The Community Reinvestment Act Regulations: Another Attempt to Control Redlining

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THE COMMUNITY REINVESTMENT ACT
REGULATIONS: ANOTHER ATTEMPT
TO CONTROL REDLINING

Refusal of lending institutions to lend or invest in specific geographic areas is commonly referred to as redlining.\(^1\) Instances of redlining are well documented,\(^2\) despite bank allegations that they adequately meet their communities' credit needs. Redlined areas usually contain lower-to-middle-income residents, older homes, and a changing racial composition.\(^3\) Although there is some evidence that redlining is motivated by racial bias,\(^4\) redlined areas are generally considered bad credit risks by those who set a lending institution's economic investment policies.\(^5\) Although most banks

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1. Generally, redlining occurs within a section of the larger area serviced by the bank. Redlining encompasses a variety of practices including the refusal to accept loan applications within a designated area, the refusal to make loans secured by property within a designated area, the refusal to make real estate loans unless secured or guaranteed by mortgage insurance, granting loans with more burdensome terms, or refusing a loan on property older than a certain age. See Renne, Eliminating Redlining by Judicial Action: Are Erasers Available?, 29 VAND. L. REV. 987, 990 (1976). See also Comment, The Legality of Redlining Under the Civil Rights Laws, 25 AM. U.L. REV. 463, 465 (1976).

2. Studies documenting the existence of redlining include the following: Center for Applied Urban Research, The University of Nebraska at Omaha, Housing and Business Investment in Nebraska's Non-Metropolitan Communities and Declining Urban Neighborhoods (1976); Center for New Corporate Priorities, Where the Money Is: Mortgage Lending, Los Angeles County (1975); D.C. Public Interest Research Group, Redlining: Mortgage Disinvestment in the District of Columbia (1975); Urban-Suburban Investment Study Group, Center for Urban Studies of the University of Illinois, Redlining and Disinvestment as a Discriminatory Practice in Residential Mortgage Loans (1977).

3. See Comment, supra note 1, at 465.

4. See, e.g., The Center for Community Change, The National Urban League, The National Survey of Housing Abandonment (1971). This study indicates that real estate exploitation in black housing caused inflated mortgage prices. Consequently, many black homeowners defaulted. A number of banks experiencing these defaults subsequently refused to lend in racially changing neighborhoods. They based their refusal partially on anticipated frequency of loan default by blacks. Id. at 13-14. See also National Committee Against Discrimination in Housing, Inc., Patterns and Practices of Discrimination in Oakland, California (Feb. 1972) [hereinafter cited as NCADH Study]. This study notes that the federal government, by actively encouraging racial ghettoization in the 1930s and 1940s, established discriminatory lending patterns by its regulated institutions. Id. at 2. See also Office of Equal Opportunity, U.S. Dep't of Housing & Urban Dev., Private Lending Institutions Questionnaire, Initial Report on Returns (April 25, 1972) (unpublished survey of all government supervised lending institutions). Ninety-nine of 582 savings and loan associations studied in 50 cities admitted considering neighborhood racial composition in evaluating loan applications. Id. at 5.

5. See Renne, supra note 1, at 991. Various economic factors contribute to an institution's policy judgment that lower income, racially transitional areas are bad credit risks. First, these areas tend to be older urban neighborhoods. Since older property may require
contend that their reluctance to lend in certain areas is a reaction to urban decay or disinvestment, many other groups maintain that the inability of residents to obtain credit itself has caused deterioration.\(^6\) Regardless of whether it is considered a cause or effect of urban disinvestment, however, redlining inevitably contributes to the further decline of an area.

The federal government, although extensively involved in housing and urban development for nearly fifty years,\(^7\) historically assumed a hands-off policy toward redlining.\(^8\) Thus, civil rights statutes provided the sole vehicle for challenging redlining practices.\(^9\) The existence of such policies,

periodic inspection to determine its continued value as collateral, administrative costs on urban loans are higher. Secondly, there is some evidence that, on occasion, loans to urban residents result in higher default and foreclosure rates than to their suburban counterparts. Thirdly, older or deteriorated urban property is unsatisfactory collateral; a lending institution is less likely to recoup its investment upon default in these areas than in suburban areas with newer homes. See Comment, supra note 1, at 466-68. A bank’s decision not to lend, however, is often based solely on the location of the applicant’s property within a redlined area; the individual merits of the applicant’s property are not even investigated. On the other hand, applications in nonredlined areas will be considered on the creditworthiness of the particular applicant and the appraised value of the particular property sought to be financed. See Renne, supra note 1, at 992.

6. Proponents of the view that redlining is the cause of urban deterioration argue that the process begins when lenders decide not to invest in a fairly healthy community. See, e.g., Urban Suburban Investment Study Group, supra note 2, at 12 (testimony of Frances E. Werner), in which six phases of deterioration are identified: 1) a healthy community exists; 2) the decision by the lender to disinvest; 3) those who are able flee the area; 4) those remaining in the area can obtain only government insured loans or private financing; 5) the prophecy of deterioration is realized; and 6) the area becomes blighted and qualifies for urban renewal. See also D.C. Public Interest Research Group, supra note 2, at 1. Other studies assume that disinvestment occurs much later in the cycle of deterioration. See, e.g., The Center for Community Change, The National Urban League, supra note 4. This study identifies six stages in the process: 1) decline in the area’s socio-economic status; 2) racial or ethnic changes; 3) speculation; 4) declining market conditions; 5) disinvestment; and 6) abandonment. Id. at 3-10.

7. The federal investment of dollars in housing and urban development, totaling hundreds of billions of dollars, is considered by some housing experts as the single greatest force in determining and shaping economic and social growth in metropolitan areas. See M. Sloane, Federal Programs and Equal Housing Opportunity, printed in Subcomm. on Constitutional Rights, Senate Comm. on the Judiciary, Civil Rights, 94th Cong., 2d Sess., 131 (Comm. Print 1976).

8. Prior to 1960, the federal government’s housing policy tolerated, and even encouraged, racial segregation. For example, in the 1930s and 1940s, the FHA Underwriting Manual recommended restrictive covenants that would prevent purchase of properties by members of an area’s minority race. M. Sloane, supra note 7, at 135. In 1948, the Supreme Court found that such covenants were unenforceable by the courts. Shelley v. Kraemer, 334 U.S. 1 (1948). It was not until the 1960s that the federal government actively began to encourage fair housing. M. Sloane, supra note 7, at 142.

9. Discrimination in real estate sales and financing, and in some cases redlining itself, have been challenged under the Civil Rights Act of 1866, § 1, 42 U.S.C. § 1982 (1976); Title VI of the Civil Rights Act of 1964, §§ 601 to 605, 42 U.S.C. §§ 2000d to 2000d-4 (1976); and
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however, has been acknowledged by Congress. More recently, the federal government has sought to eliminate discriminatory lending practices, including redlining, through regulation of lending conditions. However, neither the Equal Credit Opportunity Act (ECOA), which prohibits discrimination in lending, nor the Home Mortgage Disclosure Act, which requires lending institutions to disclose the number and amounts of mortgages granted, has been particularly effective in deterring redlining.


At the Joint Agency Hearings held on the Community Reinvestment Act prior to the promulgation of agency regulations, numerous witnesses presented evidence of existing redlining practices. For example, in a particular one-year period, Williamsburgh Savings Bank, located in Brooklyn, New York, received $932 million from local depositors and granted mortgages in Brooklyn of $35 million. In contrast, a branch office in more affluent Suffolk County collected only $75 million in deposits but lent $243 million in mortgages. Proposed Regulations to the Community Reinvestment Act: Joint Hearings Before the Financial Regulatory Agencies, 95th Cong., lst Sess. 332 (1978) (statement of Rep. Fred Richmond). Likewise, Northeast Federal Savings & Loan Association received 40% of its total assets of $14 billion from the Kensington section of Philadelphia. Nonetheless, in 1975, Northeast did not grant any mortgages in Kensington. Id. at 71 (statement of Rev. Robert A. Young, Jr., Kensington Action Now) (Kensington is an area composed of predominantly white, lower income residents). In West Virginia, coal miners have difficulty obtaining mortgage loans for houses but can obtain loans on mobile homes at higher interest rates. Id. at 286 (statement of Jeff Zinsmeyer, Center for Community Change).

11. See generally Searing, Discrimination in Home Finance, 48 NOTRE DAME LAW. 1113 (1973). The FHA's discriminatory policies discussed in note 7 supra began to change two years after the Supreme Court declared its racially restrictive covenants illegal. See M. SLOANE, supra note 7, at 135.

Government regulation of lending institutions and the mortgage industry is extensive. The Federal Home Loan Bank Board (FHLBB) charters and regulates savings and loan associations and also regulates state-chartered members of the Federal Savings and Loan Insurance Corporation (FSLIC). The Comptroller of the Currency charters and regulates national commercial banks. The Federal Reserve Board monitors state-chartered banks which are not members of the Federal Reserve System. The Federal Deposit Insurance Corporation (FDIC) insures state-chartered banks which are not members of the Federal Reserve System. Besides direct regulation of banks, the federal government has created vehicles for purchasing mortgages (the Federal National Mortgage Association, the Government National Mortgage Association, and the Federal Home Loan Mortgage Association). Additionally, the federal government insures real estate loans at low interest rates under the FHA and VA programs. See Renne, supra note 1, at 994-96.

12. 15 U.S.C. § 1691-1691f (1976). The ECOA prohibits discriminatory lending practices based on race, color, religion, national origin, sex, marital status, age or receipt of public assistance funds. Id. at 1691(a)(1) & (2).


14. See S. REP. No. 95-175, supra note 10, at 33.
In a recent attempt to deal with the problem, Congress enacted the Community Reinvestment Act (CRA) as Title VIII of the Housing and Community Development Act of 1977. The CRA states that federal financial regulatory agencies are to "encourage" lending institutions to meet credit needs of their local communities, and requires the agencies to issue regulations for this purpose.

In 1978, the appropriate federal agencies responded to the Congressional mandate. They adopted regulations requiring each financial institution to issue a statement identifying the community it serves and listing types of credit available to that community. Provided with this required information, bank regulatory agencies will assess how well the institution meets community credit needs, and may deny an institution's application for the CRA.


for a charter, merger or branch office should its record prove inadequate.21

The Act and the regulations portend a developing banking policy that requires banks to be responsive to both community credit and depository needs. Significantly, the Act shifts the burden of enforcing this policy from those affected by redlining abuses to the government. Nevertheless, because it fails to specifically outlaw redlining practices and to provide a comprehensive legislative scheme for remedying redlining abuses, the CRA seems likely to fall short of its ultimate goal. This Note will analyze this thesis in light of two different approaches that have been used to combat redlining in the past — civil rights statutes and the use of federal bank regulation.

I. STRUGGLING AGAINST URBAN DISINVESTMENT: THE USE OF CIVIL RIGHTS AND BANK REGULATORY STATUTES

A. Civil Rights Statutes

In the absence of legislation specifically outlawing or regulating redlining, individuals and civil rights groups have argued that various civil rights laws either explicitly or implicitly prohibit discriminatory lending practices, including redlining.

Section one of the Civil Rights Act of 1866 (section 1982) states that every United States citizen has the same right to inherit, purchase, lease, sell, hold, or convey property, both real and personal.22 Before 1968, the Supreme Court assumed that state action was a prerequisite to a claim under section 1982.23 In Jones v. Alfred H. Mayer Co.,24 however, the Supreme Court found that section 1982 bars both public and private racial discrimination in the sale and rental of property. Despite this expansive reading of the statute, the Court explicitly limited section 1982's application to discrimination in the sale and rental of property. Despite this expansive reading of the statute, the Court explicitly limited section 1982's application to discrimination in property sales and rentals.25 Discriminatory financing practices, the Court noted, were covered instead by the Fair Housing Act of 1968.26 Following Alfred H. Mayer, two lower courts held that the sale of property to black purchasers at allegedly higher prices and on less favorable terms than those available to whites stated a cause of

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25. Id. at 413.
26. Id. For a discussion of the Fair Housing Act, 42 U.S.C. §§ 3601 to 3619 (1976), see notes 35-69 infra.
It does not appear, however, that any court has ruled precisely on section 1982’s applicability to redlining practices, and it appears that such an expansion of the statute is unlikely in light of the Supreme Court’s restrictive statutory interpretation in *Alfred H. Mayer* and the availability of more appropriate civil rights legislation.

Another civil rights statute of limited applicability to redlining is Title VI of the Civil Rights Act of 1964. Section 2000d of the Act prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assistance. Because most mortgages are not funded by the federal government and because federally insured mortgages, including FHA and VA loans, are specifically excluded from

27. *Contract Buyers League v. F & F Inv.*, 300 F.2d 210 (N.D. Ill. 1969), *aff’d on other grounds sub nom. Baker v. F & F Inv.*, 420 F.2d 1191 (7th Cir. 1970), *cert. denied*, 400 U.S. 821 (1970); *Clark v. Universal Builders, Inc.*, 501 F.2d 324 (7th Cir. 1974), *cert. denied*, 419 U.S. 1070 (1974). In both cases, real estate companies had allegedly exploited existing racial segregation and a resultant scarcity of black housing by imposing stricter terms in installment contracts with black purchasers. In *Contract Buyers*, this purported exploitation was achieved by giving mortgages based on falsely inflated appraisals of residential properties. The real estate company ostensibly engaged also in "blockbusting," or scare tactics to encourage white residents to sell at low prices. 300 F. Supp. at 214. In *Clark*, the Seventh Circuit coined the phrase "exploitation theory" to describe this type of liability under § 1982, and stated that such a violation would be found if "the facts demonstrate that defendants exploited a situation created by socio-economic forces tainted by racial discrimination." 501 F.2d at 330. The court, however, required only a showing that the sellers had intentionally encouraged racial segregation by exploitation rather than a showing of actual sales to whites on more favorable terms. *Id.* But see *Love v. DeCarlo Homes, Inc.*, 482 F.2d 613 (5th Cir. 1973), *cert. denied*, 414 U.S. 1115 (1973), in which the court rejected the exploitation rationale and held that a violation of § 1982 requires a showing that defendants themselves actually discriminated against blacks by selling homes to them on less favorable terms than on those to which they sold homes to whites. *Id.* at 616. The exploitation theory has not gained wide acceptance and has not been the subject of Supreme Court review.

28. *But see Renne*, supra note 1, at 998-99. The author argues that the exploitation theory (see note 27 supra) might be useful in instances where banks discriminate in residential financing based on a neighborhood’s racial composition or geographic location. See also Comment, supra note 1, at 489-93. Even if this theory were accepted in redlining cases, however, § 1982 could be invoked only when the redlining was alleged to have racially discriminatory effects. See Comment, *Redlining and the Home Mortgage Disclosure Act of 1975*, 25 *Emory L.J.* 667, 680 (1976). See also Note, *Redlining: Remedies for Victims of Urban Disinvestment*, 5 *Fordham Urb. L.J.* 83, 86-87 (1976).


31. Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976) states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."
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coverage, the provision’s usefulness as a redlining remedy is limited. Nevertheless, one federal district court has classified a building and loan company’s extension of home mortgage money as a federally assisted activity, whether or not the loan is, in fact, federally insured. Although the court did not explain its reasons for viewing extension of home mortgage loans as a federally assisted activity, its decision was likely based on the federal government's substantial involvement in the home mortgage market above and beyond insuring or guaranteeing loans made by private lenders.

Since this theory has not been accepted by any other court, however, it is unlikely that a redlining suit premised on Title VI grounds could prevail.

The civil rights statute most applicable to redlining is Title VIII of the Civil Rights Act of 1968, more commonly referred to as the Fair Housing Act. Sections 804 and 805 of the Act prohibit discrimination in the sale, rental, or financing of housing. Early cases brought under these provi-


33. Laufman v. Oakley Bldg. & Loan Co., 408 F. Supp. 489, 499 (S.D. Ohio 1976). In Laufman, potential homebuyers, excluded from participation in a building and loan company's home mortgage financing program, claimed that systematic denial of loan applications in interracial neighborhoods violated § 2000d as well as the Fair Housing Act. Id. at 491. The court denied the company's motion for summary judgment, holding that plaintiffs had stated a cause of action under § 601 of the Civil Rights Act of 1964, and under §§ 804, 805 and 817 of the Fair Housing Act. Id. at 501. For a discussion of the Fair Housing Act claims raised in this case, see notes 38-44 and accompanying text infra.

34. See note 11 supra. The Act's legislative history suggests a deliberate attempt to exempt private lending institutions from the coverage of § 2000d through the exclusion of contracts of insurance or guaranty. See note 32 and accompanying text supra. Nevertheless, one commentator has argued that loan advances which the federal government makes to banks, particularly under the Federal Home Loan Bank System, are not contracts of insurance or guaranty, but are direct financial assistance, thus subjecting the banks to Title VI's coverage. See Searing, supra note 11, at 1124.


36. Section 804 of the Fair Housing Act, 42 U.S.C. § 3604 (1976) makes it unlawful because of a person's race, color, religion, sex or national origin a) to refuse to sell or rent after making an offer, to refuse to negotiate, or to otherwise make unavailable or deny a dwelling; b) to discriminate in the terms, conditions or privileges of a sale or rental, or in the provision of services; c) to make, print, or publish any notice, statement or advertisement that indicates any discriminatory preference with respect to a sale or rental; d) to represent that a dwelling is not available for sale or rental, when in fact it is available; or e) to induce or attempt to induce any person to sell or rent a dwelling by statements concerning the prevalence of a particular race, color, religion, sex or national origin in the neighborhood.

Section 805 of the Fair Housing Act, 42 U.S.C. § 3605 (1976), makes it unlawful for a bank, building and loan association, insurance company, or other business making commercial real estate loans to deny a loan or other financial assistance or to discriminate in the amount, interest rate, duration or other loan conditions because of the race, color, religion, sex or national origin of the applicant, or any person associated with the applicant in con-
sions dealt with racially discriminatory practices, including "blockbusting" and advertising a preference for white tenants or buyers. Recently, however, one district court ruled that racially oriented redlining is a discriminatory lending practice explicitly prohibited by sections 804 and 805. In Laufman v. Oakley Building & Loan Co., potential homebuyers, excluded from a building and loan company's home mortgage financing program, alleged that the company's practice of denying loan applications in certain interracial neighborhoods violated both sections 804 and 805 of the Act. The court denied the company's motion for summary judgment, holding that the plaintiffs had stated a cause of action under both provisions. In so ruling, the court extensively reviewed the discriminatory sales and lending provisions of the Fair Housing Act to determine their applicability to redlining.

The court first found that denial of financial assistance for home purchase would "make unavailable or deny" a "dwelling" within the meaning of section 804.

37. "Blockbusting" has been defined as "the practice of inducing the sale of homes through representations that persons of a particular race or color were entering or about to enter the neighborhood." Comment, supra note 1, at 476. See, e.g., Brown v. State Realty Co., 304 F. Supp. 1236 (N.D. Ga. 1969) (statements made by real estate agents to white property owners that neighborhood was "going colored" fell within statutory proscription of 42 U.S.C. § 3604(e) (1976) (blockbusting provision) despite absence of evidence of excessive profiteering by agents); United States v. Mintzes, 304 F. Supp. 1305 (D. Md. 1969) (repeated representations that neighborhood was changing made by real estate agent to induce listing contracts and sales violated 42 U.S.C. § 3604(e) (1976)). See also United States v. Hunter, 324 F. Supp. 529 (D. Md. 1971), aff'd, 459 F.2d 205 (4th Cir. 1971), cert. denied, 409 U.S. 934 (1972) (newspaper which placed advertisements indicating a preference for white tenants violated 42 U.S.C. § 3604(e) (1976), but no injunction granted because no pattern of such discrimination shown).


39. Id. at 491.

40. Id. The court also found that plaintiffs had stated a cause of action under § 2000d of Title VI of the Civil Rights Act of 1964. Id. See notes 33-34 and accompanying text supra. Additionally, the court found that plaintiffs had a valid claim under § 817 of the Fair Housing Act, 42 U.S.C. § 3617 (1976), which provides that "it shall be unlawful to . . . interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section . . . 3604, 3605 . . . of this title."

41. 408 F. Supp. at 493. This section, as interpreted by the court, generally encompasses transactions involving sales or rentals. Since the court found that financing is an integral part of the sales transaction, denial of financing because of racial considerations is a violation of § 804. Thus the court, in viewing §§ 804 and 805 collaterally, found that discrimina-
racial considerations would violate the Act. Secondly, the court interpreted section 805, prohibiting loan denials based on racial factors, as an explicit prohibition of redlining. Thus, it deemed illegal loan availability based on the racial composition of a specific geographic area.

In line with *Laufman, Harrison v. Otto G. Heinzeroth Mortgage Co.*, also condemns discriminatory lending practices. In *Harrison*, two white homebuyers attempting to purchase a home in an integrated neighborhood alleged that the only mortgage loan terms available to them were less favorable than would have been available for a purchase in an all-white area. In denying the mortgage company's motion to dismiss, the court held that to state a cause of action under the Fair Housing Act, a plaintiff need demonstrate that racial considerations alone resulted in denial of housing or loan terms. It is not necessary to demonstrate discrimination on the basis of a plaintiff's own race. The decision not only buttresses *Laufman*'s holding that Title VIII explicitly prohibits redlining, but also makes clear that discrimination based on the redlined area's racial composition, rather than on the individual plaintiff's race, will support a cause of action under the Fair Housing Act.

Both the Department of Housing and Urban Development (HUD) and the Federal Home Loan Bank Board (FHLBB) have interpreted the Fair Housing Act to include transactions involving both the sale or rental of a dwelling and real estate loans within the purview of either provision.
Housing Act to specifically prohibit redlining.\textsuperscript{49} A HUD report states that outright refusals to lend, as well as onerous loan terms for areas of high minority group concentration, are prohibited by Title VIII.\textsuperscript{50} Additionally, the FHLBB has issued a regulation prohibiting discrimination in lending based on the race, color, religion, sex or national origin of those residing in the vicinity of the property for which the loan is requested.\textsuperscript{51}

Redlining premised on the age of homes or on area income levels, rather than on racial criteria, is not likely to come within the prohibitions of the Fair Housing Act. Nevertheless, those redlining practices which are fair in form are frequently discriminatory in operation and thus are susceptible to attack under the discriminatory effects test enunciated in \textit{Griggs v. Duke Power Co.}\textsuperscript{52} In this employment discrimination case, the Supreme Court held that regardless of an employer's motivation, use of employee selection criteria excluding a disproportionate number of minorities violates section 703(h) of the Civil Rights Act of 1964,\textsuperscript{53} absent proof that the criteria reasonably measure job performance, and, consequently, qualify as a "business necessity."\textsuperscript{54}

Several courts have upheld application of the discriminatory effects test in cases brought under the Fair Housing Act. In \textit{Williams v. Matthews},\textsuperscript{55} a real estate company maintained a policy of selling lots to only certified builders. Ostensibly the company's goal was to develop the area in a

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\item \textsuperscript{49} HUD has the primary responsibility for administering the Fair Housing Act. 42 U.S.C. § 3608 (1976). \textit{See also note 44 supra.}
\item \textsuperscript{50} \textit{See Private Lending Institutions Questionnaire, supra note 4.} In \textit{Trafficante v. Metropolitan Life Ins. Co.}, 409 U.S. 205, 210 (1972), the Supreme Court held that HUD's interpretations of the Fair Housing Act are entitled to great weight.
\item \textsuperscript{52} 401 U.S. 424 (1971). The employer had made attainment of a high school diploma or minimum intelligence test score a prerequisite to employment, although there was no evidence that such factors were related to successful job performance. \textit{Id.} at 426.
\item \textsuperscript{53} 42 U.S.C. § 2000e-2(h) (1976).
\item \textsuperscript{54} 401 U.S. at 432. Under a business necessity defense, a selection procedure which "serves the employer's legitimate interest in efficient and trustworthy workmanship" will be permitted despite its discriminatory effect. \textit{Albemarle Paper Co. v. Moody}, 422 U.S. 405, 422 (1975). If the defendant can meet this test, the burden shifts back to plaintiff to show the absence of less discriminatory selection criteria to adequately measure job capacity. \textit{Id.} at 425.
\item \textsuperscript{55} 499 F.2d 819 (8th Cir. 1974).
\end{itemize}
prompt and orderly fashion. This restrictive sales practice, however, disproportionately excluded black real estate buyers. Finding that the policy violated the Fair Housing Act, the Eighth Circuit ruled that such a policy could be justified as a "business necessity" only if the seller could demonstrate lack of an acceptable, less discriminatory alternative. In United States v. City of Black Jack, the same court invalidated a zoning ordinance prohibiting construction of multiple-family dwellings under section 817 of the Fair Housing Act because the ordinance effectively prevented eighty-five percent of the metropolitan area's blacks from obtaining housing in Black Jack. The city had argued that the ordinance was necessary to control traffic, school overcrowding, and devaluation of single-family homes. The court did not deem these purposes to be sufficiently "compelling" to overcome the presumption of illegality. Moreover in another case, Resident Advisory Board v. Rizzo, black residents had been forced to leave their Philadelphia neighborhood because construction of a low-income public housing project was planned for the area. The Third Circuit found that the city's subsequent decision to cancel the project had a discriminatory impact on blacks, as only white residents remained in the area. Although the city had offered no justification for its decision, the court ruled that the standard for applying the "business necessity" defense under Title VIII should be determined on a case-by-case basis.

56. Id. at 825.
57. Id. at 828. See note 54 and accompanying text supra.
58. 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975).
60. 508 F.2d at 1186.
61. Id. The court listed several factors determinative of whether the defendant had met the compelling justification standard: whether in fact the ordinance furthers the governmental interest asserted; whether the public interest to be served is constitutionally permissible and substantially outweighs the private detriment; and whether there are less drastic means available to accomplish the government's purpose. Id. at 1187. Accord, Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971) (to justify rezoning of an area selected for a housing project for a park and recreation area, thus discriminating against minorities, the city must show a compelling government interest).
63. Id. at 149.
64. Id. at 148-49. The court specifically rejected the compelling interest test used by the Eighth Circuit in City of Black Jack, and listed several factors to be weighed under a case-by-case analysis. The justification must serve a legitimate and bona fide interest of the defendant, and defendant must demonstrate that no less discriminatory course of action is available to achieve that interest. Id. at 148. See also Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir.), cert. denied, 434 U.S. 1025 (1977), in which the court found that the village's failure to rezone to allow for construction of low-income housing violated Title VIII under the discriminatory effects test, but remanded for a
It does not appear that any cases have directly challenged redlining practices under section 805 solely because of discriminatory effect. An opinion letter of the FHLBB General Counsel, however, states that the discriminatory effects test is directly applicable in the redlining context, and that redlining practices having such discriminatory effects violate other FHLBB regulations specifically forbidding discrimination in lending. To establish a prima facie case under the discriminatory effects test, a plaintiff would compare the racial or ethnic population of the redlined area with the racial or ethnic composition of the lending institution's effective lending territory. Assuming that a discriminatory effect could be established, the defendant institution would then have to demonstrate a business necessity for redlining. As demonstrated above, however, the standard applied in Title VIII cases to establish a business necessity defense varies from court to court and from case to case. Nevertheless, several courts and the FHLBB General Counsel have indicated that a bank should use the least discriminatory means of accomplishing its goal. Under such a test, it would be difficult for a lending institution to justify its redlining practices, since a less discriminatory means of measuring creditworthiness would always be to examine each applicant's financial status and the specific property to be financed.

determination of whether such effect was justifiable under the particular facts of this case. The court would look to four factors to determine if discriminatory impact is justified: 1) the strength of plaintiff's showing of discriminatory effect; 2) some evidence of discriminatory intent; 3) defendant's interest in taking the opposed action; and 4) whether plaintiff seeks to compel affirmative action on the part of defendant to provide housing for minorities or merely seeks to restrain defendant from interfering with individual property owners seeking to provide such housing. 558 F.2d at 1290. But see Boyd v. Lefrak Organization, 509 F.2d 1110, 1112-13 (2d Cir.), cert. denied, 423 U.S. 896 (1975) (landlord's requirement that tenants have a weekly income equal to 90% of monthly rental, which excluded almost all public assistance recipients, held not violative of § 804, even though it had an adverse effect on minorities).

65. 3 U.S. LEAGUE OF SAV. ASSN'S FED. GUIDE ¶ U 13-49.2 at 8173-3D (1978). The FHLBB has also issued a guideline stating that a refusal to grant a loan based on the age of the home or the income level of the neighborhood may be discriminatory in effect, since minority groups tend to live in older, less affluent areas. 12 C.F.R. § 531.8(c)(6) (1978).

66. 3 U.S. LEAGUE OF SAV. ASSN'S FED. GUIDE ¶ U 13-49.2 at 8173-7 (1978). This opinion defines effective lending territory as the area in which an institution makes a substantial majority of its loans and all other areas which are as close to the institution's offices as such areas. Id. at 8173-7, n.2.

67. See notes 55-64 and accompanying text supra. Contrary to Title VIII standards, the standard for establishing a business necessity defense under Title VIII is clearly enunciated in Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1977). See note 54 and accompanying text supra.

68. See notes 55-57 & 62-64 and accompanying text supra; 3 U.S. LEAGUE OF SAV. ASSN'S FED. GUIDE ¶ U 13-49.2 at 8173-6.

69. See Comment, supra note 1, at 481-82. See also Comment, Redlining: Why Make a
Despite various judicial and administrative interpretations prohibiting redlining, the Fair Housing Act and other civil rights statutes have been invoked very sparingly to combat bank redlining policies. One reason for the dearth of lawsuits is the difficulty plaintiffs face in meeting their initial burden. Establishing a prima facie case of discriminatory intent or discriminatory effect of a lending practice on minorities requires a vast compilation of statistical data, involving significant expenditures of time and money. Additionally, to challenge redlining under the Fair Housing Act, a plaintiff must allege either an intent to discriminate on the basis of race or a racially discriminatory effect. Hence, the civil rights statutes will not apply to lower income white residents whose neighborhoods might be redlined because of the age of their homes or area income levels, rather than the area's racial composition.

B. Bank Regulatory Statutes

Partly because of the difficulties in using civil rights statutes to eliminate discriminatory lending practices on a case by case basis, Congress has enacted bank regulatory statutes designed to eliminate and prevent discriminatory practices, including redlining, on an industry-wide level through administrative regulation. These regulatory statutes have been rather unsuccessful, however, largely due to both minimally effective enforcement efforts and mechanisms.

One such statute directly resulting from concern over redlining is the Home Mortgage Disclosure Act of 1975 (HMDA). The purpose of the

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Federal Case Out of It?, 6 GOLDEN GATE U.L. REV. 813, 839-42 (1976). The FHLBB General Counsel has stated that "it is highly unlikely that any legitimate business purpose could be served by the practice of redlining . . . which cannot be achieved by non-discriminatory, or less discriminatory means." 3 U.S. LEAGUE OF SAV. ASSN'S FED. GUIDE ¶ U 13-49.2 at 8173-6 (1978).

70. The Fair Housing Act provides for a private cause of action when a single instance of a discriminatory housing practice is alleged. Fair Housing Act, § 812, 42 U.S.C. § 3612 (1976). Additionally, the Attorney General may institute an action when there is reasonable cause to believe that a "pattern or practice" of racial discrimination is involved. Id. at § 813, 42 U.S.C. at § 3613. Regardless, however, of whether the suit is brought by an individual, a group of individuals, or the government, it is necessary to present statistical data to show the existence or discriminatory effects of a lender's discriminatory redlining policies. See Comment, supra note 1, at 483-86.

71. 12 U.S.C. §§ 2801 to 2809 (1976). The statute asserts as a congressional finding that deposit institutions have sometimes contributed to urban decay by failing to provide adequate home financing to qualified individuals. Id. § 2801(a).

Historically, redlining primarily affected racial minorities and lower income residents. Increasingly, as more professionals and persons of middle income return to city dwelling, the practice has begun to affect these other groups as well. Consumer groups affected by redlining conducted extensive studies on this effect. See Note, The Home Mortgage Disclosure Act of 1975, 12 NEW ENG. L. REV. 957, 974 n.75 (1977) (citing LOS ANGELES CENTER FOR NEW
HMDA is to ensure that banks provide sufficient information to citizens and public officials who can then determine whether the banks are actually serving the borrowing needs of their communities. Consequently, the Act requires most lending institutions to disclose to the public the number and dollar amounts of the home mortgage loans they grant. The Federal Reserve Board (FRB) has issued implementing regulations to clarify and elaborate on the HMDA provisions, but compliance with the Act

CORPORATE PRIORITIES, WHERE THE MONEY IS: MORTGAGE LENDING, LOS ANGELES COUNTY (1975); LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, M. ANGELASTO, GEOGRAPHICAL DISCRIMINATION IN MORTGAGE LENDING; NATIONAL URBAN LEAGUE, WHERE THE LENDER LOOKS FIRST: A CASE STUDY OF MORTGAGE DISINVESTMENT IN BRONX COUNTY, NEW YORK (1960-1970). The HMDA is the result of demands made by these groups that financial institutions be required to disclose information on where they are making loans.

72. 12 U.S.C. § 2801(b) (1976). Additionally, some state and local governments have taken anti-redlining action. See Note, supra note 71, at 977 nn. 88 & 89 citing: CHICAGO, ILL. CODE, ch. 7 §§ 7-30 to 40 as amended June 26, 1974; California Savings and Loan Comm'n, Title 10 Subchapter 20 (1976); Office of the Comm'r of Banks, Mass. Disclosure Directive (Aug. 1, 1975)). At least two state statutes have been challenged on the ground that they were preempted by the HMDA. In Glen Ellyn Savings and Loan Ass'n v. Tsoumas, 377 N.E.2d 1 (Ill. 1978), cert. denied, 47 U.S.L.W. 3301 (U.S. Oct. 31, 1978), the court ruled that the Home Mortgage Disclosure Act was intended to preempt application of state anti-redlining statutes to federally chartered banks and savings and loan associations. Accordingly, the court struck down the Illinois law. ILL. ANN. STAT., ch. 95, § 201 (Smith-Hurd) (1976 Supp.). 377 N.E.2d at 2. In a similar case, the New Jersey anti-redlining statute which requires disclosure and prohibits redlining was challenged. National State Bank v. Long, No. 77-2168 (D.N.J. Feb. 2, 1979). The United States District Court for New Jersey held that although HMDA preempts the state disclosure law as it applies to national banks, it does not prohibit states from enacting anti-redlining statutes. Hence, national banks are still subject to the state's prohibition of redlining. Id. at 18

73. HMDA requirements are limited to lending institutions with total assets in excess of $10 million and a home or branch office within a Standard Metropolitan Statistical Area (SMSA). 12 U.S.C. § 2803(a)(1) (1976). An SMSA is a county or group of contiguous counties which contain at least one city of 50,000, or twin cities with a combined population of at least 50,000. See Community Reinvestment Act Examination Procedures, reproduced in R. BRANDEL & M. LARGE, A COMPLIANCE GUIDE FOR THE COMMUNITY REINVESTMENT ACT 99 n.4 (1978).

74. This information must be made publicly available at the home office and at one branch office within each SMSA. 12 U.S.C. § 2803(a)(1) (1976). Disclosure must be made as to the following: the number and total dollar amounts of mortgage loans originated or purchased within each fiscal year, id.; the number and dollar amounts of such loans by census tracts both within and without the SMSA, id. at § 2803(a)(2)(A) & (B); the number and dollar amounts of federally insured loans, id. at § 2803(b)(1), the number and dollar amounts of loans made to mortgagors who did not intend to reside in the secured property, id. at § 2803(b)(2); and the number and dollar amounts of home improvement loans, id. at § 2803(b)(3). Federally insured loans include FHA loans insured under Title II of the National Housing Act, 12 U.S.C. §§ 1707 to 1752z (1976), Farmers Home Administration loans under Title V of the Housing Act of 1949, 42 U.S.C. §§ 1471 to 1490 (1976), and guaranteed VA loans, 38 U.S.C. §§ 1801 to 1827 (1976).

75. Known collectively as Regulation C, these regulations: 1) provide that any deposi-
is enforced by the appropriate supervisory agency.\textsuperscript{76}

Since the HMDA does not require that depository institutions disclose information on denial of loans or standards used in processing loan applications, the public cannot fully determine whether an institution is adequately meeting local credit needs. Additionally, because nothing more than disclosure is required by the Act, only public pressure can be expected to effect change in a bank's lending policy.\textsuperscript{77} Although it is clear that the HMDA is inadequate to meet the redlining problem, the information disclosed under the Act could prove useful in establishing a prima facie case of racially discriminatory effect under the Fair Housing Act.\textsuperscript{78}

The Equal Credit Opportunity Act (ECOA)\textsuperscript{79} also seeks to eliminate discriminatory lending practices. The ECOA prohibits discrimination against a loan applicant on the basis of race, color, religion, national origin, sex, marital status, age, income derived from public assistance programs, or the exercise of rights under the Consumer Credit Protection Act.\textsuperscript{80} Under the ECOA, a creditor taking adverse action on an application must supply reasons for the decision, if requested.\textsuperscript{81} Additionally,
under regulations promulgated by the Federal Reserve Board to enforce the Act, creditors must retain loan applications for a period of twenty-five months after decisions are made. These regulations also spell out certain criteria which must be excluded in evaluating a loan application. Most relevant to redlining, when processing an application for mortgage money, a lender may not consider the racial or ethnic character of the neighborhood in which the property is located. The Act also provides a private cause of action for actual damages sustained by an applicant, either individually or as a member of a class, because of the creditor's failure to comply with ECOA requirements. Compelling compliance with ECOA requirements is the statutorily mandated duty of the financial supervisory agencies.

By requiring retention of all loan applications, the ECOA and its regulations fill one of the gaps in the HMDA disclosure system. Retention of this information, combined with that which must be disclosed under HMDA, will enable individuals, groups, or federal agencies to determine whether a financial institution is actually meeting community credit needs. Such information should also be adequate to establish a prima facie case of discriminatory effect under either the ECOA or the Fair Housing Act. Indeed, the legislative history makes clear that Congress intended that the standards established in Title VII cases, particularly in *Griggs v. Duke Power Co.*, should be applied in suits brought under the ECOA. Additionally, since the ECOA specifically allows use of class action suits, a large number of citizens may be able to share the expense of such a lawsuit. Nonetheless, attempts to eliminate redlining through litigation under the ECOA will probably meet the same problems as those occurring in Fair Housing Act suits — presenting sufficient proof and rebutting a business necessity defense.

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86. See note 77 and accompanying text supra.
87. See text accompanying notes 66-69 supra.
89. See S. REP. NO 589, 94th Cong., 2d Sess. 4-5 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 403, 406. These standards are particularly relevant in questions of burdens of proof. Id.
91. See notes 55-69 and accompanying text supra. To date, it does not appear that any suits attacking redlining have been brought under ECOA.
Neither the civil rights statutes, the Home Mortgage Disclosure Act, the Equal Credit Opportunity Act nor their accompanying regulations have provided a satisfactory solution to the redlining problem. The civil rights approach, while potentially useful in attacking racial redlining, places the burden of enforcement on individual victims and civil rights advocates. The ECOA, which provides for a combination of administrative and judicial enforcement, still is limited to racial redlining. The HMDA, on the other hand, while broadening the scope of the redlining attack to include discrimination based on the age or income levels of a neighborhood, provides for no enforcement at all and relies solely upon public pressure. The Community Reinvestment Act of 1977\textsuperscript{92} represents one further step in the attempt to control redlining by placing the enforcement burden primarily on financial regulatory agencies and forcing lending institutions to demonstrate their efforts to serve community credit needs.

II. THE COMMUNITY REINVESTMENT ACT REGULATIONS

Intended to pressure lending institutions to meet their affirmative obligation to serve their local communities,\textsuperscript{93} the Community Reinvestment Act (CRA) was introduced by Senator William Proxmire as part of the Housing and Community Development Act of 1977.\textsuperscript{94} To accomplish this purpose, the federal financial supervisory agencies\textsuperscript{95} must assess each lender's record of meeting its entire community's credit needs and consider this record when evaluating the financial institution's application for a de-


\textsuperscript{93} In the Senate Report on the Community Reinvestment Act, the Committee on Banking, Housing and Urban Affairs stated that under then existing law lending institutions had a primary responsibility to service their local communities. The Committee found that the CRA was necessary because the bank regulatory agencies had no affirmative programs to encourage lenders to give first priority to local credit needs. S. REP. No. 95-175, supra note 10, at 307. In its Report, the Committee also stated its dissatisfaction that only one federal bank regulatory agency, the FHLBB, had instituted an anti-redlining program. \textit{Id}. This statement was made in reference to the FHLBB's regulations under the Fair Housing Act, in which the agency interprets the Act as prohibiting redlining. \textit{See} note 51 and accompanying text \textit{supra}. For the legislative history of the CRA, \textit{see} note 15 \textit{supra}.

The Act provides that regulated financial institutions must demonstrate that their offices serve the convenience and needs of the communities in which they are chartered to operate, that they must provide for both credit and deposit needs, and that they have a "continuing and affirmative obligation to help meet the credit needs" of their local communities. Community Reinvestment Act, § 802(a), 12 U.S.C.A. § 2901(a) (West Supp. 1978).


\textsuperscript{95} The agencies obligated to enforce CRA are listed in note 11 \textit{supra}.
Accordingly, the Act required each financial supervisory agency to issue regulations to implement the CRA. The regulations spell out in detail the means by which the agencies will encourage and determine a lending institution's effort and success in meeting community credit needs. Although each agency promulgated separate regulations, the provisions are identical except for procedural variations. Since the FHLBB regulates savings and loan associations, which grant more home mortgage loans than other lending institutions, the FHLBB regulations will be used to illustrate the general requirements of all the regulations.

The regulations require each financial institution to adopt a Community Reinvestment Act Statement delineating its local community. This delineation may be determined by reference to existing political or governmental boundaries, the institution's effective lending territory, or by

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96. Community Reinvestment Act, § 804, 12 U.S.C.A. § 2903 (West Supp. 1978). For the purposes of the CRA, the term "application for a deposit facility" encompasses requests for approval of: a national bank charter or charter for a federal savings and loan association; deposit insurance for a state bank, a savings bank, or a savings and loan association; establishment of a branch depository office; the relocation of a home or branch office; or a merger, consolidation, or acquisition of assets of another financial institution regulated under the Bank Holding Company Act or the National Housing Act. See Community Reinvestment Act, § 803(3), 12 U.S.C.A. § 2902(3) (West Supp. 1978).

Each agency must also report to Congress each year on the actions it has taken to accomplish the purposes of the CRA. See Community Reinvestment Act, § 805, 12 U.S.C.A. § 2904 (West Supp. 1978).


98. See National Committee Against Discrimination in Housing, Inc., Patterns and Practices of Discrimination in Oakland, California 1 (1972). See also Renne, supra note 1, at 993 n.29.

99. 43 Fed Reg. 47154 (1978) (to be codified in 12 C.F.R. § 563e.4). The Board of Directors of each institution is to adopt the Statement within 90 days of the effective date of the regulations. Id. The local community is defined as "the contiguous areas surrounding each office or group of offices, including any low and moderate income neighborhoods in those areas." 43 Fed. Reg. 47153 (1978) (to be codified in 12 C.F.R. § 563e.3(b)). The agencies have agreed, at least for the present, to use the HUD definition of "low and moderate income" to determine which neighborhoods fall into this category. HUD's definition encompasses those families whose income is 80% or less of the median income of an area, after adjustments are made for family size. See R. Brandel & M. Large, supra note 73, at 40.

100. 43 Fed. Reg. 47153 (1978) (to be codified in 12 C.F.R. § 563e.3(b)(1)). SMSA (see
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any other reasonable means.\textsuperscript{102} The Statement must also include a list of specific types of credit which the institution provides,\textsuperscript{103} and a copy of its "CRA Notice" advising the public of the Act's coverage.\textsuperscript{104} To assess whether the institution has met the credit needs of its entire community, the Board will consider any CRA Statement, signed comments retained by the institution or agency, and other relevant factors.\textsuperscript{105} The Board will use

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note 73 \textit{supra} or county lines may be used for this delineation. If the institution operates in more than one SMSA or county, it must delineate each community, but only one Statement is necessary. See R. Brandel & M. Large, \textit{supra} note 73, at 38.

101. 43 Fed. Reg. 47153 (1978) (to be codified in 12 C.F.R. \S 563e.3(b)(2)). The effective lending territory is defined as the "local area or areas around each office or group of offices where it makes a substantial portion of its loans and all other areas equidistant from its offices as those areas." \textit{Id}. The regulation does not specify what constitutes a "substantial portion" of the institution's loans. Additionally, it should be noted that this territory is based on loans, not deposits. See R. Brandel & M. Large, \textit{supra} note 73, at 38-39.

102. 43 Fed. Reg. 47153 (1978) (to be codified in 12 C.F.R. \S 563e.3(b)(3)). Such means must meet the purposes of CRA and may not exclude any low and moderate income areas. \textit{Id}. Regardless of the method used to delineate the local community, maps must be used for illustration in the Statement. 43 Fed. Reg. 47153 (1978) (to be codified in 12 C.F.R. \S 563e.3).

103. The categories which may be covered under this list include, for example, residential loans for one to four family dwelling units, residential loans for five or more family dwelling units, housing rehabilitation loans, home improvement loans, small business loans, farm loans, community development loans, commercial loans, and consumer loans. 43 Fed. Reg. 47154 (1978) (to be codified in 12 C.F.R. \S 563e.4(b)(2)).

104. The CRA notice must also be displayed in the lobby of each of the institution's offices. The notice, which is designed to encourage public involvement, states that CRA requires the FHLBB to evaluate the financial institution's record and that the public may submit comments, and may look at comment files, CRA statements, and FHLBB announcements of applications covered by CRA. 43 Fed. Reg. 47154 (1978) (to be codified in 12 C.F.R. \S 563e.6). Institutions are encouraged to include in the CRA statement information on particular efforts they have made to meet community credit needs. 43 Fed. Reg. 47154 (1978) (to be codified in 12 C.F.R. \S 563e.4(c)). Optional statements may include: a description of how special credit programs help to meet the credit needs of the community; a periodic report outlining the institution's record of helping to meet local credit needs; and a description of communication efforts with members of the community and other efforts to determine area credit needs. \textit{Id}. The CRA statement must be made available for public inspection, and must be reviewed and updated annually by the board of directors. 43 Fed. Reg. 47154 (1978) (to be codified in 12 C.F.R. \S 563e.4(d) & (e)). In addition, each institution must maintain a file containing any signed written comments concerning the CRA statement or the institution's performance in meeting community credit needs, responses made by the institution to such comments, and any CRA statements in effect for the past two years. 43 Fed. Reg. 47154 (1978) (to be codified in 12 C.F.R. \S 563e.5(a)).

105. 43 Fed. Reg. 47154 (1978) (to be codified in 12 C.F.R. \S 563e.7). Other relevant factors include an institution's attempts to ascertain local credit needs, its attempts to inform the local community of its credit services, the geographic breakdown of its loan applications and denials, evidence of discriminatory credit practices, and the institution's participation in community development and governmental insured loan programs. 43 Fed. Reg. 47154 (1978) (to be codified in 12 C.F.R. \S 563e.7(a) to (j)).

The four bank regulatory agencies have collectively formulated the Community Reinvest-
the CRA assessment in determining whether to grant an institution's application for a charter, branch office or other change in status. The application of an institution assessed to be inadequately meeting credit needs may be denied by the Board.106

In the first case to arise under the Act, a community group challenged a merger application before the Federal Reserve Board on the ground that the merger would not serve the "convenience and needs" of a nearby low to moderate income area.107 Although the merger was approved prior to the effective date of the regulations,108 the Board's decision did take into account the general policies of the CRA, and thus provides some insight into the approach agencies might take in enforcing the Act. Commerce Bancshares, Inc., a bank holding company, applied for a merger with the Manchester Financial Corporation, another bank holding company. In accordance with the Bank Holding Company Act,109 the Board received

The CRA has prompted the four financial supervisory agencies to issue rules changing application procedures to allow for more public notice and input into the process. See generally 43 Fed. Reg. 47156-62 (1978) (to be codified in 12 C.F.R. § 5.2) (detailing conforming amendments pursuant to the agencies' rule changes). Additionally, three agencies have specifically exempted from CRA requirements those institutions which operate as correspondent banks, trust companies, or clearing agencies, since such institutions neither perform commercial or retail banking services nor extend credit to the public. See 43 Fed. Reg. 47148 (1978) (to be codified in 12 C.F.R. § 345.101), 43 Fed. Reg. 47150-51 (1978) (to be codified in 12 C.F.R. § 228.100), 43 Fed. Reg. 47152 (1978) (to be codified in 12 C.F.R. § 25.101).

106. 43 Fed. Reg. 47154-55 (1978) (to be codified in 12 C.F.R. § 563e.8). The Board may consider the views of a state-chartered bank's state supervisory authority as to the applicant's record of meeting community credit needs. In addition, in an application of a savings and loan holding company, the Board may consider the credit needs of any subsidiary's community. Id. at 47155. For a complete list of applications which may be denied on the basis of a CRA assessment, see note 96 supraj".

The examiner will then assign the institution a rating of 1 to 5 based on its overall CRA performance. Id. at 117-18.


108. Id. at 579 n.9.

comment from, among others, the Manchester-Tower Grove Community Organization, an affiliate of the Missouri Association of Community Organizations for Reform Now (ACORN). At a hearing to determine whether the merger would serve the convenience and needs of the relevant community, ACORN testified that the merger would not serve the Manchester-Tower Grove neighborhood. In particular, ACORN contended that the low to moderate income neighborhood had been inadequately served by the applicant's subsidiaries in terms of home mortgages, home improvement loans and small business credit, areas which are particularly stressed under CRA regulations. Apparently, however, ACORN failed to establish at the hearing that any such loans had actually been denied. The Board concluded that the applicant's subsidiaries in the St. Louis area had adequately served, and upon merger would most likely continue to serve, the convenience and needs of their entire market, including low to moderate income neighborhoods. The applicant's subsidiaries had concentrated their lending in commercial and industrial credit areas. The Board found this emphasis on commercial loans not inconsistent with the goal of meeting the convenience and needs of the area, even though it resulted in Bancshares making fewer housing and consumer loans.

Accordingly, the Board found that it should not require an applicant to allocate a certain proportion of its funds to a particular credit need, borrower or neighborhood.

The ACORN decision has sparked vigorous protest by congressional supporters of the CRA. In a letter to Federal Reserve Board Chairman Miller urging reconsideration of the decision, Senator Proxmire wrote that the Board had totally misinterpreted the "affirmative obligations principle" of the CRA. Proxmire described this obligation as requiring "aggressive and affirmative lending efforts to provide housing and small business loans in the local community, with particular emphasis on low and moderate income neighborhoods." Although ACORN is currently

113. Id. at 579-80. The Board, however, extensively considered Bancshares' housing-related credit programs and support of community development projects, which included low to moderate income areas, and found its involvement sufficient. Id. at 580-81.
114. Id. at 579. The Board found relevant the fact that the Bank Holding Company Act, 12 U.S.C. §§ 1841 to 1850 (1976), requires the Board to consider an applicant's record for meeting community credit needs, but does not require that the Board dictate a bank's product mix — the credit or deposit services a bank should emphasize. Id.
115. See R. Brandel & M. Large, supra note 73, at 26-27.
116. Id.
on appeal, it indicates that at least the Federal Reserve Board does not intend to require institutions to meet all types of community credit needs in order to comply with CRA.

While the CRA does emphatically state that lending institutions have an affirmative obligation to meet local credit needs, ACORN indicates that the extent of this responsibility is unclear. Conversely, although the Act fails to make redlining illegal, it does provide minimum sanctions for lenders who do not attempt to meet local credit needs. To understand these apparent incongruities in the CRA, the new law and regulations must be assessed in light of the competing interests Congress had to accommodate in attempting to develop a comprehensive redlining enforcement scheme — those of financial institutions, those of consumer and civil rights groups, and those of the financial regulatory agencies.

III. THE CRA STANDARD: FINANCIAL INSTITUTIONS HAVE AN AFFIRMATIVE OBLIGATION TO HELP MEET COMMUNITY CREDIT NEEDS

Although the Community Reinvestment Act is an attempt to restrict redlining practices, it fails to establish a comprehensive legislative scheme for remedying such abuses. While the legislative history clearly indicates that Congress was concerned with redlining, neither the Act nor the regulations specifically address this issue or declare such practices illegal. Rather, the Act and the regulations merely stress the affirmative obligation of lending institutions to service their local areas. Although a congressional declaration of this responsibility is significant, such a statement is alone inadequate to remedy redlining problems. Further, although the Act requires agency assessment of the extent to which lending institutions are meeting local credit needs and provides limited sanctions for failure to

118. See S. REP. NO. 95-175, supra note 10, at 33.
119. To the extent that CRA attempts to pressure financial institutions into meeting community credit needs, without actually determining the legality of redlining, it is very similar to the HMDA. In the CRA Examination Procedures issued by the agencies, a "judgmental process" and "balanced viewpoint" are stressed. See R. BRANDEL & M. LARGE, supra note 73, at 94-95. See also note 105 supra. Hence, no particular action on the part of an institution will determine a failure per se to meet community credit needs. In fact, an institution's redlining policies could be outweighed by its other lending policies or its community involvement.
meet them, it does not provide a unified administrative and enforcement scheme. Similar to previous attempts to deal with redlining abuse, the CRA is a piecemeal approach to a complex problem.

In enacting the CRA and formulating the regulations, Congress and the four regulatory agencies attempted to strike a compromise between the interests of civil rights and consumer groups on the one hand, and financial institutions on the other. While the former groups wanted a comprehensive anti-redlining statute, the banks opposed any federal regulation either mandating undesirable investments or imposing unwieldy requirements. Unfortunately, Congress' attempt to accommodate these conflicting interests resulted in a lukewarm scheme increasing the banks' responsibilities without providing an effective remedy for redlining abuses.

Had Congress truly intended to enact comprehensive anti-redlining legislation, it could have done so without forcing lenders to make unduly risky loans. Since redlining is, in essence, an over-generalization of the creditworthiness of a given class of properties or borrowers, usually distinguished by their location in a certain geographical area, the practice could be eliminated simply by prohibiting banks from making such overgeneralizations. In practice, this would merely require banks to give full consideration to each and every application for mortgage money. Banks should be required to independently investigate the creditworthiness of

122. *Id.* at § 2903(2). Indeed, there are no sanctions available under the Act against financial institutions which have not applied for a deposit facility. *See* note 96 *supra.*

123. *See* Center for Community Change, Citizens' Regulatory Guidelines (July 11, 1978) (unpublished comments submitted to the Federal Reserve Board pursuant to proposed CRA regulations by 32 public interest, housing, and consumer organizations). The obvious interest of these organizations is that city neighborhoods, in their battle against urban blight, should be able to obtain adequate home financing. These groups suggested that the agencies be permitted under CRA to resort to legal sanctions available to them under their chartering statutes, such as their cease and desist powers, and their ability to remove bank officials and directors who violate banking laws and regulations. *Id.* at 32. For a listing of such statutory authorities, see note 76 *supra.*

124. Comment letters sent to the various agencies by lending institutions pursuant to the proposed CRA regulations include: letter of B.F. Mizell, Jr., President, Guaranty Federal Savings and Loan Association of Gainesville, Gainesville, Florida (July 21, 1978) (banks are not eleemosynary institutions); letter of David E. Keller, Vice President, The State National Bank, Big Spring, Texas (July 18, 1978) (CRA will lead to credit allocation, which is contrary to the free enterprise system); letter of Joe Kirkpatrick, Vice President, Dove Creek State Bank, Dove Creek, Colorado (July 19, 1978) (CRA might encourage those who are uncreditworthy to believe that they have a legal right to receive credit); letter of Alan L. Lord, President, Cache National Bank, Greeley, Colorado (July 17, 1978) (agrees with goals of CRA, but requests that no additional paperwork be required of lending institutions). *See also* S. REP. No. 95-175, *supra* note 10, at 81-85. These views of Senators Morgan, Tower, Garn, Lugar & Schmitt explicate many of the banking industry's concerns.

125. *See* notes 1-6 and accompanying text *supra.*
each prospective borrower as well as each piece of realty to be mortgaged. Applications which have been denied should be accompanied by a written explanation of the action and on request, the bank should be required to justify a particular mortgage loan denial vis-a-vis loans granted by the bank in nearby communities. If a bank fails to comply with these procedures, or if a particular loan denial appears to be inadequately supported by evidence of relative unprofitability, a private cause of action should be available to the victim.

This approach would utilize the most effective features of the civil rights laws, particularly the delineation of specifically prohibited activities, and the provision of adequate remedies for violations. Indeed, such a proposal effectively surpasses the civil rights statutes by prohibiting all forms of redlining, rather than only those based on racial or ethnic factors. At the same time, the proposal would not create any unmanageable administrative burdens on lending institutions, since existing legislation already requires most of the record-keeping necessarily involved. It would not force lenders to make any loans inconsistent with safe and sound banking practices. Finally, the assessment of the lending institutions' efforts to meet local credit needs could provide a strong administrative enforcement mechanism, while the private cause of action would be available in the event such mechanisms failed.

This is not to suggest that CRA is insignificant. Despite its limitations, it explicitly imposes on lending institutions a primary affirmative obligation to serve local credit needs.

126. Compare these proposed elements of an anti-redlining statute with the statutory requirements of the ECOA. See notes 79-91 and accompanying text supra.

127. Although victims of racial redlining could still bring a lawsuit under the Fair Housing Act, the view that this Act makes redlining illegal is not universally accepted by the courts. For a discussion of the Fair Housing Act, see notes 35-69 and accompanying text supra. Further, redlining based on the age or location of property in a white neighborhood cannot be challenged under civil rights statutes whose applicability to redlining extends only to racial discrimination. For a discussion of the civil rights statutes, see notes 22-70 and accompanying text supra.

128. In fact, the CRA statement requires no statistical reporting, and agency assessments will make use of data collected under HMDA and ECOA. See S. REP. NO. 95-175, supra note 10, at 34. See also R. Brandel & M. Large, supra note 73, at 114. It was one of the legislative goals of the CRA to encourage lending institutions to meet community credit needs without requiring additional bank paperwork. S. REP. NO. 95-175, supra note 10, at 34.

129. In fact, as currently formulated, CRA only requires banks to meet community credit needs to the extent possible within safe and sound banking practice. Community Reinvestment Act § 802(b), 12 U.S.C.A. § 2901(b) (West Supp. 1978).

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in that it requires, at least in theory, aggressive efforts by the institution to seek out credit needs. Although banks have long been subject to a “convenience and needs” test when applying for a charter or branch office, until recently this test has generally been used only to consider the community’s need for a deposit facility. The area’s credit needs were not taken into account.

The CRA is also important in that it shifts much of the burden of combating redlining away from the private victim and onto the federal financial regulatory agencies. Unfortunately, even this factor does not

131. As defined by Senator Proxmire, this affirmative obligation requires “aggressive and affirmative lending efforts to provide housing and small business loans in the local community, with particular emphasis on low and moderate income neighborhoods.” See R. Brandel & M. Large, supra note 73, at 27.

Lending institutions have expressed their concern that such an obligation will force them to make less profitable loans, and will in effect demote them from an independent component of the free enterprise economy to quasi-governmental bodies. See id. at 4. CRA does in fact indicate a policy decision by Congress to require that lenders meet local credit needs, even if this means sometimes sacrificing more profitable ventures. In view of the fact that banks have always been considered quasi-public institutions subject to extensive federal and state regulation, however, Congress may clearly require them to meet local credit needs. See In re Thornton, 7 F. Supp. 613, 614 (D. Colo. 1934); Hawkins Realty Co. v. Hawkins State Bank, 205 Wis. 406, 236 N.W. 657, 662 (Wis. 1931); Knass v. Madison & Kedzie State Bank, 354 Ill. 554, 188 N.E. 836, 842 (Ill. 1933). See also United States v. Farmers & Merchants Bank, 397 F. Supp. 418, 420 (C.D. Ca. 1975); New Hampshire Bankers’ Ass’n v. Nelson, 336 F. Supp. 1330, 1336 (D.N.H.), aff’d, 409 U.S. 1001 (1973); Jackson v. First Nat’l Bank, 246 F. Supp. 134, 136 (M.D. Ga. 1965). For a discussion of the interrelationship of the federal government and the banking industry, see Comment, supra note 1, at 470-74. See also Comment, supra note 69, at 819-25 & n.11 supra.

The additional concern of the banking industry that CRA is the first step towards “credit allocation” which will severely restrain the free flow of capital also seems to be without merit. But see S. Rep. No. 95-175, supra note 10, at 82 (additional views of Sens. Morgan, Tower, Garn, Lugar & Schmitt). The agencies have specifically stated that the regulations will not require institutions to offer particular kinds or amounts of credit. 43 Fed. Reg. 29918 (supplementary information to proposed regulations issued July 11, 1978).

132. Under § 5(a) of the Home Owners’ Loan Act, 12 U.S.C. § 1464(a) (1976), in issuing charters for federal savings and loan associations, the FHLBB considers the practices of local mutual thrift and home financing institutions. In chartering federal banks, the Comptroller of the Currency, under 12 U.S.C. § 1816 (1976) considers: 1) the financial history and condition of the bank; 2) the adequacy of its capital structure; 3) its future earnings prospects; 4) its management; 5) the convenience and needs of the community to be served; and 6) whether its corporate powers are consistent with the law. See also S. Rep. No. 95-175, supra note 10, at 33, in which the Senate Committee states that existing law has always provided authority for the agencies to require institutions to meet local credit needs first.

In recent years, Congress has shown some inclination to develop this standard to include credit needs, especially in the ECOA and the HMDA. In the HMDA, for instance, Congress asserted that “some depository institutions have sometimes contributed to the decline of certain geographic areas by their failure pursuant to their chartering responsibilities to provide adequate home financing to qualified applicants on reasonable terms and conditions.” 12 U.S.C. § 2801(a) (1976).
guarantee deterrence of redlining given the Federal Reserve Board’s decision in *ACORN*133 and the regulatory agencies’ limited ability to curtail such practices through denial of a lending institution’s application for a charter, branch office, or other facility.134

In view of the strong opposition by many lending institutions to the CRA,135 which undoubtedly will hinder voluntary compliance, enforcement efforts may consequently have to rely on public pressure to defeat redlining. This approach, while permitting consumer groups and individuals to take a more active role than was possible under the HMDA in assessing a financial institution’s record of meeting community credit needs,136 counteracts the CRA’s intent to shift the burden of enforcing redlining regulations to federal financial agencies. Public involvement could have a significant impact in forcing banks to make at least minimal efforts to meet local credit needs, but such measures, even when combined with minimal agency enforcement, will not be sufficient to eliminate redlining.

IV. CONCLUSION

Because neither the civil rights laws, the Home Mortgage Disclosure Act

133. For a discussion of this case, see notes 107-17 and accompanying text supra. It appears that the FHLBB may be more diligent than the FRB in enforcing CRA. Since CRA was enacted, the FHLBB has revised its anti-discriminatory lending regulations to prohibit discrimination based on the age or location of property. See note 51 and accompanying text supra.

134. Community Reinvestment Act § 804(2), 12 U.S.C.A. § 2903(2) (West Supp. 1978). At most, the agencies have some discretion to informally “encourage” lending institutions to meet local credit needs during regular bank examinations. See R. BRANDEL & M. LARGE, supra note 73, at 95. Since agency enforcement under CRA is so minimal, Congress should have provided a private cause of action for these affected by redlining. Some courts have indicated that when agency enforcement under a statute is inadequate, a cause of action may sometimes be implied. Cort v. Ash, 422 U.S. 66 (1975). In this case, the Court outlined four criteria for implying a cause of action: 1) whether the plaintiff is within the class for whose benefit the statute was created; 2) whether there is any evidence of legislative intent either explicitly or implicitly to create or to deny such a remedy; 3) whether implying a cause of action would be consistent with the legislative scheme; and 4) whether the creation of a private cause of action would interfere with the relationship between federal and state law. Id. at 80-85. See also J.I. Case Co. v. Borak, 377 U.S. 426 (1964). In implying a private cause of action under the Securities Exchange Act of 1934, 15 U.S.C. § 78 (1976), the *J.I. Case* Court stated that such remedies, including implied causes of action, as are necessary to make effective the congressional purpose must be provided by the courts, 377 U.S. at 433. Under these standards, it is reasonable to assume that a private cause of action could be implied under CRA. A person affected by redlining is obviously within the class to be protected, and the Act is intended to protect such an individual’s interest in obtaining mortgage money in a nondiscriminatory way. Since agency enforcement under CRA will be minimal, a private cause of action is necessary to accomplish this purpose.

135. See note 124 and accompanying text supra.

136. See note 104 supra.
nor the Equal Credit Opportunity Act has been effective in eliminating redlining, Congress passed the Community Reinvestment Act. The CRA represents a valuable addition to existing legislation because it emphasizes that lenders have an affirmative obligation to meet credit needs of their local communities. Further, it places upon the federal administrative agencies the primary burden of enforcing that obligation.

Nevertheless, because it fails both to prohibit redlining specifically and to allow for a private cause of action against lenders when agency enforcement fails, the CRA’s forthright policies are unlikely to come to fruition. Congress must realize that only a comprehensive statute outlawing all forms of redlining is likely to diminish the problem successfully, and that a statute can be enacted which is consistent with the free enterprise system of which private lending institutions are a part.

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