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THE EVOLUTION OF REDLINING POST-FINANCIAL CRISIS AND BEST PRACTICES FOR FINANCIAL INSTITUTIONS

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I. INTRODUCTION

During the past decade, financial regulators and enforcement agencies such as the United States Department of Housing and Urban Development ("HUD") and the United States Department of Justice ("DOJ") have made fair lending enforcement a major priority. Possibly in response to the recent financial crisis and its arguably disproportionate impact on the ability of individuals in legally protected classes to achieve the "American dream" of home ownership, these agencies became more creative in the application of the legal standards of discrimination to perceived inequality in lending practices. The current version of discriminatory "redlining" that is the subject of this Article reflects this novel approach—an approach that has strayed somewhat far afield from the traditional version of the legal standard.

Part I of this Article provides an introductory foundation, and includes an explanation of the legal concepts embodied by the term "fair lending," a review of the statutory sources of fair lending law, a description of the three legal standards for evidencing discrimination in the fair lending context, and an overview of the mechanism by which a fair lending enforcement case may be commenced.[1] Part II delves further into the concept of redlining.[2] It describes what is meant by use of the term, illustrates the accelerating pace of redlining cases over the past decade, and reviews a few selected recent enforcement cases for the

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1. *See infra* Part I.
2. *See infra* Part II.

important insights they offer.[3] Part III theorizes about the changes in the application of the fair lending disparate treatment standard, considers the possible impact on supervision and enforcement as a result of the shifting political winds, and offers guidance for institutions as to how best to comply with legal and regulatory expectations.[4] Finally, Part IV summarizes the topics and offers concluding thoughts.[5]

A. What is Fair Lending?

The term "fair lending" refers to the fair, impartial, and unprejudiced access to credit for qualified persons.[6] Stated another way, individuals who are otherwise qualified to receive credit cannot be denied access to such credit during any aspect of the credit pre-application, application, and approval process based on some personal characteristic that is protected under the law.

Importantly, fair lending law does not require an institution to make bad loans.[7] There is a common misperception that a depository institution will subject itself to heightened credit risk and the accompanying safety and soundness concerns simply by having an effective fair lending program. To the contrary, regulatory requirements obligate an institution to take steps to satisfy itself that the borrower has the ability to repay the loan obligation prior to making the loan.[8]

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3. *See infra* Part II.

4. *See infra* Part III.

5. *See infra* Part IV.

6. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1002, 12 U.S.C. § 5481(13) (2016).

7. *See, e.g.,* Consent Order at 20, United States v. BancorpSouth Bank, No. 1:16cv118 (N.D. Miss. 2016) (reiterating that "[n]o provision of this Order requires Defendant to make any unsafe or unsound loan or to make a loan to a person who is not qualified for the loan based upon lawful, nondiscriminatory terms . . .") (discussed *infra* Part II.A.2); *see also* FED. RESERVE BD., CONSUMER COMPLIANCE HANDBOOK (2016), *available at* https://www.federalreserve.gov/boarddocs/supmanual/cch/fair_lend_fhact.pdf ("[B]anks are not expected to make unsound real estate loans or to render services on more-favorable terms to applicants solely because of the applicant's status as a member of a protected class. However, denying loans or services on this basis is illegal.").

8. As early as December of 2005, federal banking regulators began to express concern about the upward trend in the prevalence of nontraditional mortgages that allowed borrowers to defer repayment of mortgage principal and, in many cases, interest. One underlying issue involved the potential inability of a borrower to repay the mortgage obligation once the deferment period ended. In response, the Federal Reserve Board and other federal banking regulatory agencies finalized interagency supervisory guidance in June of 2007. This informal guidance set forth certain underwriting standards the supervised institutions were to follow prior to issuance of certain types of nontraditional mortgage loans to help ensure that

In the broadest sense, every successful lender "discriminates," in that such a lender will avoid those potential borrowers who are unlikely to repay the obligation and instead favor (i.e., provide loans to) those most likely to repay. The fair lending issue only arises when the discriminatory treatment of the individual occurs because of any of a number of individual characteristics that are protected by law.[9] In most fair lending cases, allegations of violations are charged under both the Equal Credit Opportunity Act and the Fair Housing Act.[10] The protected

a borrower had the ability to repay the credit obligation. State banking and mortgage regulators soon followed suit by issuing "parallel statements" that were adopted by many states. *See* Truth in Lending, 73 Fed. Reg. 44522, 44528 (July 30, 2008) (codified at 12 C.F.R. pt. 226) (discussing in the Preamble to the Final Rule the informal guidance that existed prior to the 2008 formal notice-and-comment rulemaking). Rather than continue to rely on informal guidance, the Federal Reserve Board (having rule-making authority for the Truth-In-Lending Act and other consumer financial regulations prior to the emergence of the Consumer Financial Protection Bureau) finalized rules to prohibit creditors from extending credit for "higher-priced mortgage loans" and loans subject to the Home Ownership and Equity Protection Act unless the borrower demonstrated an "ability to repay from sources other than the collateral itself." *Id*. at 44539 (codified at 12 CFR 226.34(a)(4)(ii) and 226.35(b)(1)). These protections were amplified and extended to all "consumer credit transaction[s] . . . secured by a dwelling" in the "Ability-to-Repay and Qualified Mortgage Standards" Rule promulgated by the Consumer Financial Protection Bureau that became effective January 10, 2014. *See* Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 6407, 6585 (Jan. 30, 2013) (codified at 12 CFR 1026.32 and 1026.43) (requiring that "[a] creditor shall not make a loan that is a covered transaction unless the creditor makes a reasonable and good faith determination at or before consummation that the consumer will have a reasonable ability to repay the loan according to its terms") [hereinafter PROCEDURES].

9. FED. FIN. INSTS. EXAMINATION COUNCIL, INTERAGENCY FAIR LENDING EXAMINATION PROCEDURES iii (Aug. 2009) (explaining that "[d]isparate treatment occurs when a lender treats a credit applicant differently based on one of the prohibited bases") . *See also* FED. RESERVE BD., *supra* note 7 (observing that "[redlining] is unlawful under the FHAct only when done on a prohibited basis").

10. Observe that the ECOA has a broad application to "any aspect of a credit transaction" (15 U.S.C. § 1691), whereas the FHAct is less specific in its application but has a wide scope of prohibition of discrimination against any person in making available a residential real estate-related transaction, or in the terms or conditions of such a transaction (42 U.S.C. § 3604). See more detailed discussion of the ECOA and the FHAct *infra* Parts I.B.1 and I.B.2.

characteristics[11] vary based on the statute, [12] but most cases involve race or national origin.[13]

B. *Two Statutory Sources Of Fair Lending Law*

Fair lending law derives from two primary statutes: the Equal Credit Opportunity Act ("ECOA")[14] and the Fair Housing Act ("FHAct").[15]

1. ECOA

The ECOA was enacted in 1974 as an amendment to the Consumer Credit Protection Act of 1968. As its name suggests, the purpose of the statute is to provide an equal opportunity for credit to certain protected classes. This purpose is to be achieved by forbidding discrimination on a prohibited basis against a credit applicant during any aspect of a credit transaction.[16] The ECOA was amended in 1976 to add

11. Throughout, the terms "protected characteristic(s)," "protected class(es)," and "prohibited basis (bases)" may be used interchangeably and have the same meaning.

12. ECOA and the FHAct each protect against discrimination on the basis of the following characteristics: race/color, religion, national origin, and sex. ECOA also prohibits discrimination on the basis of marital status, age, the receipt of public assistance income, and an applicant's good faith exercise of any right under the Consumer Credit Protection Act. 15 U.S.C. § 1691(a) (2016). The FHAct provides further protection against discrimination on the basis of familial status or handicap. 42 U.S.C. § 3605(a) (2016); 24 C.F.R. § 100.110(b) (2017). Additionally, a HUD Rule now prohibits discrimination in a housing transaction on the basis of actual or perceived sexual orientation or gender identity. 24 C.F.R. § 5.105(a)(2). As a general warning, because a complaint involving a violation of one statute will often also allege a violation of the other, the best practice is to not discriminate on the basis of any of these characteristics.

13. *See, e.g.*, FED. FIN. INSTS. EXAMINATION COUNCIL, *supra* note 9, at v (observing that the agency fair lending examination "procedures emphasize racial and national origin discrimination in residential transactions, but the key principles are applicable to other prohibited bases . . . .").

14. 15 U.S.C. § 1691 (2016).

15. 42 U.S.C. §§ 3601–3619 (2016).

16. Although outside the scope of this Article, it is important to an overall understanding of ECOA to realize that the scope of the regulation extends throughout the life of the loan. This means that ECOA is also applicable to the way in which the loan is serviced and modifications are made. *See, e.g.*, CFPB, MORTGAGE SERVICING EXAMINATION PROCEDURES 29 (June 2016) (cautioning that during the review of the servicer's loss mitigation activities, "examiners must be mindful of activities that may indicate disparate treatment in violation of the ECOA . . . ."). Observe that the implication of fair lending with respect to mortgage servicing was highlighted as one of three "key areas where the CFPB's fair lending team [was to have] focus[ed] in 2017." Patrice Ficklin, *Fair Lending Priorities in the New Year*,

more prohibited bases beyond the original sex and marital status discriminatory prohibitions.[17]

The statute itself is not very explicit, so the agency that was tasked with implementation of the statute[18] adopted Regulation B to provide more specific guidance. Regulation B clarifies, in part, that "[a] creditor shall not make any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage on a prohibited basis a reasonable person from making or pursuing an application."[19] As will be discussed in further detail, the ECOA prohibition on discouragement, even as to potential applicants, may be one reason that regulators and the DOJ have begun to scrutinize the advertising campaigns (or the lack thereof) of the subject financial institution,[20] and also may have led to a new analytical focus that compares the market penetration of the subject institution to that of its peers.[21]

2. The FHAct

The second statutory source of fair lending law, the FHAct, was passed as Title VIII of the 1968 Civil Rights Act.[22] The Act forbids discrimination on a prohibited basis[23] in housing transactions. In the

CONSUMER FINANCIAL PROTECTION BUREAU (Dec. 16, 2016), https://www.consumerfinance.gov/about-us/blog/fair-lending-priorities-new-year/.

17. *See, e.g.*, MICHAEL M. GREENFIELD, CONSUMER TRANSACTIONS 276 (5th ed. 1999) (explaining that subsequent to the initial enactment in 1974, Congress amended the Act in 1976 to include the additional prohibited characteristics).

18. Originally, the Federal Reserve Board was tasked with rulemaking authority related to the statute. However, rule-making authority for this and other consumer financial protection statutes was transferred to the Consumer Financial Protection Bureau. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1085(3), 15 U.S.C. § 1691b (2016); Dodd-Frank § 1042, 12 U.S.C. § 5552 (2016).

19. Equal Credit Opportunity Act (Regulation B), 12 C.F.R. § 1002.4(b) (2017) (entitled "Discouragement"). *See* list of prohibited characteristics, *supra* note 12.

20. For further discussion, *see infra* Part II.

21. *See infra* note 175 (analyzing the advantage to a financial institution to select the appropriate peer group, as opposed to having the supervisory or enforcement agency make that determination).

22. *See* Fair Housing Act § 805, 42 U.S.C. § 3605 (2016) (regulating fair lending in residential real estate transactions). *See also* FED. RESERVE BD., *supra* note 7 (asserting that, because of the broad way in which the civil rights statutes were written by Congress, "[a] variety of lending practices have been found to be illegal under the act, including some that are not specifically mentioned in the act but that have been determined to be illegal because they violate requirements and prohibitions that are implicit in the act's language").

23. For a list of prohibited-basis characteristics, see *supra* note 12.

disparate treatment context that is the subject of this Article, the FHAct applies to loans with a home-based purpose or loans where residential real estate is taken as collateral.[24]

3. HMDA and CRA

Two additional statutes having fair lending implications are often conflated with the fair lending laws that actually prohibit discrimination: the Home Mortgage Disclosure Act of 1975 ("HMDA")[25] and the Community Reinvestment Act of 1977 ("CRA").[26]

The HMDA is not a fair lending statute *per se*, in that it does not expressly prohibit discriminatory lending behavior. Rather, it is a data collection and reporting statute related to a financial institution's[27] mortgage lending activity. One of its three enumerated purposes is to "assist identification of possible discriminatory lending patterns and enforcement of antidiscrimination statutes."[28] The statute's

24. 42 U.S.C. § 3605(b) (2016); 24 C.F.R. 100.115 (2017). With respect to the FHAct, HUD has the rulemaking and enforcement authority. 42 U.S.C. § 3535(d) (2016).

25. Home Mortgage Disclosure Act of 1975, 12 U.S.C. § 2801 (2016); 12 C.F.R. Pt. 1003 (2017) (Regulation C).

26. Community Reinvestment Act, 12 U.S.C. § 2901 (2016); 12 C.F.R. Pt. 25 (2017) (OCC regarding national banks); 12 C.F.R. Pt. 195 (2017) (OCC regarding federal savings associations); 12 C.F.R. Part 228 (2017) (Federal Reserve System); 12 C.F.R. Pt. 345 (2017) (FDIC). Within each federal banking regulator's Chapter in the Code of Federal Regulations are virtually identical Parts and Subparts detailing the CRA provisions applicable to the depository institutions under the authority of the given regulator. The CRA regulatory text is virtually identical, regardless of regulator, across each of Subparts A ("General"), B ("Standards for Assessing Performance") and C ("Records, Reporting and Disclosure Requirements"), and the paragraphs within each Subpart bear the same numbering sequence within the applicable Part related to each regulator.

27. The statute and implementing regulations apply to both depository and nondepository mortgage lending institutions that meet certain coverage criteria. 12 C.F.R. § 1003.1(c) (2017).

28. 12 C.F.R. § 1003.1(b)(iii) (2017). The third, fair lending, purpose was added in 1989 when the Federal Reserve Board revised Regulation C "to incorporate amendments contained in the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA). 12 U.S.C. § 1811 (2016). The FIRREA amendments accomplished the following: expanded the coverage of HMDA to include mortgage lenders not affiliated with depository institutions or holding companies; required reporting of data regarding the disposition of applications for mortgage and home improvement loans in addition to data regarding loan originations and purchases; and required most lenders to identify 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. To facilitate the collection of this information, Regulation C requires a loan/application register (LAR) to be submitted by each institution. The LAR allows institutions to log loan applications, loans originated, and loans purchased." *History of HMDA*, FFIEC, https://www.ffiec.gov/hmd

implementing regulation, Regulation C, requires depository and nondepository originators of consumer-purpose, closed-end loans and open-end lines of credit that are secured by a dwelling to collect information on each credit applicant. The institution's HMDA data must be reported annually to the Consumer Financial Protection Bureau ("CFPB"),[29] and is later reported to the public in aggregated form on the CFPB's website each fall. The publicly available information may be used by regulators, consumer advocacy groups, and others to perform regression analyses in order to identify potential fair lending issues. If apparent disparities are identified, the credit originator is vulnerable to targeted fair lending examinations by regulators, enforcement actions by the CFPB, HUD or the DOJ, and private class action litigation.

The genesis of the second related statute, the CRA, was to combat the potentially detrimental "redlining" policies of depository institutions that prohibited lending in minority neighborhoods.[30] The Act encourages

a/history2.htm (last visited Jan. 18, 2018). The CFPB promulgated the 2015 HMDA Final Rule (Rule) to further bolster this purpose. The Rule modifies and adds numerous data fields and elements in an attempt to provide additional insight into characteristics of lenders and loan applicants and thereby better determine a lender's compliance with fair lending laws. 80 Fed. Reg. 66127 (Oct. 28, 2015), as corrected and amended Nov. 10, 2015, and Aug. 24, 2017. However, in conjunction with the recent change in CFPB leadership (*see infra* note 162), the CFPB issued an announcement on Dec. 21, 2017, stating that "it intends to open a rulemaking to reconsider various aspects of the Bureau's 2015 HMDA [Final] [R]ule, such as the institutional and transactional coverage tests and the rule's discretionary data points." *CFPB Issues Public Statement on Home Mortgage Disclosure Act Compliance*, Consumer Fin. Prot. Bureau (Dec. 21, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-public-statement-home-mortgage-disclosure-act-compliance/. The FDIC followed suit on the same day, stating that with respect to its supervised institutions with less than $10 billion in assets (i.e., state-chartered, non-Federal Reserve-member depository institutions for which the CFPB does not have supervisory authority), it "does not intend to assess penalties with respect to errors in data collected in 2018 and reported in 2019. Through this supervisory approach, FDIC examination staff will give credit to institutions' good faith compliance efforts, and the approach will help institutions identify compliance weaknesses." FED. DEPOSIT INS. CORP., FIL NO. 63-2017, HOME MORTGAGE DISCLOSURE ACT: STATEMENT ON INSTITUTIONS' GOOD FAITH COMPLIANCE EFFORTS (Dec. 21, 2017).

29. Under the 2015 HMDA Final Rule (*see supra* note 28), the CFPB will act as a centralized collection point and data repository, effective with the data submitted for calendar year 2017, regardless of whether the institution is subject to CFPB supervisory and enforcement authority (for example, a depository institution with less than $10 billion in assets is subject to supervision only by its prudential regulators and not by the CFPB, *see infra* note 54). *See* FED. FIN. INSTS. EXAMINATION COUNCIL, FILING INSTRUCTIONS GUIDE FOR HMDA DATA COLLECTED IN 2017 (FIG) 5 (Aug. 2017). Although the regulations prescribe transmission to the appropriate federal regulatory agency in 12 C.F.R. § 1003.1(c), the FIG clarifies that "[t]he HMDA agencies have agreed that filing HMDA data collected in or after 2017 with the CFPB will be deemed submission to the appropriate Federal agency." *Id.*

30. David Evan Cohen, *The Community Reinvestment Act: Asset or Liability?*, 75 MARQ. L. REV. 599, 601 (1992). The term "redlining" is traditionally credited to sociologist John

depository institutions to help meet the credit needs of the communities they serve, but—like HMDA—it does not prohibit discriminatory behavior.[31] Nor is its focus solely on lending activity, as credits that count toward a desirable compliance rating may be obtained for non-lending activities such as community service and investment.[32] Furthermore, the statute includes no mechanisms to enforce compliance. Instead, the CRA's primary incentives for compliance include proactive self-protection against any adverse public attention that may result from a poor rating (also known as "reputational risk"),[33] and a provision in the regulations whereby the bank's CRA rating will be considered in the regulatory approval process related to any planned bank expansion, such as through the establishment of new branches or acquisitions and mergers.[34] Interestingly, the CRA is the only statute of all of these to

McKnight. However, its traditional usage may also refer to the experience of a community activist who was once reportedly shown a map at a bank with literal red lines drawn around prohibited lending neighborhoods. As explained in an article for the North Carolina Banking Institute, "The United States Congress passed the Community Reinvestment Act [] after neighborhood activists presented evidence that banks were withdrawing credit from minority neighborhoods while continuing to take deposits from them . . . . Tom Fox, director of San Diego-based Normal Heights Community Development Corporation and one of the authors of the Act, stated that during his research in Chicago, a bank loan officer pulled a map out of a drawer and said he was not allowed to make loans in a neighborhood that had been clearly outlined in red." Joseph Moore, Note, *Community Reinvestment Act and Its Impact on Bank Mergers*, 1 N.C. BANKING INST. 412, 412 (1997). As exemplified in the BancorpSouth discussion at *infra* Part II.A.2, the disparate treatment redlining legal evidentiary standard that is the subject of this Article stands in contrast to this original concept of redlining.

31. *See, e.g.*, *Hicks v. Resolution Trust Corp.*, 970 F.2d 378, 382 (7th Cir. 1992) ("There is no language which suggests that the [CRA] was intended to prevent racially discriminatory lending policies or minority 'redlining'. . . . Nor does the CRA's legislative history reflect any congressional intent other than that of promoting sound community banking policy.").

32. A depository financial institution's CRA rating is based on a performance testing protocol in which test credits are assigned for various lending, service and investment activities. Test credits need not be accumulated in each category, and an abundance of credits in one area may essentially serve to offset a lack of credits in another of the three testing areas. Community Reinvestment Act, 12 U.S.C. § 2903 (2016). Each federal banking regulator has its own Chapter/Parts/Subparts of the Code of Federal Regulations (Code). 12 C.F.R. Pt. 25 (2017) (OCC regarding national banks); 12 C.F.R. Pt. 195 (2017) (OCC regarding federal savings associations); 12 C.F.R. Pt. 228 (217) (Federal Reserve System); 12 C.F.R. Pt. 345 (2017) (FDIC). The regulations regarding the "Standards for Assessing Performance" are found in Subpart B of each applicable regulator's Chapter and Part of the Code.

33. A CRA rating of Outstanding, Satisfactory, Needs to Improve, or Substantial Noncompliance has been required to be made public since 1990. 12 U.S.C. § 2906(b)(2) (2016). The CRA report must be included as part of the "public file" at the bank's headquarters. The regulations regarding the contents of the public file are found in Subpart C ¶ 43 of each applicable regulator's Chapter and Part of the Code. *See supra* note 26.

34. 12 C.F.R. § 25.29(a) (2017); 12 C.F.R. § 195.29(a) (2017); 12 C.F.R. § 228.29(a) (2017); 12 C.F.R. § 345.29(a) (2017). Importantly for the purposes of this Article, the regulations also provide that, apart from strict compliance with the prescribed CRA testing

impose any affirmative duty, that being "to help meet the credit needs of the local community in which they are chartered, including low- and moderate-income neighborhoods."[35]

C. What is Discrimination?

There are three legal standards for proving discrimination: overt discrimination, disparate treatment, and disparate impact.

The first of these standards, overt discrimination, involves—as the term suggests—blatant and obvious bias. Because its nature makes overt discrimination easier to prove and eradicate, it has become "relatively uncommon."[36] The second standard, disparate treatment, is generally found where similarly situated individuals are treated

protocol, the regulator's "*evaluation* of a bank's *[overall]* CRA *performance* is adversely affected by evidence of discriminatory or other illegal credit practices in any geography by the bank or in any assessment area by any affiliate whose loans have been considered as part of the bank's lending performance." (emphasis added). 12 C.F.R. §345.28(c) (2017). It is because of this provision of the CRA that the regulatory approval of several proposed mergers or acquisitions were delayed the past few years due to regulatory concerns about redlining allegations. *See* Rachel Louise Ensign, *M&T Bank Completes Acquisition of Hudson City After 3-Year Delay*, WALL STREET JOURNAL (Updated Nov. 2, 2015 8:28 AM), https://www.wsj.com/articles/m-t-bank-completes-acquisition-of-hudson-city-after-3-year-delay-1446470410 (highlighting that, in the "longest delay ever for a U.S. deal valued at more than $1 billion, according to Dealogic," "[t]he lender eventually settled with federal officials over allegations it intentionally withheld mortgages from minorities."). *See also BancorpSouth Announces Extension of Merger Agreements with Central Community Corporation and Ouachita Bancshares Corp.*, PRNEWSIRE (Oct. 14, 2016, 7:13 AM) https://www.streetinsider.com/Press+Releases/BancorpSouth+Announces+Extension+of+Merger+Agreements+with+Central+Community+Corporation+and+Ouachita+Bancshares+Corp./12132609.html (explaining that "the extension of our merger will provide adequate time to resolve remaining hurdles necessary to obtain regulatory approval"). Even though BancorpSouth reached settlement with the CFPB on June 29, 2016, regarding the alleged fair lending violations, the mergers did not close until January 15, 2018. *BancorpSouth Bank Receives Regulatory Approval for Mergers*, PRNEWSWIRE (Dec. 27, 2017), https://www.prnewswire.com/news-releases/bancorpsouth-bank-receives-regulatory-approval-for-mergers-300575419.html.

35. 12 C.F.R. § 25.11(b)(1) (2017); 12 C.F.R. 195.11(b)(1) (2017); 12 C.F.R. § 228.11(b)(1) (2017); 12 C.F.R. § 345.11(b)(1) (2017). Note that discussions are underway to revise the existing CRA regulations to "better align the benefits arising from banks' CRA investments with the interest and needs of the communities that they service while also improving the supervisory and regulatory framework for CRA obligations." John Heltman, *Treasury Quietly Looking at Revamping CRA*, AM. BANKER, July 10, 2017.

36. FED. FIN. INSTS. EXAMINATION COUNCIL, *supra* note 9, at 30 (stating "[o]vert evidence is relatively uncommon"). *But see* Complaint, United States v. BancorpSouth Bank, No. 1:16cv118-GHD-DAS ¶¶ 99-112 (N. D. Miss. June 29, 2016), alleging overt discrimination ¶¶ 88 – 98. *See infra* text accompanying note 116.

differently because of one or more prohibited-basis characteristics.[37] The subject of this article—redlining—is a type of disparate treatment.[38] Finally, disparate impact occurs when a facially neutral policy results in a discriminatory effect on individuals of a protected class. This type of discrimination has been the topic of recent Supreme Court cases.[39]

The concepts of disparate treatment and disparate impact are often confused or conflated. As a legal standard, disparate treatment requires an *intent* to discriminate.[40] However, it has become accepted that, in certain instances, intent may be implied by law, even absent proof of a discriminatory motive. In such instances, the differing treatment itself becomes the proof of intent when there is no legitimate, non-discriminatory reason for the disparate conduct.[41]

During a regulatory examination or a review of documents produced for enforcement purposes in a disparate treatment matter, a loan-file-by-loan-file review is usually conducted to ascertain the treatment (application denial or approval) of pairs of individuals that are

37. Institutions should be mindful that, when provided opportunity to present a business necessity justification, "[i]f an agency determines that a lender's explanation for treating some applicants differently is a pretext for discrimination, the agency may find that the lender discriminated, notwithstanding the lender's explanation." FDIC Policy Statement on Discrimination in Lending, FED. DEPOSIT INS. CORP., https://www.fdic.gov/regulations/laws/rules/5000-3860.html.

38. *See infra* Part II. This article will distinguish the traditional concept of redlining exemplified in *supra* note 30 from the new, more nuanced approach.

39. *See, e.g.*, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 135 S. Ct. 2507, 2511 (2015) (narrowly holding "that disparate-impact claims are cognizable under the Fair Housing Act," but setting forth in dicta a burden-shifting process for the evidentiary process by which a disparate-impact claim may be proven). *See also* Bank of America Corp. et al. v. City of Miami, 137 S. Ct. 1296, 1298 (2017) (holding that the city of Miami is an "aggrieved person" authorized to bring suit under the Fair Housing Act). The disparate-impact legal standard of proof is not the primary subject of this Article. No disparate treatment cases in the residential mortgage context that is the subject of this Article have been tried by the United States Supreme Court.

40. Memorandum in Support of Defendant's Motion to Dismiss, United States v. Kleinbank, No. 17-cv-136 (RHK/FLN) (D. Minn. June 5, 2017) (discussed *infra* Part II.A.1) (quoting *Gallagher v. Magner*, 619 F.3d 823, 831 (8th Cir. 2010), averring that "[p]roof of discriminatory purpose is crucial for a disparate treatment claim" and *Ave. 6E Invs, LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 504 (9th Cir. 2016), arguing that "[t]o state a facially plausible claim for disparate treatment, the government must allege facts demonstrating 'that a discriminatory reason more likely than not motivated'" the defendant).

41. *Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) ("Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment."). The DOJ uses this argument in its Memorandum in Opposition to KleinBank's Motion to Dismiss. Memorandum in Opposition of Defendant's Motion to Dismiss at 11, United States v. Kleinbank, No. 17-cv-136 (RHK/FLN) (D. Minn. June 5, 2017). *See* discussion of Klein Bank case at *infra* Part II.A.

otherwise "matched" in non-prohibited-basis characteristics.[42] Because such a loan file review is not appropriate for the scrutiny of disparate treatment in the pre-application phase,[43] the CFPB has recently begun to use "mystery shoppers" in order to ferret out differences in the ways in which applicants might be encouraged or discouraged to apply for credit, or otherwise be aided through the application process, by an institution's loan originators or other employees or agents.[44]

As further explained below, an allegation of the redlining form of disparate treatment is based, not on the potential borrower's individual characteristics, but on the characteristics of the individuals residing in a geographic area as a whole.[45] Proof of such redlining allegations need not rely on a clear delineation of an institution's intentional service areas, as was the case with traditional redlining, but instead may be based on statistical indicators of avoidance of certain geographic areas or less favorable treatment of high-minority areas over non-minority areas.[46]

In contrast to the disparate treatment legal evidentiary standard, intent is completely irrelevant in the context of a disparate impact claim.[47]

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42. This type of review is commonly referred to as "matched-pair analysis," in which underwriting criteria, such as credit score, debt-to-income ratio, loan-to-value ratio, etc., are used to identify instances in which "similarly qualified prohibited basis and control group applicants had different credit outcomes . . . ." FED. FIN. INSTS. EXAMINATION COUNCIL, *supra* note 9, at 20. Financial regulatory agency examiners perform such a review in their supervisory capacity. However, the DOJ and HUD do not have the same type of access to file-by-file detail in their enforcement capacity, absent a document production request. Consequently, the DOJ and HUD focus the initial analysis that is conducted during an agency-initiated enforcement investigation (i.e., as distinct from a matter that was referred by the regulatory agency, as detailed further at *infra* Part I.D) on publicly available HMDA data.

43. Loan files will not exist prior to application.

44. Complaint, United States v. BancorpSouth Bank, No. 1:16cv118-GHD-DAS ¶¶ 99–112 (N.D. Miss. June 29, 2016) (describing the instances allegedly witnessed by mystery shoppers). This tactic has been used routinely in HUD investigations of residential rental and real estate sales transactions, but this is the first instance in which mystery shoppers were used by the CFPB. *Consumer Financial Protection Bureau and Department of Justice Action Requires Bancorpsouth to Pay $10.6 Million to Address Discrimination Mortgage Lending Practices*, CONS. FIN. PROTECTION BUREAU (June 29, 2016), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-and-department-justice-action-requires-bancorpsouth-pay-106-million-address-discriminatory-mortgage-lending-practices/ (stating that "[t]his is the CFPB's first use of testing, sometimes referred to as 'mystery shopping,' to support an allegation of discrimination.").

45. *See infra* Part II.

46. *See, e.g.*, FED. FIN. INSTS. EXAMINATION COUNCIL, *supra* note 9, at 10–11, 35–36.

47. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 135 S. Ct. 2507, 2511 (2015) (reasoning that the "results-oriented 'otherwise make unavailable'" language in the FHAct as it was applied in the Supreme Court opinions deciding other disparate-impact claims "refers to the consequences of an action rather than the actor's intent." *See also id.* at 2513 explicitly contrasting the "disparate-impact theory of liability" with "a disparate-

The disparate impact standard is applicable when a facially neutral policy or practice has a demonstrated disproportionate effect on a protected class, as opposed to a lone protected individual. A 2015 U. S. Supreme Court case set forth in dicta a burden-shifting framework for proving disparate impact in the context of an alleged violation of the FHAct.[48] First, in order to establish a prima facie case, the plaintiff must identify a specific, facially neutral policy and demonstrate a robust causal relationship of this policy to the discriminatory effect. The Court stated that a showing of statistical disparities alone is not sufficient to establish a disparate impact claim, and further reasoned that "policies are not contrary to the [disparate impact] requirement unless they are artificial, arbitrary, and unnecessary barriers."[49] Once the robust causality requirement has been met, the burden then shifts to the defendant to state and prove a business necessity. In particular, the Court was concerned that the entity must be free "to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system."[50] Once the defendant has met that hurdle, the burden shifts back to the plaintiff, requiring proof that a less discriminatory alternative exists that will "serve[] the [entity's] legitimate needs."[51]

D. *Who Polices Fair Lending?*

There are several ways a fair lending enforcement case can be commenced. For depository institutions with less than $10 billion in assets, the primary enforcement authority rests with the federal prudential regulator. It is only when this prudential regulator has reason to believe that a pattern or practice of discriminatory lending behavior[52] exists in

treatment case, where a 'plaintiff must establish that the defendant had a discriminatory intent or motive'" (quoting *Ricci* v. *DeStefano*, 557 U. S. 557, 577 (2009)).

48. *Id*. Many industry legal practitioners are skeptical of the applicability of the disparate-impact theory of liability in a claim brought only under the ECOA and not under the FHAct. *See, e.g.*, Eileen Grey, Paul F. Hancock, Ken Markison, Jeffrey Naimon, Michael Skojec, July 21, 2015 Mortgage Bankers Association webinar: Disparate Impact: Implications of the Supreme Court Ruling (Jul. 21, 2015) (averring that "[s]ome of the Court's reasons for upholding disparate impact – such as the legislative history and the uniform appellate court decisions – will not apply to the Equal Credit Opportunity Act (ECOA)").

49. Inclusive Cmtys., 135 S. Ct. at 2524.

50. *Id*. at 2518.

51. *Id*.

52. Such a "pattern or practice" belief is based on findings that result from a targeted fair lending examination, which can include a review of HMDA data. FED. FIN. INSTS. EXAMINATION COUNCIL, *supra* note 9 ("Procedures"), at 22 (discussing throughout that the

violation of ECOA that the regulator is obligated by law to refer the matter to the DOJ for further investigation.[53] For all nondepository financial institutions, and for depository institutions with $10 billion or more in assets, the CFPB has primary responsibility for fair lending enforcement.[54] The CFPB also has discretion as to whether to partner with the DOJ in any CFPB enforcement investigation and subsequent litigation, or to pursue the matter further on its own.[55]

When a prudential regulator or the CFPB finds reason to believe there has been a pattern or practice of behavior in violation of the FHAct, a referral must be made to HUD,[56] which must, by law, respond. HUD

examiner is looking for evidence to establish a "pattern or practice" of discriminatory behavior by the lender). Note that there is a common tendency by smaller banks in particular to conflate a targeted fair lending examination with a compliance examination or a CRA examination. *See, e.g.*, Memorandum in Support of Defendant's Motion to Dismiss *a*t 8–10, U.S. v. Kleinbank, No. 17-cv-136 (RHK/FLN) (D. Minn. June 5, 2017) (arguing in opposition to the DOJ's claim that a targeted fair lending examination had not been conducted by claiming that the FDIC's ordinary compliance and CRA examinations followed the Procedures and were therefore sufficient to establish that there had been no discovery of fair lending violations by the FDIC). Because of the multiple redactions throughout the Motion to Dismiss text, it is difficult to determine if such a targeted examination had been conducted. However, p. iv of the Procedures and institutional experience suggests that an examination conducted pursuant to the Procedures is undertaken only on a targeted basis once there has been a strong suspicion of fair lending risk by the regulatory agency conducting a routine compliance or CRA examination. *See also* Memorandum in Opposition to KleinBank's Motion to Dismiss at 20, US v. Kleinbank, No. 17-cv-136 (RHK/FLN) (D. Minn. June 5, 2017) explaining the typical FDIC examination process (clarifying, based on the text of the Procedures, that "the FDIC does not review all banks for redlining at each examination. . . . The FDIC's examination procedures plainly state that even where one or more redlining 'risk factor[s]' is present, a redlining analysis is not mandatory").

53. Equal Credit Opportunity Act (Regulation B), 12 C.F.R. § 1002.16(b)(3) (2017). *See also* Equal Credit Opportunity Act, 15 U.S.C. § 1691e(g) (2016). The DOJ is the federal government law enforcement agency tasked with enforcing federal civil rights laws. 28 C.F.R. § 0.50 (2017). *See also* discussion accompanying *infra* note 62 listing the factors considered by the DOJ in deciding whether to litigate or send the matter back to the prudential regulator for administrative resolution (or, if the matter did not originate with a referral, close the investigation). With respect to referrals to the DOJ by a prudential regulator, or coordination between a regulatory agency and the DOJ or HUD, "[t]he [a]gencies will coordinate their enforcement actions and make every effort to eliminate unnecessarily duplicative actions. Where both a federal financial institution[] regulatory agency and either DOJ or HUD are contemplating taking actions under their own respective authorities, the [a]gencies will seek to coordinate their actions to ensure that each agency's action is consistent and complementary." FED. DEPOSIT INS. CORP., *supra* note 37.

54. The scope of CFPB supervision authority is set forth in 12 U.S.C. § 5514 (as to nondepository institutions) and § 5515 (regarding "very large" depository institutions).

55. *See generally* CONSUMER FIN. PROT. BUREAU, MEMORANDUM OF UNDERSTANDING BETWEEN THE CONSUMER FINANCIAL PROTECTION BUREAU AND THE UNITED STATES DEPARTMENT OF JUSTICE REGARDING FAIR LENDING COORDINATION (Dec. 6, 2012).

56. *See, e.g.*, FED. DEPOSIT INS. CORP., *supra* note 37 (stating that a "pattern or practice" FHAct violation "must be referred to HUD"). Financial regulatory agencies have no authority

can choose to handle the referral by administrative action or it can refer the matter to the DOJ.[57] In addition, individuals or advocacy groups can register complaints directly with the DOJ or HUD, which may then choose whether to investigate and pursue the matter further, or close the complaint without action.

The DOJ may also initiate a fair lending case on its own. Although the DOJ seems careful to avoid public disclosure of the frequency with which this happens,[58] anecdotally, it seems to be happening with more regularity.[59] By way of example, the *KleinBank* case, discussed below, did not originate with a referral from the bank's federal prudential regulator, the FDIC.[60] [61] One possible explanation for the perceived proliferation of DOJ-initiated cases may be that the DOJ's recent emphasis on the use of statistical comparisons of a subject institution's lending activity to the HMDA-reported behavior of members of a DOJ-selected peer group has enabled it to target additional institutions for investigation from among the statistical outliers it observed during its peer-group-determination process.

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to enforce the FHAct. 42 U.S.C. § 3608(a) (2016) (opining that "[t]he authority and responsibility for administering [the FHAct] shall be in the Secretary of Housing and Urban Development.").

57. 42 U.S.C. § 3610 (2016) (outlining HUD administrative enforcement generally and, in sub-section 3610(e), referral to the DOJ); 42 U.S.C. § 3614 (2016) (prescribing enforcement by the DOJ).

58. As discussed further in the text accompanying *infra* note 62, the DOJ submits a report to Congress annually regarding the prior year's ECOA activities. Significant difficulties were encountered when trying to reconcile non-referral matters from year to year, likely due to the discretion necessary to avoid unintentional disclosure of non-public DOJ-initiated investigatory matters.

59. In addition to the KleinBank matter discussed in the next sentence, the DOJ investigation that resulted in a combined Union Savings Bank/Guardian Savings Bank complaint and consent order does not appear to have been initiated by referral from the banks' respective prudential regulatory agencies, given the lack of mention of a regulatory referral in the complaint and consent order. (Union Savings Bank is chartered by the state of Ohio and the FDIC is its federal prudential regulator. Guardian Savings Bank is regulated by the OCC due to its charter as a federal savings bank. Because the banks share common ownership and management, the complaint and consent order are each a joint document applicable to both banks but which address the issues alleged with respect to each individual bank.) *See generally*, Complaint, United States v. Union Savings Bank, No. 1:16CV1172 (S.D. Ohio Dec. 28, 2016).

60. The apparent lack of prior concern by the FDIC with the bank's residential mortgage lending practices consumes much of the argument in the bank's Motion to Dismiss. *See infra* Part II.A. *See also supra* note 52 (discussing elements of the FDIC's supervisory process with respect to KleinBank).

61. This is the first residential mortgage fair lending matter to be litigated under this contemporary disparate treatment redlining theory, rather than settled. *See generally infra* chart accompanying note 87.

In evaluating whether to pursue potential litigation or return the matter to the regulator for administrative resolution (or close the matter if there was no regulatory agency referral), the DOJ cites its consideration of several factors.[62] In general, referrals are most likely to be returned to the regulatory agency (or the matter dropped in the case of a DOJ-initiated investigation) when the following characteristics are present:

- the bank has ended the practice and there is "little chance that it will be repeated";
- the violation was likely "accidental or arose from ignorance of the law's more technical requirements," such as spousal signature violations; or
- the matter involved "either . . . few potential victims or de minimis harm to any potential victims."[63]

To the contrary, the DOJ will likely retain a referral or initiate an independent investigation when the aforementioned criteria are not present and at least one of the following characteristics applies:

- the practice has "serious . . . potential for either financial or emotional harm to members of protected classes";
- only court action is likely to cause cessation of the practice;
- the victims harmed by the practice "cannot be fully compensated without court action";
- "damages for victims, beyond out-of-pocket losses" are seen as a necessary deterrent to prevent the lender "or others like it" from viewing "the cost of detection" as merely a "cost of doing business"; or
- the observed practice is believed by the DOJ to be "sufficiently common in the lending industry, or raises an important issue, so as to require action to deter lenders."[64]

62. U.S. Attorney General, 2016 Annual Report to Congress Pursuant to the Equal Credit Opportunity Act Amendments of 1976, 12–13 (Sep. 2017). These factors were first communicated in 1996 upon recommendation of the Government Accountability Office as "guidance to the federal bank regulatory agencies on pattern or practice referrals." *Id*.

63. *Id*. at 12.

64. *Id*.

Interestingly, in the case of every referral received from a bank regulatory agency since December 2012, the DOJ met its goal of completing its review and making its determination to proceed or return the matter within 60 days of the date of referral.[65] The decision process to litigate or close a fair lending investigation undertaken without referral does not appear to move as quickly.[66]

II. WHAT IS REDLINING?

The Federal Financial Institution Examination Council's Interagency Fair Lending Examination Procedures, used by the regulatory agencies to guide agency examiners through the examination process,[67] describes redlining as "a form of illegal disparate treatment in which a financial institution provides unequal access to credit, or unequal terms of credit," based on the prohibited-basis characteristics of residents of the geographic area "in which the credit seeker resides or will reside or in which the residential property to be mortgaged is located."[68] Cited examples of redlining behavior by an institution include failing or refusing to extend credit, or otherwise discouraging applications, in a certain area on a prohibited basis; targeting of those areas with less advantageous products (sometimes referred to as "reverse redlining"); or omitting or excluding such areas from the institution's efforts to market its residential loan products. It is important to note that these examples include both passive behavior (i.e., a failure to extend credit) and affirmative activity (i.e., a refusal to extend credit).[69] This equal focus on passive behavior appears to be reflected in the recent trend of using statistical comparisons as between the subject institution and its "peers"

65. *Id*.

66. By way of example, "on May 21, 2015, the [DOJ] informed KleinBank that it had initiated an investigation into potential lending discrimination by the Bank," yet the complaint was not filed until Jan. 13, 2017. Complaint at 1, United States v. Kleinbank, No. 17-cv-136 (RHK/FLN) (D. Minn. Jan 13, 2017). Arguably, the DOJ investigation took some period of time (which time interval would not be relevant in the case of a referral to DOJ following a regulatory examination), and it is also quite likely that KleinBank and the DOJ negotiated at length prior to KleinBank's declination of any DOJ settlement offer. Still, the time from initiation of the investigation to filing of the complaint spans nearly twenty months.

67. *See supra* Part I.D (discussing the agencies that perform fair lending examinations).

68. FED. FIN. INSTS. EXAMINATION COUNCIL, *supra* note 9, at iv.

69. *Id*. at 10–11.

to allege a redlining violation, and has been the object of industry scorn.[70] It can be argued, however, that such an approach merely reinforces the regulation's prohibition on discouraging access to credit, reasoning that a potential applicant may be deemed to have been discouraged from application solely because the potential applicant was unaware of the availability of credit.[71]

The distinguishing characteristic of disparate treatment redlining, as contrasted with disparate treatment that results from an individualized, "matched-pair"[72] assessment, is that, here, the discriminatory conduct is directed toward an entire geographic area, regardless of whether an individual applicant or potential applicant may be qualified to enter a credit transaction. In other words, instead of a comparison of different treatment as between individuals,[73] the focus now is on geography, and whether the institution has limited the access to credit, passively or actively, based on the prohibited-basis characteristics (usually race or national origin) of that area, despite the fact that there may be qualified borrowers residing, or wanting to purchase property, in those areas.

Although the disparate treatment redlining approach has been used in recent consent orders,[74] it has not yet been fully litigated in the courts.[75] That said, one way in which the regulatory and enforcement agencies attempt to "prove" disparate treatment redlining is through a record of mortgage lending HMDA data that shows statistically

70. *See, e.g.*, Andrew L. Sandler, Jeffrey P. Naimon, Andrea K. Mitchell, *Redlining Cases in 2015 and a New Discrimination Standard*, LAW360 (Jan. 3, 2016, 10:03 AM) [hereinafter SANDLER] (opining that "[t]he government's use of the term 'redlining' in its current wave of fair-lending enforcement, which has focused on statistics related to geographic lending patterns, is a misuse of that term"). *See also* Paul F. Hancock, *BankThink: Trump has opportunity to restore balance in fair lending cases*, AM. BANKER 2, Feb. 7, 2017 (arguing that the "explosive application of 'redlining' claims" is an "overreach" that has "morphed far beyond the original invidious practice of drawing a 'red line' to exclude minority neighborhoods from a business plan" to legal challenges that arise "simply because [the subject bank] did not distribute loans between minority and nonminority neighborhood[s] in the same proportion as the aggregate of all other lenders." Mr. Hancock deduces that "[b]y definition, this means approximately one-half of lenders are always 'redlining.'").

71. *See* 12 C.F.R. § 1002.4(b) (2017) (stating that "[a] creditor shall not make any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage on a prohibited basis a reasonable person from making or pursuing an application").

72. *See* discussion of "matched-pair" analysis *supra* note 42.

73. *See* discussion accompanying *supra* notes 42 and 44, on loan-level file comparisons and the use of mystery shoppers.

74. *See, e.g.*, Joe Rodriguez, *CFPB's New Approach to Redlining Analysis is Put Into Action*, LAW360 (Oct. 15, 2015, 12:35 PM) (observing that "the CFPB has a new approach").

75. *See supra* note 61 and discussion of the KleinBank case, *infra* Part II.A.1.

significant disparities in comparison to similar lenders.[76] The inference by the agencies is that if peer lenders[77] are taking applications or originating loans[78] in high-minority areas, there must be no legitimate nondiscriminatory reason for the subject institution to draw fewer applications or originate fewer loans from that same geographic area.[79] This inference, of course, diminishes the importance of other intervening

76. *See* Maureen Yap, *Fair Lending Webinar: Questions and Answers*, Cons. Compliance Outlook (Oct. 17, 2012), https://consumercomplianceoutlook.org/2013/second-quarter/fair-lending-webinar/ (documenting, on behalf of the Non-Discrimination Working Group of the Financial Fraud Enforcement Task Force, answers to questions most frequently asked during the Outlook Live webinar titled "Fair Lending Hot Topics," as well as other frequent questions received by the Federal Reserve Board (Federal Reserve). "Generally, the Federal Reserve evaluates a bank's HMDA data relative to similar lenders in the bank's CRA assessment area or reasonably expected market area. More specifically, the Federal Reserve typically reviews whether there is a statistically significant disparity between a bank's mortgage applications and originations in majority-minority census tracts compared with the adjusted aggregate of similar lenders. The "adjusted aggregate" is typically defined as lenders with lending activity that is between 50 and 200 percent of the bank's volume and with a rate spread incidence of less than 25 percent, but it may be adjusted further based on the bank's business model."). *See also* Complaint, United States v. Kleinbank, No. 17-cv-136 (RHK/FLN), ¶¶ 33-34 (D. Minn. Jan 13, 2017) (alleging that "a smaller proportion of HMDA-reportable residential mortgage loans in majority-minority tracts relative to comparable lenders . . . show a statistically significant failure by KleinBank to provide loan services for dwellings located in majority-minority tracts"). However, it can be argued that, despite the distinctions between the disparate treatment redlining and disparate impact legal standards, U.S. Supreme Court analysis regarding the appropriate use of statistical analyses in disparate impact cases also may be applicable in the disparate treatment context. Such an argument would assert that, as in the disparate impact case of *Inclusive Communities*, unless there is a robust causal connection to the alleged disparity, statistical analysis alone is not sufficient to prove a prima facie case. 135 S. Ct. 2507, 2512 (2017) (explaining that "[a] disparate-impact claim relying on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement is important in ensuring that defendants do not resort to the use of racial quotas"). *See also* SANDLER, *supra* note 70 (opining that "the use of superficial peer analyses as the[] principal evidence in bringing 'redlining' discrimination cases . . . [is a] misuse of statistics . . . [that] is directly inconsistent with the position taken by the U.S. Supreme Court in . . . "Inclusive Communities").

77. *See supra*, note 76, explaining the interagency regulatory approach to the determination of an appropriate peer group. However, as discussed *infra* note 175, the best practice is for the lender to proactively determine (and defend, as necessary) a peer group, considering all relevant competitive and other information as to which a regulator may not be aware.

78. Some recent complaints have alleged violations as to both originations and applications, whereas other cases have focused only on one or the other, but not both. *See, e.g., infra* case studies in Part II.A.

79. *See* FED. FIN. INSTS. EXAMINATION COUNCIL, *supra* note 9, at 38 (suggesting that "an institution's inactivity in an underserved area where its acknowledged competitors are active would tend to support the interpretation that [the subject institution] intends to avoid doing business in that area. Conversely, if [the subject institution] is as active as other institutions that would suggest that it intends to compete for, rather than avoid, business in the area.").

competitive factors that may result in the subject institution's lower application or origination rates.[80]

An additional concept somewhat related to disparate treatment redlining, that of disparate marketing treatment, has become a focus in recent fair lending examinations and consent orders. The disparate marketing treatment concept imposes an affirmative obligation to market or advertise in certain geographic areas, or to certain segments of the population, even though there is no such proven legal duty (and despite any justifiable assessment by the institution that such efforts will be unlikely to produce a sufficient return on the marketing or advertising expenditure).[81] The interconnectedness between disparate treatment redlining and disparate marketing treatment arguably flows, yet again, from the provision in ECOA that prohibits institutions from discouraging protected applicants and potential applicants from seeking access to credit.[82] The premise behind using an institution's marketing, or lack of marketing, efforts to allege disparate treatment is that marketing decisions are affirmative, i.e., deliberate, acts to include or exclude areas on the basis of prohibited characteristics. The deliberateness helps prove the necessary "intent" element of disparate treatment.[83]

The interagency guidance checklist used by regulatory agency examiners in the review of disparate marketing treatment behavior suggests that examiners look for advertising patterns or practices that a reasonable person would believe indicates an institution's perception that prohibited-basis customers are less desirable than those without such

80. For example, larger banks with a more predominant presence or more advertising money are likely better able to penetrate any particular market; there may be a limited population of qualifying prospective borrowers, and these individuals are captured by other institution(s) for any variety of reasons; the subject bank may have legitimate business reasons that limit the variety of its product offerings; or the subject institution's business model may be predicated on a different loan delivery channel.

81. Although 12 C.F.R. 1002.4(b) prohibits discouragement in advertising based on protected characteristics, there is no affirmative marketing or advertising obligation expressly stated in either the statute or the implementing regulation.

82. Observe that the instructions to examiners regarding the review of marketing efforts with respect to certain population segments or geographies is found in a separate section from redlining in the Interagency Fair Lending Examination Procedures, and the disparate marketing treatment charge is usually a separate allegation in a judicial complaint. *See, e.g.*, FED. FIN. INSTS. EXAMINATION COUNCIL, *supra* note 9 (listing "Analysis of Potential Discriminatory Marketing Practices" as its own, separate, section in the Table of Contents (Part III § H, 38–40), which immediately follows the "Analysis of Potential Discriminatory 'Redlining'" section (Part III § G, 29–38).

83. *See supra* Part I.C for discussion of an "intent" requirement.

characteristics, such as: (1) restriction of institutional advertising to only media that serve a particular racial or national origin market segment; (2) marketing efforts that are undertaken by brokers or agents known to the institution to serve only one racial or national origin group; or (3) instances where the proportion of prohibited-basis applicants is significantly lower than that group's representation in the total population of the institution's market area.[84]

Unfortunately, smaller community banks in particular can unwittingly find themselves under suspicion of disparate marketing treatment merely because they do not have a cohesive or well-considered marketing and advertising strategy. Furthermore, the institution may view itself as serving a particular niche market, and indeed may have been chartered on such a premise. In this situation, marketing and advertising spending likely is intentionally focused on those areas where the institution might reasonably be expected to get the "most bang for its buck," without consideration of any possible fair lending implications. However, such an unintentional oversight may place an institution squarely in the cross-hairs of a deemed ECOA violation, in that the institution did not provide equal access to credit because it did not make certain segments of protected individuals aware of their possible credit opportunities with the institution.[85] As an example, a recent DOJ complaint against Union Bank alleged that the bank took "inadequate steps" to spend its (limited) marketing budget on reaching minorities and further did not "monitor the effectiveness of its marketing efforts in reaching" minority residents.[86]

84. FED. FIN. INSTS. EXAMINATION COUNCIL, *supra* note 9, at 11–12, 39–40.
85. *See supra* Part I.B.1, explaining ECOA "discouragement" principles.
86. Complaint, United States v. Union Savings Bank, No. 1:16CV1172, ¶ 43 (S.D. Ohio Dec. 28, 2016).

Accelerating Pace of Redlining Cases

Bank	Year	Agency	Total Assets	Total Settlement	Most Recent CRA Rating Prior to Redlining Allegations
KleinBank	2017	DOJ	$1,800,000,000	No Settlement	Satisfactory (2016)
Union Savings/ Guardian Savings (common owners)	2016	DOJ	$2,700,000,000 $861,000,000	$9,000,000	Satisfactory (2014) Outstanding (2014)
BancorpSouth Bank	2016	CFPB/DOJ	$13,900,000,000	$10,707,646	Satisfactory (2014)
First Federal Bank, FSB	2016	HUD	$487,000,000	$310,000 + Orig.	Satisfactory (2013)
First Tennessee Bank	2015	HUD	$25,199,000,000	$1,920,000	Satisfactory (2010)
Eagle Bank and Trust Company of Missouri	2015	DOJ	$900,000,000	$975,000	Satisfactory (2014)
Hudson City Savings Bank	2015	CFPB/DOJ	$35,414,798,000	$32,750,000	Satisfactory (2011)
Associated Bank	2015	HUD	$26,600,000,000	$15.4M + Orig.	Satisfactory (2006)
Midland States Bank	2014	HUD	$1,790,000,000	$16,800,000	Satisfactory (2014)
Community State Bank	2013	DOJ	$201,000,000	$165,000	Needs to Improve (2013)
Luther Burbank Savings	*2012*	DOJ	$3,700,000,000	$2,000,000	Needs to Improve (2010)
Citizens Republic Bancorp	2011	DOJ	$12,300,000,000	$3,525,000	Satisfactory (2010)
Enterprise Bank & Trust	2011	HUD	$3,200,000,000	$3,112,500	Satisfactory (2011)
Midwest BankCentre	2011	DOJ	$1,100,000,000	$1,475,000	Needs to Improve (2009)
First United Security Bank	2009	DOJ	$658,000,000	$660,000	Needs to Improve (2009)
Centier Bank	2006	DOJ	$1,500,000,000	$4,375,000	Satisfactory (2003)

*Note that consent orders were also entered in 2012 with Bank of America and Wells Fargo (details not shown here)

As demonstrated in the above table,[87] the pace of redlining settlements has been increasing rapidly over the past few years. Given the recent change in presidential administrations, it is difficult to know whether this trend will continue.[88] That said, the DOJ's Civil Rights Division Annual Report to Congress reported that the DOJ had seven open redlining investigations at the end of 2016.[89]

A. Selected Case Studies

1. KleinBank

The most recent redlining complaint was filed on January 13, 2017, just one week prior to a change in presidential administration from one that had been very proactive in civil-rights issues to one whose views

87. BROOKS F. BOSSONG, NEXSEN PRUET LLP; MARSHA J. COURCHANE, CHARLES RIVER ASSOCIATES; BRIAN C. MCCORMALLY, ARNOLD & PORTER; JAMES W. STEVENS, TROUTMAN SANDERS LLP; MARTHA J. SVOBODA, POYNER SPRUILL LLP, PRESENTATION AT 2017 UNC LAW BANKING INSTITUTE (Mar. 23-24) [hereinafter 2017 BANKING INSTITUTE PRESENTATION].

88. *See* discussion accompanying *infra* note 90.

89. U.S. ATTORNEY GENERAL, *supra* note 62, at 2. The DOJ is required to file a report regarding its enforcement under ECOA, the FHAct and the Servicemembers Civil Relief Act each September based on the prior calendar year's activity. The count of seven open cases appears to include the KleinBank matter. There were no noteworthy public allegations of disparate treatment redlining activity in 2017.

have not yet been clearly articulated.[90] The complaint alleged at a high level, as do many complaints, that KleinBank "structur[ed] its residential mortgage lending business so as to avoid serving the credit needs of neighborhoods where a majority of residents are individuals of racial and ethnic minorities."[91] Interestingly, KleinBank is the only financial institution to have decided to litigate, rather than settle, charges of fair lending violations.[92] One speculative theory is that the bank's decision to fight was emboldened by the change in administration.[93]

A more likely reason for the decision to litigate rather than settle may be that the bank believes both the facts and the law are on its side. As noted previously, some of the arguments used to allege disparate treatment redlining in prior consent orders have not been tested in the courts. For example, the allegations against KleinBank include having no branch locations in majority-minority neighborhoods,[94] excluding majority-minority neighborhoods from the bank's marketing efforts,[95] having a disproportionately low rate of applications from majority-minority neighborhoods,[96] and having a disproportionately low rate of originations in majority-minority neighborhoods.[97] There are no statutes,

90. *See, e.g.*, Terry Carter, *Jeff's Law: The Attorney General Sees His Roles as Pushing Present-Day Law Enforcement Toward a Rose-colored Past*, ABA JOURNAL, October 2017, at 61 (noting the ways in which "he has reversed significant civil rights policies adopted by the Obama administration").

91. Complaint at 1, United States v. Kleinbank, No. 17-cv-136 (RHK/FLN) (D. Minn. Jan. 13, 2017). The term "avoid" is a clear reference to ECOA discouragement, although FHA violations (which are more generalized) are also alleged. "Discouragement" may connote an affirmative act, as opposed to inaction.

92. As regards complaints filed by each of the CFPB, DOJ and HUD in which redlining was a central issue, no other defendant parties to-date have challenged the allegations in court, but have instead agreed to a negotiated consent order settlement. *See, e.g.*, table accompanying *supra* note 87.

93. In answer to the speculation that a DOJ led by U.S. Attorney General Jefferson Sessions III may not take quite as active an interest in new fair lending cases, let alone those still sitting in the pipeline, it is interesting that the DOJ's Memorandum in Opposition to KleinBank's Motion to Dismiss, dated August 25, 2017, was signed by U.S. Attorney General Jefferson Sessions III. *See also* John L. Culhane, Jr., *DOJ Issues Annual Report to Congress on 2016 ECOA/FHA/SCRA Enforcement* Activities, CONSUMER FINANCE MONITOR (Sept. 28, 2017), https://www.consumerfinancemonitor.com/2017/09/28/doj-issues-annual-report-tocongress-on-2016-ecoafhascra-enforcement-activities/ (observing that "although [the annual report] concludes by noting the role of the DOJ's 'vigorous enforcement of fair lending laws' in expanding credit access, it is unclear how the DOJ will carry out that role under the leadership of Attorney General Jeff Sessions").

94. Complaint, United States v. Kleinbank, No. 17-cv-136 (RHK/FLN), ¶¶ 22–25.

95. *Id*. ¶¶ 26 – 27.

96. *Id*. ¶¶ 28 – 32.

97. *Id*. ¶¶ 33 – 35.

regulations, or case law that obligate a financial institution to affirmatively solicit mortgage applications to or originate mortgages from any particular population segment or geographic area.[98] In addition, the reliance on statistical analysis of a subject institution's performance in terms of applications or originations when compared to a group of peer institutions to prove disparate treatment has not been judicially challenged.[99] Competitive market forces, and other differences such as the size of the banks, the short- and long-term business models of the various banks, and their product offerings, may well explain the differences in penetration rates, which might consequently preclude any correlation to intentional discriminatory behavior.[100]

In its additional allegation that the bank used a "discriminatory CRA assessment area,"[101] the DOJ invented new terminology when it referred in its complaint to the geographic areas as to which it believes the bank's performance should be measured. The DOJ drew a new area for measurement of application and origination activity, which it termed the "Proper Assessment Area."[102] It distinguished that area from the bank's CRA assessment area, dubbed by the DOJ as the "narrower market area."[103]

98. The only affirmative obligation in the fair lending and related statues is the obligation in the CRA "to help meet the credit needs of the local community in which they are chartered, including low-and moderate-income neighborhoods." *Supra* Part I.A.3; *see also* ¶ 11(b)(1) of each of the applicable Parts in Title 12 of the Code of Federal Regulations, as explained in *supra* note 26.

99. As previously observed, this is the first such case to challenge this legal standard regarding evidence of disparate treatment redlining. Memorandum in Support of Defendant's Motion to Dismiss at 17, US v. Kleinbank, No. 17-cv-136 (RHK/FLN) (D. Minn. June 5, 2017) (arguing that "[t]he government's statistical allegations do not resuscitate its claim," citing Gallagher v. Magner, 619 F.3d 823, 833, which averred that "evidence of impact alone is not sufficient to state a claim for disparate treatment unless the evidence is 'so stark and unexplainable on other grounds to justify, on its own, an inference of discriminatory purpose'").

100. *See, e.g.*, 2017 BANKING INSTITUTE PRESENTATION, *supra* note 87. The failure to account for competitive market forces and other differences to explain discrepancies in market penetration becomes more problematic when a new "Proper Assessment Area" is drawn to include areas in which the bank has no market presence, but is instead deemed remiss for not having more properly sought business there. *See* discussion in the following paragraph regarding determination of the geographic areas as to which the institution's performance should "properly" be assessed.

101. Complaint at 5, United States v. Kleinbank, No. 17-cv-136 (RHK/FLN) (D. Minn. Jan 13, 2017). .

102. *Id*. ¶ 29.

103. *Id*. ¶ 32.

While a bank might be expected under certain circumstances to perform its internal fair lending analysis using different geographic boundaries than those used for CRA assessment purposes,[104] the designation of the DOJ's market area as "proper" in comparison to the bank's "narrower" area seems somewhat pejorative.[105] This is particularly so, given that the regulatory agencies have generally settled on the use of the term "reasonably expected market area" ("REMA") to describe the geographic areas in which a lender engages in a relatively high volume of mortgage activity.[106] The REMAs are distinguished from the CRA assessment areas due primarily to the differences in statutory purpose. REMAs are intended for use in fair lending analysis, whereas CRA assessment areas define the boundaries within which the bank's depository facilities are located and as to which, under the CRA, the bank has certain lending, service, or investment obligations to individuals of low-to-moderate income.[107]

The unique litigation posture of this case provides valuable insight into the potential development of the applicable legal standards. In its motion to dismiss, the bank argues that reliance by the DOJ on the overall prohibited-basis composition of a census tract[108] to prove discrimination is unsupportable, since it cannot be proven "whether

104. *See* FED. FIN. INSTS. EXAMINATION COUNCIL, *supra* note 9, at 32 (explaining that the redlining analysis should focus on geographic areas where "the institution actually marketed and provided credit and where it could reasonably be expected to have marketed and provided credit . . . [which] might be beyond or otherwise different from the CRA assessment area"). *See* additional discussion at *infra* note 107.

105. However, it is in plaintiff's interest to assert any and all plausible arguments against the defendant.

106. FED. FIN. INSTS. EXAMINATION COUNCIL, *supra* note 9, at 32. However, it is important to keep in mind that this concept of a REMA is not a regulatory construct, but merely has been suggested in fair lending examination guidance.

107. Also observe that with respect to any REMA, the bank here did not have a history of mortgage originations outside of its CRA assessment area. This fact pattern stands in contrast to banks that utilize a wide network of third-party originators apart from or in addition to retail loan originators. It is this third-party-origination business model for which the REMA concept is most appropriate. The third-party-origination business model may become more prevalent as banks seek to find new sources of non-deposit-based income. *See supra* note 32 (regarding the lending, service, and investment components of an institution's CRA rating).

108. Observe that "'[m]ajority-minority' census tracts are those in which over fifty percent (50%) of the residents are of a minority race, ethnicity or national origin. 'Majority-white' census tracts are those in which over fifty percent (50%) of the residents are non-Hispanic whites." Complaint, US v. Kleinbank, No. 17-cv-136 (RHK/FLN), ¶ 4 n. 1 (D. Minn. Jan 13, 2017).

minorities owned . . . dwellings,"[109] and furthermore the DOJ argument does not "differentiate[] between individuals in the majority-minority census tract[]."[110] KleinBank also asserts that there has been no discriminatory behavior because the statistical analysis, which is based on geographic areas, does "not establish that the actual minority residents in these census tracts faced a disproportionately adverse effect," and in fact does "not demonstrate that individuals in a protected class suffered any adverse impact at all."[111] KleinBank further avers that "[i]f anything, the [DOJ] alleges discrimination as to the entire majority-minority census tract, which is not a protected class."[112]

The DOJ countered this aspect of KleinBank's theory of the case in its opposition memorandum, stating that "[c]ourts have confirmed that discrimination in residential lending based on the racial and/or ethnic characteristics of a neighborhood generally, rather than necessarily on the race or ethnicity of a particular borrower, is discrimination because of race or national origin in violation of the FHA and ECOA."[113]

But perhaps more importantly, the judge's decision on the motion to dismiss may turn on the procedural significance of this particular stage of the case. The defendant's motion to dismiss will fail if there is "sufficient factual matter, accepted as true, to 'state a claim to relief that

109. KleinBank apparently argues (in sections scattered throughout the motion to dismiss) that census data evidence as to residence by a minority individual is not proof that the individual owns the residence. The presumptive inference is that if the minority individual does not own the residence, any alleged lack of availability of residential mortgage credit to that individual (which credit unavailability would be a violation of both ECOA and the FHAct) is not relevant to the DOJ's claim. *See, e.g.*, Memorandum in Support of Defendant's Motion to Dismiss at 7, 18–19, 27 (, US v. Kleinbank, No. 17-cv-136 (RHK/FLN) (D. Minn. June 5, 2017).

110. KleinBank avers that the government's focus on the prohibited-basis composition of a census tract "provides no data to suggest that minorities within those tracts were treated differently than others in those same tracts." *Id.* at 7. The bank further reasons that because the DOJ evidence focuses on geography rather than on individuals, the DOJ essentially "alleges discrimination as to the entire majority-minority census tract, which is not a protected class." *Id*. at 27.

111. *Id*. at 19.

112. *Id*. at 27.

113. Memorandum in Opposition to KleinBank's Motion to Dismiss at 8, US v. Kleinbank, No. 17-cv-136 (RHK/FLN) (D. Minn. June 5, 2017) (citing, among other cases, *Ring v. First Interstate Mortg*., Inc. 984 F.2d 924, 927 (8th Cir. 1993)) ("denying a motion to dismiss where the complaint alleged a refusal to make available a residential real-estate transaction 'based on the racial composition of the tenants of the properties or the neighborhoods in question'").

is plausible on its face.'"[114] Here, there is disagreement between the parties as to whether the statistically significant differences between the lending patterns of KleinBank and its peers constitute sufficient facts. As earlier stated, all prior cases have been settled and not litigated, so the final determination as to the applicability of the legal arguments on both sides depends on the progression of this case all the way through the judicial process.

2. BancorpSouth

The 2015 joint complaint by the DOJ and the CFPB against BancorpSouth is notable for the breadth and depth of the fair lending allegations.[115] The factual allegations, although neither proven nor admitted as true, may provide a classic case study in "what not to do." The complaint also includes two particularly striking aspects: there apparently exists an audio recording of statements made during an internal meeting that would tend to support a rare charge of overt discrimination,[116] and the CFPB relied on its first-ever use of mystery shoppers to evidence a claim of individualized disparate treatment.[117]

In the complaint, the government parties allege that BancorpSouth committed various fair lending violations, including redlining and disparate treatment in its marketing efforts.[118] In sum, the government parties proclaimed that "[t]he totality of BancorpSouth's acts, policies, and practices . . . ha[d] the effect of denying or discouraging [] an equal credit opportunity to the prospective applicants of the majority-minority neighborhoods" on a prohibited basis,[119] without

114. Memorandum in Support of Defendant's Motion to Dismiss at 13, US v. Kleinbank, No. 17-cv-136 (RHK/FLN) (D. Minn. June 5, 2017) (citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombley, 550 U.S. 544, 570 (2007)). KleinBank argues that reliance by the DOJ on statistical evidence is tantamount to a conclusory assertion, and therefore the DOJ has not sufficiently stated a particularized claim. *Id.* at 16.

115. Complaint, United States v. BancorpSouth Bank, No. 1:16cv118-GHD-DAS ¶ 3 (N. D. Miss. June 29, 2016) (declaring that "BancorpSouth discriminated in a number of distinct ways through virtually every stage of the lending process.").

116. *Id.* ¶¶ 90 – 98. *See supra* note 36 noting the rarity of reported cases of overt discrimination in the residential mortgage lending context.

117. *Id.* ¶¶ 99 – 112.

118. *Id.* ¶ 4, ¶¶ 18 – 51, including a discussion of alleged marketing violations at ¶¶ 42 – 45; ECOA Count 1 (Redlining) at ¶¶ 113 – 117; FHAct Count 1 (Redlining) at ¶¶ 136 – 140.

119. *Id.* ¶ 51. The reference to the "[t]otality of [the bank's] acts, policies and practices is unusual and speaks to the many and varied ways in which BancorpSouth was alleged to have violated fair lending laws.

justification "by business necessity or legitimate business considerations."[120]

The disparate treatment redlining allegations include opening branches only in majority-white neighborhoods,[121] failing to market loan products in minority neighborhoods,[122] and actively discouraging applications from prospective borrowers residing in minority neighborhoods.[123] This case used statistical analysis of HMDA loan application and origination data in the affected areas in comparison to its peers.[124]

Additionally, using the more traditional CRA-based redlining standard,[125] the government parties took issue with the bank's reliance on business emanating from its CRA assessment areas.[126] The government parties proffered the bank's exclusion of high-minority census tracts from its CRA assessment areas as evidence of unlawful discrimination.[127] The government parties further alleged that the bank discouraged mortgage lending outside of its CRA assessment areas by characterizing such loans as "undesirable."[128] Another element of the complaint was that all of the bank's branches were located in non-minority areas.[129]

The disparate marketing treatment claims state that BancorpSouth focused its advertising in majority-White neighborhoods, but failed to advertise meaningfully in high-minority neighborhoods.[130] Additionally, the government parties charge that the bank focused its

120. Complaint, United States v. BancorpSouth Bank, No. 1:16cv118-GHD-DAS ¶ 137. *See also infra* note 153.

121. *Id*. ¶ 34.

122. *Id*. ¶¶ 42–45.

123. *Id*. ¶¶ 23, 46.

124. *Id*. ¶¶ 47–50.

125. *See, e.g.*, *supra* notes 30 and 70. The more traditional standard is distinguished from disparate treatment redlining, which has become a major examination focus. *But see* Complaint at 6, Consumer Fin. Prot. Bureau v. BancorpSouth Bank, No. 1:16cv-00118-GHD-DAS, n. 4 (N. D. Miss. filed June 29, 2016) (acknowledging that "Plaintiffs do not have authority to enforce the CRA and do not purport to do so here. Rather, Plaintiffs cite to the Bank's exclusion of majority-minority neighborhoods from its designated assessment area as evidence that the Bank engaged in unlawful discrimination in violation of ECOA and the FHA").

126. Complaint at ¶¶ 23–34, CFPB v. BancorpSouth, No. 1:16cv118-GHD-DAS; *see supra* note 52 (regarding the occasional conflation between fair lending and CRA compliance.

127. Complaint at ¶¶ 23–41, CFPB v. BancorpSouth, No. 1:16cv118-GHD-DAS.

128. *Id*. ¶ 31.

129. *Id*. ¶ 35. Note that the bank has no loan production offices. All residential mortgage loan officers are located in retail bank branches.

130. *Id*. ¶ 42.

marketing efforts on promoting individual loan originators, the vast majority of whom were White, rather than on advertising the availability of its loan products.[131] Further, the government parties took exception with the fact that there was no specific targeting of marketing efforts towards minority communities.[132]

Remarkably, the bank had been warned previously by the CFPB of possible redlining violations, but it took no substantive corrective actions.[133] The consent order specifically mentioned this perceived disregard for the importance of a higher degree of compliance, which disregard may well have had an impact on the level of penalties ultimately assessed.[134]

3. Eagle Bank

The settlement between the DOJ and Eagle Bank and Trust Co. of Missouri, with just $900 million in assets, demonstrates that even smaller community banks are not immune from interest by the DOJ.[135] The matter was referred by the bank's prudential regulator based on an examination finding of a pattern or practice of fair lending violations,[136] which primarily relied on a statistical analysis of the bank's HMDA application and origination data in affected areas compared to its peers.[137] But despite the regulatory finding of a pattern or practice, the bank got off relatively easily in its settlement with the DOJ: although the bank was ordered to create a (relatively small) $800,000 loan subsidy fund, open two new full-service branches in minority areas, and employ a full-time

131. *Id*.

132. *Id*. ¶ 45.

133. *Id*. ¶¶ 39-41 (noting that outside consultants had provided the bank with advice regarding viable expansion opportunities in high-minority census tracts that would be helpful for fair lending compliance). *See also infra* Part III.B (discussing the best practices that an institution can adopt to reduce the risk of an allegation of fair lending violations).

134. It may be that such disregard is viewed by government parties as an aggravating factor during settlement negotiations, resulting in the assessment of heightened penalties and a greater degree of monitoring for future compliance.

135. Complaint at ¶ 3, United States of American v. Eagle Bank and Trust Company of Missouri, No. 4:15-cv-01492 (E.D. Mo. Sept. 29, 2015).

136. *Id*. ¶¶ 7 – 8.

137. *Id*. ¶¶ 19 – 21.

Director of Community Development, importantly, no civil monetary penalties were imposed.[138]

One likely explanation for the relatively minor consequences is found in the consent order itself. An entire paragraph is devoted to a discussion of the proactive initiatives undertaken by Eagle Bank during the course of the DOJ investigation.[139] Specifically, the DOJ acknowledged the bank's voluntary commencement of outreach programs in majority-minority census tracts and the voluntary expansion of its branch presence in majority-minority neighborhoods. The DOJ stated that "this consent order is intended to facilitate the continuation of [these] outreach efforts."[140]

4. Hudson City Savings Bank

The case against Hudson City Savings Bank resulted in the largest-dollar joint DOJ/CFPB settlement to-date, which included a $5.5 million civil monetary penalty and a requirement to spend at least $25 million on a loan subsidy program.[141] Here, the government parties took issue with the way in which the bank "structur[ed] its business . . . to avoid" meeting the residential mortgage credit needs of majority-Black-and-Hispanic neighborhoods.[142] The specific redlining allegations involved the bank's decisions related to branch and loan officer placement that discouraged minority applications,[143] its decisions related

138. *See* Consent Order, United States v. Eagle Bank and Trust Company of Missouri, No. 4:15-cv-01492 ¶¶ 12, 21, 30 (E.D. Mo. Sept. 29, 2015). In a settled complaint, the complaint and consent order are filed simultaneously in the appropriate federal jurisdiction. It is a common negotiated element of redlining consent orders that the financial institution hire a full-time Director of Community Development (or similarly titled management-level employee).

139. *Id*. ¶¶ 3 – 4 (noting that "[t]he United States recognizes that during the investigation, Eagle has voluntarily undertaken several initiatives to help further meet the credit needs of residents located in majority-African-American census tracts in the Missouri portion of the St. Louis MSA," and highlighting examples of helpful steps the bank had already undertaken).

140. *Id*. at 3. Given the favorable impact these proactive measures appeared to have in lessening the remediation burden on Eagle Bank, institutions in similar situations should follow suit and initiate remedial actions as soon as potential issues are identified. *See* discussion accompanying *infra* note 178.

141. Consent Order, Consumer Fin. Prot. Bureau, and United States of America v. Hudson City Sav. Bank, No. 2:15-cv-07056, ¶ 25 (D. N.J. Sept. 24, 2015).

142. Complaint, Consumer Fin. Prot. Bureau, and United States of America v. Hudson City Sav. Bank, No. 2:15-cv-07056, ¶ 1 (D. N.J. Sept. 24, 2015).

143. *Id*. ¶ 33. Another item of note is that the bank relied heavily on a network of mortgage brokers, with approximately 80 percent of its mortgage applications being generated by

to CRA assessment area designations which the government parties asserted were drawn with the intent to obviously exclude counties having the highest proportion of majority-minority neighborhoods,[144] and the bank's failure to market to potential applicants in majority-minority neighborhoods.[145] The allegations were based largely on a statistical analysis of HMDA application data as compared to its peers in the affected areas, but, in contrast to other similar redlining investigations, the complaint did not include allegations based on disparities in origination data.[146]

One important factor that may have influenced the size of the penalty and the total settlement obligations is that the CFPB had previously asked the bank to do its own internal redlining analysis and make any necessary adjustments, but the bank "failed to do so."[147]

5. Associated Bank

HUD also has been active in disparate treatment redlining matters the past few years.[148] The largest HUD settlement ever was reached in 2015 with Associated Bank, based on a complaint initiated by the HUD

brokers, as compared with 20 percent of the applications being generated by loan originators affiliated with its retail branch facilities. *Id.* at ¶ 14. Furthermore, none of the retail branches located in majority-minority census tracts would accept mortgage loan applications, but instead referred the potential applicants to retail loan officers situated in its branches that were located in low-minority census tracts. *Id.* ¶¶ 20-21.

144. Federal prudential regulators have the sole authority to enforce CRA compliance. *See, e.g.*, *supra* note 32. Despite the lack of authority by the plaintiff parties here to allege CRA violations, *see also*, *supra* note 125, the DOJ and the CFPB concluded that, purely on the basis of the bank's exclusion of certain majority-minority census tracts from the CRA assessment areas, any potential applicants from those areas were the victims of illegal discrimination. The government parties reasoned that such census-tract-based exclusion kept potential applicants residing in the excluded census tracts from securing benefits (such as discounted home improvement loans) that were generally offered to low-to-moderate income applicants residing within a designated CRA assessment area. *See* Complaint, Consumer Fin. Prot. Bureau, and United States v. Hudson City Sav. Bank, No. 2:15-cv-07056, ¶ 41 (D. N.J. Sept. 24, 2015).

145. Note that in this complaint, there is no distinction drawn between traditional redlining, disparate treatment redlining, and disparate marketing treatment, as is sometimes the case.

146. *See, e.g.,* Complaint, Consumer Fin. Prot. Bureau, and United States of America v. Hudson City Sav. Bank, No. 2:15-cv-07056, ¶¶ 59–63 (D. N.J. Sept. 24, 2015).

147. *Id*. ¶ 66. *See also infra* Part III.B (discussing the best practices that an institution can adopt to reduce the risk of an allegation of fair lending violations).

148. *See, e.g.,* 2017 BANKING INSTITUTE PRESENTATION, *supra* note 87.

secretary.[149] The primary allegation was that the bank was "underserving" African-American and Hispanic geographic areas, "despite demand for residential mortgage loans" emanating from those areas.[150] HUD determined that the bank's lending comprised "a smaller share of the market in higher-minority population census tracts than" in its market share in other non-minority areas, based largely on a statistical analysis of the bank's HMDA data.[151]

The most noteworthy aspect of this consent order may be HUD's requirement that the bank more than double the planned expansion of its physical presence.[152] As with other matters in which the cases were settled, information is not publicly available regarding the impact competition from other area banks played in Associated Bank's ability to win mortgage business.

III. WHAT HAS CHANGED?

As discussed in Part II, there has been a metamorphosis in the way disparate treatment redlining is alleged and evidenced. Rather than focusing primarily on the traditional, CRA-assessment-area-based analysis, the recent trend has been to utilize a peer-based analysis of HMDA application- and origination-volume data. Under the former approach, regulatory or enforcement agencies needed to evidence a conscious intent to exclude certain geographic areas based on the legally protected characteristics of the area's population. Now, statistical analysis is used to show that a bank with application or origination volumes, measured as a percentage, significantly below the peer-group

149. *See* U.S. DEP'T OF HOUS. AND URBAN DEV., CONCILIATION AGREEMENT BETWEEN ASSISTANT SECRETARY FOR FAIR HOUSING AND EQUAL OPPORTUNITY AND ASSOCIATED BANK, N.A., [hereinafter CONCILIATION AGREEMENT], https://archives.hud.gov/news/2015/pr15-064b-ExecAssBankConAgrmnt.pdf. The accompanying press release succinctly summarizes the terms of the nearly $200 million agreement. Press Release by Brian Sullivan, U.S. DEP'T OF HOUS. AND URBAN DEV, HUD & ASSOCIATED BANK REACH HISTORIC $200 MILLION SETTLEMENT OF 'REDLINING' CLAIM (MAY 26, 2015) https://archives.hud.gov/news/2015/pr15-064b.cfm. The press release includes HUD Secretary Julian Castro's assertion that the "settlement sends a strong message that HUD does not tolerate practices that unfairly restrict an equal and open housing market." *Id*.

150. CONCILIATION AGREEMENT, *supra* note 149, at 2.

151. CONCILIATION AGREEMENT, *supra* note 149, at 2.

152. CONCILIATION AGREEMENT, *supra* note 149, at 18 (requiring the bank to open four loan production offices in majority-minority areas within thirty months of the settlement date, in addition to the three full-service retail bank branches it was already in the process of opening).

average, is at risk of a redlining allegation. In essence, the new approach focuses on results in order to back into intent.[153] The increasing predominance of nondepository mortgage lenders, who have no CRA obligations and therefore have no CRA assessment areas by which to measure geographic focus, may be driving the development of this new standard.[154]

Another new distinction appears to be emerging from that of the traditional redlining analysis conducted in the CRA context. In a CRA compliance examination by federal prudential bank regulators, the bank is granted credit for low-to-moderate-income mortgage loans purchased from other institutions at any time subsequent to loan origination.[155] In recent cases, however, the CFPB and the DOJ have elected to exclude these purchases from its analysis of compliance with fair lending laws.[156] It may be argued that this shift is merely reflective of the tension in statutory purposes between the CRA and fair lending, such that the focus is now on application and origination, rather than on whether a bank buys and sells loans originated by others.[157]

153. One unfortunate outcome for institutions is that the intense pressure to settle, rather than litigate, deprives the institution from having an opportunity to present its business justifications as a defense to a disparate treatment redlining allegation.

154. *See generally* Tammy Butler & David Skanderson, *Redlining Risk—Walking a Fine Line*, *in* MORTGAGE BANKING (July 2016).

155. *See, e.g.*, Office of the Comptroller of the Currency et al., Large Institution CRA Examination Procedures 4-6, available at https://www.ffiec.gov/cra/pdf/cra_exlarge.pdf.

156. *See, e.g.*, 2017 BANKING INSTITUTE PRESENTATION, *supra* note 87. As an example, purchased loans were excluded from the government parties' fair lending analysis in the Hudson City case. *See supra* Part II.A.4.

157. The difference in statutory purpose between the CRA ("to help meet the credit needs of the communities they serve, including communities of low-to-moderate income [LMI] levels," *see supra* note 35) and the fair lending statutes of ECOA and the FHAct (prohibition from discrimination that is based on a protected characteristic, *see* discussion *supra* Part I.B) may be foundational to any supervisory or enforcement decision to exclude purchased loans from a pure fair lending analysis. A bank's purchase of already originated residential mortgage loans does not expand the availability of credit to those in protected classes. In other words, the purchase of such loans is part of the CRA statutory scheme and, while relevant to an institution's compliance with CRA, does not promote actual fair lending compliance. In point of fact, the LMI focus of the CRA in contrast to the prohibited-basis focus of fair lending law can be confusing for depository lenders. By way of example, *supra* note 144 illustrates an instance in which the two statutory purposes, as applied, seemed to be in direct conflict. In that example, Hudson City Savings Bank's CRA program included a product generally available to all LMI applicants living in one of the bank's CRA assessment areas. But because the bank excluded from access to the product anyone living in a majority-minority census tract that was not part of the CRA assessment area, a fair lending violation was alleged. It is also important to the fair lending analysis to note that implementation of the 2015 HMDA Final Rule as written will enable tracking of residential mortgage loan purchases and sales as a possible deterrent against banks using residential mortgage loan purchase activity merely to

There is also a new focus on "high-Black-and-Hispanic" measurement areas (that is, measurement areas[158] comprised of more than 80 percent combined Black or Hispanic individuals),[159] as distinguished from "high-minority" measurement areas with a singular minority population greater than 80 percent or "majority-minority" measurement areas with a singular or combined minority population of more than 50 percent. This combination of the race *and* ethnicity composition of a measurement area can be a challenge for the tracking software that is utilized by financial institutions to proactively monitor for fair lending compliance.[160] There also seems to be minimal concern by supervisory and enforcement agencies for application of fair lending principles to certain races, such as individuals of East Asian descent, even though by definition those of Asian descent are included in the list of protected classes.[161] No rationale has been articulated for the occasional absence of such East Asian, for example, racial information in document production requests related to judicial investigations or the regulatory agency analysis that can result in supervisory administrative action or referral.

A. *Opportunities For States To Fill Gaps In Federal Redlining Enforcement*

Since the 2016 presidential election, there has been much speculation as to whether the new administration's influence over the leadership of the DOJ, HUD, federal prudential regulators, and the CFPB[162] may result in any change in emphasis as to the supervision and

boost CRA ratings, effective with HMDA data beginning January 1, 2018. *But see*, *supra* note 28 (discussing the current state of flux as to possible supervision and enforcement of the rule as promulgated).

158. This measurement is usually, but not always, based on the census tracts established by the U.S. Bureau of Census for analyzing populations.

159. *See, e.g.,* Complaint, Consumer Fin. Prot. Bureau & United States v. Hudson City Sav. Bank, No. 2:15-cv-07056, at ¶ 57 (D. N.J. Sept. 24, 2015).

160. Because race is captured in different HMDA data fields than ethnicity, fair lending compliance software generally has not been designed to analyze the race and ethnicity fields in combination, making internal institutional compliance monitoring more difficult.

161. *See, e.g.*, 2017 BANKING INSTITUTE PRESENTATION, *supra* note 87.

162. The original CFPB Director, Richard Cordray, whose term was not set to expire until July 2018, resigned from his position effective at midnight November 24, 2017. Just prior to his resignation, Mr. Cordray appointed his Chief of Staff, Leandra English, as Deputy Director, in an apparent attempt to have Ms. English succeed him in an Acting Director capacity as arguably prescribed by the Dodd-Frank Act (as codified at 12 U.S.C. § 5491(b)).

enforcement of consumer-oriented financial regulations and fair lending law. If federal regulators fail to act, however, the states, if so inclined, have the authority to pick up the slack.

Title X of the Dodd-Frank Act[163] provides that any state's attorney general ("AG") may bring a civil action to enforce provisions of or regulations issued under Title X, either in Federal district court or in a state court located in the AG's home state, and secure remedies under the same.[164] Notably, even though an important exception provides that a state AG may only enforce upon a national bank or federal savings association "a regulation prescribed by the Bureau under a provision of this title,"[165] a broad interpretation of this provision means that a state AG has authority to enforce violations of ECOA against all financial institutions, including national banks and federal savings associations.[166]

Similarly, a state regulator may bring a civil action or any "other appropriate proceeding" to enforce Dodd-Frank's Title X provisions or any regulations issued thereunder as to institutions that are state-chartered or "[i]ncorporated, licensed or otherwise authorized to do business under State law," and to secure remedies under the same.[167]

However, President Donald Trump immediately appointed as Acting Director Mr. Mick Mulvaney, Director of the Office of Management and Budget, under the apparent authority of the Federal Vacancies Reform Act of 1998 (codified at 5 U.S.C .§ 3345 *et seq.*). Mr. Mulvaney's position as Acting CFPB Director has already survived a motion by Ms. English for a temporary restraining order and a second motion by Ms. English for a preliminary injunction. Although those motions were unsuccessful, it is doubtful that the legal battles over the position have ended. Additionally, President Trump likely will at some point nominate someone for Senate confirmation of the Directorship. Until the position is officially filled by a permanent Director, the direction and tenor of the agency may be in flux. Already, Acting Director Mulvaney—a very vocal opponent of the Dodd-Frank Act and the CFPB during his tenure in the U.S. House of Representatives—has shown signs of attempting to roll back many initiatives, regulations and enforcement matters that were in process at the time of Mr. Cordray's resignation. *See, e.g.*, *infra* note 168.

163. Title X is also known as the Consumer Financial Protection Act of 2010.

164. 12 U.S.C. § 5552 (2016).

165. § 5552(a)(2)(B) (2016). State AGs do not have the authority to enforce "provisions" of Title X in matters involving a national bank or a federal savings association. Although unrelated to the subject of this Article, the primary importance of this distinction is that, unless and until the CFPB promulgates regulations regarding the UDAAP (unfair, deceptive, or abusive acts or practices) provision introduced by Title X, a state AG may not enforce federal UDAAP violations against a national bank or federal savings association, and must instead rely on state UDAP law.

166. 12 U.S.C. § 5552 (2016). The Equal Credit Opportunity Act is one of the "enumerated consumer laws" listed in 12 U.S.C. § 5481(12) for which the CFPB has authority, and which can also be enforced by the states.

167. 12 U.S.C. § 5552 (2016).

Indeed, there has been an uptick in consumer financial regulatory supervision and enforcement by certain states, even preceding the election. In September 2015, Evans Bank settled a redlining claim brought by the New York AG, Eric Schneiderman.[168] More recently, the Maryland state legislature formed a Consumer Protection Commission in April 2017 to fill "gaps created by the Trump administration's deregulatory efforts."[169] In July of 2017, the Pennsylvania AG created a new Consumer Financial Protection Unit that is headed by one of the original United States Treasury team members that stood up the CFPB.[170] Other states also have a long history of strong consumer financial and civil rights protection at both the state AG and the state financial regulatory levels.[171]

168. *See* Press Release by Eric Schneiderman, N.Y. Attorney General, N.Y. State Office of the Attorney General (Sep. 10, 2015), https://ag.ny.gov/press-release/ag-schneiderman-secures-agreement-evans-bank-ending-discriminatory-mortgage-redlining. Much more recently, "the superintendent of the New York Department of Financial Services" stated on Jan. 25, 2018, that the "agency would work to fill any consumer protection gaps that federal regulators create," citing "disappoint[ment with] recent moves at the CFPB under the leadership of Mick Mulvaney that have signaled that the federal consumer finance watchdog would take a different tack in its enforcement and oversight . . . ." Evan Weinberger, *NY Vows to Fill Consumer Protection Gaps Mulvaney Creates*, LAW 360 (Jan. 25, 2018), https://www.law360.com/articles/1005843/ny-vows-to-fill-consumer-protection-gaps-mulvaney-creates.

169. Lalita Clozel, *States preparing to pick up slack if CFPB backs down*, AMERICAN BANKER (Aug. 30, 2017), https://www.americanbanker.com/news/states-preparing-to-pick-up-slack-if-cfpb-backs-down.

170. Press release by Josh Shapiro, Attorney General Penn., Office of Attorney General, (July 20, 2017), https://www.attorneygeneral.gov/Media_and_Resources/Press_Releases/Press_Release/?pid=3757. Interestingly, the Pennsylvania AG recently filed suit in state court against a student loan servicer that closely emulates an earlier federal case brought by the CFPB, possibly out of "concern that the CFPB under Mulvaney would not litigate the case as aggressively as under previous leadership." Stephen Piepgrass & Robert Claiborne, Jr., *Appointment of CFPB Director Causes Rift Among State AGs*, LAW360 (Jan. 25, 2018), https://www.law360.com/articles/1005757/appointment-of-cfpb-director-causes

171. In addition to the aforementioned states, the AGs for The District of Columbia, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, New Mexico, Oregon, Rhode Island, Vermont and Washington were among a total of eighteen state AGs and the District of Columbia AG that filed an amicus curiae brief on Dec. 8, 2017, in support of the motion for preliminary injunction filed by Leandra English, Deputy CFPB Director. Complaint, English v. Trump & Mulvaney, No. (filed Dec. 8, 2017), http://guptawessler.com/wp-content/uploads/2017/11/StatesBrief.pdf. This same group of eighteen AGs "authored a letter to President Trump backing past CFPB actions, expressing concerns regarding the direction that the CFPB may be taking under Mr. Mulvaney, and asserting that, to the extent the CFPB does not continue to vigorously protect consumers from financial fraud and harm, the state attorneys general will do so." MANATT, PHELPS & PHILLIPS, LLP, CFPB AND STATE CONSUMER FINANCIAL PROTECTION YEAR IN REVIEW, JDSUPRA (Jan. 11, 2018), https://www.jdsupra.com/legalnews/cfpb-and-state-consumer-financial-99027/. Although the North Carolina state AG did not join the brief or letter, North Carolina also has a strong

B. *Best Practices for Financial Institutions*

A careful reading of the various redlining complaints and their accompanying consent orders provide a great deal of instruction as to the types of behavior to avoid to reduce the risk of landing in a similar predicament. A few common themes are prevalent.[172]

- It is incredibly important that an institution have comprehensive fair lending policies and procedures that appropriately address current supervision and enforcement trends. In addition, there should be an overarching fair lending statement from the board and senior management that demonstrates the institution's commitment to fair lending principles.

- A robust Compliance Management System ("CMS"), incorporating the above policies and procedures, is essential.[173] Regulatory agencies will scrutinize the sufficiency of the CMS during their periodic supervisory examinations, and will view the absence of a CMS as a significant risk factor for potential fair lending and other regulatory compliance violations.

- Elements of an effective CMS include, but are not limited to:

    - annual fair lending training that is appropriately tailored to the duties and responsibilities of the trainee, which should include training for members of the board of directors and senior management;[174]

record of consumer financial protection, as demonstrated by participation of the North Carolina Deputy AG as a lead negotiator in the $25 billion 2012 National Mortgage Settlement. *See, e.g.*, Philip A. Lehman, *Executive Summary of Multistate/Federal Settlement of Foreclosure Misconduct Claims*, https://d9klfgibkcquc.cloudfront.net/NMS_Executive_Summary-7-23-2012.pdf.

172. It is likely advisable that an institution seek the assistance of experienced counsel, and consultants as necessary (hired by counsel), to proactively or reactively address fair lending issues and concerns.

173. Note that Hudson City did not have an adequate CMS, but instead had only a single statement asserting that it was "an equal opportunity lender." *See* Complaint , Consumer Fin. Prot. Bureau, and United States of America v. Hudson City Sav. Bank, No. 2:15-cv-07056 at ¶ 65 (D. N.J. Sept. 24, 2015).

174. Although presently an expectation by regulatory agencies, this training element for members of the board may be cast aside for institutions under $10 billion in assets who are regulated by the Federal Reserve Board (FRB) under the new proposed board oversight regime currently undergoing notice and comment by the FRB.

  - identification of and monitoring for elements of the underwriting and pricing process that may involve employee discretion;

  - built-in mechanisms that monitor for and require appropriate approval for exceptions or departures from documented requirements;

  - back-end monitoring for disparities that may have occurred on a prohibited basis, including periodic redlining analysis to identify practically or statistically significant disparities;

  - capture and monitoring of consumer complaints, and timely reporting and prompt corrective action to address the underlying issues; and

  - timely and adequate remediation of identified harm, and, if systemic, identification of corrective action to alleviate future occurrence.

- To better understand the redlining risk, the institution should evaluate:

  - its product mix (particularly in comparison to competing institutions);

  - the location of branches and loan production offices, and any plans for expansion or contraction;

  - CRA assessment area(s) (for banks);

  - opportunities for community investments and partnerships; and

  - advertising and marketing efforts.

- Because of the recent emphasis on statistics-based peer-group analysis, the institution should identify (and periodically reevaluate, as necessary) appropriate peer group members, and understand their business models, product offerings, loan production channels, and trends.[175]

175. During the course of a regulatory examination or an enforcement action, it is appropriate to challenge the composition of the peer group against which the institution's performance is being measured. *See, e.g.*, Rodriguez, *supra* note 74 (suggesting ways by which an institution should "Carefully Define [its] Competition . . . ."). Factors to look for in

- To the extent the institution's business model utilizes a network of third-party originators ("TPOs"), careful thought should be given to the appropriate level of oversight and monitoring of TPO practices and activity.[176] Because such TPOs often engage with potential applicants who reside or wish to purchase property in geographic areas that are widely dispersed from the institution's retail locations, the institution's redlining analysis should consider adding these TPO coverage areas to its "reasonably expected market area."[177]

- Given the favorable impact proactive measures had in lessening the remediation burden imposed in a previously settled case, the institution should initiate remedial action as soon as potential issues are identified by the institution prior to or during the pendency of any investigation.[178]

- Finally, and most importantly, the institution should heed carefully any formal warnings from its regulator and take prompt, corrective action to mitigate the future risk. Failure to do so may result in heightened penalties and greater future scrutiny.[179]

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differentiating between institutional business models include: the institution's mix of loan purpose options (such as a purchase, refinance, home equity line of credit or home equity conversion mortgage); loan product offerings (such as fixed- or adjustable-rate products); loan types (conventional or government-backed); loan production channels (third-party or retail originators, and brick-and-mortar or on-line presence); and geographic coverage areas.

176. Note that these TPOs are deemed to be subject to the institution's vendor risk management system protocols, just like any other vendor. Ultimately, in most cases, the institution is responsible for the fair lending violations of its TPOs. By way of example, the Hudson City complaint alleged that the actions of the bank's TPOs led to fair lending violations. Complaint, Consumer Fin. Prot. Bureau, and United States v. Hudson City Sav. Bank, No. 2:15-cv-07056, ¶¶ 24-32 (D. N.J. Sept. 24, 2015). That said, TPOs are not the only loan originators subject to scrutiny: the Union and Guardian combined complaint alleged fair lending issues related to the hiring and training of its retail loan originators. Complaint, United States v. Union Savings Bank, No. 1:16CV1172, ¶ 44 (S.D. Ohio Dec. 28, 2016). Note also that new HMDA reporting will enable analysis of broker activities. *See supra* note 28.

177. *See* FED. FIN. INSTS. EXAMINATION COUNCIL, *supra* note 9, at 32; *see supra* notes 104 and 107.

178. *See supra* note 140.

179. As has been earlier noted, BancorpSouth was warned by the CFPB of possible violations, and its failure to act may have led to heightened penalties. *See supra* note 133. Hudson City failed to perform an internal redlining analysis after having been told to do so by the CFPB. *See supra* note 147. Union Bank's internal compliance group regularly reported to the board of directors that improvement was required, to no avail. Complaint, United States v. Union Savings Bank, No. 1:16CV1172, ¶ 40 (S.D. Ohio Dec. 28, 2016).

IV. CONCLUSION

Longstanding fair lending laws returned to sharp focus during the Obama administration. As part of the laws' reemergence, a new evidentiary standard of discriminatory disparate treatment redlining was developed. This new version of redlining focuses on a comparative statistical analysis of market penetration in certain geographies, without regard for the underlying business justifications that may drive the outcomes.

Importantly, the underlying standards of proof have yet to be fully tested in a court of law. KleinBank has recently elected to litigate, rather than settle. However, the facts in that case may be squarely in favor of the bank as outlined in its motion to dismiss, such that a fully articulated decision on the merits of redlining may never be reached. Thus, it may be some time until there is a more complete picture of the future of the new standard and the associated means of proof applicable to disparate treatment redlining.

In addition, the question as to the appropriateness of a newly presumed affirmative obligation to market and advertise residential mortgage loan products to individuals and geographic areas based on prohibited basis characteristics has not yet been answered, although it is an element of the pending litigation.

While it remains to be seen whether a focus on fair lending supervision and enforcement in general, and disparate treatment redlining and disparate marketing treatment in particular, will continue under the leadership of a new presidential administration, many lessons can be learned, and should be heeded, from the activity of the recent past.