

Remarks by
Jesse Stiller
Historian
Office of the Comptroller of the Currency
OCC Fair Lending Conference
New Orleans, Louisiana
September 9, 2008

Thank you very much for the opportunity to join all of you today at this very important and very timely conference.

What makes it especially timely is the history: this year we mark the 40th anniversary of fair lending regulation. It was in April 1968, just days after the assassination of Dr. Martin Luther King, that Congress passed the Civil Rights Act of 1968, which included the Fair Housing Act. That law outlawed private, as well as public, discrimination in housing. After April 1968, it was illegal for mortgage lenders to discriminate on the basis of race.

Not that mortgage lending discrimination came to any abrupt end. In fact, the Fair Housing Act proved to be “by far the weakest” of the civil rights laws of the 1960s. [1] Endemic, continued violations and ineffective enforcement continued for 20 years before Congress had had enough. Its response, in the late 1980s and early ‘90s, was tougher new legislation -- the Fair Housing Amendments Act and, especially relevant in the context of this conference, amendments to the Home Mortgage Disclosure Act and the Equal Credit Opportunity Act – HMDA and ECOA. With those laws, overt mortgage discrimination did start coming to an end.

But for all their benefits, HMDA and ECOA imposed costs. The current fair housing laws have taken much discretion out of the hands of regulators; they require

heavy penalties even for inadvertent non-compliance by lenders; and they've imposed substantial administrative and paperwork burdens on bankers and regulators alike.

And here's the irony: many of these burdens might have been avoided if bankers and regulators had moved more decisively against discrimination starting in 1968, when equal opportunity in mortgage lending first became the law of the land.

There's a lesson here. And it's this: as bankers and regulators, we're accountable for everything we do -- and everything we don't do. If the existing laws aren't effective, we're eventually going to get tougher laws. Bankers and regulators of a generation ago may not have grasped this. But it's something we can't afford to forget.

Yet the risk of complacency can never be overlooked -- especially at a time like right now, when we have every reason to think we're doing quite well enough in the fair lending arena and there are so many other priorities that compete for our attention as bankers and regulators. It's just at such a time, I think, that the danger of complacency is greatest.

For that reason, it's also the time when I think history can be most valuable.

So I'd like to spend a few minutes looking back at how today's fair lending framework evolved, paying special attention to those critical points in time when things might have taken a different turn. I offer these thoughts with this caveat: the views I express here are mine alone, and should not be construed as the official interpretation of events involving the OCC.

It's generally agreed that the Fair Housing Act of 1968 was a big disappointment. [2] But considering its provisions, it's clear that one of the law's biggest problem was unrealistic expectations. The law assigned primary responsibility to HUD, but it

provided that agency with little actual authority to carry out its mandates. Presented with a consumer complaint of discrimination, HUD was essentially limited to working with the parties to achieve a voluntary settlement. [3] It could take no formal action and impose no penalties on its own. It depended on the cooperation of the banking agencies - - which was rarely forthcoming -- to obtain lender data, which was essential in building a case against alleged violators that the Justice Department would consider for prosecution.

HUD did conduct lender surveys, which tended to underscore the extent of the problem. In one such survey, conducted in the early '70s, one of every five banks freely admitted that they took the applicant's race into account in the decision-making process [4]. Such a finding might have been expected to send the regulators straight into action, but, according to HUD testimony, it elicited practically no response. "Basically," a HUD assistant secretary told the Senate, "bank examiners felt that they could not conveniently carry out their traditional and normal examinations while pursuing inquiry with respect to possible discriminatory housing lending practices." [5] As if to corroborate HUD's concerns, one banking agency representative went on to announce that it did not have the authority even to require banks to display the "Equal Housing Lender" poster - a poster which itself had taken years of tedious interagency coordination to develop. [6]

It's interesting, though, that the next time a major piece of fair lending legislation came before Congress, it didn't address the manifest weaknesses in the Fair Housing Act or the growing ranks of victims of race-based housing discrimination. The 1974 Equal Credit Opportunity Act was more broadly focused on all consumer credit transaction, including those involving installment loans and credit cards. [7] And although originally

intended to cover race-, religion-, national origin-, or gender-based discrimination, in the end, ECOA's provisions applied to only one group: women.

That narrowing of ECOA's constituency reflects a shift in the political winds. The steam had run out of the Civil Rights movement of the '60s. The early '70s, by contrast, was the time of *Roe v. Wade*, the Equal Rights Amendment, and powerful female leaders like First Lady Betty Ford. And so the ECOA hearings turned the spotlight, intensely but narrowly, on the very real abuses and indignities suffered by women in obtaining credit. The country heard shocking stories about banks demanding that married women declare in writing that they would use birth control and have no more children as a condition for their incomes to be counted along with their husband's for a mortgage. It heard from affluent professional women who were told that their loan applications would not be processed until they'd had a quote/unquote "personal" consultation with the loan officer. We saw the results of field tests confirming that the surest way to be rejected for a credit card was to enter "Miss" or "Mrs." before your name on the application; for how else to explain the fact that an application identical in every other respect was invariably approved when it was in a "Mister's" name? [8]

Clearly, it was high time to outlaw such egregious practices, and ECOA did just that. [9]

But there was just as clearly a sense of Congress in 1974 that race-based discrimination was a less urgent matter, in part because the Fair Housing Act was already on the books -- despite mounting evidence that practically nothing was being done to implement its provisions. In 1976, after a scathing report by the U.S. Commission on Civil Rights, noting that there had not been a single referral for prosecution of a race-

based case of discrimination in the entire eight years since the law passed, Senate Banking Committee Chairman William Proxmire called in the regulators for a hearing on fair lending enforcement.

Even today, reading those transcripts can be a squirm-inducing experience. The agencies betrayed their priorities by sending third-tier officials – a deputy chief counsel from the OCC, for example – to represent them, and the committee duly noted this point. When one hapless regulator explained that his agency had failed to adopt anti-discrimination regulations because it was afraid of “moving in too quickly,” Proxmire responded: “Too quickly? If this was a law that was passed eight days ago or eight weeks ago, I’d understand it; but eight years? Eight years is a long, long time.” The regulators’ record, he concluded, “makes Tobacco Road look like a one-nighter. You talk about Rip Van Winkle. For eight years, the agencies seem to have been sound asleep.” [10]

Yet all this Congressional thunder produced minimal action, again reflecting the waning political appeal of what was perceived to be yesterday’s issue. Even the Home Mortgage Disclosure Act, which was passed in 1975, turned out to be a largely empty gesture. In its original incarnation, HMDA was, as one scholar has put it, a “humdrum reporting statute” [11] that captured applicant income only and thus couldn’t prove much more than that banks were making more mortgages in wealthier neighborhoods than in less-affluent ones.

A year later, in 1976, ECOA was amended to ban discrimination on the bases of race, religion, and national origin, as well as gender, in effect bringing under its protection the groups that had fallen by the wayside when ECOA was originally

proposed. [12] But it allowed the regulators maximum discretion in determining when to refer a case of discrimination to the Justice, and, in the atmosphere of deregulation that held sway in the late 1970s and early '80s, the banking agencies used that discretion very discretely. They had other things on their plates, to be sure, including a big upsurge in bank chartering activity in the early 1980s, and then, by the middle 80s, a not-unrelated surge in bank failures. With resources increasingly scarce and national priorities pointed elsewhere, bankers and regulators were apt to view their responsibilities to deal with race-based mortgage discrimination as a much lower priority.

But if bankers and regulators thought they were off the hook, they were badly mistaken. Because the times -- and public attitudes toward banks and racial discrimination generally -- were soon to change.

A sign of those changing times appeared in the May 1, 1988 edition of the Atlanta Constitution. On that day began a series entitled "The Color of Money," by reporter Bill Dedman. In those articles, Dedman revealed that white folks in Atlanta received five times as many home loans from local banks and savings and loans, as African-Americans at the same income levels. [13]

These articles caused a furor. In Atlanta, the city and the county councils both held hearings, where there were demands for the withdrawal of government funds and bank boycotts. Demonstrators called on the banks to issue formal statements of contrition and make new loan commitments.

And the furor soon spread beyond Atlanta. Newspapers in other U.S. cities, like Detroit and Boston, launched their own investigations, reporting similar results. Dedman's Atlanta articles won the Pulitzer Prize for investigative reporting in 1989.

Back in Washington, most of the major players had changed since the last time race-based mortgage discrimination had been a hot-button topic. But after six years in the minority, William Proxmire was back as chairman of the Senate Banking Committee. That didn't bode well for the current group of bank regulators, who had to respond to the new allegations of mortgage lending discrimination, and explain what they were doing to stop it. Unfortunately for them, the answer was not much.

Federal Reserve Board Chairman Alan Greenspan agreed that banks weren't very active making mortgages in minority communities. But he suggested that the problem rested not with the banks in places like Atlanta, but rather with local realtors, who were apparently steering minority borrowers to local mortgage brokers – and, Greenspan said, you couldn't blame banks for that.

As for FDIC chairman William Seidman, he said he doubted the veracity of the newspaper accounts and rejected outright the allegations of racial discrimination. He did concede, however, that with problem bank caseloads then running into the thousands – remember, this was during the depths of the banking crisis of the 1980s – FDIC's “enforcement of all consumer compliance laws and regulations . . . has suffered somewhat in recent years.”

In other words, he didn't think there was a problem, but admitted that the FDIC wasn't trying very hard to find one.

And while Comptroller of the Currency Robert Clarke didn't dismiss the Atlanta findings quite as categorically as his peers, he still saw “no hard evidence from which to conclude national banks . . . discriminate against individual applicants for housing credit on the basis of race.”[14]

To Proxmire and other majority members of Congress, this testimony convinced them it was time to take far bolder action to end what they saw as twenty years of foot-dragging by bankers and regulators on fair lending – foot-dragging that dated back to the Fair Housing Act itself.

A first step took place in 1988, with passage of the Fair Housing Amendments Act, giving HUD independent enforcement authority through its own administrative law judges. [15]

Then, in 1989, came FIRREA – the Financial Institutions Reform, Recovery, and Enforcement Act, better known as the S&L bail-out bill. But it was a lot more than that, and in a clear spirit of retribution directed against both banks and regulators, Title XII of FIRREA amended HMDA, forcing mortgage originators to track applicants' race and sex, as well as their income, and to make that information publicly available. The thinking – and it was clever – was that compliance would be constantly monitored by advocacy groups if Congress's attention was elsewhere.

The final step came in FDICIA, two years later. That's when ECOA was amended to require the banking agencies to refer fair lending matters to the Department of Justice for prosecution. [16] The days of unlimited regulatory discretion in regard to fair lending were now pretty much over.

Just as Congress was putting the finishing touches on the ECOA provisions of FDICIA, the first of the expanded HMDA data arrived, and it amounted to another blow to an industry already reeling from large-scale failures and diminished public confidence. The first year's HMDA reports showed that African-Americans had their mortgage applications denied at a rate nearly two-and-half times that of white applicants. For

Hispanics, the disparity was less – denials were only 150 percent higher than for whites. [17]

Bankers and others were quick to point out that the HMDA data omitted such key variables such as debt ratios, credit histories, loan-to-value ratios, and property characteristics not reflected in the HMDA data. But a year later, in October 1992, the Federal Reserve Bank of Boston released a study that took those key variables into account and, for a time, anyway, silenced the banker opposition. The Boston Fed's authors found that blacks and Hispanics in the Boston area were roughly 60 percent more likely to be denied a mortgage loan than a similarly situated white applicant. And so the Boston Fed's authors concluded, that race was "a serious problem" for Americans seeking mortgage credit. [18]

As it turned out, this was not the final word on the subject. The Boston Fed study proved controversial from day one – and remained so for years thereafter. Many serious students continued to raise doubts about the policy implications of HMDA data – and continue to do so to this day. [19]

But after more than twenty years and many Congressional shots across the bow, bankers and regulators finally got the message. At his March 1993 Senate confirmation hearing, the new Comptroller-designate, Eugene Ludwig, said that fair lending would not only be his priority as Comptroller, but his top priority. He would work day and night, he promised, "to remove discrimination from our financial system, root and branch." [20]

With the OCC leading the way, the regulatory agencies dramatically stepped up their investigatory and enforcement activities, developing new exam procedures, new training, and new statistical models to better detect discrimination. [21]

Banking largely fell into line. Many bankers recognized that the regulators' initiative might even be a blessing in disguise, in the sense that a credible government commitment to fair lending could help raise the industry's reputation and improve its legislative prospects. [22] This was no small matter at a time when the industry was seeking regulatory relief in both the compliance and new powers areas.

In this new environment, banks with questionable fair lending records scurried to clean up their acts. For example, Shawmut National Corp. of Boston and Hartford was quick to announce a special mortgage program for customers with limited credit histories, the opening of a branch in a predominantly minority neighborhood in Boston, and a program that involved the dispatch of undercover "testers" into its loan offices. Unfortunately for Shawmut, it was too late: on the basis of its blemished fair lending record, the Federal Reserve in late 1993 voted to deny the bank's application to complete a corporate acquisition. [23] Times had indeed changed.

Obviously, my goal today hasn't been to explore the history of fair lending per se. I wanted, instead, to explore the intersection of practice and politics, suggesting the importance of regulators and bankers taking their responsibility under fair lending laws with extreme seriousness – and to highlight the consequences of being under-attentive to that responsibility. The history of fair lending illustrates that in compliance, just as in safety and soundness, bad things can happen -- for consumers, for banks, and for bank regulators -- when we take our eyes off the ball.

Of course, the real world is full of tough choices, with real-life consequences. The key is to understand those consequences – even the ones that may be less obvious and less immediate in their impact. That's where the bankers and regulators of the

previous generation fell short. Without a strong culture of compliance and compliance supervision, they thought they could downplay fair lending. Of course, they were mistaken. The more demanding, less permissive regulations we live with today are a direct result of their decisions. But fortunately, it's a lesson we've taken to heart. And hopefully, despite all the competing priorities that bankers and regulators face today, it's a lesson we can take with us, well into the future.

Thank you very much.

[1] "Bring Life to Fair Housing Law," New York Times, Apr. 28, 1979; Michael H. Schill and Samantha Friedman, "The Fair Housing Amendments Act of 1988: The First Decade," Cityscape 4:3 (1999), p. 58.

[2] "Bring Life to Fair Housing Law," New York Times, Apr. 28, 1979.

[3] "After 20 Years, Fair Housing Teeth," New York Times, Aug. 8, 1988.

[4] **Equal Opportunity in Lending**, Hearings before the Committee on Banking, Housing and Urban Affairs, United States Senate, 94th Congress, 2d session, on Oversight on Equal Opportunity in Lending Enforcement by the Bank Regulatory Agencies, March 11 - 12, 1976, p. 21.

[5] Testimony of James H. Blair, Assistant Secretary for Fair Housing and Equal Opportunity, Department of Housing and Urban Development, in Ibid., p. 127.

[6] The FDIC disputed that it had the authority to require the poster. See **Equal Opportunity in Lending**, p. 20. On the poster's development, see Robert J. Cole, "Personal Finance: Housing-Bias Ban," New York Times, Jan. 10, 1972.

[7] "A Bill to Prohibit Discrimination on the Basis of Race, Color, Religion, National Origin, Age, Sex, or Marital Status in the Granting of Credit," (H.R. 12856), May 16, 1974.

[8] Congressional Research Service, "Women and Credit," in **Credit Discrimination**, Hearings before the Subcommittee on Consumer Affairs, Committee on Banking and Currency, House of Representatives, 93d Congress, 2d session, June 21 - 22, 1974, pp. 636 - 37.

[9] See James F. Smith, "The Equal Credit Opportunity Act of 1974: A Cost/Benefit Analysis," The Journal of Finance, 33:2 (May 1977), pp. 609 - 622.

[10] **Equal Opportunity in Lending**, pp. 11, 22.

[11] Patricia McCoy, "Home Mortgage Disclosure Act: A Synopsis and Recent Legislative History," Journal of Real Estate Research, 29: 4 (Oct- Dec. 2007), p. 382.

[12] H.R. 6516.

[13] Dedman, "The Color of Money," Atlanta Journal-Constitution, May 1 – 4, 1988. This series, and its repercussions, can be conveniently retrieved at <http://powerreporting.com/color>.

[14] "Federal Bank Regulators Respond to 'The Color of Money,'" Atlanta Journal Constitution, Sept. 11, 1988, p. A12.

[15] Schill and Friedman, "Fair Housing Amendments Act," pp. 58 – 60.

[16] The 1991 change in ECOA is at Section 223.02 of FDICIA.

[17] Claudia Cummings, "Fed Reports Little Change in Loan Bias," American Banker, Oct. 28, 1992, p. 1.

[18] Alicia H. Munnell, Lynn E. Brown, James McEneaney, and Geoffrey M.B. Tootell, Mortgage Lending in Boston: Interpreting HMDA Data, Federal Reserve Bank of Boston Working Paper No. 92 – 7, Oct. 1992.

[19] For summaries of critiques of the Boston Fed study, see Peter Passell, "Redlining Under Attack," New York Times, Aug. 30, 1994 and Barbara L. Miles, "Discrimination in Mortgage Lending: What Do We Know?" Congressional Research Service, Sept. 1, 1994, esp. pp. 14 – 18. See also Vern McKinley, "Community Reinvestment Act: Ensuring Credit Adequacy or Enforcing Credit Allocation," Regulation, 1994:4, pp. 32 – 33.

[20] **Nomination of Eugene Allan Ludwig**, Hearing before the Committee on Banking, Housing, and Urban Affairs, United States Senate, 103d Congress, 1st session, Mar. 31, 1993, p. 10.

[21] Claudia Cummings, "Regulators Jointly Warn Banks to End Loan Bias," American Banker, May 28, 1993; Cummings, "Regulators Are Focus of Attention as Fair-Lending Issue Gains Steam," Ibid., June 1, 1993. OCC Banking Bulletin, 93-30, "Joint Statement on Fair Lending Expectations"

[22] Jim McTague, "You, Too, Can Learn to Love the Lender Bias Crackdown," American Banker, June 21, 1993; Claudia Cummings, "Improbable Allies: Bankers and Activists," Ibid., June 2, 1993

[23] On Shawmut, see John H. Cushman, Jr., "Lending-Bias Rules Create Quandary for Banks," New York Times, Nov. 28, 1993.