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Full Disclosure: How Should Lenders Respond to the Heightened Reporting Requirements of the Home Mortgage Disclosure Act?

I. INTRODUCTION

Prompted by the release of lenders’ data under the revised Home Mortgage Disclosure Act (HMDA),¹ New York Attorney General Eliot Spitzer sought to force New York banks to disclose minority applicant credit scores not supplied in their 2004 HMDA reports.² Spitzer requested the information to help the Attorney General’s office understand how loans are being priced and if lending decisions were being made according to legitimate business justifications.³ Spitzer’s investigation was spurred by HMDA reports showing that minorities were receiving significantly higher priced loans than white applicants.⁴ A federal judge ruled that Spitzer was barred from issuing subpoenas or demanding inspection of the records of any national banks and from bringing court actions against national banks to enforce New York fair-lending laws.⁵ This was the first of what may be many more inquiries and legal actions against lenders in response to the 2004 data released under the revised HMDA.⁶

HMDA now requires that lenders make loan-pricing information for home mortgages available to the public.⁷ Lenders can expect community and civil rights groups and regulators to scrutinize this data heavily, but a central question is how will banks and other lending institutions prepare for the fallout, scrutiny, and possible litigation that

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⁴. Id.
⁵. Heller, supra note 2.
are sure to accompany the data reporting of the more stringent revised HMDA? This question is a very salient one and requires lenders to take proactive steps in order to minimize the risks associated with bad public relations, litigation, and federal regulation surrounding each lender’s 2004 HMDA data. Preliminary reports of this data have already energized the media to report negatively regarding the lending practices of banks and will, almost certainly, lead to a flurry of regulatory agency investigations and class action lawsuits. This Note examines the potential issues that lending institutions will face in light of the publicity of the new HMDA data and outlines proactive steps that institutions can take in order to prepare themselves for the legal and media fallout.

Part II of this Note will briefly examine the history of discriminatory lending practices and discuss HMDA. Parts III and IV will explore the new requirements of HMDA and the new data produced. Part V will examine the potential for lawsuits, look at lawsuits in which parties have used HMDA data to support their claims, and closely examine why the claims succeeded or failed, in order to prepare lending institutions for potential litigation. Part VI will discuss and outline proactive steps that lenders can take to prepare and protect themselves from potential negative fallout from the new HMDA data reports.

II. THE HISTORY OF LOAN DISCRIMINATION AND HMDA

HMDA, enacted in 1975 and implemented by Federal Reserve Board Regulation C, is aimed at discouraging loan discrimination.
HMDA encourages banks and other lenders to reinvest in the communities that they serve.\textsuperscript{19} Prior to HMDA, there were findings that lenders contributed to the decline of these communities by denying qualified borrowers access to loans simply due to their inner city locations.\textsuperscript{20} Banks and lenders were accused of "red-lining" certain communities, based upon the "perceived practice of drawing red lines on maps around areas for which they would not make loans."\textsuperscript{21} The "view was that inner city neighborhoods were declining due to lack of available credit for sale, improvement and rehabilitation of homes."\textsuperscript{22} In order to encourage banks to reinvest in the areas where their depositors lived, HMDA was designed to publicize the banks' lending practices.\textsuperscript{23} The act states, "[t]he Congress finds 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."\textsuperscript{24}

Historically, HMDA provided no guidelines or rules designed to enforce community reinvestment.\textsuperscript{25} It only required that banks report lending statistics on the number and total monetary amount of loans made or purchased on home purchases, home refinances, and home improvements within their Metropolitan Statistical Area (MSA).\textsuperscript{26} Two years after HMDA was enacted, in 1977, Congress passed the


23. Legal Match, \textit{supra} note 20.

24. 12 U.S.C. § 2801(a) (2005). The Act also states that "[t]he purpose of this chapter is to provide the citizens and public officials of the United States with sufficient information to enable them to determine whether depository institutions are filling their obligations to serve the housing needs of the communities and neighborhoods in which they are located and to assist public officials in their determination of the distribution of public sector investments in a manner designed to improve the private investment environment." \textit{Id.} § 2801(b).

25. \textit{Id.} at § 2804 (noting that there are no guidelines or rules specifically laid out to enforce community reinvestment).

Community Reinvestment Act (CRA), to work jointly with HMDA to more effectively encourage banks to reinvest in their communities. "The CRA require[s] banks to be responsive to the credit needs of their entire communities, including ‘low- and moderate-income neighborhoods, and to provide appropriate access to banking services.’"

In 1989, Congress made the first revisions to HMDA that allowed for better monitoring of loan discrimination. These revisions expanded HMDA to include mortgage lenders that were not affiliated with depository institutions. It also required lenders to report application statistics, information regarding loan originations, as well as, the race, sex, and income of loan applicants and borrowers. Lenders were also required to identify the class of purchaser for mortgage loans sold and were permitted to explain the basis for their lending decisions.

The 1989 revisions to HMDA were a significant step toward encouraging lenders to be more accountable for their loan decisions. By requiring lenders to include application statistics, demographic information about applicants and borrowers, and identification of the class of purchasers, Congress held lenders to a higher standard of responsibility. With more demographic information about applicants and borrowers available, regulators, community groups, and citizens could more carefully monitor lender practices.

28. Id. § 2901(b).
31. Id.
32. 12 C.F.R. § 203.4(a) (2005). These application statistics include the type of loan application, the amount of the loan applied for, the application’s purpose, the type and location of the property for the loan application, and whether the application was a pre-approval that was denied or originated. Id.
33. Id. at §§ 203.4(a).
35. See generally Home Mortgage Disclosure Act: History of HMDA, supra note 26 (detailing the increased disclosure requirements for lenders). By requiring many more disclosure requirements, lenders are encouraged to use non-discriminatory criteria because regulatory agencies can better determine discrimination with the additional requirements.
37. Id.
demographic information, regulatory agencies could more easily “red flag” lenders whose data showed disparities and could indicate that further investigation was needed to determine if discriminatory practices were present.\textsuperscript{38} As a result, regulatory agencies, fair housing advocacy groups, and individual consumers grew stronger because they could demand more accountability from their community lenders.\textsuperscript{39}

This accountability was strengthened even more in 2002,\textsuperscript{40} when the Federal Reserve Board (the Board) proposed to expand the information reported under HMDA to include pricing.\textsuperscript{41} The new pricing requirements became effective on January 1, 2004 and lenders were required to make their individual reports publicly available in March 2005.\textsuperscript{42} Notwithstanding, the 2004 HMDA aggregate report, containing loan pricing information, was not released until September 2005 by the Federal Financial Institutions Examination Council.\textsuperscript{43} These new requirements pose a litany of new challenges and issues for lenders.\textsuperscript{44} The way that lenders handle the content and reporting of


\textsuperscript{39} See generally Robert B. Avery, Glen B. Canner, & Robert E. Cook, \textit{New Information Reported Under HMDA and Its Application in Fair Lending Enforcement} 344 (2005), http://www.federalreserve.gov/pubs/bulletin/2005/3-05hmda.pdf (inferring that the increased power of regulatory agencies, fair housing advocacy groups, and consumers is based on the premise that with more information reported under HMDA, these parties could possibly scrutinize the practices of lenders more easily without having to try to gain this additional data only through discovery).

\textsuperscript{40} Warren W. Traiger & Joseph Calluori, \textit{The Fair Lending Implications of the New Home Mortgage Disclosure Act Data}, 84 \textsc{Banking Rep.} (BNA) 347, 347 (Aug. 29, 2005). The Federal Reserve Board first proposed that pricing information be reported under HMDA in 2000. That proposal would have required lenders to report each loan’s annual percentage rate instead of the 2002 revision, which requires that lenders report the spread between a loan’s APR and the comparable Treasury yield. \textit{Id.}

\textsuperscript{41} \textit{Id.}

\textsuperscript{42} Klubes & Saul, \textit{supra} note 7, at 64-65.

\textsuperscript{43} Avery, Canner, & Cook, \textit{supra} note 39; \textit{see also} Ethan Zindler, \textit{supra} note 38.

\textsuperscript{44} Lenders fear that the public response to the 2004 HMDA data could lead to class-action lawsuits, increased federal regulation and damage to lenders’ reputations. \textit{Use 8 Explanations for Higher-Cost Mortgage Loans to Avoid PR Crisis Over 2004 HMDA Report}, \textsc{Mortgage L. Compliance Insider}, Sept. 2005, at 1.
HMDA data could substantially affect their prosperity\textsuperscript{45} and ultimately the availability of subprime\textsuperscript{46} loans, based on risk, for consumers.\textsuperscript{47}

III. The New Requirements of HMDA

The Board first proposed to amend HMDA to include the new requirements in 2000 and published the proposed amendments for public comments.\textsuperscript{48} Nearly 300 comments were received and most of the commenting lenders, community groups, and civil rights groups supported expanding the reporting requirement to previously excluded non-traditional lenders.\textsuperscript{49} Support for the inclusion of pricing data, however, was not met with the same enthusiasm.\textsuperscript{50} Community and civil rights groups wanted the data to help enforce fair lending laws and to provide more information regarding the mortgage markets.\textsuperscript{51} Lenders, on the other hand, opposed the pricing requirement because they believed that it would be burdensome and misinterpreted by the public.\textsuperscript{52}

The Board believed that the new requirements were necessary in order to "improve understanding of the mortgage market, including the subprime market, and assist in enforcing fair lending laws."\textsuperscript{53} The Board also considered each proposed change in light of the aggregate benefit and burden of all of the proposed changes.\textsuperscript{54} Consequently, the Board adopted final amendments that were substantially similar to the

\begin{footnotes}
\item[45] This notion of prosperity is based upon the assumption that if lenders are forced to spend large amounts of time and money on litigation, public relations rebuilding, and regulatory compliance, then their bottom lines will be negatively affected.
\item[46] Joseph A. Smith, Jr., Financial Literacy, Regulation and Consumer Welfare, 8 N.C. Banking Inst. 77, at 81 (2004). The distinction between prime and subprime lending has been described as, "the 'prime' market, comprising borrowers deemed creditworthy under traditional lending standards, and the 'subprime' market, which includes borrowers with no credit history or damaged credit." \textit{Id.}
\item[47] This notion assumes that if lenders have to face costly litigation due to the HMDA statistics that show higher loan prices for minorities, their subprime lending programs, are likely to be the first cut.
\item[49] \textit{Id.}
\item[50] \textit{Id.}
\item[51] \textit{Id.} at 7,223.
\item[52] \textit{Id.}
\item[53] \textit{Id.}
\item[54] \textit{Id.}
\end{footnotes}
HMDA now requires lenders to include six additional categories of data that may flag discriminatory lending. The added requirements provide regulators and community groups with more information to determine whether lenders are engaging in discriminatory practices. The new requirements require lenders to report the rate spread of a loan if it is three or more percentage points for first-lien loans and five or more percentage points for subordinate-lien loans. The rate spread is the difference between the annual percentage rate on the loan and the yield on comparable U.S. Treasury securities.

Further, lenders are required to identify loans that are subject to the Home Ownership and Equity Protection Act (HOEPA). Passed in 1994 to combat predatory lending, HOEPA regulates loans that are secured by the borrower's principal residence with annual percentage rates above certain thresholds. Under HOEPA, lenders are required to report a rate spread of eight percentage points for first-lien loans and ten points for subordinate-lien loans, which is higher than the new requirement under HMDA. "Obtaining HOEPA status on loans is critical to address fair-lending concerns related to loan pricing and to


63. HMDA Regulation C Amendments, supra note 62.
better understand the mortgage market, including the subprime market." Finally, lenders are required to obtain a collection of information on the applicant’s race, ethnicity, and sex for all applications completed in person, by mail, on the phone, or over the internet. The other new requirements continue to make discriminatory lending practices more easily discernable.

These changes in the reporting requirements of lenders reflect the Board’s concern with unfair lending. The new requirements provide regulatory agencies with much greater insight into lender practices than the previous requirements. The Board clearly stated this position by noting that, “obtaining loan pricing data is critical to address fair lending concerns related to loan pricing and to better understand the mortgage market.” Consequently, with these revisions, the Board made a significant step toward increasing awareness of discriminatory loan practices as outlined in HMDA’s purpose.

IV. WHAT THE NEW HMDA DATA REPORTS SHOW

Preliminary reports show that the additional requirements have certainly made a difference in the kind of information that can be

64. Id.
65. 12 C.F.R. § 203.4(14) (2005); see also Klubes & Saul, supra note 7, at 64.
66. 12 C.F.R. § 203.4(14) (2005). The other requirements include reporting denials of requests for preapprovals, reporting loans or applications that involve manufactured homes, and characterizing loans using the act’s definitions of “refinancing” and “home improvement loan.” These may be used to identify patterns of disparity between borrowers, which may be a sign of discrimination. Id.
68. Id.
69. Id.
70. Home Mortgage Disclosure Act: Background and Purpose, supra note 17.

This regulation implements the Home Mortgage Disclosure Act, which is intended to provide the public with loan data that can be used:
(i) To help determine whether financial institutions are serving the housing needs of their communities;
(ii) To assist public officials in distributing public-sector investment so as to attract private investment to areas where it is needed; and
(iii) To assist in identifying possible discriminatory lending patterns and enforcing anti-discrimination statutes.

Id.
gathered about lending practices.\textsuperscript{71} Media outlets and anti-discrimination community organizations eagerly anticipated the 2004 HMDA report.\textsuperscript{72} Many requested HMDA data from lending institutions before the official release of the data by the government.\textsuperscript{73} The preliminary data that some of these lenders provided showed sharp disparities between the loans received by minorities and white borrowers.\textsuperscript{74} According to the \textit{Wall Street Journal}, one major national lender’s pricing data showed that minorities were twice as likely as white borrowers to have loans that fall within the new HMDA price reporting criteria.\textsuperscript{75} Further, the National Community Reinvestment Coalition reported that 28.7\% of African Americans and 15.4\% of Hispanic borrowers had higher-priced loans for first-lien home purchases from leading national lenders as opposed to 7.8\% of white borrowers.\textsuperscript{76} Additionally, the 2004 report showed that 24.7\% of African Americans, 21.1\% of Native Americans, and 18.4\% of Hispanics were denied conventional loans compared with only 10.1\% of white applicants.\textsuperscript{77}

Following the release of the 2004 HMDA report, federal regulators flagged 200 lenders, including 100 banks, for further investigation regarding possible discrimination.\textsuperscript{78} According to the Board’s analysis,\textsuperscript{79} African American borrowers were two to three times more likely than white borrowers to receive a higher-priced loan.\textsuperscript{80} Federal agencies have approached this data in different ways.\textsuperscript{81} For example, the Board promptly contacted approximately twenty-five lenders to obtain further information, which could include borrowers’

\textsuperscript{71} Klubes \& Saul, \textit{supra} note 7, at 65; see also Nat’l Cmty. Reinvestment Coal., \textit{PREAPPROVALS AND PRICING DISPARITIES IN THE MORTGAGE MARKETPLACE: A NCRC FOLLOW-UP REPORT FOR NATIONAL HOMEOWNERSHIP MONTH}, (June 2005), \url{http://www.ncrc.org/pressandpubs/press_releases/documents/Preapproval_Report_June05.pdf}.

\textsuperscript{72} Klubes \& Saul, \textit{supra} note 7, at 64.

\textsuperscript{73} \textit{Id.}

\textsuperscript{74} \textit{Id.}

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} Nat’l Cmty. Reinvestment Coal., \textit{supra} note 71, at 5.

\textsuperscript{77} Avery, Canner, \& Cook, \textit{supra} note 39, at 374.

\textsuperscript{78} Zindler, \textit{supra} note 38.

\textsuperscript{79} Avery, Canner, \& Cook, \textit{supra} note 39, at 377.

\textsuperscript{80} Zindler, \textit{supra} note 38.

\textsuperscript{81} \textit{Id.}
Similarly, the Department of Housing and Urban Development (HUD) is concerned about the report and is considering a full-scale investigation, but has not yet requested further information from lenders. Regulators will likely seek explanations from the lenders regarding the reasons for the disparities, as well as, possibly seeking to obtain credit scores, debt-to-income ratios, and other factors needed to do their own analyses.

Although, the report shows disparities between minority borrowers and white borrowers, the HMDA data alone is insufficient to prove lending discrimination. There are several other factors that play a significant role in loan pricing decisions, such as credit score, loan-to-value ratio, and debt-to-income ratio. "The HMDA data are not, by themselves, a basis for definitive conclusions regarding whether a lender discriminates unlawfully against particular borrowers or takes unfair advantage of them." Still, lenders should expect thorough examinations and potential litigation from regulators, community organizations, and consumers because of the disparity in pricing between minority and white borrowers.

82. Id.
83. Id (monitoring of non-bank lenders and enforcement of the federal Fair Housing Act).
84. Id.
85. Id.
86. See infra note 89 and accompanying text.
88. Klubes & Saul, supra note 7, at 64.
90. Zindler, supra note 38.
V. THE ROLE OF HMDA DATA IN ESTABLISHING LOAN DISCRIMINATION

A. Types of Loan Discrimination

Two federal laws, the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act (FHA), govern credit and loan discrimination. Three types of discrimination are recognized under the ECOA and the FHA. The first is overt discrimination, where a lender "blatantly discriminates on a prohibited basis." Next is disparate treatment, which occurs "when a lender treats applicants differently based on one of the prohibited factors." Finally, there is disparate impact, which occurs "when a lender applies a practice uniformly to all applicants but the practice has a discriminatory effect on a prohibited basis and is not justified by business necessity."

Claims under the ECOA and FHA may be brought by an individual or by a class, and the HMDA data will largely be used to support claims against lenders based on the latter two forms of discrimination – disparate treatment and disparate impact. Fair housing community groups and class action attorneys know that HMDA data alone cannot be used to establish a prima facie case of discrimination under the ECOA and FHA, but the new pricing data requirements can strengthen their claims of disparate treatment and impact. Especially in proving disparate treatment, a plaintiff needs to have access to non-public data from the lender that is not included under HMDA. Most of the time, a plaintiff will not have access to

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93. Klubes & Saul, supra note 7, at 66.
95. Id.
96. Id.
97. Id.
98. Klubes & Saul, supra note 7, at 63 and 66.
this type of information.\textsuperscript{101} Even with this information, however, there are many other variables that go into a lender’s pricing decision. Because of the challenge presented by obtaining necessary non-public information from the lender,\textsuperscript{102} sustaining a claim based on a disparate treatment theory is difficult.\textsuperscript{103} A plaintiff must show that he or she was, as an individual, treated differently than other applicants under a lender’s neutral policy.\textsuperscript{104} To do this, a plaintiff would need to find other applicants with similar credit scores, debt-to-income ratios, purchasing similar properties, with similar down-payments, and other factors in order to establish that holding these factors equal, the plaintiff received different treatment.\textsuperscript{105} For these reasons, this information is difficult to obtain, thereby making a disparate treatment claim difficult to substantiate.\textsuperscript{106}

\textsuperscript{101} OCC et al., supra note 100, at 7-8. According to federal regulatory agencies, some examples of non-public data that examiners use to find disparate treatment are: “loan officer or broker compensation relationships,” “broad discretion in pricing/transaction costs,” “use of risk-based pricing that is not empirically or statistically sound,” “high percentages of either exceptions to underwriting criteria or overrides of credit score cutoffs,” “and lack of clear, objective standards for classifying applicants... as ‘prime’ or ‘subprime’ borrowers.” \textit{Id.}

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\textsuperscript{104} Latimore v. Citibank, 979 F.Supp. 662, 665 (N.D.I11. 1997) (applying the \textit{prima facie} requirements for disparate treatment). In order to demonstrate a \textit{prima facie} case of disparate treatment, plaintiffs must prove: “(1) they are members of a protected class; (2) they applied and were qualified for a loan; (3) they were rejected for the loan; and (4) defendants continued to approve loans for other applicants with similar qualifications.” \textit{Id.}

\textsuperscript{105} OCC et al., supra note 100. \textsuperscript{106} OCC et al., supra note 100. \textsuperscript{107} OCC et al., supra note 100.

\textsuperscript{106} See \textit{supra} notes 100-05 and accompanying text. This inference is drawn from the requirement that disparate treatment claims be based on either overt or comparable evidence which is not included in HMDA reports and would thereby need to be obtained in other ways. \textit{Id.}

Bd., Office of Thrift Supervision, and Nat'l Credit Union Admin. [hereinafter OCC et al.], \textit{Interagency Fair Lending Examination Procedures}, Page iii. (2005) (inferring the requirement that disparate treatment claims be based on either overt or comparable evidence which is not included in HMDA reports and would thereby need to be obtained in other ways).

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Since this data is not available to the public, plaintiffs will have to rely on other methods of finding such proprietary information and/or discovery devices. \textit{Id.}

\textsuperscript{102} See \textit{id.}

\textsuperscript{103} See \textit{supra} notes 100-05 and accompanying text. This inference is drawn from the requirement that disparate treatment claims be based on either overt or comparable evidence which is not included in HMDA reports and would thereby need to be obtained in other ways. \textit{Id.}
B. Using HMDA to Establish Disparate Impact

In light of the new HMDA data, plaintiffs will be more likely to use it to support a claim of disparate impact. The number of affected persons makes disparate impact claims more conducive to class action lawsuits, but recent legislation makes it easier for lenders to remove state-brought class action suits to less “plaintiff-oriented” federal courts. Disparate impact occurs “when a lender applies a racially or otherwise neutral policy or practice equally to all credit applicants, but the policy or practice disproportionately excludes or burdens certain persons on a prohibited basis.” The regulatory agencies explain that, “although the precise contours of the law on disparate impact as it applies to lending discrimination are under development, it has been clearly established [that] the single fact that a policy or practice creates a disparity on a prohibited basis is not alone proof of a violation.”

Evidence of discriminatory intent is not necessary to establish that a lender’s policy violates the ECOA or FHA on grounds of disparate impact. In order for a plaintiff to prove that a lender has violated the ECOA or FHA on grounds of disparate impact, the plaintiff must prove: (1) that the lender’s policy or practice has a disparate impact on a protected class, (2) that the disparate impact created by the lender’s policy is unjustified by an adequate “business necessity,” and (3) that an alternative policy could serve the same purpose with less discriminatory effect.

As part of establishing a prima facie case of disparate impact, a plaintiff must use statistical evidence to show that the lender’s policy...
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has a significantly greater adverse effect on a protected class. Once proven, some circuits then shift the burden of proof to the lender to demonstrate a valid business necessity. Other circuits have established four criteria for evaluating a claim based on a policy's disparate impact: (1) strength of the plaintiffs' statistical showing; (2) the lender's legitimate interest in the action; (3) some indication of discriminatory intent; and (4) possible relief obtained if another practice would be used.

C. Examining the Role of HMDA in Disparate Impact Litigation

HMDA data can play a significant role in the success or failure of a plaintiff's claim of loan discrimination based upon a theory of disparate impact. That role can be better understood by closely examining two significant loan discrimination cases. The courts in both Thomas v. First Federal Savings Bank of Indiana and Hargraves v. Capital City Mortgage Corp. placed heavy weight on the plaintiffs' use of HMDA data in establishing their claim.

In Thomas, African American homeowners brought an action against First Federal Savings Bank of Indiana after the lender refused to grant them a second mortgage on their home. As one of their claims, the plaintiffs argued discrimination under disparate impact theory. The district court applied the four-tiered evaluation method of determining disparate impact and held that the lender did not violate the

120. Thomas, 653 F. Supp. at 1330.
121. Hargraves, 140 F. Supp. 2d at 7.
123. Thomas, 653 F. Supp. at 1330.
124. Id.
The plaintiffs in *Thomas* provided HMDA data as evidence of the alleged disparate impact, but the court held that, as a matter of law, the statistical evidence alone was not enough to prove the violation. The HMDA data showed the number and amounts of the loans issued by First Federal by type and community over a two-year period, but nothing more. The plaintiffs did not provide any further analysis of the HMDA data, nor did they attempt to explain to the court what the data showed. The court called the statistical evidence "incomplete and disjointed" and stated that:

Plaintiffs' attorneys offered no explanation of the meaning of these figures, they made no attempt to present evidence which would allow the court to draw any inferences from them. This evidence, standing alone, does not establish that race played any part in First Federal’s decisions to make loans to people in Gary; no reasonable inferences can be drawn in that direction.

The court went further to say that there are numerous legitimate business factors that go into a loan decision which do not qualify as a violation.

There is nothing in the Board’s regulations or in the Board’s policies which mandates an association to make a bad loan as long as the criteria they use for making the loan are legitimate business criteria, such as the credit worthiness of the borrower, the marketability, the salability of the security property, including the neighborhood in which it’s located which has a bearing.

125. *Id.* at 1340.
126. *Id.*
127. *Id.*
128. *Id.*
131. *Id.*
on the salability, the diversification of the institution's assets. All these things are legitimate criteria.\textsuperscript{132}

Conversely, in \textit{Hargraves}, the court found that the plaintiffs made a prima facie case for disparate impact.\textsuperscript{133} The eight plaintiffs in \textit{Hargraves} alleged that the lender practiced reverse red-lining\textsuperscript{134} by targeting African-American communities for "predatory" loan products, which had a disparate impact on those communities.\textsuperscript{135} The plaintiffs used HMDA data to show that Capital City made a greater percentage of its loans than other subprime lenders in census tracts where African Americans were a majority.\textsuperscript{136} The plaintiffs used the HMDA data to support a specific claim of disparate impact.\textsuperscript{137} In addition, the data showed that Capital City made a disproportionately large number of loans in neighborhoods which were over ninety percent black, showing that Capital City's business was heavily targeted toward African Americans.\textsuperscript{138} The plaintiffs expanded upon the HMDA data by providing additional evidence that supported the HMDA conclusions, including evidence of the lender's solicitation of mortgage brokers who worked in predominately black communities, the decision to open offices within black communities, and of the display of pictures of the company president with black leaders including Rev. Jesse Jackson and Marion Berry.\textsuperscript{139}

Unlike the plaintiffs in \textit{Thomas}, the plaintiffs in \textit{Hargraves} made a compelling argument using HMDA data.\textsuperscript{140} In other words, they did not just let the numbers speak for themselves.\textsuperscript{141} Instead, they

\begin{itemize}
  \item \textsuperscript{132} \textit{Id.}
  \item \textsuperscript{133} \textit{Hargraves} v. Capital City Mortgage Corp., 140 F. Supp.2d at 21.
  \item \textsuperscript{134} \textit{Id.} Reverse red-lining occurs when lenders specifically target groups or neighborhoods for unfair, sub-prime lending products. \textit{Id.} at 20.
  \item \textsuperscript{135} \textit{Id.} at 18-21.
  \item \textsuperscript{136} \textit{Id.} at 21-22.
  \item \textsuperscript{137} \textit{Id.}
  \item \textsuperscript{138} \textit{Hargraves} v. Capital City Mortgage Corp., 140 F. Supp.2d at 21-22.
  \item \textsuperscript{139} \textit{Id.}
  \item \textsuperscript{140} \textit{Compare Hargraves}, 140 F. Supp. 2d at 21-22 (holding that the plaintiffs used HMDA data to support their argument for disparate impact), with \textit{Thomas} v. First Fed. Sav. Bank of Indiana, 653 F. Supp. 1330, 1335-36, 1340 (N.D.Ind. 1987) (holding that the plaintiffs use of the HMDA data was "incomplete" and did not support their claim for disparate impact).
  \item \textsuperscript{141} \textit{See Hargraves}, 140 F. Supp. 2d at 21-22.
\end{itemize}
informed the court of the inference that they were trying to make.\footnote{142} They took an already strong use of the statistical data and added other evidence to make it stronger.\footnote{143} In fact, the HMDA data coupled with the plaintiff’s supporting evidence convinced the court that a \textit{prima facie} case for disparate impact had been made.\footnote{144} In contrast, the \textit{Thomas} plaintiffs’ lack of specificity in and support of their HMDA data led to their claim’s dismissal.\footnote{145}

Both cases contain valuable lessons.\footnote{146} HMDA data can be a very effective tool for both the plaintiff and the lender.\footnote{147} Plaintiffs will want to follow the \textit{Hargraves} example and provide strong, relevant statistical data coupled with other evidence to support their claims.\footnote{148} The effect of the HMDA reports has the potential to be far more prejudicial to lenders since the revision.\footnote{149} Lenders should emphasize HMDA’s limitations, even after the expanded revisions.\footnote{150} There are a myriad of other factors that go into a loan decision and the courts should be aware of them.\footnote{151} Credit score, loan-to-value, and debt-to-income ratio all play a huge role in the lending decision and may support higher loan rates for borrowers based on the credit risk that they present.\footnote{152} Unfortunately, the HMDA data does not collect this information.\footnote{153} Accordingly, lenders should not let the courts be biased by the statistical information suggesting disparate lending practices toward racial groups.\footnote{154} Courts should be reminded that the HMDA data, standing
alone, does not establish impermissible discrimination. Lenders should follow the traditional defense approach to assert (1) no cause of action for disparate impact exists, (2) plaintiffs have failed to establish a \textit{prima facie} disparate impact case because of the weakness of their statistical data, and (3) even if \textit{prima facie} case is made, there is a legitimate business justification for the challenged policy or practice. 

\textbf{VI. PROACTIVE STEPS FOR MOVING FORWARD}

The most important thing for lenders to remember when facing the possible negative press, damage to reputation, and litigation is to be proactive. First, lenders should analyze their own HMDA data in order to know \textit{exactly} what it shows and does not show. The second task is to conduct a thorough S.W.O.T. analysis regarding the HMDA data. Finally, lenders should develop an explanation of their HMDA data that can be shared with the public. These items should be done as soon as possible so that lenders will not be caught off-guard by regulatory agencies, community groups, and litigants who may know what the data shows better than they do.

First, the importance of a lender conducting a thorough, independent analysis of HMDA data cannot be stressed strongly enough. Doing so allows the lender to be ready for any questions that regulators, potential litigants, or the media may have, thus preventing any surprises. There are numerous software programs that enable lenders to review HMDA data and non-HMDA data in a myriad of ways. Regulators will pay particular attention to the higher-priced loans made to protected class borrowers and their average rate spreads. Lenders should compare their data to that of their peers in each of the geographic areas where their company does significant

155. \textit{See id.} 
156. \textit{See id.} 
157. \textit{See id. at 70.} 
158. Few, \textit{supra} note 18. 
159. \textit{See infra} notes 170-87. 
160. Klubes & Saul, \textit{supra} note 7, at 70. 
161. Few, \textit{supra} note 18 (noting that "now" is the time for lenders to act). 
162. \textit{See id.;} Traiger & Calluori, \textit{supra} note 40, at 351. 
163. Klubes & Saul, \textit{supra} note 7, at 70. 
164. Few, \textit{supra} note 18. 
165. Traiger & Calluori \textit{supra} note 40, at 351.
business. If the lender finds some disparity in its loan pricing, it should investigate further until it finds the reason for this disparity. Assuming that a legitimate business reason cannot be found, the lender should immediately take steps to reform its lending practices. The bottom line is that lending is a risk-assessment industry, and lenders can minimize risk regarding their HMDA data only if they know exactly what it shows and prepare for it.

After lenders conduct an analysis of their HMDA data, they should prepare a S.W.O.T. analysis. Business planners, marketing firms, and public relations professionals have long advocated the use of S.W.O.T. analyses to properly prepare for expansion, new opportunities, or potential business problems. Lenders should do the same. In a S.W.O.T. analysis, a company examines its strengths, weaknesses, opportunities, and threats in order to plan accordingly. The lender should ask whether the data shows little or no disparity across protected classes. Additionally, the lender should inquire if the data shows that minorities receive lower loan pricing than their peers. These all may be strengths that can be highlighted. Then, the lender should look at its weaknesses. Perhaps there are some statistics that

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166. Id.
167. Id.
168. Id.
169. See Klubes & Saul, supra note 7, at 70.

SWOT analysis is a simple framework for generating strategic alternatives from a situation analysis. It is applicable to either the corporate level or the business unit level and frequently appears in marketing plans. SWOT stands for Strengths, Weaknesses, Opportunities, and Threats. The SWOT framework was described in the late 1960s by Kenneth Andrews, C. Roland Christiansen, William D. Guth, & Edmund P. Learned.

Id.
171. See id.
172. See id.
173. See id.
174. Traiger & Calluori, supra note 40, at 351.
175. Id. (explaining that a thorough analysis should be completed to see exactly what the lender's data shows).
176. See Traiger & Calluori, supra note 40, at 351.
the public could misinterpret as discrimination.\textsuperscript{178} Perhaps there are other weaknesses that the data may show such as higher loan prices than competitors. The lender should be ready for these possible misinterpretations.\textsuperscript{179} A detailed explanation should be prepared in advance to respond to and explain inquiries regarding the lender’s data.\textsuperscript{180} Next, lenders should examine opportunities that are present during this tumultuous time.\textsuperscript{181} Often a lender can tout some of its strengths to combat the negative publicity that the lending industry will face.\textsuperscript{182} For example, it may be time for a campaign that highlights the lender’s proud statistics of fairness and equality in lending or that the large number of loans that it provides for credit-challenged lenders. “[The HMDA data] may also open new opportunities if... there are substantial numbers of protected class borrowers who are sufficiently credit-worthy to qualify for prime mortgages.”\textsuperscript{183} Taking advantage of this market may provide great rewards for those who respond quickly.\textsuperscript{184} Finally, lenders should make an honest assessment of the threats posed by the data report.\textsuperscript{185} Maybe analysis shows that there is some unexplained disparate treatment, or that a competitor’s data shows non-disparity across-the-board. For whatever is determined to be a threat, the lender needs a plan to deal with it.\textsuperscript{186} Creating a S.W.O.T. analysis will help lenders be proactive and plan their way through a potentially difficult time.\textsuperscript{187} 

Finally, a lender should prepare an explanation of its HMDA data that it can easily share with the public.\textsuperscript{188} Lenders should reassure consumers that they have nothing to hide and that they handle their business with the utmost integrity,\textsuperscript{189} while, at the same time, being

\textsuperscript{178} Klubes & Saul, supra note 7, at 70.
\textsuperscript{179} See generally Use 8 Explanations for Higher-Cost Mortgage Loans to Avoid PR Crisis Over 2004 HMDA Report, supra note 44 (outlining explanations for misinterpretations of a lender’s HMDA data).
\textsuperscript{180} Id.
\textsuperscript{181} See Net MBA Bus. Knowledge Ctr., supra note 170.
\textsuperscript{182} See Klubes & Saul, supra note 7, at 63; Traiger & Calluori, supra note 40, at 352.
\textsuperscript{183} Traiger & Calluori, supra note 40, at 352.
\textsuperscript{184} Id.
\textsuperscript{185} See Net MBA Bus. Knowledge Ctr., supra note 170.
\textsuperscript{186} Id.
\textsuperscript{187} See supra notes 170-186 and accompanying text.
\textsuperscript{188} Klubes & Saul, supra note 7, at 70.
\textsuperscript{189} See id.
mindful not to include any proprietary information. The different factors that play a part in the loan pricing decision should be explained so that the public doesn’t just look at statistics and think that discrimination is occurring. Lenders may want to issue press releases with their data explanations if they are positive. The media will probably have plenty of seemingly negative stories to report, if the preliminary reports are any indication. Any positive exposure that lenders can get during this time will be an asset. Most importantly, lenders do not want to be caught off-guard by inquiries that regulators, the media, or customers may have. By being proactive and having statements prepared and ready, lenders can show that they have nothing to hide.

VII. CONCLUSION

The release of the revised HMDA data will certainly cause a stir in the lending community. Lenders should thoroughly prepare themselves for the possible regulatory, media and community group inquiries and litigation. Judging from the preliminary inquiries and the initial reaction to the release of the 2004 report, there will be significant fallout and the best way for lenders to prepare is to be proactive. Plans should be made to meet the turmoil head-on. Lenders should conduct analysis of their own data and be prepared to explain it to an inquisitive public. Lenders should also familiarize themselves with the revisions made to HMDA and look at prior loan discrimination cases to be ready for any litigation that may result from the data’s release.

190. Use 8 Explanations for Higher-Cost Mortgage Loans to Avoid PR Crisis Over 2004 HMDA Report, supra note 44.
191. Id.
192. Id.; see also Few, supra note 18.
193. See Klubes & Saul, supra note 7, at 70.
194. Id.
195. See id.
196. Traiger & Calluori, supra note 40, at 352; Few, supra note 18.
197. Id.
198. Klubes & Saul, supra note 7, at 70.
199. See supra notes 157-95 and accompanying text.
200. Klubes & Saul, supra note 7, at 70.
201. Id.
In addition, lenders should thoroughly examine and analyze their strengths, weaknesses, opportunities, and threats in regard to the release of the revised HMDA data. By completing a S.W.O.T. analysis, lenders will be more adequately prepared to handle any problems that may occur and take advantage of any opportunities that arise from the 2004 reports. Completing a S.W.O.T. analysis, after analyzing their own HMDA data, forces lenders to be proactive and to think about how the data can and will affect their institution in the future. This proactivity is essential for lenders to survive the possible bad public relations, litigation, and regulatory controls that may follow the release of the 2004 HMDA data.

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202. See supra notes 170-87 and accompanying text.
203. See supra notes 170-87 and accompanying text.
204. See supra notes 170-87 and accompanying text.
205. See supra notes 157-95 and accompanying text.