Fair Lending Issues Impacting Immigrant Borrowers

Executive Summary

This panel addresses issues impacting immigrant borrowers, including: (1) the status of the Deferred Action on Childhood Arrival Program (DACA), (2) Limited English Proficiency and their vulnerability to unfair, deceptive, or abusive acts or practices (UDAAP), (3) the requirements and risks of posing citizenship inquiries, (4) immigration status as a factor in determining a borrower’s ability to repay a loan, and (5) risks of violating anti-discrimination laws when evaluating an immigrant’s ability to repay a credit obligation.

Status of the DACA Program

In 2012, the Obama Administration initiated DACA to permit undocumented immigrants who entered the country as children to obtain deferred action on deportation. The program allows participants to obtain employment authorization up to two years subject to renewal. In 2017, the Trump Administration announced it would end the program prompting several lawsuits to save the program. Several federal courts issued injunctive relief to preserve the status quo. The Supreme Court will soon determine the fate of the nearly 800,000 DACA participants. Meanwhile, HUD and Fannie Mae reached differing conclusions on whether DACA participants are legally present in the U.S. for purposes of determining eligibility for government-backed home loans.

Limited English Proficiency & UDAAP Risk

Immigrants are more likely to have limited English proficiency. They are particularly vulnerable to unfair and deceptive practices in connection with marketing and applying for financial products and services. Additionally, financial institutions with no intent to take advantage of immigrants may still face heightened UDAAP risk if they initiate communications with them in a language other than English, but are unable to fully service those customers in their preferred language.

Requirements and Risks of Posing Citizenship Inquiries

The Patriot Act requires financial institutions to identify their customers. Documentation required to confirm an individual’s identity differs based on whether or not an individual is a U.S. citizen. Immigrants may be offended by questions designed to ensure compliance with federal law and may prompt claims of discrimination. California law provides a safe harbor for financial institutions making such inquiries as required by federal law.

Ability to Repay

Safety and soundness considerations and compliance with consumer protection statutes both compel creditors to assess an applicant’s ability to repay a loan she is applying for when determining whether to grant credit. As of 2014, Regulation Z has required creditors to make

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1 31 C.F.R. § 1020.220.
reasonable and good faith determinations of consumers’ ability to repay home loans according to their terms.3

**Immigration Status a Factor in Determining Ability to Repay**

An applicant’s immigration status will correlate to her ability to remain in the country as well as her earning potential. Regulation B provides that 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 creditor’s rights and remedies regarding repayment.”4 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.”5

**Tension with Broadly Applicable Anti-Discrimination Laws**

When DACA participants apply for credit, the uncertainty regarding their continued presence in the country and ability to work makes evaluating them for credit fraught with myriad risks including running afoul of broader anti-discrimination statutes. In 1991, Section 1981 was broadened to apply to non-government actors.”6 In 2017, a group of DACA participants filed suit against Wells Fargo in federal district court alleging that its policy of refusing to lend to DACA participants, even if they had co-signers who were citizens of the United States, violated Unruh’s civil rights provision and 42 U.S.C. § 1981. The court denied the bank’s motion to dismiss the claim. In July 2019, a proposed class action suit was recently filed by a DACA recipient against the bank in the same court alleging violations of Section 1981 and the notice provisions of ECOA. The court will have to resolve the tension among these statutes.

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3 12 C.F.R. § 1026.43(c)(1).
4 12 C.F.R. § 1002.6(b)(7).