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TESTIMONY OF
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OFFICE OF THE COMPTROLLER OF THE CURRENCY
BEFORE THE
SUBCOMMITTEE ON DOMESTIC POLICY
OF THE
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
OF THE
U.S. HOUSE OF REPRESENTATIVES
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Statement Required by 12 U.S.C. § 250:

The views expressed herein are those of the Office of the Comptroller of the Currency and do not necessarily represent the views of the President.

INTRODUCTION

Chairman Kucinich, Ranking Member Issa, and members of the Subcommittee, I am Ann Jaedicke, Deputy Comptroller for Compliance Policy, at the Office of the Comptroller of the Currency (OCC). I am pleased to appear before you today to discuss the OCC's fair lending and Community Reinvestment Act (CRA) examination processes, and to discuss how a national bank's CRA evaluation and rating can be adversely affected by evidence of unlawful lending discrimination.

The OCC has a comprehensive and rigorous fair lending oversight program, which is our foundation for ensuring that national banks comply with the fair lending laws. Additionally, the OCC conducts CRA examinations of national banks to evaluate whether they are meeting the credit needs of their communities. The CRA evaluation process provides the OCC with an opportunity to incorporate evidence of discriminatory credit practices into the assessment of a national bank's efforts to meet its communities' credit needs.

My testimony will describe the OCC's supervisory and enforcement process for fair lending compliance, our process for evaluating CRA performance, and the relationship between fair lending compliance and the assessment of CRA performance. Our regulations and supervisory procedures ensure that discriminatory practices that are found to violate the fair lending laws are taken into account in evaluating a national bank's CRA record of performance.

In particular, my statement will discuss how the federal banking agencies' joint CRA regulations provide that evidence of substantive fair lending violations will adversely affect the evaluation of a bank's CRA performance. Consistent with the

regulation and guidance, at each CRA examination, OCC examiners consider a national bank's fair lending compliance, and if there is evidence of unlawful discrimination, that information is taken into account in the bank's CRA evaluation and the examiner's findings are discussed in the bank's public performance evaluation (PE). The interagency CRA rules further provide guidance on the factors that will be considered in determining whether a bank's CRA *rating* should be adjusted as the result of such evidence. These factors include the nature of the violation, the extent of the problem, whether the bank self-identified the issue, whether the bank has initiated corrective action, whether the bank has a compliance monitoring system, and any other relevant information. Examiners evaluate these factors on a case-by-case basis. Pursuant to the interagency CRA rules, the OCC takes into account evidence of fair lending violations as a negative factor in assessing the CRA performance of national banks, and we have lowered the CRA ratings of national banks in several instances based on such evidence.

I. THE OCC'S SUPERVISORY AND ENFORCEMENT PROCESS FOR ENSURING COMPLIANCE WITH FAIR LENDING LAWS

A. The Supervisory Process

1. Background.

National banks are among the most extensively regulated commercial enterprises in the United States. The OCC comprehensively examines these institutions to ensure that they operate in compliance with applicable banking laws, regulations, and supervisory guidance and in a safe and sound manner.¹

Assuring fair access to credit and fair treatment of national bank customers are fundamental responsibilities of the OCC as administrator of the national banking system.

¹ 12 U.S.C. § 481.

In this regard, two federal statutes form the foundation for protecting consumers from discrimination in credit transactions: the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act. ECOA and its implementing regulation prohibit discrimination against applicants for credit on the basis of race, color, religion, national origin, sex, marital status, age, receipt of public assistance income, or the exercise of rights under the Consumer Credit Protection Act.² ECOA designates the OCC as the enforcing authority with respect to national banks.³ The Fair Housing Act prohibits discrimination in residential real estate-related transactions based on race, color, religion, national origin, sex, familial status, or handicap.⁴ The OCC enforces the Fair Housing Act as part of its authority to ensure national banks' compliance with applicable law.⁵ Accordingly, the OCC examines national banks for compliance with the Fair Housing Act as well as ECOA.

The OCC has a nationwide network of examiners who comprehensively supervise all national banks in the national banking system. Our fair lending supervisory and enforcement process is designed to assess and monitor the level of fair lending risk in every national bank; assess compliance with fair lending laws and regulations; obtain corrective action when significant weaknesses or deficiencies are found in a bank's policies, procedures, and controls relating to fair lending; and ensure that enforcement action is taken when warranted, including referrals to the United States Department of Justice and notifications to the United States Department of Housing and Urban Development (HUD).

² 15 U.S.C. § 1691(a); 12 C.F.R. § 202.4.

³ 15 U.S.C. § 1691c(a)(1)(A).

⁴ 42 U.S.C. § 3605.

⁵ *See* 12 U.S.C. § 1818.

The OCC uses a combination of analytical tools, lending information, and risk-based targeted fair lending examinations to identify and test for potential discriminatory practices. As described in greater detail below, our supervisory process entails several steps including: (1) risk assessment and screening; (2) on-site examinations and, if appropriate, statistical analysis; and (3) enforcement and referrals.

2. *OCC Fair Lending Risk Assessments.*

The foundation of the OCC's supervisory process is the detailed, core knowledge that examiners develop and maintain about each bank's organizational structure, culture, business lines, products, services, customer base, and level of risk. The OCC's examination guidance directs examiners to consider fair lending risk as part of our supervisory process, including the nature, scope, and volume of the bank's activities, the quality of the bank's risk management systems and personnel, findings in previous risk assessments, and whether there have been recent changes in products, systems, or processes that may affect fair lending risk. Examples of factors related to fair lending that may be considered, as appropriate, in conducting risk assessments include Home Mortgage Disclosure Act (HMDA) data; types of products offered; origination channels, including reliance on third party brokers; pricing, underwriting, and compensation policies and procedures; internal controls, self-evaluations, and self-testing activities; servicing values, market environment, and profitability; loan application processes; complaint data; comments in the bank's CRA public file;⁶ and the bank's own audit results.

⁶ Banks are required to maintain a public file that includes, among other materials, written comments received from the public for the current year and the preceding two years specifically relating to the bank's performance in helping to meet community credit needs. 12 C.F.R. § 25.43.

3. *OCC Fair Lending Screening Process.*

While regular risk assessments allow examiners to establish a fair lending risk profile and supervisory strategy for each national bank, this process is augmented by the OCC's annual fair lending screening process. Through a successive series of steps and filters, the OCC identifies those institutions, loan products, markets, and prohibited basis categories that appear at greatest risk for discriminatory practices. When combined with our regular risk assessments, this screening process is central to our risk-based approach to fair lending supervision, because it focuses on the institutions where we then conduct our most in-depth fair lending examinations. The OCC periodically reviews and modifies its screening process to enhance its effectiveness, and to incorporate new sources of risk information as they become available.

The OCC uses HMDA data as part of the screening process. Each year, after the OCC receives HMDA data for national banks,⁷ OCC economists run the data through multiple screens developed by OCC fair lending experts. These screens test for national banks that are outliers when compared to all national banks in terms of disparity ratios by race, ethnicity, and sex for: 1) denial rates; 2) the incidence of reported "rate spread" loans;⁸ and 3) the presence of other indicators in HMDA data relating to possible differences in treatment in terms and conditions.

⁷ The Federal Reserve Board collects and compiles HMDA data and reviews the data for errors on behalf of the federal banking agencies. The reported information includes data on type and purpose of the loan; race, ethnicity and gender of the borrower and co-borrower; geographic location of the property; "rate spread" and HOEPA status; and action taken on the application. For a given year, the OCC generally receives HMDA data for national banks from the Federal Reserve in June of the following year. These files contain data on approximately eight million loan applications received by national banks during the prior calendar year.

⁸ The term "rate spread" refers to the requirement in Regulation C (HMDA) that lenders report the spread between the APR on the loan and the rate of Treasury securities of comparable maturity. The requirement is triggered if the APR exceeds the Treasury security rate by 3 percentage points, for first lien loans, and by

In addition to these screens, the OCC analyzes HMDA data and Census Bureau data to assess application patterns in metropolitan statistical areas. We also incorporate information from the pricing screens that the Federal Reserve Board develops.

Finally, our annual screening lists contain two random sample components. First, the entire population of national banks is randomly sampled to develop a list of banks that will receive in-depth fair lending examinations. Even banks that do not report HMDA data face the possibility of an in-depth examination in any given year.⁹ Likewise, banks that do not trigger our risk-based screening criteria face that possibility. The OCC also randomly samples OCC-supervised credit card banks to develop a separate list of those institutions that will receive fair lending examinations.

After we have developed preliminary screening lists, the lists are sent to examiners of the banks identified on the list for review.¹⁰ The banks that appear on the final screening lists receive an in-depth, on-site fair lending examination.

4. *OCC Fair Lending Examinations.*

After we identify banks that appear to exhibit the highest fair lending risk through our fair lending risk assessment and screening, the next step is the fair lending examination itself. As part of our fair lending examinations, we use interagency fair lending examination procedures and additional OCC-developed analytical tools to evaluate whether different outcomes in lending decisions are the result of unlawful discrimination. Our examiners rely on the detailed examination guidance contained in

5 percentage points, for subordinate lien loans. The term “rate spread loan” refers to a loan that meets these reporting thresholds. *See* 12 C.F.R. § 203.4(a)(12).

⁹ For example, banks are not subject to HMDA reporting requirements in 2007 if they have assets of \$36 million or less or if they do not have a home office or branch in a metropolitan area.

¹⁰ In a small number of instances, banks may be added to, or removed from, the list based on recommendations by examiners concerning the level of fair lending risk.

interagency fair lending examination procedures, which were developed with the other Federal Financial Institution Examination Council (FFIEC) agencies.¹¹ These procedures contain guidance for assessing risks of unlawful behavior involving overt discrimination, underwriting and pricing discrimination, steering, and discriminatory redlining and marketing.¹²

When our examiners encounter information indicating different lending outcomes for similarly situated individuals or groups, our supervisory approach is to evaluate the factors a bank relies on to explain its credit decisions. We then reach our own conclusions about whether these factors are valid, business-related, and nondiscriminatory, and whether they do in fact explain the outcomes. If disparities remain that cannot be attributed to legitimate factors, then examiners preliminarily conclude that there is reason to believe that the disparities are the result of unlawful discrimination, and we then move to the enforcement and referral process described below.

For banks that have a large volume of applications, as well as a variety of loan product types, OCC economists may develop a statistical model to compare information from large numbers of files and to test for potential unlawful discrimination. The statistical model is an automated comparative file review of all applications or originations in a given population, such as all files relating to a particular loan product. This statistical tool allows us to compare and evaluate a large number of files simultaneously. As part of this process, examiners first review the bank's underwriting

¹¹ Comptroller's Handbook, *Fair Lending Examination Procedures* (Apr. 2006) (*Examination Procedures*), available at <http://www.occ.treas.gov/handbook/fairlep.pdf>. The OCC's *Examination Procedures* incorporate the Interagency Fair Lending Examination Procedures, as well as OCC-specific supplemental material.

¹² *Id.* at pp. 23-29.

and pricing policies, and then work with quantitative experts to construct a statistical model to test for potential disparate treatment. Once a model is developed, we focus on the magnitude and significance of the estimated disparities between prohibited basis groups and a control group, using standard statistical tests. These techniques help to identify particular applications or originations that appear to be outliers or to identify applicants who appear to be similarly situated, but who experienced different credit decision outcomes. The corresponding loan files then can provide examiners with a better starting point for file-by-file comparison than that which could be achieved through random selection.

In mid-size and community banks, many of which have smaller volumes of loans and less diversity in loan types, a fair lending examination typically involves a comparative file review, rather than the use of statistical analysis. Examiners review files to compare denied versus approved applicants who are similarly situated, or to compare the terms and conditions offered to such applicants. The fair lending examination procedures provide guidance on how to determine sample sizes and the types of files to compare.¹³

For all banks, when potential unlawful discriminatory results are found, examiners present their findings to bank management for an explanation. If the bank's explanation is inadequate to rebut preliminary examination findings, the findings are documented, and decisions are made on what OCC supervisory or enforcement action should be taken and on whether the matter must or should be referred to the Department of Justice or HUD.¹⁴ This process is discussed in more detail below. Additionally, even

¹³ *Id.* at pp. 16-17, 37-52 & App. D.

¹⁴ *Examination Procedures*, at pp. 66-68 & App. C.

if no violation is found, where specific practices or a lack of adequate controls expose the bank to unacceptable risk that a fair lending violation could occur, the OCC will direct bank management to modify its practices or policies to address that risk.

B. The Enforcement Process

The OCC has broad enforcement authority to address violations of law, including ECOA and the Fair Housing Act.¹⁵ Under this authority, we may take a variety of actions against banks and individuals, including cease and desist orders (which, in some circumstances, may direct the payment of restitution to affected customers), formal agreements, civil money penalties, and the removal and prohibition of “institution-affiliated parties” from participation in the banking industry. The agency also may take informal actions, such as entering into memoranda of understanding with the bank and actions pursuant to the safety and soundness order process.¹⁶

In addition to our independent enforcement authority, ECOA requires the OCC to refer matters to the Department of Justice “whenever the agency has reason to believe that 1 or more creditors has engaged in a pattern or practice of discouraging or denying applications for credit” in violation of ECOA’s nondiscrimination provisions.¹⁷ In cases not involving a pattern or practice of violations, the OCC has discretion to make a referral to the Department of Justice when it has reason to believe that discrimination has occurred or when it is unable to obtain compliance with the ECOA’s provisions.¹⁸ ECOA also requires the OCC to notify HUD when there is a reason to believe that a creditor has violated ECOA and the Fair Housing Act, but the matter is not referred to the

¹⁵ 12 U.S.C. § 1818.

¹⁶ 12 U.S.C. § 1831p-1; 12 C.F.R. Part 30.

¹⁷ 15 U.S.C. § 1691e(g).

¹⁸ *Id.*

Department of Justice.¹⁹ Further, Executive Order 12892 requires each executive agency to forward to HUD information suggesting a violation of the Fair Housing Act. The information also must be forwarded to the Department of Justice if it indicates a possible pattern or practice of discrimination in violation of the Fair Housing Act.²⁰ Finally, a 1991 Memorandum of Understanding between HUD and the federal banking agency members of the FFIEC requires the agencies to notify HUD of complaints that appear to allege a violation of the Fair Housing Act.

Before the OCC takes an enforcement action or makes a referral, banks are provided with a letter containing preliminary findings of discrimination and are given an opportunity to respond in writing. If, after the response is considered, the supervisory office continues to believe that violations of ECOA or the Fair Housing Act occurred, the matter is reviewed by appropriate legal staff and senior OCC officials before final determinations are made regarding enforcement actions and referrals to the Department of Justice and HUD. In determining the appropriateness of an OCC enforcement action and the type of relief to seek, the OCC considers the nature of the violation, the extent of the harm, voluntary remedial action, and other factors.²¹

In 1994, the OCC became the first federal banking agency to use its cease and desist authority to take a public enforcement action against a bank under ECOA.²² Over the next decade, the OCC took several other enforcement actions based on violations of

¹⁹ *Id.* at § 1691e(k).

²⁰ Executive Order 12892, Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing § 2-204 (Jan. 17, 1994), *reprinted in* 42 U.S.C.A. § 3608 note (West 1994).

²¹ Interagency Fair Lending Policy Statement, 59 Fed. Reg. at 18,272 (1994) (discussion of factors federal banking agencies will consider in determining appropriate enforcement sanctions and remedial measures).

²² *In the Matter of First National Bank of Vicksburg, Mississippi*, No. 94-220, Stipulation and Consent Order (Jan. 21, 1994).

the fair lending laws.²³ These actions typically required the bank to change or enhance its policies and procedures and to take corrective actions to redress consumer harm, such as by paying restitution.

Since 1993, we have also made referrals to the Department of Justice and/or notified HUD of 38 matters under the referral and notification provisions of ECOA. Additionally, pursuant to the 1991 Memorandum of Understanding, the OCC has forwarded to HUD 92 complaints of discrimination filed with our Customer Assistance Group over the past five years.

Several of the OCC's referrals to the Department of Justice have resulted in public consent decrees or settlement agreements resolving litigation instituted by the Department. These matters have addressed a variety of loan products and types of alleged discriminatory conduct.²⁴ In other instances, after a referral, the Department of Justice has declined to take action and has requested that the OCC handle the matter through its own supervisory and enforcement processes. In several instances, the CRA rating of the bank involved in these matters was lowered.²⁵

As previously noted, the OCC also has available a variety of supervisory mechanisms to address problematic practices or weaknesses in controls before such

²³ See *In the Matter of: First Central Bank, N.A., Cerritos, California*, No. 99-13, Stipulation and Consent Order (Feb. 12, 1999), available at <http://www.occ.treas.gov/ftp/release/99-23a.txt>; *Household Bank (SB), National Association, Las Vegas, Nevada*, No. 2003-17, Formal Agreement (March 25, 2003), available at <http://www.occ.treas.gov/FTP/EAs/ea2003-17.pdf>.

²⁴ See, e.g., *U.S. v. First National Bank of Vicksburg*, Consent Decree (S.D. Miss. 1994), available at <http://www.usdoj.gov/crt/housing/documents/vicksburgsettle.htm> (settling allegations of race discrimination in the pricing of unsecured home improvement loans); *U.S. v. Huntington Mortgage Co.*, Settlement Agreement (N.D. Ohio 1995), available at <http://www.usdoj.gov/crt/housing/documents/huntingtonsettle.htm> (settling allegations of race discrimination in charging overages on mortgage loans); *U.S. v. Associates National Bank*, Settlement Agreement (D. Del. 2001), available at <http://www.usdoj.gov/crt/housing/documents/assocsettle.htm> (settling allegations of discrimination against Spanish speaking applicants and cardholders in credit card lending).

²⁵ See, e.g., Public Disclosure, *Associates National Bank*, pp. 1, 5 (May 30, 1997), available at <http://www.occ.treas.gov/ftp/craeval/jan99/22277.pdf>; Public Disclosure, *First National Bank of Gordon*, pp. 3, 8 (Sept. 21, 1993).

issues lead to potential violations and formal enforcement actions or referrals to the Department of Justice would be necessary. Our fair lending supervisory process entails a number of steps, in ascending order of consequence, including our assessment and screening processes to identify banks exhibiting higher fair lending risks, fair lending examinations of those banks, corrective actions to address deficiencies, and finally, where necessary, enforcement actions to address violations of law or deficiencies in bank controls. Formal enforcement actions and referrals to the Department of Justice generally should be necessary only if the preceding measures have failed to ensure compliance with the fair lending laws. Our goal is to address fair lending risk through comprehensive and escalating supervision -- before it develops into illegal practices requiring referrals and enforcement.

When the OCC finds practices or weaknesses that could expose the bank to an unacceptable risk that a fair lending violation could occur, for example, we direct bank management to modify its practices or policies to address that risk. Significant problems can be addressed in a variety of ways, including through findings and conclusions, or as MRAs of bank management and boards of directors, in written reports of examination. To assist institutions in strengthening fair lending controls, our examiners also may provide supervisory recommendations. These may be contained in examination reports, or in other communications to the institution. These elements of the OCC supervisory process help to prevent bank practices from reaching the point where enforcement action or referrals to the Department of Justice are warranted.

II. THE OCC'S PROCESS FOR ASSESSING CRA PERFORMANCE

The Community Reinvestment Act²⁶ encourages each insured depository institution covered by the Act to help meet the credit needs of the communities in which it operates. The CRA applies only to banks and savings associations the deposits of which are insured by the Federal Deposit Insurance Corporation.²⁷ Affiliates of insured depository institutions that are not themselves insured depository institutions are not directly subject to the CRA.

The CRA requires each federal financial supervisory agency to assess the record of each covered depository institution in helping to meet the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with safe and sound operations. The law also directs the agencies to take that record into account when deciding whether to approve an application by the institution for a deposit facility.²⁸

Neither the CRA nor its implementing regulations provide hard and fast rules or ratios applicable to the examination or application processes. Rather, the rules contemplate an evaluation of each lender's record taking into consideration the individual institution's business model.

An institution's capacity to help meet community credit needs is influenced by many factors, including its financial condition and size, resource constraints, legal impediments, and local economic conditions that could affect the demand and supply of

²⁶ 12 U.S.C. § 2901 *et seq.* Credit unions, as well as non-depository institutions like mortgage companies, are not covered by the CRA.

²⁷ *Id.* §§ 2902(2), 2903(a)(1), 1813(c)(2).

²⁸ *Id.* § 2903(a)(1).

credit. Examiners must consider these factors when evaluating an institution's performance under CRA.²⁹

The CRA regulation prescribes different evaluation methods tailored to respond to differences in institutions' structures and operations. For example, the regulation provides a streamlined assessment method for small institutions with assets of less than \$258 million.³⁰ The small bank performance evaluation emphasizes lending performance by focusing on the bank's loan-to-deposit ratio, the percentage of loans made within the bank's assessment area, and the distribution of loans among borrowers and geographies of different incomes.³¹ Intermediate small institutions, those with assets of at least \$258 million but less than \$1.033 billion, are examined under the same lending performance criteria as the smaller institutions, but also are evaluated on the community development activities in which they engage.³²

Large banks – those with assets of at least \$1.033 billion – are evaluated under three tests: the lending test, the investment test, and the service test.³³ The lending test performance criteria focus on the number and amount of loans originated in the bank's assessment area, the distribution of the bank's lending to individuals and geographies of different income levels, and the number and amount of the bank's community development loans.³⁴ The investment test is used to evaluate the number and amount of the bank's investments with a primary purpose of community development,³⁵ while the

²⁹ 12 C.F.R. § 25.21(b).

³⁰ *Id.* at §§ 25.12(u)(1), 25.26(a).

³¹ *Id.* at § 25.26(b).

³² *Id.* at § 25.26(a)(2), (b)-(c).

³³ *Id.* at § 25.21(a).

³⁴ *Id.* at § 25.22(b).

³⁵ *Id.* at § 25.23.

service test considers the retail and community development services that the bank has offered.³⁶

Banks that are designated as wholesale or limited-purpose institutions are evaluated only on their community development activities.³⁷ Finally, the regulation allows any institution, regardless of size or business strategy, the choice to be evaluated under a strategic plan.³⁸ This type of flexibility and customizing permits institutions to be evaluated fairly and in conformance with their business approach.

Examiners review HMDA data, if the bank is a HMDA reporter, to gauge the number and amount of home mortgage loans and the loan distribution among borrowers and geographies of different incomes.³⁹ Similarly, if the bank is a large bank subject to CRA data reporting requirements, examiners review CRA data regarding small business, small farm, and community development loans. Prior to the examination, examiners often request additional relevant information from the bank.⁴⁰ For example, examiners may request information about (1) other relevant loan data that the bank would like examiners to consider; (2) investments that the bank has made that it would like considered; (3) branch location information, along with information about branches that were opened or closed during the examination cycle; (4) the types of banking products (loan and deposit) offered by the bank; (5) the bank's delineated assessment areas; and (6) the bank's performance context.

³⁶ *Id.* at § 25.24.

³⁷ *Id.* at § 25.25.

³⁸ *Id.* at § 25.27.

³⁹ See Large Institution CRA Examination Procedures, at pp. 1, 4 (Feb.2006), available at <http://www.occ.treas.gov/ftp/bulletin/2006-17a.pdf>; Small Institution CRA Examination Procedures, at p. 4 (Feb. 2006), available at <http://www.occ.treas.gov/ftp/bulletin/2006-17b.pdf>.

⁴⁰ *Id.* at pp. 117-119.

Upon the conclusion of CRA examinations, the OCC provides banks with written performance evaluations (PEs), which, unlike banks' Reports of Examinations, are publicly disclosed documents.⁴¹ In a PE, conclusions are made about each performance criterion for the type of bank evaluated (e.g., large, intermediate small, small, etc.). These conclusions are supported by facts and data, which may be found either in the narrative discussion of the PE or in tabular form. A bank's rating(s) are derived from the conclusions about each performance criterion. An intrastate bank will have only one rating – a bank-wide rating. An interstate bank will have ratings for each state in which it has at least one branch or main office and for each multistate metropolitan area if it has at least one branch or main office in more than one state of the multistate metropolitan area, as well as a bank-wide rating. By statute, the ratings that a bank may receive are “Outstanding,” “Satisfactory,” “Needs to Improve,” and “Substantial Noncompliance.”⁴²

The CRA limits the frequency of CRA examinations in institutions with aggregate assets of not more than \$250 million that were rated Outstanding or Satisfactory in the most recent CRA examination. Such an institution is not subject to a routine CRA examination more often than (1) once every 60 months, if it received an Outstanding rating on its most recent examination; or (2) once every 48 months, if it received a Satisfactory rating on its most recent examination. The statute provides the OCC with discretion to examine these institutions more or less frequently, however, upon reasonable cause, as determined by the OCC.

For institutions with total assets of \$250 million or less that received a rating of less than Satisfactory in the most recent CRA examination, the statute provides the OCC

⁴¹ See 12 U.S.C. § 2906(b); 12 C.F.R. § 25.42(a)(2).

⁴² 12 U.S.C. § 2906(b)(2).

with discretion to conduct routine CRA examinations as frequently as the OCC deems necessary.⁴³ The OCC ordinarily will begin a CRA examination for these institutions within 36 months of the close date of the prior examination.⁴⁴ For institutions with assets of more than \$250 million, CRA examinations are normally scheduled to begin within 36 months after the close date of the last CRA examination.

III. THE EFFECT OF EVIDENCE OF ILLEGAL DISCRIMINATION ON A NATIONAL BANK'S CRA RATING

Beginning with the CRA regulations adopted by the federal banking agencies in 1978, one of the factors taken into consideration during a CRA performance evaluation has been evidence of prohibited discriminatory or other illegal credit practices.⁴⁵ In 1995, when the OCC and the other banking agencies revised their CRA regulations, evidence of discriminatory or other illegal credit practices was included as a factor that could adversely affect a bank's CRA evaluation.⁴⁶ The interagency regulations provided that, in determining the effect on a bank's assigned rating, the appropriate agency would consider the nature and extent of the evidence, the policies and procedures that the bank had in place to prevent discriminatory or other illegal credit practices, any corrective action that the bank had taken or has committed to take, particularly voluntary corrective action resulting from self-assessment, and other relevant information.⁴⁷ In July 2001, the agencies adopted guidance that explained that an institution engages in discriminatory credit practices if it discourages or discriminates against credit applicants or borrowers on

⁴³ 12 U.S.C. § 2908(a)(3).

⁴⁴ The OCC uses the term "close date" to refer to the supervisory office approval date.

⁴⁵ 12 C.F.R. § 25.7(f) (1979).

⁴⁶ 60 Fed. Reg. 22,156, 22,183 (May 4, 1995) (*codified at* 12 C.F.R. § 25.28(c) (1996)).

⁴⁷ *Id.*

a prohibited basis, in violation, for example, of the Fair Housing Act or ECOA (as implemented by Regulation B).⁴⁸

In 2005, the agencies revised their joint CRA regulations to clarify that a bank's evaluation is adversely affected by discriminatory or other illegal credit practices by the bank regardless of whether the practices involve loans in the bank's assessment areas or in any other location.⁴⁹ The revised rule also provides that a bank's CRA evaluation is likewise adversely affected by evidence of discrimination or other illegal credit practices by any affiliate in connection with loans inside the bank's assessment areas, if any loans of that affiliate have been considered at the bank's election in the bank's CRA evaluation.⁵⁰ The adverse effect on the bank's CRA rating of illegal credit practices by an affiliate is limited to affiliate loans within the bank's assessment areas because, under the regulation, a bank may elect to include as part of its own CRA evaluation only those affiliate loans that are within the bank's assessment areas.⁵¹

Consistent with the regulation and guidance, at each CRA examination, examiners refer to a bank's fair lending evaluation to determine whether the bank's CRA evaluation should be affected by evidence of lending discrimination, and the examiner's findings are discussed in the public performance evaluation (PE). If no evidence of discrimination is found, this will be noted in the PE.

In determining the impact of a substantive fair lending violation or abusive lending practice on the CRA rating, interagency CRA regulations require the agencies to

⁴⁸ Community Reinvestment Act; Interagency Questions and Answers Regarding Community Development, 66 Fed. Reg. 36,620, 36,640 (July 12, 2000). In 2005, the OCC codified the substance of this guidance. 70 Fed. Reg. 44,256, 44,267 (Aug. 2, 2005) (*codified at* 12 C.F.R. § 25.28(c)(1)(i) (2006)).

⁴⁹ 70 Fed. Reg. 44,256, 44,267 (Aug. 2, 2005) (*codified at* 12 C.F.R. § 25.28(c)(1)(i) (2006)).

⁵⁰ *Id.*

⁵¹ *Id.* at p. 44,263.

consider a number of factors. These factors include the nature of the violation, the extent of the problem, whether the bank self-identified the issue, whether the bank has initiated corrective action, whether the bank has a compliance monitoring system, and any other relevant information.⁵² Decisions about the impact of evidence of illegal discrimination on a bank's CRA rating are made on a case-by-case basis and supported in the bank's report of examination and CRA PE.

The CRA PE language discusses substantive violations or findings resulting from illegal discrimination and other illegal credit practices inconsistent with helping to meet community credit needs that adversely affect the evaluation of an institution's CRA rating. A CRA PE would not include a description of the fair lending supervisory activities when no substantive violations have been found.

In several instances, the OCC has concluded that a national bank's CRA performance was adversely affected by evidence of unlawful lending discrimination. In some cases, the bank's rating was lowered to Needs to Improve based on substantive violations of the fair lending laws.⁵³ In one instance, the bank was rated Satisfactory because of its discriminatory or other illegal credit practices, even though it had otherwise demonstrated Outstanding CRA performance.⁵⁴ In other instances, the OCC has described the violations in the CRA PE and taken them into account in evaluating

⁵² 12 C.F.R. § 25.28(c)(2).

⁵³ See, e.g., Public Disclosure, Spirit of America National Bank, pp. 1, 7 (Oct. 15, 2002), *available at* <http://www.occ.treas.gov/ftp/craeval/aug03/22183.pdf>; Public Disclosure, First Central Bank, N.A., pp. 1, 8 (June 18, 1998), *available at* <http://www.occ.treas.gov/ftp/craeval/oct98/18695.pdf>; Public Disclosure, Associates National Bank, pp. 1, 5 (May 30, 1997), *available at* <http://www.occ.treas.gov/ftp/craeval/jan99/22277.pdf>.

⁵⁴ See Public Disclosure, Household Bank (SB), N.A., pp. 5, 9-11 (Apr. 30, 2001), *available at* <http://www.occ.treas.gov/ftp/craeval/jan04/22675.pdf>.

CRA performance, but has determined that lowering a rating was not appropriate based on its assessment of the circumstances.⁵⁵

Generally, evidence of illegal discrimination is detected by bank examiners and then, as described above, appropriate enforcement action is taken and matters are referred to DOJ as required or appropriate. In these situations, the OCC will be able to take such information into account during the bank's next CRA examination. In rare circumstances, a CRA PE may not reflect fair lending issues that are the subject of a subsequent DOJ investigation, because of the timing of the CRA examination and the discovery of evidence of substantive fair lending violations. This is the situation with respect to the pending investigation by the Department of Justice of the First National Bank of Pontotoc. In such cases, including the fair lending investigation of the First National Bank of Pontotoc, the OCC will evaluate any findings by the Department of Justice and evidence of unlawful lending discrimination will be considered at the bank's next CRA evaluation. Also, the OCC will conduct its own review as appropriate of the fair lending implications of conduct that is under investigation by the Department of Justice.

CONCLUSION

I appreciate the opportunity to discuss the important nexus between fair lending compliance and helping to meet community credit needs. The OCC is committed to ensuring that our evaluation of national banks' CRA performance appropriately reflects any evidence of unlawful discrimination, consistent with the interagency CRA

⁵⁵ See, e.g., Public Disclosure, Belk National Bank, p. 6 (May 6, 2002), available at <http://www.occ.treas.gov/ftp/craeval/mar03/23726.pdf>; Public Disclosure, Dillard National Bank, p. 8 (Oct. 9, 2001), available at <http://www.occ.treas.gov/ftp/craeval/feb02/18777.pdf>.

regulations. Along with our robust fair lending examination and enforcement process, the CRA process is an important “tool” in federal law that we use to address, and to help prevent, unlawful discrimination.

I will be pleased to answer any questions that you may have.