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CFPB and DOJ Joint Statement Signals Increased Fair Lending Scrutiny for Noncitizen Borrowers

The Consumer Financial Protection Bureau (CFPB) and the Department of Justice (DOJ) have issued a new joint statement focused on anti-discrimination in lending practices as they relate to noncitizens. This guidance not only underscores the agencies' commitment to scrutinizing lending practices but also signals a significant shift, effectively broadening the scope of protected classes under the Equal Credit Opportunity Act (ECOA).

ECOA, enacted in 1974, originally prohibited credit discrimination on the basis of sex or marital status. Race, color, religion, and national origin were added later that same year. Subsequent amendments extended protections to include age, receipt of public assistance, and the good faith exercise of rights under the Consumer Credit Protection Act. While immigration status has never been explicitly listed as a protected class, the recent joint statement from the CFPB and DOJ clarifies that lenders using immigration status in their decision-making could risk running afoul of the ECOA.

What you need to know

- Immigration status in credit assessments.** Neither ECOA nor the CFPB's implementing rule, Regulation B, explicitly prohibits evaluating an applicant's immigration status. What this joint statement indicates, however, is that it depends on how and for what purpose immigration status is considered. For example, the current commentary to Regulation B permits lenders to consider immigration status for the purpose of differentiating between a noncitizen who has long-time resident with permanent resident status and a noncitizen who is temporarily in the country on a student visa. But if immigration status is considered in a way that results in indirect discrimination based on natural origin or another protected trait, that violates

ECOA. For lenders, this means exercising greater diligence in credit risk assessments. Any practices that could be viewed as discriminatory—even if they are framed as evaluations of credit risk based on immigration status—could draw regulatory scrutiny.

- 2. Elevated scrutiny on proxy metrics.** Lenders should exercise caution when utilizing metrics such as the length of time a consumer has held a Social Security number. While this may seem like a neutral, unbiased criterion for assessing credit risk, it could inadvertently act as a de facto method for discriminating against individuals based on their national origin, particularly targeting recent immigrants. Such criteria are ripe for CFPB scrutiny and could result in allegations of ECOA violations. To navigate this shifting regulatory landscape, lenders must consistently examine and update their evaluation metrics to avoid inadvertent discrimination.

Broader fair lending implications

The CFPB and DOJ's joint statement comes at a crucial juncture in fair lending, notably following a Texas court order vacating the CFPB's effort to expand its anti-discrimination reach through the "unfairness" element of UDAAP. One of the chief concerns with the now-vacated updates to the UDAAP exam manual was that UDAAP, unlike the ECOA, does not identify protected classes. This led to industry speculation on what could be deemed discriminatory, with questions arising around factors like language proficiency and even employment history tied to visa status.

While the CFPB and DOJ's joint statement doesn't definitively answer those questions, its focus on immigration status provides a strong hint that language proficiency and other related factors could have been within the scope of the now-voided "unfairness" amendments to UDAAP. And although the recent Texas decision provided some much-needed relief to the industry, the joint statement leaves no doubt that addressing broader forms of discrimination will remain a central focus of future regulatory efforts—using various legal avenues. For lenders, this emphasizes the need for a proactive approach in updating and refining credit policies.

It's worth noting that the CFPB previously addressed language-related barriers and encouraged financial institutions to better serve consumers with limited English proficiency in 2021 under its former director Kathy Kraninger. This suggests that the emphasis on language proficiency in fair lending is not tied to political affiliations and is likely to persist regardless of election outcomes.

What this means to you

While the regulatory landscape is evolving, the CFPB and DOJ's emphasis on addressing broader forms of discrimination remains unwavering. Lenders should carefully reevaluate and fine tune their existing credit risk assessment policies to ensure they are not overly broad in ways that may result in a

negative impact on any protected characteristic. A meticulous commitment to compliance today can serve as a safeguard against potential future regulatory scrutiny.

Contact us

If you have any questions about the joint statement, the ECOA, or other CFPB rules, please contact Gina Carter, Susan Seaman, Leslie Sowers, Alex McFall, or your Husch Blackwell attorney.