Under the statute, the privilege applies only if the creditor has already taken or is in the process of taking appropriate corrective action. In some cases, the issue of whether certain information is privileged may arise before the corrective actions are fully underway. The rule requires, at a minimum, that the creditor establish a plan for corrective action, a means for monitoring the creditor's progress in implementing the plan, and activity to begin carrying out the plan. A schedule may be imposed by the court or agreed to by an agency or the other parties affected. A creditor's failure to fully implement planned corrective action may be cause for subsequently reevaluating whether the privilege applies.

15(b) Self-test defined

15(b)(1) Definition

Proposed paragraph 15(b)(1) states what constitutes a ''self-test'' for purposes of this rule. The 1996 Act does not define ''self-test'' and authorizes the Board to define by regulation the practices to be covered by the privilege. The Board proposes to define a ''self-test'' as any program, practice, or study used to create data or factual information about the creditor's compliance with the ECOA and Regulation B that is not available and cannot be derived from loan or application files or other records related to credit transactions. This definition of self-test includes but is not limited to the practice of using testers. For example, self-testing would also include a survey of mortgage customers conducted by a creditor for fair lending purposes, or a program specially designed to test loan officers' knowledge about fair lending laws.

In establishing the self-testing privilege, the Congress sought to encourage lenders to undertake voluntary efforts to assess their compliance with fair lending laws. The proposed definition is an incentive for creditors to use self-testing to monitor the pre-application stage of the loan process in particular; the pre-application process does not typically produce the type of documentation that lends itself to traditional file reviews. The privilege serves as an incentive by assuring that evidence of possible discrimination voluntarily gathered through a self-test will not be used against a creditor, provided the creditor takes appropriate corrective actions for any discrimination that is found. Although the legislative history focuses on the traditional use of matched-pair testers, it also recognizes that other testing methods may also be useful.

Under the proposed rule, the principal attribute of self-testing is that it constitutes a voluntary undertaking by the creditor to produce new factual evidence that otherwise would not be available from credit records. The proposed rule does not define ''self-test'' so broadly as to include all types of self-evaluation or self-assessment performed by a creditor. Self-evaluations involving creditor reviews of loan or application files, and reviews of HMDA data or similar types of records (such as broker or loan officer compensation records) that do not produce new data or factual evidence about a creditor's compliance would not be covered by the privilege. Accordingly, a compilation of data or a regression analysis derived from the data in existing loan files would not be privileged.

Although a broader definition encompassing such audits or evaluations would be within the Board's rulemaking authority under the statute, the Board does not believe that this broader definition of self-test is necessary. Principles of sound lending dictate that a creditor have adequate policies and procedures in place to ensure compliance with applicable laws and regulations, and that lenders adopt appropriate audit and control systems. These may take the form of compliance reviews, file analyses, the use of second-review committees, or other methods that examine creditor records kept in the ordinary course of business. Notwithstanding any evaluation performed by the creditor, the underlying loan records are themselves subject to examination by the regulatory and enforcement agencies and must usually be disclosed to a private litigant alleging a violation. The Board believes that creditors already have adequate incentive to conduct such routine compliance reviews and file analyses as a good business practice and to avoid or minimize potential liability for violations.

Insured financial institutions also have an incentive to conduct such audits to assist the regulatory agencies in streamlining the bank examination process and thereby minimizing the burden and costs associated with that process. A broader definition of self-test would allow creditors to withhold information relating to self-audits from a regulatory agency. At this time, the Board does not believe it is necessary to extend the privilege to audits of existing business records, which could have an unintended negative effect on the levels of cooperation between creditors and the regulatory agencies. The Board solicits public comment, however, on the scope of the proposed definition of ''self-test'' and whether a broader definition would adversely affect the ability of supervisory or enforcement agencies or private parties to obtain needed information or whether it would provide needed incentive for creditor monitoring and self-correction.

In order to qualify for the privilege, a self-test must be designed and conducted to assess the level and effectiveness of the creditor's compliance with the rules prohibiting discrimination or discouraging loan applications on a prohibited basis. Testing for compliance with the other regulatory requirements of Regulation B is not privileged. For example, a test to determine whether adverse action notices are mailed within applicable time limits would not be privileged. A self-test designed for other purposes, such as a self-test designed to observe employees' efficiency and thoroughness in meeting customer needs, is not covered by the privilege even if evidence of discrimination is uncovered incidentally.

15(b)(2) Examples

Proposed paragraph 15(b)(2) gives examples of some activities that would and would not be included as self-tests for purposes of this section.

15(b)(3) Types of information covered

Under the 1996 Act, the privilege covers the report or results of a self-test. Proposed paragraph 15(b)(3) clarifies that this includes any data generated by the self-test and any analysis of such data, and any workpapers or draft documents.

15(b)(4) Types of information not covered

The 1996 Act does not prohibit an agency or applicant from requesting information about whether a creditor has conducted a self-test. Proposed paragraph 15(b)(4) clarifies the right of a government agency or private litigant to obtain sufficient information about the existence of the self-test, including its scope or the methodology used in conducting the test, to determine whether to challenge a creditor's claim of privilege. The 1996 Act provides that a challenge to a creditor's claim of privilege may be filed in any court or administrative law proceeding with appropriate jurisdiction. The Board expects such challenges to be resolved according to the laws and procedures used for other types of privilege claims. This may include the use of *in camera* proceedings, the filing of documents and pleadings with the court under seal,