougherty, *supra* note 115; Seiberg, *supra* note 117.

loans.¹²¹ In New York, for example, Chemical Bank established a \$10 million home mortgage loan pool for borrowers who did not satisfy traditional loan criteria.¹²² Several lenders combined to create the New York Mortgage Coalition, a consortium that offered loan counseling and a second review of rejected loan applications by all banks in the consortium.¹²³ This coalition made 191 loans in 1993.¹²⁴

Thus, the extent and timing of the increase in the subject communities' market share of applications and loans, the consistency of local results with national results and the widespread public outcry over the first data disclosure, followed by increased activism, government enforcement and efforts by lenders to increase their lending in the subject communities, demonstrate the allocative impact of the HMDA.

B. Discrimination in the Conventional Home Mortgage Lending Market

As discussed above, denial rate ratios have been consistently high in the subject communities.¹²⁵ This trend leads to an inquiry about whether lenders have been discriminating in the conventional home mortgage loan market in the New York metropolitan area, even in spite of the allocated effort of the expanded HMDA disclosure. While the high denial rate ratios are consistent with discrimination, they alone cannot prove conclusively that there is discrimination in the conventional home mortgage lending market. Other data exists that evidence lending discrimination, including lenders' failure to report the race of borrowers on a high percentage of loans, a relatively high percentage of minority applicants whom lenders apparently discouraged from pursuing their loan applications and lenders' use of evaluative criteria that have a disparate impact based on race.¹²⁶ This data, along with the consistently high denial rate ratios, suggest the need for a comprehensive study

121. See Canner & Smith, *supra* note 93, at 817-18; Brooks, *supra* note 111; Dougherty, *supra* note 115; Hansell, *supra* note 70; Karr, *supra* note 115; Timmons, *supra* note 115.

122. See Dougherty, *supra* note 115.

123. See Christine Dugas, *Lenders Organize to Right Wrong*, *NEWSDAY*, Aug. 15, 1994, at 6.

124. See *id.*

125. See *supra* Part I.C.

126. As described more fully *infra* at note 153, use of a lending criterion that has a disparate impact based on race is not illegal as long as it fulfills a business purpose and there is not an alternative criterion that serves the same purpose but does not have a disparate impact.

of discrimination in the New York City metropolitan area conventional home mortgage market by the federal and state governmental agencies with access to the data and authority over lenders.

1. Denial Rate Ratios in the New York Metropolitan Area

In 1997, denial rate ratios in the New York metropolitan area were high for African Americans (2.2), Latinos (1.7) and predominantly minority neighborhoods (2.0).¹²⁷ A Chi-Square test,¹²⁸ based on this HMDA data, indicates that the chance that any of these denial rate ratios is explicable other than by race is less than .1 percent.¹²⁹ The results of this Chi-Square test do not prove discrimination because causality is not tested and because of the

127. Although denial rate ratios were also high for LMI applicants and LMI neighborhoods, this study does not use this as evidence of discrimination against these communities because differences in income may explain differences in denial rates, while differences in race do not.

128. The Chi-Square test is a statistical method used where more than one variable has been collected as part of a sample survey and the variables are in a categorical form (when numbers are used as symbols to stand for individual characteristics of the category chosen). The data is then put into a contingency table. The numbers in the table are the actual numbers of individuals that fit the description. The test statistic used is $\chi^2 = \sum(O - E)^2/E$. "O" is the actual observed value in each case. "E" is the expected value in that same cell. The expected value is the product of the total number in its row times the total number in its column divided by the grand total of the entire table. See JAMES BROOK, A LAWYER'S GUIDE TO PROBABILITY AND STATISTICS 199-206 (1990) (describing how to conduct the Chi-Square test).

129. The Chi-square test results are based on the following data for 1997:

African-Americans/Whites			
	Approvals	Denials	Total
African-Americans	5,923	2,249	8,172
Whites	33,944	4,615	38,559
Total	39,867	6,864	46,731

Latinos/Whites			
	Approvals	Denials	Total
Latinos	4,320	1,130	5,450
Whites	33,944	4,615	38,559
Total	38,264	5,745	44,007

Predominantly Minority/Predominantly White Neighborhoods			
	Approvals	Denials	Total
0-20% Minority	33,778	4,668	38,446
80-100% minority	6,268	2,292	8,560
Total	40,046	6,960	47,006

See *supra* note 30 (containing the source of this data).

HMDA's limitations, but the Chi-Square test results do show a strong association between race and the outcome of a lending decision that merits further study.¹³⁰

Denial rate ratios in the New York metropolitan area in 1997 were also high when controlling for the income of the applicant or the neighborhood, as Table Seven shows.

TABLE SEVEN¹³¹

	Denial Rate Ratio
LMI African American Appl./LMI White Appl.	1.9
MI African American Appl./MI White Appl.	1.8
UI African American Appl./UI White Appl.	2.2
LMI Latino Appl./LMI White Appl.	1.4
MI Latino Appl./MI White Appl.	1.3
UI Latino Appl./UI White Appl.	1.7
LMI Minority Neighborhood/LMI White Neighborhood	1.4
MI Minority Neighborhood/MI White Neighborhood	1.5
UI Minority Neighborhood/UI White Neighborhood	2.2

In 1997, the denial rate ratios for African Americans to white applicants at the LMI, MI and UI levels stood at 1.9, 1.8 and 2.2, respectively. A Chi-Square test on these HMDA data indicates that there is less than a .1 percent chance that no link existed between status as an African American person and the decision on a lending application at each of these three income levels.¹³² The corresponding rates for Latinos were 1.4, 1.3 and 1.7. A Chi-Square test indicates that the chance that race was not related to a decision on LMI and MI Latino applicants is between one and five percent, and less than .1 percent for UI Latino applicants.¹³³ By

130. See BROOK, *supra* note 128, at 199-200. For a discussion of the HMDA's limitations, see text accompanying notes 135-137 *infra*.

131. See *supra* note 30 (containing the source of this data).

132. The data that these results are based on are as follows for 1997 in MSA 5600:

	Approvals	Denials	Total
LMI African-American	870	623	1,493
LMI White	1,955	532	2,487
Total	2,825	1,155	3,980
MI African-American	1,682	604	2,286
MI White	5,215	874	6,089
Total	6,897	1,478	8,375
UI African-American	2,920	880	3,800
UI White	24,539	2,787	27,326
Total	27,459	3,667	31,126

See *supra* note 30 (containing the source of this data).

133. The data that these results are based on are as follows for 1997 in MSA 5600:

1997, the denial rate ratios for LMI, MI and UI predominantly minority neighborhoods to white neighborhoods at the same income levels were 1.4, 1.5 and 2.2, respectively. A Chi-Square test on these results indicates that the chance that the racial composition of a neighborhood was not related to a lending decision is between five and ten percent for LMI minority neighborhoods, between .1 percent and one percent for MI minority neighborhoods and less than one percent for UI minority neighborhoods.¹³⁴ As previously stated, these Chi-Square tests do not prove discrimination, but they do suggest a strong association between race and a decision on a loan application that merits further study.

2. *The Meaning of High Denial Rate Ratios*

The persistently high denial rate ratios in the New York metropolitan area are consistent with the existence of lending discrimination, although the high denial rate ratios alone do not conclusively prove this discrimination. The HMDA does not require lenders to provide sufficiently detailed information about applicants or the property that is the subject of the loan application to justify a conclusion that a high denial rate ratio is the result of discrimina-

	Approvals	Denials	Total
LMI Latino	546	236	782
LMI White	1,955	532	2,487
Total	2,501	768	3,269
MI Latino	1,191	291	1,482
MI White	5,215	874	6,089
Total	6,406	1,165	7,571
UI Latino	2,281	507	2,788
UI White	24,539	2,787	27,326
Total	26,820	3,294	30,114

See *supra* note 30 (containing the source of this data).

134. The data that these results are based on are as follows for 1997 in MSA 5600:

	Approvals	Denials	Total
LMI Minority	2,887	1,123	4,010
LMI White	186	44	230
Total	3,073	1,167	4,240
MI Minority	2,218	744	2,962
MI White	4,038	780	4,818
Total	6,256	1,524	7,780
UI Minority	1,157	424	1,581
UI White	29,487	3,819	33,306
Total	30,644	4,243	34,887

See *supra* note 30 (containing the source of these data).

tion.¹³⁵ Further, the HMDA does not require lenders to provide information about most of the factors that lenders consider when deciding a loan application, including the applicant's credit and employment history, housing expense-to-income ratio and overall debt-to-income ratio.¹³⁶ The HMDA also does not require lenders to disclose crucial information about the property that is the subject of the loan application, including its appraised value and the loan-to-property value ratio.¹³⁷

Despite the HMDA's limitations, a high denial rate ratio is consistent with discrimination and merits further investigation.¹³⁸ Even when considering complete data, including factors relating to borrower creditworthiness and the value of the collateral, it is possible that differences will remain in denial rates. A good example of this proposition – as well as an example of the sort of study that would be necessary to reach a more definitive conclusion about lending discrimination – is a study three economists from the Federal Reserve Bank of Boston published in 1992 (the “Boston Fed Study”).¹³⁹ According to the Boston Fed Study, in 1990, lenders in Boston denied conventional home mortgage loan applications from African Americans and Latinos 2.7 times more frequently than whites.¹⁴⁰ The Boston Fed Study found that the average minority applicant had weaker financial characteristics than the average white applicant, including higher debt burdens and weaker credit histories.¹⁴¹ To control for these differences, the authors of the Boston Fed Study conducted a multiple regression analysis using twelve variables about borrower qualifications and the property that were relevant to a bank's decision on a loan application.¹⁴²

135. See Cathy Cloud & George Galster, *What do We Know about Racial Discrimination in Mortgage Markets?*, June 1992, at 9; FAIR LENDING ANALYSIS, *supra* note 27.

136. See FAIR LENDING ANALYSIS, *supra* note 27, at 2, 16, 41.

137. See 12 U.S.C. §§ 2801-2810 (1999).

138. See Policy Statement, *supra* note 101, at 18,270 (noting that the HMDA data can provide “red flags” that there is a problem at a particular institution); Clark H. Nielsen, *Regulators Looking for Racial Bias in Lending*, MAG. BANK MGMT., July 1992, at 16 (discussing that the OCC examined lenders for potential discrimination if they rejected minorities twice as frequently as whites); Thomas, *supra* note 86 (discussing that the OCC reviewed banks with denial rate ratios of two or higher).

139. ALICIA H. MUNNELL ET AL., MORTGAGE LENDING IN BOSTON: INTERPRETING THE HMDA DATA, Federal Reserve Bank of Boston, Working Paper No. 92-7 (1992) [hereinafter “Boston Fed Study”].

140. See *id.* at 2.

141. See *id.* at 2, 25.

142. The Boston Fed Study identified several variables relevant to a lending decision, including: 1) housing expense-income ratio; 2) total debt payment-income ratio;

Controlling for these factors reduced the denial rate ratio between minorities and whites to 1.6 to 1.¹⁴³ Lenders rejected minority applicants with the same financial characteristics as whites seventeen percent of the time but rejected whites only eleven percent of the time.¹⁴⁴ The Boston Fed Study concluded that this was a statistically significant gap of greater than two standard deviations that was associated with race.¹⁴⁵ Put another way, even accounting for differences in finances, employment and neighborhood characteristics, minorities were sixty percent more likely to be rejected for home mortgage loans than whites, with race serving as the only explanation.¹⁴⁶

3) net wealth; 4) consumer credit history; 5) mortgage credit history; 6) public record of defaults; 7) probability of unemployment; 8) self-employment; 9) loan/appraised property value ratio; 10) private mortgage insurance; 11) neighborhood rent/value ratio; 12) personal characteristics of mortgage applicants; and 13) number of units in the home. The study then assigned a weight to each variable based on its relative importance to the lending decision. When applied to the characteristics of a particular applicant, these variables predict the result of the applicant's application. *See id.* at 24.

143. *See id.* at 2.

144. *See id.*

145. *See id.*

146. *See id.* The Boston Fed Study was and is controversial and has many supporters and detractors. Two critics found that errors in the Boston Fed Study's data tainted the results, and that by using correct data there was no evidence of discrimination. *See* JAMES H. CARR & ISAAC F. MEGBOLUGBE, *THE FEDERAL RESERVE BANK OF BOSTON STUDY ON MORTGAGE LENDING REVISITED* (1993) (reporting on the criticisms of the Boston Fed Study). However, both the Federal National Mortgage Association ("Fannie Mae") and the OCC conducted studies that corrected the data and confirmed the Boston Fed Study's original results. *See id.* at 15-21; *see also* DENNIS GLENNON & MITCHELL STENGEL, *AN EVALUATION OF THE FEDERAL RESERVE BANK OF BOSTON'S STUDY OF RACIAL DISCRIMINATION IN MORTGAGE LENDING 1* (1994).

Economist Mark Zandi concluded that the Boston Fed Study was flawed because it failed to account for the fact that housing prices in Boston declined in 1990 at higher rates in minority neighborhoods than white neighborhoods; it should have included several additional variables, including whether the applicant's credit history met the lender's guidelines, whether the borrower submitted information that could not be verified, the presence of a co-signor, and the loan amount; and it should have analyzed how much the denial rate for minorities would have decreased if lenders treated minorities like whites rather than how the denial rate for whites would have changed if lenders treated whites like minorities. *See* Mark Zandi, *Boston Fed's Bias Study Was Deeply Flawed*, *AM. BANKER*, Aug. 19, 1993, at 13. Studies by Fannie Mae and the OCC rebutted Zandi's conclusions. CARR & MEGBOLUGBE, *supra*, at 15; GLENNON & STENGEL, *supra*, at 17-20. Several economists argued that the Boston Fed Study was wrong to conclude there was discrimination in the Boston area because the default rate in minority census tracts was equal to the default rate in white census tracts, meaning that lenders were appropriately measuring the true default risks of whites and minorities and were not discriminating against minorities. *See* Gary S. Becker, *The Evidence Against Banks Doesn't Prove Bias*, *BUS. WK.*, Apr. 19, 1993, at

3. *Other Data Consistent With Lending Discrimination*

Other data exists that is consistent with the existence of lending discrimination in the New York metropolitan area. First, lenders did not report the race of the applicant on a large percentage of applications.¹⁴⁷ One possible explanation for this is that they may have been masking discriminatory intent by reporting that the race of minority applicants whom they intended to deny was not available.¹⁴⁸ Table Eight shows that in 1997, lenders did not report the race of the applicant on 9.9 percent of applications, and that they failed to do so on 11.2 percent of applications from 1990 to 1997.¹⁴⁹

TABLE EIGHT¹⁵⁰

	1990	1991	1992	1993	1994	1995	1996	1997	1990-1997
Percent of Race Not Available	14.4	14.5	9.6	9.8	10.5	10.5	11.1	9.9	11.2

Second, lenders appear to be discouraging a relatively high percentage of minority applicants and residents of predominantly minority neighborhoods from pursuing loan applications that they

18; Peter Brimelow & Leslie Spencer, *The Hidden Clue*, FORBES, Jan. 4, 1993, at 48. One author of the Boston Fed Study responded to this criticism by stating that a higher proportion of whites who were granted loans were at the higher end of creditworthiness than minority applicants who were granted loans. See Lynn E. Browne, *Default Rates Aren't the Way to Determine Bias in Boston*, BUS. WK., May 24, 1993, at 7. Therefore, whites and minorities had an equal default rate even though minorities were subject to higher (discriminatory) loan standards. Both Fannie Mae and the OCC conducted independent analyses of the Boston Fed's data, and after employing several different studies using different variables, concluded that lenders in Boston discriminated on the basis of race. See CARR & MEGBOLUGBE, *supra*, at 35; GLENNON & STENGEL, *supra*, at 36-37.

147. The HMDA requires lenders to report the race of applicants, if known, but the HMDA does not require applicants to report their race. If an applicant does not do so, the HMDA requires the lender to report the race of the applicant to the extent possible. If it is not possible for the lender to report the race of the applicant, the HMDA permits the lender to report that the race of the applicant is not available. See 12 C.F.R. § 203.4(b) (1999).

148. There may be many other reasons lenders fail to report the race of an applicant that are not related to intent to discriminate. One possible reason is that a large number of applicants who made applications telephonically or electronically declined to report their race and the lender had no way to determine the race of those applicants. Even if innocent, however, at the very best, lenders' failure to report the race of applicants renders it more difficult to identify potentially discriminatory lending patterns.

149. Tables Eight, Nine and Ten start from 1990, the first year expanded the HMDA data was available. This is in contrast to the previous tables that start in 1991 because Tables Eight, Nine and Ten are not attempting to measure lender behavior following the disclosure of expanded HMDA data.

150. See *supra* note 30 (containing the source of this data).

have filed.¹⁵¹ The HMDA requires lenders to report one of five dispositions of an application: 1) loan originated; 2) loan denied; 3) application withdrawn; 4) file closed for incompleteness; and 5) application granted but not accepted by the borrower.¹⁵² Any one of the last three outcomes suggests the possibility that the lender, either implicitly or explicitly, discouraged the applicant from pursuing a loan application.¹⁵³ For example, the lender might have

151. The FHA prohibits housing providers from discouraging individuals from pursuing housing without explicitly rejecting them. See ROBERT SCHWEMM, HOUSING DISCRIMINATION LAW § 13.2, at 13-3 (Release No. 1, 1991). Professor Schwemm's treatise cites several cases in support of this proposition. See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 207-09 (1972); *Bellwood v. Dwivedi*, 895 F.2d 1521, 1529 (7th Cir. 1990); *Davis v. Mansards*, 597 F. Supp. 334, 343 (N.D. Ind. 1984); *United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 648 (N.D. Cal. 1973). See also 24 C.F.R. §§ 100.65(b)(3), 100.70(d)(3) (1999). Although a search turned up no cases that determined whether the FHA and ECOA prohibit lenders from discouraging an applicant from pursuing a home mortgage loan, the Policy Statement states that the FHA and ECOA prohibit lenders from discouraging an applicant from pursuing a filed application by, for example, providing different information or services regarding any aspect of the lending process. See Policy Statement, *supra* note 101, at 18,628. HUD regulations reflect the Policy Statement. See 24 C.F.R. §§ 100.120(b), 100.130(b)(1) (1999).

152. See 12 C.F.R. pt. 203, App. A, § V.B.1 (1999).

153. These outcomes do not include another form of discouragement, known as "pre-screening," by which a lender discourages a potential applicant from filing an application in the first place. See Policy Statement, *supra* note 101, at 18,266 (stating that the FHA and ECOA prohibit discouraging applicants with respect to inquiries about credit). See also Krause Statement, *supra* note 92, at 51 (suggesting that the fact that half of national banks received no applications from African Americans might have been the result of pre-screening); Thomas, *supra* note 86 (observing that OCC examined banks for pre-screening if they received at least 350 home mortgage applications and less than one percent were from minorities). A lender is required to report a "pre-screened" application as a denial under the HMDA. See 12 C.F.R. § 202.5(f) (1999); Board of Governors of the Federal Reserve System, Official Staff Interpretation, Regulation B, 12 C.F.R. § 202.2(f), *supp.* 1, *cmt.* 2 (1999). This rule, however, is subject to many exceptions, and the result is a rather murky requirement. See FDIC, MORTGAGE LOAN PRE-QUALIFICATIONS: APPLICATION OR NOT? (1996). In addition, the ECOA requires lenders to provide loan applicants with a statement of reasons for an "adverse action," which includes a denial of credit or a refusal to grant credit in substantially the terms or amount requested. See 15 U.S.C. §1691(d) (1999).

A search found no cases that concluded that pre-screening violated the ECOA or FHA, but the Policy Statement takes the position that it is illegal. It states that lenders are prohibited from failing to provide information or services about credit, providing different information or services regarding application procedures, or selectively encouraging applicants with respect to inquiries about applications for credit. See Policy Statement, *supra* note 101, at 18, 628. HUD regulations are similar. See 24 C.F.R. §§ 100.120(b), 100.130(b)(1) (1994).

Matched-pair testing of lenders can be an effective way to determine whether they are pre-screening. See Eugene Ludwig, Statement (1993), *reprinted in* OCC Q. REP., 1st Qtr. 1994, at 119. For a more detailed description of matched-pair testing, see *supra*, note 87.

taken too long to make a decision, suggested to the applicant that the loan would be denied or demanded unreasonably extensive documentation. As a result, the borrower might have withdrawn the application, abandoned it or applied elsewhere. While it is impossible to tell from the HMDA data alone whether the lender in fact discouraged an applicant, if lenders disproportionately report these three outcomes for the subject communities, this raises a concern that they might be discriminating by discouraging members of the subject communities from pursuing their loan applications.

Table Nine shows the percentage of applicants that lenders discouraged from applying for loans.¹⁵⁴ It shows the combined percentage of applications that lenders approved but borrowers did not accept, that borrowers withdrew and that lenders closed because incomplete, for African Americans, Latinos and predominantly minority neighborhoods, and their corresponding control groups, and the percentage difference, from 1990 to 1997.

TABLE NINE¹⁵⁵

Community	Percent	Percent Differential
White	11.7	N/A
African American	13.7	+17.1
Latino	13.6	+16.2
Race Comp. <20% Min.	12.6	N/A
Race Comp. >80% Min.	17.7	+40.5

Lenders discouraged applicants from minority neighborhoods 40.5 percent more frequently than they discouraged residents of white neighborhoods. There was also a pronounced difference in the experiences of African Americans and white applicants, as lenders discouraged African American applicants 17.1 percent more frequently than whites. The difference in discouraged Latino and white applicants was similar, at 16.2 percent. A Chi-Square test indicates that there is less than a .1 percent chance that race

In one series of tests conducted in Kentucky, the testing agency found that lenders discouraged applicants from applying by falsely stating that they did not take mortgage applications, by referring a minority applicant to get an insured loan at another institution, and by informing minority testers of the rules but not the exceptions. See *HUD Enforcement Efforts Target Three New Areas, Mansfield Tells FHA Group*, Fair Housing-Fair Lending Rptr., ¶ 5.1 (Nov. 1, 1990); Brenner & Spayd, *supra* note 53.

154. As described earlier, it is impossible to conclude whether any one of these three results indicates that a lender, in fact, discouraged an applicant. It is only possible that the lender discouraged an applicant. As shorthand, however, this study refers to applicants whose application resulted in one of these three results as “discouraged” applicants.

155. See *supra* note 30 (containing the source of this data).

did not play a role in the results for African Americans and predominantly minority neighborhoods and between a .1 and one percent chance that race did not play a role in the results for Latinos; these results are qualified by the limits of the HMDA data and Chi-Square testing as described earlier.¹⁵⁶

Finally, lenders appear to be using several criteria for evaluating loan applications that have a disparate impact on Latinos, African Americans or both.¹⁵⁷ The HMDA permits, but does not require,

156. These Chi-Square test results are based on the following data:

Predominantly Minority Neighborhoods			
	Discouraged	Processed	Total
≥80% Minority	8,791	40,852	49,643
<20% Minority	28,576	198,855	227,431
Total	37,367	239,707	277,074

African-American Applicants			
	Discouraged	Processed	Total
African-American	7,136	45,097	52,233
White	26,022	196,842	222,864
Total	33,158	241,939	275,097

Latino Applicants			
	Discouraged	Processed	Total
Latino	4,062	25,897	29,959
White	26,022	196,842	222,864
Total	30,084	222,739	252,823

See *supra* note 30 (containing the source of this data).

157. Under the disparate impact theory of discrimination, if a lender uses criteria that have a significant disproportionately negative effect on minorities, this would violate the FHA unless the lender could justify the use of that criterion as serving a legitimate business purpose and not replaceable by an alternative criterion that served the same purpose but did not have the same effect. See Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J., 409, 458-95 (1998). The U.S. Supreme Court has not determined whether the FHA prohibits housing providers from employing housing eligibility criteria that have a disparate impact, but the lower courts have generally ruled that the FHA does do so. See SCHWEMM, *supra* note 151, ¶ 10.4, at 10-21 to 10-22 (Release No. 7, 1997). Professor Schwemm's treatise cites several cases as among those finding that the FHA prohibits practices that have a discriminatory effect. See *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 250-51 (9th Cir. 1997); *Larkin v. Michigan Dep't of Soc. Servs.*, 89 F.3d 285, 289 (6th Cir. 1996); *Mountain Side Mobile Estates Partnership v. HUD*, 56 F.3d 1243, 1250-51 (10th Cir. 1995); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995); *Jackson v. Okaloosa County*, 21 F.3d 1531, 1543 (11th Cir. 1994); *Orange Lake Assocs. v. Kirkpatrick*, 21 F.3d 1214, 1227-28 (2d Cir. 1994); *Casa Marie, Inc. v. Superior Ct. of P.R.*, 988 F.2d 252, 269 n.20 (1st Cir. 1993); *Doe v. City of Butler*, 892 F.2d 315,

lenders to report the reasons they denied a loan.¹⁵⁸ A lender can report eight specific reasons for denying a loan.¹⁵⁹ If a lender denies loans to minorities at a disproportionately higher rate than whites based on the failure to satisfy a particular criterion, that criterion has a disparate impact on minorities. In order to pass scrutiny under the fair lending laws, the lender would have to justify its use of this criterion on the basis that the criterion had a legitimate business purpose and that there were no alternative criteria that would serve the same business purpose but would not have a disparate impact.¹⁶⁰ Table Ten depicts the percentage of applicants that lenders rejected for each reason by race of the applicant.

TABLE TEN¹⁶¹

	Debt-To- Income Ratio	Employment History	Credit History	Collateral	Insufficient Cash	Unverifiable Information	Application Incomplete	Mortgage Insurance Denied
African American	19.7	2.6	25.6	9.1	6.7	2.7	4.4	1.2
Latino	18.0	1.6	18.9	11.8	7.5	3.7	5.2	1.3
White	20.0	3.2	15.4	17.4	5.5	3.0	6.5	0.9

323 (3d Cir. 1989); *Edwards v. Johnston County Health Dep't*, 885 F.2d 1215, 1223 (4th Cir. 1989); *Summerchase Ltd. Partnership I v. City of Gonzales*, 970 F. Supp. 522, 527-31 (M.D. La. 1997); *Bronson v. Crestwood Lake Section 1 Holding Corp.*, 724 F. Supp. 148, 153-54 (S.D.N.Y. 1989). See SCHWEMM, *supra* note 151, § 10.4(1), at 10-28 & n. 113.1. Similarly, whether the disparate impact theory of discrimination applies to lending under the FHA has not been resolved. At least one court of appeals has held that the FHA does prohibit lenders from employing practices that have a disparate impact based on race. See *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996). District courts have agreed. See *Steptoe v. Savings of Am.*, 800 F. Supp. 1542, 1546-47 (N.D. Ohio 1992); *Old West End Ass'n v. Buckeye Fed. Sav. & Loan*, 675 F. Supp. 1100, 1105-06 (N.D. Ohio 1987); *Thomas v. First Fed. Sav. Bank of Ind.*, 653 F. Supp. 1330, 1340 (N.D. Ind. 1987). The courts have made similar rulings regarding the ECOA. See *Miller v. American Express Co.*, 688 F.2d 1235 (9th Cir. 1982); *Cherry v. Amoco Oil Co.*, 490 F. Supp. 1026 (N.D. Ga. 1980). A federal task force concluded that the disparate impact theory of discrimination applies to lending. See *Policy Statement*, *supra* note 101, at 18,268-70.

It is also possible that, rather than applying these criteria equally, resulting in a disparate impact, lenders apply them differently based on race. One study concluded that lenders in Botson held marginal African American and Latino applicants to higher standards regarding credit history and debt-to-income ratios than marginal white applicants. WILLIAM C. HUNTER & MARYBETH WALKER, *THE CULTURAL AFFINITY HYPOTHESIS AND MORTGAGE LENDING DISCRIMINATION* (1995).

158. See 12 U.S.C. § 2803(h)(5) (1999); 12 C.F.R. § 203.4(c) (1999).

159. See 12 C.F.R. § 203, App. A, § V.F.1 (1999). The reasons are debt-to-income ratio, employment history, credit history, collateral, insufficient cash, unverifiable information, credit application incomplete and mortgage insurance denied.

160. See *Policy Statement*, *supra* note 101, at 18,270; SCHWEMM, *supra* note 151, § 10.4(2)(b), at 10-37; *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 939 (2d Cir. 1988).

161. See *supra* note 30 (containing the source of this data).

Lenders rejected African Americans and Latinos more frequently than whites for credit history, meaning poor credit history or lack of a credit history;¹⁶² insufficient cash for closing costs, fees and reserves; and mortgage insurance denied.¹⁶³ They rejected Latinos more frequently for unverifiable information.

In conclusion, the permanently high denial rate ratios, even when controlling for income, combined with lenders' failure to report the race of borrowers on a high percentage of loans, lenders' discouragement of a high percentage of minority applicants from pursuing their loan applications and lenders' use of evaluative criteria that have a disparate impact based on race are consistent with the existence of discrimination in conventional home mortgage lending in the New York City metropolitan area.

III. THE RELATIONSHIP BETWEEN DIFFERENTIAL TREATMENT AND LENDING

Part II of this study reports what appears to be anomalous results: while the disclosure of expanded HMDA data appeared to influence private lenders' allocation of credit in terms of increasing the market share of applications from and loans to African Americans, Latinos, LMI and predominantly minority neighborhoods, other data is consistent with finding that lenders are discriminating on the basis of race. HMDA data, however, offer an explanation for this: changes in the market share of applications were more strongly correlated than changes in denial rate ratios with changes in the market share of loans. In order to demonstrate this, it is necessary to examine the relationship between: 1) denial rate ratios and lending; 2) applications and lending; and 3) denial rate ratios, applications and lending.

162. See FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL, HOME MORTGAGE LENDING AND EQUAL TREATMENT (1992). In order to alleviate any disparate impact from this criterion, the Federal Financial Institutions Examination Council ("FFIEC") suggested to lenders that rather than focus on credit history as defined in a credit report, they should focus on evidence of a borrower's ability and willingness to repay a loan, including a record of regular payments for utilities and rent. See *id.* at 7, 9.

163. See *id.* at 15-16 (suggesting that lenders may want to use private mortgage insurance ("PMI") providers that are willing to employ alternate criteria in order to ensure that PMI denials do not have a disparate impact).

A. Denial Rate Ratios and Lending

One hypothesis about the relationship between denial rate ratios and lending is that a decrease in the denial rate ratio¹⁶⁴ for a subject community will be associated with an increase in that community's market share of loans, and vice versa. The basis for this hypothesis is that if lenders deny proportionately fewer loans to one community than another, that community's share of loans relative to the other community should increase, and vice versa. Table Eleven depicts the change from the prior year in the denial rate ratio ("D") and the market share of loans ("L") for each of the five subject communities in each year from 1991 to 1997.

TABLE ELEVEN¹⁶⁵

	African Americans		Latinos		LMI Persons		Minority Neighborhoods		LMI Neighborhoods	
	D	L	D	L	D	L	D	L	D	L
1992	0.0	(1.1)	(21.1)	12.7	26.7	(9.5)	0.0	32.4	(5.6)	(22.5)
1993	(10.5)	20.7	6.7	(4.8)	10.5	19.3	(10.5)	1.0	(5.9)	(3.8)
1994	11.8	20.7	0.0	28.8	19.0	(19.1)	11.8	13.1	12.5	6.6
1995	(5.3)	10.4	0.0	6.6	12.0	(30.9)	(10.5)	8.0	(16.7)	6.2
1996	16.7	(17.6)	6.3	(3.7)	(10.7)	(7.9)	17.6	(16.5)	26.7	(15.1)
1997	4.8	(15.6)	0.0	(2.6)	(8.0)	111.4	0.0	0.9	(5.3)	8.2

According to Table Eleven, changes in the denial rate ratio are correlated with changes in the market share of loans in seventeen of twenty-four observations, excluding the six observations in which the denial rate ratio did not change.

B. Applications and Lending

One hypothesis about the relationship between applications and lending is that when the market share of applications in a community increases, its market share of loans will increase as well. The basis for this hypothesis is the assumption that, all things being equal, a community that files relatively more applications will receive relatively more loans. Table Twelve depicts the change from the prior year in market share of applications ("A") and the market share of loans ("L") for each of the subject communities.

164. As a reminder, the denial rate ratio is the denial rate for a subject community divided by the denial rate for a control group. A high denial rate ratio indicates that the bank is rejecting applications from a subject community more frequently than the control group. An increase in the denial rate ratio from one year to the next indicates that the differential rejection rate is increasing, while a decrease indicates that the differential rejection rate is decreasing.

165. See *supra* Tables Two and Three (containing the source of this data).

TABLE TWELVE¹⁶⁶

	African Americans		Latinos		LMI Individuals		Minority Neighborhoods		LMI Neighborhoods	
	A	L	A	L	A	L	A	L	A	L
1992	(1.8)	(1.1)	3.2	12.7	(1.4)	(9.5)	26.9	32.4	(26.1)	(22.5)
1993	13.1	20.7	0.0	(4.8)	19.1	19.3	(0.9)	1.0	(4.5)	(3.8)
1994	18.2	20.7	20.3	28.8	(17.3)	(19.1)	11.6	13.1	5.9	6.6
1995	11.9	10.4	11.7	6.6	(29.9)	(30.9)	8.0	8.0	6.7	6.2
1996	(11.3)	(17.6)	(3.5)	(3.7)	0.0	(7.9)	(6.7)	(16.5)	(6.3)	(15.1)
1997	(13.4)	(15.6)	(1.2)	(2.6)	97.9	111.4	5.6	0.9	11.2	8.2

Table Twelve shows that changes in the market share of applications are very strongly associated with increases in the market share of loans. Excluding observations in which the market share of applications did not change, changes in the market share of applications were correlated with changes in the market share of loans in twenty-seven of twenty-eight observations.

C. Applications, Denial Rate Ratios and Lending

The examination of the relationship between denial rate ratios and lending and applications and lending has shown that changes in the market share of applications were correlated more frequently than changes in denial rate ratios with changes in the market share of loans. Not surprisingly, when examining the combined relationship between applications, denial rate ratios and lending, the change in the market share of applications more frequently controlled the change in the market share of loans than the change in the denial rate ratio. Table Thirteen shows the changes in market share of applications ("A"), denial rate ratios ("D") and market share of loans ("L") for each subject community for each year from 1992 to 1997.

TABLE THIRTEEN¹⁶⁷

	African Americans			Latinos			LMI Individuals			Minority Neighborhoods			LMI Neighborhoods		
	A	D	L	A	D	L	A	D	L	A	D	L	A	D	L
1992	(1.8)	0.0	(1.1)	3.2	(21.1)	12.7	(1.4)	26.7	(9.5)	26.9	0.0	32.4	(26.1)	(5.6)	(22.5)
1993	13.1	(10.5)	20.7	0.0	6.7	(4.8)	19.1	10.5	19.3	(0.9)	(10.5)	1.0	(4.5)	(5.9)	(3.8)
1994	18.2	11.8	20.7	20.3	0.0	28.8	(17.3)	19.0	(19.1)	11.6	11.8	13.1	5.9	12.5	6.6
1995	11.9	(5.3)	10.4	11.7	0.0	6.6	(29.9)	12.0	(30.9)	8.0	(10.5)	8.0	6.7	(16.7)	6.2
1996	(11.3)	16.7	(17.6)	(3.5)	6.3	(3.7)	0.0	(10.7)	(7.9)	(6.7)	17.6	(16.5)	(6.3)	26.7	(15.1)
1997	(13.4)	4.8	(15.6)	(1.2)	0.0	(2.6)	97.9	(8.0)	111.4	5.6	0.0	0.9	11.2	(5.3)	8.2

166. See *supra* Tables One and Two (containing the source of this data).

167. See *supra* Tables One, Two and Three (containing the source of this data).

Table Thirteen shows that for the fifteen observations where the change in the market share of loans and the change in the denial rate ratio would suggest the same result in the change in the market share of loans—that is, when the market share of applications increased and the denial rate ratio decreased, and vice versa—the change in the market share of loans was correlated. However, in the seven observations when the change in the market share of applications and denial rate ratio predicted different results, the change in the market share of applications trumped the change in the denial rate ratio, correlating with the market share of loans in six of the seven observations.

D. The Relationship Between Anti-Discrimination Efforts and Efforts to Increase Lending

HMDA data depicted in Tables Eleven, Twelve and Thirteen, in addition to reconciling the apparent inconsistency between the existence of increased lending and discrimination, offer some insights about anti-discrimination efforts, which are generally directed toward reducing denial rate ratios. First, the data shows that it was more likely than not that a reduction in the denial rate ratio would result in an increase in the market share of loans, but this result was by no means guaranteed. Second, a reduction in denial rate ratios combined with an increase in the market share of applications guaranteed an increase in lending. Thus, to be most effective, these data show that anti-discrimination efforts should be combined with efforts to generate more applications.¹⁶⁸ Finally, in fourteen out of twenty-two observations, excluding observations in which the market share of applications or the denial rate ratio did not change, changes in the denial rate ratio were correlated with the scope of the change in lending. That is, more frequently than not, an increase in the denial rate ratio was associated with a smaller increase or a larger decrease in the market share of loans relative to the change in the market share of applications, and a decrease in the denial rate ratio was associated with a larger increase or smaller decrease in the market share of loans relative to the change in the market share of applications.

168. This conclusion contradicts a popular hypothesis that efforts to generate more applications from the subject communities will result in higher denial rate ratios because more—but less-qualified—individuals apply for credit. See LIND, *supra* note 53, at 7-8. In this study, the fifteen increase in the market share of applications were accompanied by only four increases in the denial rate ratio. See Table Thirteen.

CONCLUSION

This study makes three primary conclusions. First, the disclosure of expanded HMDA data in late 1991 had an influence on private lenders' allocation of conventional home mortgage credit in the New York metropolitan area. Following the public controversy about the initial disclosure of expanded HMDA data, increased activism and strengthened government enforcement, the market share of applications from and loans to Africans-Americans, Latinos, LMI applicants and predominantly minority neighborhoods increased from 1991 to 1997. The increase was strongest from 1993 to 1995, and tailed off from 1996 to 1997. LMI neighborhoods, however, did not share in these lending increases.

Second, there is evidence that lenders discriminate against African Americans, Latinos and predominantly minority neighborhoods in the conventional home mortgage loan market. This evidence includes persistently high denial rate ratios between these communities and whites, even when controlling for income, lenders' failure to report the race of applicants on a high percentage of applications, the relatively high percentage of discouraged minority applicants and lenders' use of several lending criteria that have a disparate impact based on race.

Finally, changes in the market share of applications and changes in the denial rate ratio correlated positively with changes in the market share of loans, but the correlation between applications and lending was more powerful than the correlation between denial rates and loans. Changes in denial rate ratios also correlated positively with the scope of the changes in the market share of loans.

These conclusions have several policy implications. First, disclosure of lending data is an effective way to influence lenders' behavior and implement policy. Consequently, to the extent that governmental policy is to influence lenders to make more small business loans to the subject communities, they should impose HMDA-like disclosure requirements for small business lending. Since this study also shows that the effects of the initial disclosure appear to diminish over time, vigilance and regular publication of the data is essential to maintaining this policy goal. In this regard, lenders, the federal banking agencies and community activists in the New York metropolitan area should work together to publish,

publicize and analyze the HMDA data each year. A consortium in Boston has done this since 1995.¹⁶⁹

Second, conventional home mortgage loans are not reaching LMI neighborhoods to the extent they are reaching other subject communities. This article has suggested that the reason for this may be that members of the subject communities who live in LMI neighborhoods are moving into higher income neighborhoods. Even if this is the case, this does not excuse the failure to make more loans in LMI communities. Lenders, government agencies and community activists should focus efforts to expand lending in these communities.

Third, the federal banking agencies and other state and federal government agencies, including the New York State Banking Department and HUD should undertake a comprehensive study of conventional home mortgage lending in the New York metropolitan area to determine whether lenders are discriminating against Latinos, African Americans and predominantly minority neighborhoods. If they lack access to all of the necessary information, they should encourage voluntary disclosure of the data, and if they are not able to secure this, they should issue the necessary regulations or propose the necessary laws. In addition, the government agencies should sponsor a comprehensive set of matched-pair tests of lenders. The government agencies should then conduct a study of lending similar to the Boston Fed Study in 1992.¹⁷⁰ If the study indicates that lenders discriminate, the government agencies should work with lenders and community groups to develop a plan to end the discrimination and compensate for its effects.

Fourth, marketing is a very effective way to increase lending. Lenders should continue to engage in the various techniques for marketing their loans in the subject communities that they developed following the disclosure of expanded HMDA data in 1992.¹⁷¹ Although bank marketing is no longer one of the evaluative criteria under the new CRA regulations, the federal banking agencies

169. See JIM CAMPEN, *CHANGING PATTERNS V: MORTGAGE LENDING TO TRADITIONALLY UNDERSERVED BORROWERS & NEIGHBORHOODS IN GREATER BOSTON, 1990-1997* (1998); CAMPEN, *supra* note 27; JIM CAMPEN, *CHANGING PATTERNS III: MORTGAGE LENDING TO TRADITIONALLY UNDERSERVED BORROWERS AND NEIGHBORHOODS IN GREATER BOSTON, 1990-1995* (Dec. 1996); JIM CAMPEN, *CHANGING PATTERNS: MORTGAGE LENDING IN BOSTON, A 1994 UPDATE* (1995); JIM CAMPEN, *CHANGING PATTERNS: MORTGAGE LENDING IN BOSTON, 1990-1993* (Dec. 1995).

170. See Warren Traiger, *Mortgage Discrimination: Get to the Bottom of It Now*, *AM. BANKER*, Nov. 4, 1997, at 4.

171. See *supra* text accompanying notes 115-124.

should urge banks that have a relatively low market share of loans in the subject communities to increase their marketing efforts in those communities. Community groups should work with banks to provide outreach and marketing in their neighborhoods.

Finally, the federal banking agencies and other government entities with jurisdiction over lending discrimination should continue to expand their efforts to detect and eliminate lending discrimination. Combining these efforts with efforts to generate more applications will create the best opportunity to increase lending in the subject communities.

EPILOGUE – 1998 RESULTS

As this article was being completed, the Federal Reserve issued HMDA data covering lending in 1998. The data does not change the three main conclusions of the article, that the disclosure of expanded HMDA data in late 1991 had an allocative impact, that there is strong evidence of discrimination in the conventional home mortgage lending market and that applications had a stronger impact on changes in the market share of loans than differential treatment of applications, although both were correlated positively with changes in the market share of loans. Nor do the 1998 results require a change in the policy recommendations, although the continued decrease in lending to African Americans and Latinos suggest that there is more urgency to follow the policy recommendations.

SUMMARY OF RESULTS

The market share of applications increased in three of the subject communities and decreased in two.

MARKET SHARE OF APPLICATIONS

	Market Share	Percent Change	Change, 1991-1998
African Americans	11.2	(8.9)	2.8
Latinos	7.4	(9.8)	19.4
LMI persons	11.4	22.3	65.2
Predominantly minority neighborhoods	14.4	8.3	61.8
LMI neighborhoods	10.8	9.1	(9.2)

The market share of loans decreased in the same subject communities – African Americans and Latinos, and increased in the other three subject communities.

MARKET SHARE OF LOANS

	Market Share	Percent Change	Change, 1991-1998
African Americans	9.4	(8.7)	(1.1)
Latinos	6.9	(9.2)	25.5
LMI persons	9.1	(22.9)	44.4
Predominantly minority neighborhoods	10.7	4.9	44.6
LMI neighborhoods	8.4	6.3	(17.6)

Finally, denial rate ratios increased for predominantly minority neighborhood applicants, decreased for African Americans and LMI persons, and remained the same for the remaining two subject communities:

DENIAL RATE RATIOS

	Denial Rate Ratio	Percent Change	Change, 1991-1998
African Americans	2.1	(4.5)	10.5
Latinos	1.7	—	10.5
LMI persons	2.0	(13.0)	33.3
Predominantly minority neighborhoods	1.9	5.0	—
LMI neighborhoods	1.8	—	—

The denial rate ratios also remain high when controlling for applicant or neighborhood income:

<i>LMI</i>	<i>Denial Rate Ratio</i>
African Americans	1.8
Latinos	1.4
Predominantly minority neighborhoods	1.4
<i>MI</i>	<i>Denial Rate Ratio</i>
African Americans	1.7
Latinos	1.5
Predominantly minority neighborhoods	1.5
<i>UI</i>	<i>Denial Rate Ratio</i>
African Americans	2.3
Latinos	1.8
Predominantly minority neighborhoods	1.9

ANALYSIS OF RESULTS

The other indicia of discrimination cited earlier in this article – lenders' failure to report the race of applicants, lenders' discouraging members of the subject communities from applying for loans and lenders' use of criteria that have a disparate impact – continue to point toward discrimination. The percentage of applicants for which lenders did not report race increased significantly from 9.9 percent in 1997 to 14.9 percent in 1998. This was the highest per-

centage of applicants whose race was not reported during the nine years such data has been available. Second, lenders discouraged applicants from the subject communities more frequently than applicants from control communities in 1998 than the average for 1990 to 1997. Lenders discouraged Latinos 1.3 times more frequently and African Americans 1.5 times more frequently than whites, and applicants from minority neighborhoods 1.7 times more frequently as applicants from white neighborhoods. Finally, lenders continued to reject African Americans and Latinos more frequently for credit history and insufficient cash and for debt-to-income ratios.