American Bankers Association

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February 12, 2024

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

Dear Director Chopra:

The American Bankers Association (ABA)[1] is writing to express concerns with a recent Joint Statement issued by the Consumer Financial Protection Bureau and the Department of Justice regarding consideration of an applicant's immigration status in credit decisions.[2]

Before commenting on the Joint Statement, we wish to state that we appreciate your acknowledgment that financial service providers and the consumers they serve benefit from clear rules. As you noted in your written testimony to Congress in April 2022, "Laws work best when they are easy to understand, easy to follow, and easy to enforce."[3] You also promised that the Consumer Financial Protection Bureau (CFPB) would "[D]ramatically increase its issuance of guidance documents, such as advisory opinions, compliance bulletins, policy statements, and other publications."[4]

You have followed through on this commitment, overseeing the agency's issuance of a steady stream of guidance documents, which have had a significant impact on industry—and the products and services available in the consumer financial marketplace. However, this impact has not always been positive, and the guidance issuances have not always provided legal clarity or useful advice and information to regulated entities.

As discussed in ABA's white paper, *Effective Agency Guidance*,[5] this is sometimes the result of a failure to follow either the mandatory process of the Administrative Procedure Act (APA),[6] which is required for guidance that is a binding "legislative rule." In other cases, the guidance may in fact be an "interpretive rule" or "general statement of policy" that is not subject to the APA, but the failure to confer with regulated entities to understand their interpretive questions,

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[1] The American Bankers Association is the voice of the nation's $23.4 trillion banking industry, which is composed of small, regional and large banks that together employ approximately 2.1 million people, safeguard $18.6 trillion in deposits and extend $12.3 trillion in loans.

[2] Joint Statement on Fair Lending and Credit Opportunities for Noncitizen Borrowers Under the Equal Credit Opportunity Act, October 12, 2023, available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-justice-department-issue-joint-statement-cautioning-that-financial-institutions-may-not-use-immigration-status-to-illegally-discriminate-against-credit-applicants/

[3] https://www.consumerfinance.gov/about-us/newsroom/written-testimony-director-rohit-chopra-before-the-senate-committee-on-banking-housing-and-urban-affairs/

[4] Id.

[5] Am. Bankers Ass'n, Effective Agency Guidance (Feb. 6, 2024), https://www.aba.com/advocacy/policy-analysis/wp-effective-agency-guidance.

[6] 5 USC §§ 551-559.

operational impacts, and system constraints limits the utility of the guidance, undermines its acceptance, and may limit its durability as administrations change.

Because ABA and its members welcome guidance that complies with legal requirements while providing useful information and advice, we are offering industry feedback on certain recently published guidance documents. Our goal is to provide constructive feedback on the legal and operational issues presented, the benefits and costs, and to identify interpretive questions that remain—in other words, to provide the comments industry would have offered had the CFPB sought public comment prior to issuing the guidance. Our intent is for the Bureau to issue guidance documents that are transparent, consistent with the law, and focused on promoting the interests of consumers in a strong, vibrant, and innovative market for consumer financial products and services.

Comment on the Joint Statement on Immigration Status

On October 12, 2023, without notice or consultation with industry, the Consumer Financial Protection Bureau (CFPB) and the Department of Justice (DOJ) issued a Joint Statement (the Joint Statement) about "potential civil rights implications of a creditor's consideration of an individual borrower's immigration status under the Equal Credit Opportunity Act (ECOA)." The Joint Statement also discusses other federal and state civil rights laws that broadly prohibit discrimination against individuals based on immigration status. ABA's comments are focused on the Joint Statement as it pertains to ECOA.

Banks are in the business of lending and want to make loans to qualified applicants, including immigrants, within the bounds of the law and prudent, responsible banking. Their credit policies regarding loans to noncitizens have been developed in reliance on Regulation B and its Official Commentary, which have not been revised in relevant part in decades. While we welcome guidance that clarifies existing law in this regard, and the agencies may have intended the Joint Statement to clarify ECOA's prohibition on discrimination, instead the statement has resulted in confusion.

The agencies correctly note that ECOA prohibits discrimination based on certain prohibited bases, including race and ethnicity. They note immigration status may "overlap with" race and ethnicity, or may be a proxy for those prohibited bases, and that creditors may not use immigration status to discriminate against applicants on prohibited bases. The agencies acknowledge that Regulation B and the Official Commentary permit a creditor to consider an applicant's immigration status to determine the creditor's rights and remedies regarding repayment and/or to avoid violating anti-money laundering laws. However, the statement otherwise selectively quotes the rule and commentary, while making sweeping statements about consideration of immigration status that only raise questions and confusion.

For the reasons discussed below we urge the agencies to withdraw the Joint Statement and re-propose it for public comment.

The Joint Statement Incorrectly Conflates an Applicant's Ability to Repay with a Creditor's Rights and Remedies

The agencies accurately state that Regulation B permits creditors to consider immigration status to determine "the creditor's rights regarding repayment," but they leave out the full text of Regulation B section 1002.6(b)(7) and its commentary, which indicates that creditors may be legitimately concerned about their ability to collect on a loan made to a noncitizen:

> A creditor may consider the applicant's immigration status or status as a permanent resident of the United States, and any additional information that may be necessary to ascertain the creditors *rights and remedies regarding repayment*.

The commentary explains that:

> [An] applicant's immigration status and ties to the community (such as employment and continued residence in the area) could have a bearing on a creditor's ability to obtain repayment. Accordingly, the creditor may consider immigration status and differentiate, for example, between a noncitizen who is a long-time resident with permanent resident status and a noncitizen who is temporarily in this country on a student visa.[7]

Instead of quoting and acknowledging these provisions addressing a creditor's ability to collect on a debt to a noncitizen, the agencies confuse things by asserting that if a noncitizen has a strong credit score and undefined "credit qualifications," then a refusal to lend for other reasons (e.g., relating to collection) may be unlawful:

> For example, if a creditor has a blanket policy of refusing to consider applications from certain groups of noncitizens regardless of the credit qualifications of individual borrowers within that group, that policy may risk violating ECOA and Regulation B. This risk could arise because some individuals within those groups may have sufficient credit scores or other individual circumstances that may resolve concerns about the creditor's rights and remedies regarding repayment.

This example is not clarifying; it is confusing because it suggests that a borrower's ability to repay can trump a creditor's consideration of its rights and remedies for repayment. Yet, the rule and Official Commentary expressly permit consideration of rights and remedies.

The CFPB's blog post accompanying the Joint Statement adds to the confusion between an applicant's ability to repay and a creditor's rights and remedies:

> The CFPB has heard feedback from advocates and consumers that some immigrant borrowers – including those protected under the Deferred Action for Childhood Arrivals (DACA) program – have been denied credit cards, auto loans, student loans, and other credit based on their immigration status. Immigrant consumers and entrepreneurs have shared their experiences of being turned away by financial institutions *despite having*

[7] Comment 1002.6(b)-7.

strong personal financial circumstances – including credit history, income, or other factors – that may resolve concerns about their ability to repay loans.[8]

The CFPB's example focuses on an applicant's ability to repay, but that is only part of a creditor's legitimate evaluation of a loan application. If the applicant exhibits an ability to repay, but nevertheless defaults and leaves the United States, the creditor may not be able to collect on the debt. That is no doubt why the Commentary expressly permits a creditor to differentiate between a permanent resident and a person who may be in the United States for a limited time, on a student visa.

Although the Joint Statement provides that it "is for informational purposes only" and "does not impose any legal requirements," confusion between the Joint Statement and the Official Commentary is concerning.[9] Banks reasonably rely on the Commentary when drafting their policies and procedures as the Commentary provides a safe harbor from ECOA liability.[10] As we have stated in other letters to the CFPB regarding guidance that is inconsistent with Official Commentary, the CFPB cannot override the Official Commentary's safe harbor through a document like the Joint Statement.

The Joint Statement's Reference to "Blanket" Policies Needs Clarification

The agencies warn creditors about overbroad policies, but they do not provide an example of the type of "blanket" policy they disfavor. The Commentary clearly permits a creditor to differentiate between citizens and permanent residents on the one hand, versus temporary visa holders and other noncitizens on the other. Is such a policy a "blanket" policy that the agencies discourage? In the absence of more information, the Joint Statement simply causes confusion.

The Agencies Incorrectly Suggest That Immigration Status is a Prohibited Basis

Other concerns with the statement include how the agencies restate the rule and commentary. It is understood that if immigration status is used as a proxy for race or national origin, then the creditor violates the prohibition on discrimination based on race or national origin. .However, the agencies confuse things in how they discuss immigration status. For example, the Joint Statement asserts that ECOA "does not expressly prohibit" consideration of immigration status. That is correct, but it should also be noted that ECOA does not *impliedly* prohibit consideration of immigration status.

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[8] *Protecting Immigrant Access to Fair Credit Opportunities,* Sonia Lin, Oct. 12, 2023 (emphasis added), available at https://www.consumerfinance.gov/about-us/blog/protecting-immigrant-access-to-fair-credit-opportunities/

[9] Joint Statement at 1.

[10] *See* 15 USC § 1691e(e), "No provision of this subchapter imposing liability shall apply to any act done or omitted in good faith in conformity with any official rule, regulation, or interpretation thereof by the Bureau or in conformity with any interpretation or approval by an official or employee of the Bureau of Consumer Financial Protection duly authorized by the Bureau to issue such interpretations or approvals under such procedures as the Bureau may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason." Although the Federal Reserve Board originally issued Regulation B's commentary, the CFPB formally adopted the commentary in 2011-2012. 76 Fed. Reg. 79442) (Dec. 21, 2011).

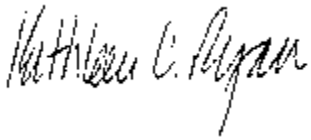
Indeed, the Official Commentary states that a refusal to lend because an applicant is not a US citizen is not "per se" discrimination. Yet, the agencies do not even acknowledge or discuss this comment. Banks understand that immigration status cannot be used as a proxy for protected characteristics. But the agencies should not confuse things by suggesting that immigration status itself is a prohibited basis under ECOA.

The Agencies Should Consider How the Joint Statement Aligns with Other Federal and State Law and Policy

The agencies do not acknowledge other policies that may limit a lender's ability to extend credit to noncitizens. For example, the Small Business Administration limits some of its loan programs to citizens and permanent residents.[11] Some states prohibit certain noncitizens from specified countries from buying real estate.[12] The agencies need to address how their concern with "blanket" policies can be reconciled with these different directives, in any guidance they issue to the lending industry.

For these reasons, we urge the agencies to withdraw the Joint Statement and re-propose it for public comment. Thank you for considering our comments. If you have questions about this letter, please contact Kitty Ryan at kryan@aba.com.

Sincerely,



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Cc: Kristen Clarke, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice

[11] U.S. Small Business Administration (SBA). "Affiliation and Lending Criteria for the SBA Business Loan Programs." 88 FR 21074. April 10, 2023.https://www.federalregister.gov/documents/2023/04/10/2023-07173/affiliation-and-lending-criteria-for-the-sba-business-loan-programs

[12] *See, e.g.,* a recently enacted law in Indiana, which prohibits citizens of China, Iran, North Korea, Russia, and other countries designated by the Governor from purchasing or leasing land adjacent to a military base. Indiana P.L. 118–2023; S.E.A. No. 477