WOMEN AND SUBPRIME LENDING: AN ESSAY ADVOCATING SELF-REGULATION OF THE MORTGAGE LENDING INDUSTRY

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Amidst the subprime debacle, one question is difficult to ask and answer—Why would people who could qualify for prime mortgage loans end up with subprime loans? This is a particularly relevant question because market-based theories suggest that robust competition will provide better products and yet, there is persistent evidence of steering women and racial minorities, who were qualified for prime products, into subprime products.[1] My article, *Intent and Empirics: Race to the Subprime*, is just one example of the nearly countless attempts by interested financial analysts, consumer advocates, government watchdog organizations, and lawyers to figure out what happened, why the market did not function well for these borrowers.[2]

I am a property law professor. From my property law perspective, this financial industries problem ultimately affects a property matter—mortgages. My thought is that the financial industry, specifically the mortgage lending industry, should develop a system of self-regulation as part of a larger response by the financial services industry to recent events. In the end, whether mortgage lending discrimination, market failure, or a combination of these two caused the mortgage-related financial crisis, the recent events are a clarion call for financial institutions, mortgage originators, and brokers to re-evaluate their internal controls and compliance programs. The overall goal of this re-evaluation should be to implement a self-governed compliance program. Such a program could help the mortgage lending industry reinforce an ethical culture that maintains the proper alignment between corporate profit and ethical lending and corporate practices.[3]

By now, most people know that subprime lending spiked dramatically during the late 1990s through 2006.[4] Subprime mortgages as a share of the total number

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1. *See, e.g.*, Carol Necole Brown, *Intent and Empirics: Race to the Subprime*, 93 MARQ. L. REV. (forthcoming 2010), *available at* https//ssrn.com/abstract=1426142. Freddie Mac estimates that twenty percent or more of all borrowers who receive subprime loans were qualified for prime loans. Mike Hudson & E. Scott Reckard, *More Homeowners with Good Credit Getting Stuck with Higher-Rate Loans*, L.A. TIMES, Oct. 24, 2005, at A1.

2. *See* Brown, *supra* note 1, at 2-6.

3. *See* Saule T. Omarova, *Rethinking the Future of Self-Regulation in the Financial Industry*, BROOK. J. INT'L L. (forthcoming). Professor Omarova argues that self-regulation in the financial services industry, in conjunction with government regulation, can play an important role in minimizing and controlling systemic risk. *Id.*

4. Brown, *supra* note 1, at 10 n.33. "In 1994, subprime loans were fewer than 5 percent of all mortgage originations; their representation had grown to 13 percent by 1999." *Id.* (citation omitted); ALLEN J. FISHBEIN & PATRICK WOODALL, WOMEN ARE PRIME TARGETS FOR SUBPRIME

of loan originations were twenty percent in 2006, up from only nine percent in 1996.[5] The subsequent national mortgage foreclosure crisis that seemed almost uncontrollable by 2007 ignited a mortgage-related financial crisis that affected the global market place.[6] News media, business reports, government investigations, regulatory inquiries, and citizen suits focused national attention on the housing crisis and the problems attending what soon came to be known as the "mortgage meltdown."[7] A dual mortgage market had emerged in which subprime lending disproportionately affected minorities (particularly blacks and Hispanics), women, and the elderly.[8]

Evidence of the disparate impact felt by certain minority borrowers is abundant and the evidence of gender disparities in subprime lending is intriguing. I described the problem of intentional steering of black borrowers into subprime products in an earlier article.[9] I argued that the evidence of disparate impact felt by minorities, combined with compelling statistical data developed in the course of my research on this issue, made the case for a finding of not only disparate impact but of steering—intentional discrimination—based upon race.[10]

Equally compelling is the credible evidence that subprime lending and the foreclosure of these subprime mortgage loans especially affected women. The income gap between women and men has narrowed considerably in recent years and, not surprisingly, single women are making up an ever-increasing share of the ranks of new homebuyers. In 1995, single women were fourteen percent of

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LENDING: WOMEN ARE DISPROPORTIONATELY REPRESENTED IN HIGH-COST MORTGAGE MARKET 1 (Consumer Fed'n Am. 2006). In 2004, subprime loans were twenty percent of all conventional mortgage originations. *Id.* at 2 (citing Robert B. Avery et al., *Higher-Priced Home Lending and the 2005 HMDA Data*, FED. RESERVE BULL., at A125 (Summer 2006). Using HMDA reported loans, Federal Financial Institutions Examinations Council (FFIEC) reported the rate of subprime loans at twenty-nine percent in 2006, eighteen percent in 2007, and twelve percent in 2008 evidencing the peak in 2006 and the subsequent decline. Press Release, Federal Financial Institutions Examination Council (Sept 30, 2009), *available at* http://www.ffiec.gov/hmcrpr/hm093009.htm; HAL S. SCOTT, THE GLOBAL FINANCIAL CRISIS 2-3 (2009).

5. KATALINA M. BIANCO, THE SUBPRIME LENDING CRISIS: CAUSES AND EFFECTS OF THE MORTGAGE MELTDOWN 6 (CCH 2008).

6. SCOTT, *supra* note 4, at 168-73.

7. *See* Mortgage Meltdown, http://money.cnn.com/real_estate/foreclosures (last visited May 16, 2010).

8. Brown, *supra* note 1, at 8, 34, 43 (discussing testimony of a former loan officer with CitiFinancial who admitted to targeting minorities and the elderly for expensive products); *see also* Regina Austin, *Of Predatory Lending and the Democratization of Credit: Preserving the Social Safety Net of Informality in Small-Loan Transactions*, 53 AM. U. L. REV. 1217 (2004). Austin discusses predatory lending and the problems some targeted consumers experience in getting credit. "Examples of targeted consumers include women, minorities, low-income wage earners, and senior citizens." *Id.* at 1219. For purposes of this essay and unless otherwise stated, the term Hispanic refers to non-white Hispanics.

9. *See* Brown, *supra* note 1, at 8.

10. *Id.* at 33-41.

homebuyers, which increased to twenty-one percent by 2003.[11] The numbers were relatively stable for 2008 at twenty percent and twenty-one percent for 2009.[12]

Professor Anita Hill has written that "[f]or women, the impact of problems in the lending industry crosses age, class, and racial lines as well as neighborhoods."[13] The Center for American Progress recently reported that

> unmarried women . . . are among the hardest hit by the deception, usury and other predatory lending practices that were a key part of the recent credit crisis . . . [and that] mortgage brokers and lenders disproportionately sold subprime mortgages to women on their own even when they could have qualified for lower-cost loans.[14]

The increasing participation of women in the national real estate market makes the subprime lending disparity even more central to national debate and attention. There is a growing body of evidence of gender-based disparities in lending though there have not been nearly enough studies that investigate gender disparities in lending as independent of race-based disparities.[15] For example, the National Community Reinvestment Coalition (NCRC) conducted a national field test in 2003, over a four-month period, aided by consumer protection organizations, local NCRC members, and civil rights activists. The NCRC conducted forty-eight match paired tests using white and black testers on twelve subprime lenders. The NCRC gave the testers similar profiles indicating that

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11. Rachel Bogardus Drew, *Buying for Themselves: An Analysis of Unmarried Female Home Buyers* 4 (Joint Ctr. Hous. Studies, Harv. Univ. 2006), *available at* www.jchs.harvard.edu/publications/markets/n06-3_drew.pdf.

12. Jessica Lautz, *Single-Women Home Buyers: A Growing Segment*, REAL ESTATE INSIGHTS, Apr. 2010, at 11, *available at* http://www.realtor.org/wps/wcm/connect/3177a800421b53e3ba64fed140d385a7/REI0410.pdf?MOD=AJPERES&CACHEID=3177a800421b53e3ba64fed140d385a7 ("Indeed, the percentage of single-women buyers has increased from 14 percent in 1995 to 21 percent in 2009.").

13. Anita F. Hill, *Women and the Subprime Crunch*, BOSTON GLOBE, Oct. 22, 2007, at A11.

14. Liz Weiss, *Protecting Unmarried Women from Unscrupulous Lenders*, CTR. FOR AM. PROGRESS, Oct. 28, 2009, at 1, *available at* http://www.americanprogress.org/issues/2009/10/unmarried_women_financial.html.

15. *See, e.g.*, Judith K. Robinson, *Race, Gender, and Familial Status: Discrimination in One US Mortgage Lending Market*, FEMINIST ECON., July 2002, at 63, 65-66 (relying on 1992 Boston Federal Reserve mortgage lending study and discussing gender and familial-status lending patterns that differ by race). A study relying on 2003 federal data of 331 Metropolitan Statistical Areas showed that in each one, women were more likely to receive a subprime loan than a prime loan. Sue Kirchhoff, *Minorities Depend on Subprime Loans*, USA TODAY, *available at* http://www.usatoday.com/money/perfi/housing/2005-03-16-subprime-usat_x.htm. *But see* NAT'L COUNCIL OF NEGRO WOMEN, ASSESSING THE DOUBLE BURDEN: EXAMINING RACIAL AND GENDER DISPARITIES IN MORTGAGE LENDING 10 (2009), *available at* www.ncnw.org/images/double_burden.pdf (stating that its analysis of 2007 Home Mortgage Disclosure Act data did not reveal "gender-based disparities in lending").

each of the testers was qualified for a prime loan. The black testers were given slightly better profiles than the white testers. The purpose of the testing was to review the underwriting practices of the subject lenders to determine if there was evidence of price discrimination. The NCRC noted several occasions in which black female testers received less favorable treatment than white female testers.[16] The report notes one instance in which a black female tester was told that the lender would rely upon her husband's income and credit because it was slightly higher than the tester's.[17] The lender did not tell the white female tester about this policy nor did the lender ask the white tester about income.[18] In a separate instance, the lender not only provided the black female tester with less information than was provided to the white female tester, but also, when following up with the black female tester, the lender called the tester's husband instead of the tester.[19]

The NCRC published a study in 2006 using home loan data for 2004. According to the study, "female borrowers of all racial groups have difficulties securing affordable home loans and receive a surprisingly high number of high cost loans."[20] The NCRC reported that the amount of subprime loans received by

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16. Press Release, Sub-Prime Fair Lending "Mystery Shopping" Update (July 21, 2008) (on file with author).

17. *Id.* Such behavior violates the Equal Credit Opportunity Act's prohibition on discrimination based upon sex in credit transactions. *See* Equal Credit Opportunity Act, 15 U.S.C. § 1691(a)(1),(b)(1) (2006).

> Sec. 1691. Scope of prohibition
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> (a) Activities constituting discrimination
> It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—
>
> > (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract) . . .
>
> (b) Activities not constituting discrimination
> It shall not constitute discrimination for purposes of this title for a creditor—
>
> > (1) to make an inquiry of marital status if such inquiry is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of credit-worthiness . . .

Id.; *see* Helen Ladd, *Evidence on Discrimination in Mortgage Lending*, J. ECON. PERSP., Spring 1998, at 41, 45 (discussing documented survey evidence of discrimination against women in the lending process such as the discounting of the wife's income by fifty percent or more and also discounting the wife's income if there were pre-school children or she was of childbearing age).

18. Press Release, *supra* note 16, at 7.

19. *Id.*

20. NAT'L CMTY. REINVESTMENT COAL., HOMEOWNERSHIP AND WEALTH BUILDING

women was greater than their share of the national household while the share of subprime loans received by men was less than their share of the national household.[21] In contrast, the share of prime loans received by men was higher than their representation in the national household.[22] The study also noted that middle-income women, in particular, are underrepresented in the share of prime loans received.[23]

A 2006 Consumer Federation of American study found that gender matters when it comes to getting a prime loan. This gender disparity crosses product lines and surfaces in refinance, home improvement, and in home purchase lending.[24] According to the study, which used 2005 Home Mortgage Disclosure Act (HMDA) data for in excess of three hundred fifty metropolitan areas nationwide and more than four million loans, women at all income levels were disparately impacted.[25] This study also confirmed that disparate subprime lending practices especially affected black and Hispanic women.[26] As women's incomes spiked above two times the area median income, upper income black women were almost five times more likely to receive a mortgage in the subprime market than were upper income white men.[27] Accounting for all income levels, black women were 256.1 percent more likely than white men to receive subprime purchase mortgages.[28] Although the evidence is not as compelling, it is worth noting that black women were also more likely to receive subprime mortgages than black men by a rate of 5.7 percent.[29] In sum, women, particularly black and Hispanic, were more likely to be saddled with a subprime mortgage than were men with similar incomes.

What evidence there is suggests that lenders may have been engaging in a practice of gender-based steering of women, especially women of certain minority groups, into subprime loans, when they were qualified for prime loans and when their male peers with comparable financial pictures received prime

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IMPEDED: CONTINUING LENDING DISPARITIES FOR MINORITIES AND EMERGING OBSTACLES FOR MIDDLE-INCOME AND FEMALE BORROWERS OF ALL RACES 1 (2006).

21. *Id.* at 2-3.

22. *Id.*

23. *Id.* at 3-4.

24. FISHBEIN & WOODALL, *supra* note 4, at 1.

25. *Id.* at 4.

26. *Id.*

27. *Id.* at 3-4.

> For purchase mortgages, women earning double the median income are 46.4 percent more likely to receive subprime mortgages than men with similar incomes. In contrast, women earning below the area median income are 3.3 percent more likely to receive subprime mortgages. Women earning between the median and twice the median income are 28.1 percent more likely to receive subprime purchase mortgages than men.

Id. at 3.

28. *Id.* at 4.

29. *Id.*

loans.[30] Certainly being both a woman and a minority hurts black and Hispanic women's chances of getting a prime rate mortgage loan.

The banking industry has responded in a rather predictable way to these recent events. The more common responses include statements include:

- You are over generalizing—attributing the actions of a few brokers or lenders to the entire industry.[31]
- This HMDA data you rely upon is limited, it is not telling the entire story because lenders consider many factors in addition to those HMDA requires lenders to report and there are also many loans that HMDA doesn't require lenders to report.[32]
- This is a very subjective process and has to be if lenders are going to be able to make loans to minorities and lower income people.[33]
- The Community Reinvestment Act is really to blame.[34]

Consumer advocates and members of Congress have responded to these

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30. *E.g.*, Minority Subprime Borrowers, Minorities Pay More for Home Ownership (Oct. 2002), http://www.consumersunion.org/pdf/au-minority-rpt.pdf (last visited May 16, 2010). Consumers Union released a study analyzing the impact of gender as a predictor of whether or not a borrower would receive a subprime loan or refinance. The impact of borrowers' race as a predictor was constant across gender lines and Consumers Union found that among all categories of race and gender, "subprime companies enjoy their highest penetration rates among Black women borrowers and in high . . . minority neighborhoods." *Id.* at 3; *see* FISHBEIN & WOODALL, *supra* note 4, at 1; NAT'L CMTY. REINVESTMENT COAL., *supra* note 20. *But see* NAT'L COUNCIL OF NEGRO WOMEN, *supra* note 15, at 10 (stating that its analysis of 2007 Home Mortgage Disclosure Act data did not reveal "gender-based disparities in lending").

31. *See* Claire A. Hill, *Who Were the Villains in the Subprime Crisis, and Why It Matters*, 4 ENTREPRENEURIAL BUS. L.J. 323 (2010), *available at* http://moritzlaw.osu.edu/eblj/issues/volume4/number2/Hill.pdf (discussing the actors in the subprime mortgage crisis and ranking them in terms of their degree of villainy); *see also* Brown, *supra* note 1, at 25 (discussing a Boston Fed study that "tested the pervasiveness of possible race bias [in the context of the subprime mortgage crisis] by questioning whether racial disparities in rejection rates were due to isolated discriminatory conduct by one or two institutions in contrast to market-wide phenomenon of discrimination").

32. *See generally* Darryl E. Getter, *Reporting Issues Under the Home Mortgage Disclosure Act*, CRS REPORT FOR CONGRESS 3-4 (Oct. 24, 2008) (discussing HMDA reporting requirements and coverage).

33. See Brown, *supra* note 1, at 17-21 for a discussion of the subjective and objective information lenders receive as part of the lending process.

34. For example, consider the following issue brief from the Center for Responsible Lending (CRL) in which the CRL states that:

> In an attempt to divert attention away from the destructive lending practices that fueled the credit crisis, some are trying to place the blame for it on the Community Reinvestment Act (CRA). They argue that CRA forced lenders to make risky loans to low and moderate families and to communities of color.

Center for Responsible Lending, *CRA Is Not to Blame for Mortgage Meltdown*, http://www.responsiblelending.org/mortgage-lending/policy-legislation/congress/cra-not-to-blame-for-crisis.pdf (last visited Oct. 3, 2008).

alleged discriminatory practices with calls for: (1) strengthening the HMDA reporting requirements for covered institutions to include all of the variables that financial institutions consider when determining creditworthiness and when pricing loans, (2) greater accountability through the establishment of a set of national mortgage lending standards (a move away from deregulation of mortgage markets), (3) consolidating our fragmented banking regulatory structure, (4) fixing the mortgage securitization process to promote greater disclosures (a quality of investment problem) and to ensure closer alignment of the incentives of investors and originators, (5) imposing stricter enforcement of existing consumer protection laws, and (6) backing away from federal preemption of state consumer protection laws.[35]

The mortgage-related financial crisis emphasized the deficiencies in the internal controls and compliance programs of the participants in the nation's mortgage lending industry. Existing compliance programs failed the test during this most recent financial crisis. The mortgage lending industry should re-evaluate its internal controls and compliance programs toward the goals of reinforcing an ethical culture and maintaining proper alignment between corporate profit and ethical lending and corporate practices. This Essay offers three recommendations for considering how to address the systemic failure of internal controls that contributed to the financial crisis.

First, the mortgage lending industry should coalesce to produce a common set of internal controls that are designed to prevent two major problems: (1) steering borrowers who qualify for prime loans into subprime loans and (2) placing borrowers who do not qualify for either a prime or subprime loan into a subprime loan. The former practice increases the cost of credit and therefore the likelihood of default for these borrowers who might not otherwise have defaulted. The latter practice, which is based on so-called "stated-income mortgages," reflects the erosion of a financial institution's underwriting standards. Under this practice, lenders accept the borrower's statement of income and fund the loan, provided the borrower's FICO score and whatever appraisals the lender ordered are verified. These loans developed the name "liar loans" because borrowers could claim whatever income they liked and the loan would fund, again, as long as the FICO and appraisals checked out.[36] To get the quantity of mortgages desired, many financial institutions sacrificed quality and relaxed their underwriting and compliance standards; they engaged in behavior that was, at the very least, unethical, and the national economy suffered.[37]

35. Press Release, New York Officials, NAACP Call on the OCC to Reverse Its Position on Federal Preemption of State Predatory Lending Laws (Dec. 10, 2003), *available at* http://www.oag.state.ny.us/media_center/2003/dec/dec10a_03.html (stating "the OCC issued an advisory letter to national banks advising them that they are not subject to state enforcement"); SCOTT, *supra* note 4, at 165.

36. PAUL MUOLO & MATHEW PADILLA, CHAIN OF BLAME: HOW WALL STREET CAUSED THE MORTGAGE AND CREDIT CRISIS 7, 86-87 (2008).

37. *Id.* at 124-25, 197 (discussing the FBI's characterization in 2006 of the loan fraud pandemic in the country and "singling out stated-income loans . . . being funded through mortgage

Second, boards of directors and senior management of mortgage lending institutions should commit to developing a more ethical culture; ethics always trumps compliance. Monitoring compliance programs and mortgage lending decisions on an ongoing, real time basis could be an important step towards developing and maintaining a more ethical corporate compliance structure.[38] Strengthening mortgage lenders' compliance posture and providing effective governance over mortgage lending decisions would require the establishment of an integrated compliance system of internal reporting and external auditing. Each mortgage lending institution would articulate its non-discriminatory mortgage lending standards as a foundational element of its compliance program. The mortgage lending standards would be self-articulated and individualized. Using an institution's self-articulated standards would allow institutions to incorporate legitimate, subjective criteria into their compliance programs. But such subjective criteria would be subject to routine, independent monitoring and auditing. This approach would allow institutions to structure their compliance programs to implement the policies and internal controls that will be most effective in building an ethical culture and in ensuring the institution's compliance with applicable mortgage lending laws and regulations.

Lastly, mortgage-lending institutions should develop a system of external audits of their mortgage lending practices and engage in voluntary self-disclosure programs. A system of periodic external auditing would bring an additional level of objectivity and independence to the compliance assessment process. External auditors, in particular, can bring an additional value; they work for numerous clients and have experience with a wider variety of industry regulatory and compliance practices. The value external auditors bring is their credibility with regulators and their independence from the institution. Because of this independence and because of their exposure to a variety of institution types and systems, external auditors may uncover issues that are new to an institution and may offer proven solutions that are likewise novel to the internal monitor. If the institutions perform the internal monitoring objectively and competently, as determined by the external auditors, the regulators can rely on the internal monitoring, to varying degrees, which creates greater efficiencies and saves money. Effective compliance builds trust in the system and among key stakeholders.

Self-governed compliance programs are not novel. In the wake of procurement scandals that plagued the U.S. defense and aerospace industry in the 1980s, the defense industry decided to coalesce and to work together to share and develop best practices for improving its ethics and compliance posture across the industry. In June 1986, the thirty-two major defense contractors established the Defense Industry Initiative on Business Ethics and Conduct (DII). DII members, known as Signatories, commit to the DII Principles as set forth in the

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brokers as the chief problem").

38. *See* David Hechler, *Risky Business: Did Compliance Programs Fail the Test During the Financial Industry Meltdown?*, CORP. COUNSEL, Apr. 1, 2009, *available at* http://www.law.com/jsp/cc/pubarticlecc.jsp?id=1202429141994.

organization's charter. The principles are the following:

(1) Each Signatory shall have and adhere to a written code of business conduct. The code establishes the high ethical values expected for all within the Signatory's organization.
(2) Each Signatory shall train all within the organization as to their personal responsibilities under the code.
(3) Signatories shall encourage internal reporting of violation of the code, with the promise of no retaliation for such reporting.
(4) Signatories have the obligation to self-govern by implementing controls to monitor compliance with federal procurement laws and by adopting procedures for voluntary disclosure of violations of federal procurement laws to appropriate authorities.
(5) *Each Signatory shall have responsibility to each other to share their best practices in implementing the DII principles*; each Signatory shall participate in an annual Best Practices Forum.
(6) Each Signatory shall be accountable to the public.[39]

In essence, the DII's objectives are the promotion of self-governance and internal reporting, the sharing of best practices related to business and ethics, and the promotion and nurture of ethical conduct in the defense industry.

Signatories are often competitor companies and sometimes they are partners. They work together in a spirit of coopetition. Companies wishing to join DII must subscribe to the six principles mentioned above. Fundamental to membership in the DII is the commitment to share business conduct and ethics best practices; sharing of best practices is strictly limited to ethics and business conduct and does not include the sharing of competitive business information or practices.[40] The DII holds an annual Best Practices Forum, which is one of the means by which Signatories share best practices. The Signatories regard the sharing of best practices as one of the most important benefits of membership in the DII.

The DII wrote in its 2000 Annual Report that "[t]he overarching principle of corporate self-governance, the bedrock of what DII is all about is embedded in the U.S. Sentencing Commission's sentence guidelines for corporations."[41] The Federal Sentencing Guidelines apply to organizations, including financial

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39. Charter of the Defense Industry Initiative on Business Ethics & Conduct, Art. III (2004), *available at* www.dii.org/resources/dii-charter.pdf (emphasis added).

40. PUBLIC ACCOUNTABILITY REPORT OF THE DEFENSE INDUSTRY INITIATIVE ON BUSINESS ETHICS & CONDUCT 2 (2008-2009), *available at* http://www.dii.org/resources/annual-report-20089.pdf.

41. *Origins and Development of the Defense Industry Initiative*, *in* 2000 DEF. INDUS. INITIATIVE ANN. REP. 10 ("discussing development of Defense Industry Initiative in the pre-Guidelines era"), *as cited and quoted in* Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697, 707 n.44 (2002).

institutions and brokers.[42] The Sentencing Guidelines impose penalties on organizations that violate federal criminal law. Importantly, the Sentencing Guidelines are also intended to incentivize organizations to develop and maintain compliance programs that are effective and that deter illegal and unethical conduct.[43]

If mortgage lenders intentionally target women for subprime mortgages, these institutions are susceptible to claims that they are violating federal housing, fair lending, and anti-discrimination laws and could be subject to civil sanctions. Although the Sentencing Guidelines would not apply in this type of corporate context to an institution's activities, where there are no federal criminal violations, they provide a useful framework for financial institutions to use to move forward and better police their own internal activities and create an ethical business culture.

The Sentencing Guidelines establish seven minimum criteria for an effective ethics and compliance program. [1] The organization must establish compliance procedures and standards designed to detect and to prevent criminal conduct. [2] Specific, high level personnel must be delegated responsibility for compliance oversight. [3] Reasonable due diligence must be exercised to make certain that individuals with substantial compliance authority are not ethically compromised. [4] The organization must communicate compliance procedures and standards to its employees. [5] The organization must establish monitoring, auditing, and reporting systems with appropriate safeguards to ensure employees follow its compliance program. [6] Compliance should be part of the performance evaluation and consequences should exist if there are violations of laws, regulations, or ethical policies. [7] If violations are detected, the organization shall have standards in place to achieve an appropriate and timely response. An appropriate response may include modifications to the compliance program and standards.[44]

Thus, the Sentencing Guidelines and the minimum criteria might be useful, as a guide and in conjunction with other self-regulatory mechanisms, in developing and articulating a self-regulatory regime, one that would allow the mortgage lending industry to effectively monitor its members for unethical conduct and for activities that contributed to the financial market instability the nation is currently experiencing.

In conclusion, self-regulation of its practices by the mortgage lending industry should be considered as part of the "dramatic action"[45] that has been necessitated by the financial crisis in this country and around the globe. In many sectors, self-regulation and codes of conduct are increasingly popular and

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42. *See* U.S. SENTENCING COMMISSION, GUIDELINES MANUAL § 8B2.1 (2009).

43. Murphy, *supra* note 38, at 703.

44. U.S. SENTENCING COMMISSION, *supra* note 39, § 8B2.1.

45. Timothy F. Geithner, President & Chief Executive Officer of the Fed. Reserve Bank of N.Y., Remarks at the Economic Club of New York, *Reducing Systemic Risk in a Dynamic Financial System*, *available at* http://www.newyorkfed.org/newsevents/speeches/2008/tfg080609.html (discussing the role of financial innovation in contributing to the global financial crisis).

implemented as part of a process of establishing high standards and meeting them. This Essay is part of a dialogue about the role of self-regulation in improving mortgage-lending practices, nationally, and affording greater protections to groups made vulnerable to steering and other forms of mortgage lending discrimination. I hope this Essay becomes part of a broader discussion about how to develop, implement, monitor, and effectively assess self-regulatory programs in the mortgage lending industry.