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**Opening Statement**

**The Federal Reserve Board  
Regulation C: Home Mortgage Disclosure Act  
(HMDA)  
Public Hearing**

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I am honored to appear before you today to discuss Regulation C and the Home Mortgage Disclosure Act (HMDA), its past and future, and its use and mis-use.

I now am a partner with K&L Gates LLP, focusing largely on assisting financial institutions in their efforts to comply with fair lending and consumer protection laws and regulations, and representing them when they are accused of running afoul of such requirements. My background with HMDA is long, beginning in 1988 when the Pulitzer Prize-winning series “The Color of Money” was published in the Atlanta Journal and Constitution. The articles, using the then-available HMDA data, documented that banks and savings & loan institutions made far fewer residential mortgage loans in Black residential areas than in White residential areas, and raised the issue of possible unlawful discrimination in mortgage lending to the national spotlight.

At the time, I was serving in the Department of Justice, had just been appointed as chief of the Housing and Civil Enforcement Section, and was asked by the Department, in light of the articles, to begin an investigation to evaluate whether banks and savings & loan institutions were discriminating unlawfully in determining who should receive a home mortgage loan. As you know, the HMDA data fields were very limited at the time, focusing on the geographic area in which loans were originated but containing no information on application disposition or pricing of loans. Nonetheless, the data that was available, coupled with other information collected by the OTS, was invaluable in focusing the inquiry and selecting targets for more detailed investigation and analysis. The investigation led to the Department’s first major pattern or practice lawsuit challenging discrimination in mortgage underwriting, filed in September of 1992 against Decatur Federal Savings and Loan.

HMDA and its Regulation C have evolved significantly since that time. More institutions became covered, information on application disposition became available, and, beginning in 2004, a limited amount of information on loan pricing was reported.

Government enforcement of fair lending laws benefited greatly from the availability of HMDA data. As information on the disposition of applications became available, the Department of Justice reviewed it carefully to look for seemingly abnormal disparities in minority vs. non-minority rejection rates, or even more subtle issues such as high levels of withdrawn applications.

HMDA data was universally viewed as only a starting point for more detailed analysis, and complex, time-consuming, resource-intensive investigations were always required to justify the filing of a legal claim. The federal government never filed a lawsuit based solely on HMDA data, and private litigants seemingly shared the view that a claim based solely on HMDA data would not survive judicial scrutiny. That is not to say that HMDA data did not raise eyebrows, with high disparities in rejection rates between minorities and non-minorities; but it was viewed that a detailed investigation was necessary to reach meaningful conclusions.

The loan pricing information that first became available in 2005 was much more limited than application disposition information. Pricing information was available only for loans that met the rate spread threshold. Designed to capture the bulk of subprime loans and exempt the bulk of prime loans, the thresholds have been imperfect. In the industry, subprime loans were viewed as a product. Yes, they were priced higher than prime loans, but with some frequency the attributes of prime loans also pushed the rate above the applicable threshold.

Again, federal government agencies have used this newer data to target lenders for more detailed investigation. The data may be a starting point, but it hardly forms a basis for reaching meaningful conclusions regarding the fairness of the pricing practices of financial institutions.

In recent years, however, we have often seen what I believe is a misuse of the HMDA data. While racial and ethnic underwriting disparities have persisted for the twenty year period that the data has been reported and yet have not been thought to be sufficient to justify legal claims, the new and significantly more limited pricing information has been the sole basis for a significant number of private lawsuits. Rate-spread reportable loans have been labeled as “subprime loans” or even “high cost loans,” with strong suggestions, if not claims, that they are *per se* invidious. None of these cases has proceeded to a decision on the merits, and yet they have imposed a significant reputational and financial burden on the defendant institutions.

HMDA subjects residential mortgage lenders to disclosures that are not applicable to any other segment of American business, including companies engaged in other types of credit transactions. Yet the focus remains on expanding the fields of public information available for residential mortgage credit transactions. Dodd-Frank addresses much of the future of HMDA by requiring the reporting of many new fields of data.

The new legislation continues the trend of reporting more loan level information about residential mortgage transactions. As I have reviewed the statement of the economists who have presented to you, I find it interesting that they call for even more information. Perhaps their profession itself calls for more data and they want what is necessary to conduct meaningful and full analyses. But this brings us back to question the underlying purpose of HMDA.

Is the purpose to provide basic information about residential mortgage transactions so that more detailed reviews can be conducted when thought to be necessary? Or is the purpose to

provide sufficient information to allow government agencies as well as private persons to determine whether individual borrowers are treated fairly? HMDA began with a focus on the first question, but we now are reaching toward data that likely will be used in an effort to address the second question.

Residential mortgage transactions, however, remain complex, and it will be difficult to form meaningful conclusions without considering the totality of circumstances presented by the loan file, which will remain beyond the reach of HMDA. It is important for the Board to clearly state that fact to advance proper use, and not misuse, of the data.

I appreciate that the focus of your review is on the broader issues, but I also suggest that you give some consideration to the more technical issues that HMDA presents. For example, the “broker rule and the meaning of ‘broker’ and ‘investor’” may raise issues in the current fair lending environment. Even at the height of the market, some loan purchasers were heavily involved in underwriting decisions, thus suggesting that they should be (but were not always) the reporting entity. We may continue to see increased investor involvement in the current market conditions. At the same time, the entity that made the credit decision may not have been responsible for the loan price. If the lender is the reporting entity, denial disparities may not reflect its practices, and if the investor is the reporting entity, pricing disparities may not reflect its practices.

Also, the guidance that the FRB has offered over the years on the use of reporting codes such as “withdrawn,” “approved but not accepted,” or “denied” has been confusing, particularly in the context of technology. Automated underwriting approvals are regularly subject to many conditions, and it is not clear when the failure to satisfy the conditions constitutes a “denial” or an application that was “approved but not accepted.” The Board’s 2002 guidance on the issue is

inadequate in that it suggests that “customary conditions” (that would authorize the use of “approved but not accepted”) might range from title difficulties, to amount of appraisal, to amount of compensation. Many would consider some of these to be “underwriting conditions” rather than “customary closing conditions,” and yet in 2002 the Board declined to provide clarity.

Also, the issue of when a credit decision has been made, and thus rendering “withdrawn” no longer permissible, may vary greatly among lenders with no clear guidance from the Board.

Lenders can expect that their HMDA data will be subjected to detailed review by a host of government and private parties. The Board should provide the guidance necessary to promote consistency and help ensure that the data reported accurately describes the practices of the reporting institution.

I am pleased to address your questions.