United States Senate
WASHINGTON, DC 20510

November 1, 2023

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

The Honorable Merrick Garland
Attorney General
Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Dear Director Chopra and Attorney General Garland:

We write today to express our concerns regarding the October 12, 2023 joint statement by the Consumer Financial Protection Bureau ("CFPB") and the Department of Justice ("DOJ") warning financial institutions that the consideration of immigration status in loan applications may be a violation of the Equal Credit Opportunity Act ("ECOA").[1]

While the CFPB and DOJ note that financial institutions are permitted to consider immigration status under the ECOA, they claim that unnecessary or overbroad reliance on immigration status "may run afoul of the law," and that all borrowers, regardless of immigration status, are protected from discrimination. Specifically, your agencies claim that if a creditor has a "blanket policy" on immigration status, then they risk violating fair lending laws. The joint statement also suggests that as long as an applicant for credit has a good credit score and other "credit qualifications," then his or her immigration status should not matter.

The CFPB and DOJ's joint directive not only flies in the face of responsible lending standards, risk-based pricing, and sound risk management, but also contradicts and rewrites decades worth of guidance from the CFPB and the federal banking regulators—all without an official rulemaking pursuant to the Administrative Procedures Act ("APA"), giving financial institutions the chance to comment, or even offering any other semblance of advanced notice. We are also concerned that the CFPB and DOJ's joint statement appears to be at odds with the official

[1] Consumer Financial Protection Bureau (CFPB) and Department of Justice (DOJ). "Joint Statement on Fair Lending and Credit Opportunities for Noncitizen Borrowers under the Equal Credit Opportunity Act." October 12, 2023. https://files.consumerfinance.gov/f/documents/cfpb-joint-statement-on-fair-lending-and-credit-opportunities-for-noncitizen-b_jA2oRDf.pdf

guidelines for various federal lending programs, many of which require U.S. citizenship or permanent residency to qualify.[2]

In 1974, Congress passed the ECOA to prohibit discrimination by lenders and other financial institutions and in 1975, the Federal Reserve ("Fed") implemented the ECOA through Regulation B ("Reg B"). In 2011, the ECOA's rulemaking authorities and Reg B's regulatory responsibilities were inherited by the CFPB following its establishment, pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").[3]

Since Reg B's adoption in 1975, financial institutions have relied on official commentary and guidance—from the Fed and the CFPB—that explicitly permits lenders to consider immigration status to help assess creditworthiness. In fact, Reg B explicitly states 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]

Moreover, the CFPB's longstanding official interpretation of Reg B states 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."[5] And the CFPB's longstanding interpretation that "a denial of credit on the ground that an applicant is not a United States citizen is not per se discrimination based on national origin"[6] also appears to explicitly rebut the CFPB and DOJ's joint statement.

Financial institutions have long relied on this guidance in their assessment of credit risk, and the abrupt upending of the CFPB's interpretation of Reg B and ECOA not only poses serious compliance costs, but could also have detrimental impacts on the safety and soundness of the banking sector, and financial stability in the American economy more broadly.

At its most fundamental level, an institution's calculation of risk and creditworthiness has two goals: to determine an applicant's likelihood of repayment and the lender's ability to enforce the loan contract. Before assessing credit history and other financial-risk factors, an institution needs to ensure that an applicant will be not only in their community for the length of the loan, but also be located somewhere where they can recoup potential unpaid debts. A borrower's likelihood of repayment significantly falls if there is no guarantee that they will be residing in the same community, let alone the same country or legal system.

To that end, the importance of considering immigration status when assessing the potential of repayment is nothing short of common sense. Even the CFPB notes that an "applicant's

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[2] 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

[3] 12 U.S.C. § 5512

[4] 12 C.F.R. § 1002.6(b)(7)

[5] Consumer Financial Protection Bureau (CFPB). Official interpretation of 12 C.F.R. § 1002.6(b)(7). https://www.consumerfinance.gov/rules-policy/regulations/1002/6/#c775e941b332ed8e39a537b741293d299b6d9822d2809e42e9b1ceb1.

[6] Ibid.

immigration status . . . could have a bearing on a creditor's ability to obtain repayment." And if financial institutions cannot use immigration status in their assessment of risk, the potential of a widespread market event where a significant number of loans go into default is all the more likely. In that event, the strain placed on financial institutions may pose a contagion effect and cause broader economic repercussions impacting the financial stability of the American economy.

While the CFPB and DOJ's joint statement conflicts with decades of immigration status-related guidance from the CFPB and the Fed, it also poses serious risks to financial stability—encouraging financial institutions to ignore critical dispositive factors in their calculation of risk. Additionally, the fact that your agencies moved forward with this guidance outside of the APA rulemaking process, and without any advanced communication or feedback from industry, raises even more concerns.

As members of the Senate Committee on Banking, Housing, and Urban Affairs, we urge you to retract your agencies' irresponsible joint statement and instead endorse risk-based lending practices that promote safety and soundness in the bank sector.

Sincerely,

JD Vance
United States Senator

Tim Scott
United States Senator

Mike Crapo
United States Senator

M. Michael Rounds
United States Senator

Thom Tillis
United States Senator

John Kennedy
United States Senator

Bill Hagerty
United States Senator

Cynthia Lummis
United States Senator

Katie Boyd Britt
United States Senator

Kevin Cramer
United States Senator

Steve Daines
United States Senator