Consumer Finance Monitor Podcast (Season 9, Episode 37): CFPB's Immigration Status Guidance Creates a Compliance Catch-22 for Creditors

Speakers: Alan Kaplinsky, Dustin O'Quinn, Richard Andreano, Jr. and John Culhane, Jr.

Alan Kaplinsky:
Welcome to the award-winning Consumer Finance Monitor Podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm. And I'm your host, Alan Kaplinsky, the founder and former practice group leader for 25 years, and now senior counsel of the Consumer Financial Services Group at Ballard Spahr. And I'll be moderating today's program. For those of you who want even more information, either about the topic that we're going to be talking about today, or for that matter, anything else in the world of consumer financial services, don't forget to consult our blog, which also goes by the name of Consumer Finance Monitor. There's a lot of relevant industry content there. We launched our blog on July 21, 2011, the very same day that the CFPB became operational.

We used to call it cfpbmonitor.com, but then when Trump became president, recognizing that CFPB would no longer be the kind of focus that it was when we launched our blog. We broadened the scope of our blog that is subject matters that we would cover to include anything in the world of consumer financial services law. We also regularly host webinars on subjects of interest to those in the industry. So if you want to subscribe to our blog or to get on the list for our webinars, you can visit us at ballardspahr.com. And if you'd like our podcast, please leave us a review on whatever platform you are using today to access this podcast. So today, we're going to discuss one of the more unusual and potentially controversial pieces of guidance issued by the CFPB in recent years. On June 5th of this year, the CFPB issued a statement entitled Ability to Repay and Immigration Status.

At first glance, this may seem like a narrow issue, but it raises significant questions for mortgage lenders, credit card issuers, and for that matter, all kinds of creditors that are subject to federal ability to repay requirements. It also raises some very important fair lending questions under the Equal Credit Opportunity Act and Regulation B. The CFPB's guidance reminds creditors that when they're required to assess a consumer's ability to repay, they may and in some circumstances may be required to consider information concerning a consumer's immigration status, if that information bears on the consumer's current or reasonably expected future income. The Bureau's theory here is straightforward. Ability to repay requirements focus heavily on income. If a creditor has information suggesting that a consumer's ability to remain employed in the USA may be affected by immigration status, the CFPB believes that the creditor may need to consider that information in determining whether the consumer will have the ability to repay the loan in the future.

And the CFPB goes even further. The bureau states that where information available to a creditor suggests that a consumer may be unlawfully present in the US and therefore potentially is subject to removal. The creditor should consider whether that fact could reasonably affect future income derived from employment requiring a physical presence in the United States. So there's a lot of issues here to unpack. And I want to introduce the three members of our Ballard Spahr team that are experts in different areas that intersect here. And here we've got consumer financial services and we have immigration issues. So we have drawn from the best of the best. First of all, I want to introduce Dustin O'Quinn. Dustin is a partner in our Seattle office and a nationally recognized immigration lawyer who regularly advises employers and businesses on immigration compliance and policy matters. And also joining us today is a regular visitor to our podcast show, regular guest, I should say, Rich Andreano.

He is the practice group leader of our mortgage banking group and one of the country's leading authorities on mortgage lending regulation, including Truth and Lending Act, Reg Z, and the ability to repay requirements. And finally, and certainly last but not least is John Culhane, who is a long time member of our consumer financial services group. In fact, John and I joined Ballard Spahr at the same time on the very same day in 1994, I think it was. Okay. So let's get started here. And I'm going to start. The way I'm going to tell our listeners just very briefly how we're going to work things out here. I'm going to direct certain questions to either John, Dustin, or Rich. Anybody else, anyone I haven't directed the question to should feel free to chime in if they would like to. And we're going to go about it that way.

And we're going to try to build a foundation here so that even those listeners who are not experts in the areas of immigration law or consumer finance will understand what the CFPB has done here. So let's start with you, Rich, and I'd appreciate if you could give our listeners a quick overview of what the guidance addresses.

Richard Andreano, Jr.:
Yes. Thank you, Alan. And good day everyone. Basically in a nutshell, under the Truth and Lending Act and Regulation Z, before extending either a credit card account or a residential mortgage loan to a consumer, there are requirements for creditors to assess the consumer's ability to repay the proposed credit in accordance with its terms at the time of account opening or consummation. Now, the recent CFPB guidance focus on the potential need under these requirements for rather a creditor to assess the consumer's immigration status as part of the necessary ability to repay assessment. Now, the concern here that the administration raises is if a consumer is not in the country legally, then their ability to remain gainfully employed in the US could be at risk, which could then impact their income and thus the ability to repay the credit in accordance with its terms. And that is the focus of the guidance.

Alan Kaplinsky:
Okay. Thank you, Rich. So John, what are the ability to repay requirements that are applicable to credit cards?

John Culhane, Jr.:
Well, the ability to repay requirements for credit cards were actually added to the Truth and Lending Act by the Credit Card Act. So they've been around for a while. They're in Section 150, the Truth and Lending Act, and Section 1026. 51 of Regulation Z. And they require this kind of an assessment at two times when an account is being opened, and then also when a creditor is considering granting an increase in a credit limit. And the obligation they impose is an obligation to consider the independent, that is individual's ability to make required minimum monthly payments under the credit card account. The obligation on card issuers is to maintain reasonable policies and procedures to consider the independent income or assets of the applicant or card holder and their current obligations. And in doing so, they have to either review debt to income, debt to assets, or the income leftover after paying current obligations.

It's unreasonable not to review any information about this. And it's unreasonable to issue a credit card to a consumer who doesn't have any income or assets. There's a lot of nuance here because creditors can make their determinations based on information provided by the consumer. They don't have to look beyond the face of an application or the face of their own records, or they can use information obtained from third parties. And they don't have to make predictions about continued income. So these are static point in time determinations about the ability to repay or to make required minimum payments.

Alan Kaplinsky:
Okay. So let's turn back to you, Rich. And I'm wondering if you could describe for us the ability to repay requirements that apply to residential mortgage loans.

Richard Andreano, Jr.:
Yes. An important factor here. These requirements are a creature of Dodd-Frank. And it was a response to the mortgage crisis that began in 2008, where there were practices where mortgage lenders were in fact not considering the ability of the consumer to repay, were in fact focusing on the collateral. There were loans where they didn't assess the income or assets or a consumer would state their income and the creditor would not verify it. Congress believed that a lot of those practices led to the crisis. So it imposed the novel theory that if you're going to make a mortgage loan to someone, you should assess whether they could actually repay that mortgage loan. Believe it or not, we need that requirement in the mortgage industry. Sounds something that would be normal and practical, but unfortunately when you get a crisis that we had, you then get a legal requirement.

And we do have that. Now, interestingly, there are two different sets of provisions under the ability repay requirements applicable to mortgage loans. One is the general requirement where there are eight different factors a creditor must consider, including reasonably or expected income, including debt to income ratio. And then there are qualified mortgage provisions. Now those are optional. A creditor does not have to comply with them, but most creditors do. The reason being is by complying with a certain additional restrictions on the loan terms and the pricing, you get, depending on the loan price, either a conclusive presumption of compliance or rebuttable presumption of compliance. So much of the industry lends under the qualified mortgage provisions. Now, both the general and qualified mortgage provisions have a requirement that the creditor consider the current or reasonably expected income of the consumer as well as their debt to income ratio.

Now, there are no specific guidelines on what is sufficient income. That is up to the creditor. A lot of creditors use standard Fannie Freddie, FHA, VA underwriting guidelines to satisfy that. Now, the general provisions in particular say when the consumer's relying on income from employment, you must consider that employment and the ability of that employment to continue. That practically is followed under the qualified mortgage provisions as well. But similar to a credit card, a creditor must assess the consumer's income, their debt load in relation to the income, and is this income likely to continue?

Alan Kaplinsky:
Yeah. So, all right. We've talked about credit cards and residential mortgage loans. What about other kinds of consumer loans, John? Is there a similar requirement that would apply to, let's say, unsecured loans, auto loans, et cetera?

John Culhane, Jr.:
I guess we could say definitely maybe. There's no express federal statutory requirement with other loan programs. But the CFPB historically, when it has been concerned about loan products, particularly subprime loan products, has elevated the ability to repay as a factor that it looks at in determining whether the program is operated in a safe and sound manner or whether it's... I guess I shouldn't say safe or sound, whether it's unfair, deceptive, or abusive.

And we've seen that with student loans going back to the CFPB's consent orders with ITT and the Corinthian colleges. We've seen it sort of lingering behind the CFPB's review of buy now, pay later loans. And in that product area, it's been a specific concern of state attorneys general. At the end of last year, seven state attorneys general launched an investigation into buy now, pay later programs, the programs of the leading companies in this field.

And one of the things that they specifically asked about was the way those companies assess the ability to repay. The CFPB has historically phrased this as a concern about debt accumulation, but I think that behind debt accumulation is this notion of ability to repay. It kind of remains to be seen whether we'll see this spread under the current Trump administration to other product lines, or whether we'll see state attorneys general, particularly in red states, using this as a vehicle to investigate lending programs.

Alan Kaplinsky:
Yeah. Curious that with the Trump administration, they're not really keen on the UDAP to begin with. And in fact, if they had their way, I'm sure they would try to eliminate that from the Consumer Financial Protection Act or limit it in a certain way. So it would certainly be ironic if they ended up then taking the position that was taken by the former administration or the former director of the CFPB, that you could import UDAP concepts into other kinds of consumer loans where the statutes didn't specifically require it.

John Culhane, Jr.:
I guess we'll see whether immigration status is more important than UDAP limitation as we go forward.

Alan Kaplinsky:
So, a question I'm going to direct to you, John, and then also to Rich. And that is, what's the specific concern with the ability to repay requirements and the applicant's immigration status?

John Culhane, Jr.:
Well, it's really whether there will be funds available to repay the obligation. And that's phrased in a number of different ways, most commonly spoken of in these guidance documents as whether there will be continued access to employment, particularly when residency in the United States is a necessary component of employment. And so that's really what the focus is on. It's on whether there are funds available. Interestingly, the focus is on income. It's not on assets. And there's an interesting wrinkle in the credit card arena in that an applicant can rely on income of a third party. So a US citizen spouse or permanent resident spouse, if they have a reasonable expectation of access to that income. We don't see that mentioned at all in the guidance, but it's an important aspect, at least of the credit card rules.

Alan Kaplinsky:
Yeah. Well, are you saying, John, that if somebody, let's just say theoretically or hypothetically has a net worth of well in excess of what is needed to repay the obligation, you can't look at that?

John Culhane, Jr.:
You don't have to look at income if somebody has a substantial amount of liquid assets to repay an obligation. It depends on the procedures that the card issuer has established for determining ability to repay.

Alan Kaplinsky:
Got it. Rich, do you have something that you wanted to add to what John mentioned?

Richard Andreano, Jr.:
Sure. Yeah. The mortgage requirements ability to pray expressly allow consideration of income and/or assets. Now, most people, they're using their income. There are some very wealthy people that borrow instead of using their assets, and then you could just rely on their assets. But most people under standard underwriting, it's the income that's the focus. And the issue with mortgage loans is you're typically dealing with a very long-term obligation, 30 years being the most typical term. And a lot can happen in 30 years. Now, most people don't hold mortgages that long. Five to 10 years or so is common. And we expect any loans being made now probably will be refinanced when rates dip sometime in the future. But that adds a practical factor when you're looking at a very long period. And so if someone doesn't have a permanent lawful residency status in the United States, what are the odds of something happening over a 30-year period? That's big concern for mortgage lenders.

Alan Kaplinsky:
Right. Right. So John, is the ability of an applicant to remain in the country the only concern that the CFPB has with regard to their immigration status?

John Culhane, Jr.:
Well, the way the CFPB and the Department of Justice have teed this up. There are four things that they're looking at. One of them is immigration status. The other is whether someone is lawfully present in the United States. The third is whether there's an authorization to work. So you may have somebody who is able to remain in the country, but doesn't have any authorization to work while they're here in the country. And then there's sort of a catchall other, sorry, other factors that can also be considered. The CFPB and Department of Justice haven't really elaborated on what those other factors are. I guess we may see more about that down the road. I would say ability to remain in the country is a big concern because the thought is that even if you're employed, if your employment may be terminated and you may be deported, then the fact that you may have had income at the time of application isn't going to be very helpful.

Alan Kaplinsky:
Right. Right. So what are the consequences, John, of not complying with these ability to repay requirements?

John Culhane, Jr.:
Well, that's a good question because I think it's going to depend in part on whether we see UDAP concerns elevated into this space or arising in this space. Technically on the credit card side, I guess also on the mortgage side, you'd have a violation of the Truth and Lending Act and Regulation Z, and the creditor would be liable for any actual damages. In this context, it seems odd to envision the government going after a creditor saying that you have to award damages to consumers because you offered them credit when you knew they might not be able to repay that credit, but that's certainly a possibility. What seems to be more likely might be the kinds of things that we saw, not with ability to repay determinations, but with sort of sloppy practices in the credit card area. So I'm thinking of the Continental Finance consent order and the CareCredit consent order where the then CFPB went in and really imposed obligations to clean up practices.

In the case of Continental Finance, Continental Finance was required to consent to CFPB supervision. CareCredit was required to provide additional disclosures, clean up its practices with service providers. I guess we could see orders requiring, for example, card issuers that have not met the CFPB standards to do more than just rely on the stated income on an application to use third party methods or even a requirement to verify that stated income, which is not currently a requirement in the credit card area.

Alan Kaplinsky:
Rich, do you have anything you'd like to add?

Richard Andreano, Jr.:
Yes. With Dodd-Frank, there were two types of provisions added to the Truth and Lending Act that they thought were particularly important to address, again, the mortgage crisis. One were the loan originator compensation provisions, which govern how loan originators may be compensated and basically divorced the loan terms from the compensation. The other is the ability to pay requirements. Now, the standard statute of limitations under truth and lending for private actions is one year, but not when it comes to ability to repair loan originator compensation. It's three year statute of limitations. And the creditor can be liable for all finance charges and fees paid by the consumer. So you could be looking at three years of interest plus all of the prepaid or other periodic finance charges. Now, even if you get beyond the three-year statute of limitations, there's a so-called defense to foreclosure provision where if the creditor or servicer goes to enforce the mortgage, the consumer at that point can raise defensively a ability to repay violation.

And if successful, they would be entitled to a set-off equal to what they could have recovered had they sued within the statute of limitations. When you add to that, the bureaus involved, they clearly have very significant civil money penalty authority and often ignore the damages under the particular statute. They just go to their civil money penalty authority and use that to extract whatever concessions they want out of the party that they're investigating. So quite significant. And it's something the industry is very careful about, which is why the industry often likes to make qualified mortgages to get either the conclusive or rebuttable presumption of compliance.

Alan Kaplinsky:
I take it that the statutory penalties that exist under the Truth and Lending Act, I'm not talking now about civil money penalties, but statutory penalties, they don't apply to a violation of the ability to repay?

Richard Andreano, Jr.:
There are some that argue that the three years of finance charges and fees is on top of the regular statutory damages. There are others that argue no, they're separate and you don't get the regular statutory damages. You only get the special damages. The provision in truthful lending is not well drafted.

Alan Kaplinsky:
Right. Right. Okay. With an applicant who's a US citizen, what is the typical approach to assessing the likely continuation of their income? And are there Equal Credit Opportunity Act, Reg B implications? I'll go back to you, John, and then let Rich add anything he'd like.

John Culhane, Jr.:
Well, on the credit card side, you're not obligated to make an assessment of the continuation of income. So you really fall under Reg B and what your approach is to evaluating income. And I think we can come back to that after Rich comments on the mortgage side. I think probably the standard approach on the credit card side up to the point where this guidance came out was just to assume that income would continue absent a really significant red flag on the face of a application or in the case of a card issuer relying on third party sources, something really dramatic in a report on the consumer's income.

Richard Andreano, Jr.:
Yeah. Similar. Even though you're looking at a 30-year obligation, the general guidance is unless there's something pretty clear indicating there's going to be a change in the consumer's income or employment, you assume at the time of consummation that that employment and income will continue for the term of the product. So you're making there a pretty large assumption. You could make a loan to someone today and they could get laid off tomorrow, but you don't view that. That's conjecture and you don't go to conjecture unless there's some pretty clear evidence that income or employment will change, you assume it will continue as is.

Alan Kaplinsky:
Right. So Rich, I want to ask you another question.

John Culhane, Jr.:
Can we talk about the regulation B overlay on this a little bit before we go on? So regulation B has some specific rules about considering income. And I guess one of the most important ones at the start is that creditors don't have to consider income, but they are allowed to consider the amount and probable continuation of any income. And there are different ways, if you're going to consider income, there are different ways to do that. One way, and I think it's fairly common, is to use total income without taking any steps to evaluate reliability or continuation. The other ways to do this really require looking at each component of income that's been proffered for purposes of the extension of credit and evaluate each component and either determine which ones are reliable and proceed on that basis or determine which ones aren't reliable and subtract them. Essentially you get the same place either way.

If you're not evaluating individual components, you just have to be careful to treat protected income like income from alimony, child support or separate maintenance as reliable. But to go back to where we started, you don't necessarily end up having to consider reliability or continuation under the Equal Credit Opportunity Act and Regulation B either.

Alan Kaplinsky:
Right, right. So I have a question now for you, Rich, and that is, does the guidance provide any details regarding the identification and assessment of an applicant's immigration status in order to comply with the ability to repay requirements?

Richard Andreano, Jr.:
Unfortunately, no. While it raises concerns and potential risks regarding immigration status and the need to consider it, it doesn't give specific guideposts on how one threads the needle of considering that status appropriately under the ability to repay requirements, yet not running afoul of the Equal Credit Opportunity Act and other civil rights laws prohibition non-discrimination against national origin, alienage and such. It's the classic type of government guidance. When the government wants to chill the waters in a certain area, it will issue guidance raising the risks under certain laws, but not telling you how to comply. It's a very classic government approach. So one has to read this as an attempt by the Trump administration to discourage lenders from extending credit to people who do not have lawful permanent residence status in the United States.

During the Biden administration, they did the exact opposite. They raised under ECOA guidance, both Department of Justice and Bureau, they issued guidance indicating that consideration of immigration status could violate the ECOA prohibition against discrimination on national origin and perhaps race, religion, and color as well, depending on the individuals involved. So one has to think that this is very consistent with the Trump administration's actions against immigrants in general.

John Culhane, Jr.:
I would add to that the one thing that the guidance does flag is the fact that an applicant has an individual taxpayer identification number instead of a social security number that's positioned as a red flag that would require further work, further diligence on the part of the creditor before proceeding. An attempt to build in, at least on the credit card side, additional requirements that are sort of barely there, if there at all.

Alan Kaplinsky:
Okay. Thank you, John. All right. We're now going to pass the baton to Dustin. And the first question I have for you, Dustin, is if an applicant has permanent residency status, are there still concerns about their ability to remain in the country or to be detained? And if so, have the concerns changed during the second Trump administration?

Dustin O'Quinn:
Sure. I think those green card holders may have concerns if they're watching the news, but generally speaking, a green card is probably the most stable form of immigration status a lender will encounter. So generally lawful permanent residents, or green card holders as we call them, are among the lowest risk immigration categories. They have authorization to reside permanently in the United States and to work for any US employer, much like a US citizen. Their green card status can be relinquished or terminated, but that is an incredibly rare circumstance and many of them go on to become US citizens. I would say the way that green card holders could lose their status, for example, they could abandon residence if they choose to relocate permanently or semi-permanently to another country. And there are a few specific crimes that can cause them to be found removable under the immigration laws or other federal laws.

And even then there's a pretty lengthy process that they have to go through to have their green card stripped from them. Those situations are relatively uncommon. I would say they're incredibly uncommon, but the most important takeaway is they involve individualized facts. So broadly speaking, we are not looking at a situation where due to policy changes under the administration, green card holders are now looking at a less secure situation.

During this administration, we have seen more aggressive enforcement, but it hasn't changed the legal framework for green card holders. And frankly, it just hasn't increased concerns about lawful permanent residents or green card holders.

Alan Kaplinsky:
Yeah. No, you're right though. You said at the beginning that if you were watching TV, every once in a while, they'll mention some green card holder who had their status revoked or the government was trying to take it away. And that sort of left me with the impression, not knowing a lot about immigration law, that having a green card wasn't as meaningful as it used to be. But I'm glad to hear that that's not the case.

Dustin O'Quinn:
That's right. I think, Alan, we're hearing more about those few instances on the news now, but there were always a few instances. There may be a few more, but I'm not talking about a big rise in percentage points here.

Alan Kaplinsky:
Right. So Dustin, what are the concerns then about an applicant with non-permanent residency status being able to remain in the country or being detained and have those concerns changed during Trump 2.0?

Dustin O'Quinn:
Oh, that's a great question. I think the key takeaway here is that we can't lump all temporary visa holders together. This is where the nuance of immigration law becomes really important for lenders. So non-permanent resident covers an enormous range of individuals. There are many temporary workers, and if you're temporary, we call you non-immigrant. Green card holders are called immigrants. Many non-immigrants have renewed their status multiple times. They have long-term careers in the United States, whether or not they have a pending or approved application for a green card. On the other hand, there are many non-immigrants who face expiration dates or policy uncertainty. And some of those have even stronger risk profiles than others. For example, on one end, you may have someone in the United States on H-1B status, that's the professional worker visa. They could be working for a Fortune 500 company and they could have been in the United States for over a decade.

They may already be pursuing permanent residence and could have a high six-figure salary. On the other end, you may have someone whose ability to remain in the United States depends on a temporary humanitarian program like temporary protective status, which we've heard about in the news. Many of those statuses have faced an end or an impending end after a long time. So we're just not sure, and we have to look at each individual's risk profile and ability to pay before we decide how to treat a particular application. One other thing I'll say is while this administration has increased enforcement activity significantly and has changed or proposed changes to certain programs, there are a lot of programs, particularly those humanitarian programs that have much greater uncertainty than they did a few years ago. But we've got to look at each individual's circumstances rather than relying on broad assumptions about all temporary visa holders.

Alan Kaplinsky:
Yeah. So Dustin, are there categories of individuals between those who were in the country illegally and have no immigration status at all and individuals with permanent or non-permanent residence status? And if so, what are the varying concerns about their ability to remain in the country or being detained and have those concerns changed during Trump 2.0?

Dustin O'Quinn:
Thanks, Alan. Yeah, I started to touch on that. And this is where we can. There are over 30 different visa types of non-immigrants, and we could really get into the nuance here. And I think that's what's important for lenders to remember is that immigration status isn't binary. It's not just I'm here legally or here illegally. It's not even just I have authorization to work or don't have authorization to work. John touched on it really poignantly a few minutes ago where he said there are several things that we're looking at and they're all related. You can be in a valid status. You could also be in a period of authorized stay, which means you're allowed to be here, but it's not the same as a valid status. It's not as strong as a valid status. You can have work authorization in either a status or a period of authorized stay.

Your work authorization could be varying levels of strong, whether you're in a valid status or a period of authorized stay. So for example, there are persons in the United States with pending asylum applications. And some people can work when they get asylum. Many people can work while they're waiting on asylum. But as we know now, there's been an increase in asylum denials. I just mentioned temporary protected status. While that is a humanitarian status that perhaps isn't the same as an H-1B work authorized visa, until recently, TPS work authorization was viewed as pretty stable.

Now, not only has the administration proposed an end or actually just created an end to some, but not all temporary protected status categories, but the end of that is actually tied up in litigation for many of those categories. So we have to wait and see what the court's saying. Additionally, even just looking at the work authorized visa status like H-1B, TN or extraordinary ability, some of those statuses have a length on how long someone can work in the United States.

There's a finite expiration where others may be renewable indefinitely. Right now, we have to look at the denial rates for all of these different work authorized visa applications as well. If you're a lender right now and you have to juggle all of these circumstances, but again, like Rich just said, what you can't do is paint with a broad brush of, well, this is difficult and the government's being aggressive. So we're just going to not lend because of course then you run afoul of those discrimination provisions.

Alan Kaplinsky:
Yeah. It seems like what you've described is just going to be impossible for at least most of the clients we deal with, the people who do credit underwriting. How can they make those kind of nuanced determinations? They don't have any expertise in immigration law. They may know something about consumer finance law and the ECOA and reg B, but all these different possible statuses and what are the odds? You'd almost have to go and go on Kalshi or the prediction market to see what Kalshi says the odds are. I mean, it's ridiculous in my view, what they've done.

Dustin O'Quinn:
Alan, I will say I agree that it's ridiculous in that when I first read this guidance, I thought the same thing, but I do live in this space and have for some time. And so I think it can actually be not that complicated. Again, we can't paint it with a binary brush, but what we can do is create a Kalshi-like spreadsheet of odds and looking at the different visa categories, watching the litigation and making informed decisions to try to remain as compliant as possible.

Alan Kaplinsky:
Right, right. Rich, I'm going to go back to you now because I'm wondering about this issue. And that is what are mortgage investor and agency policies regarding purchasing or insuring loans to persons who are not US citizens?

Richard Andreano, Jr.:
Yeah, it's a very important factor. And the three of the most important underwriting guidelines that are used in the industry are those of Fannie Mae and Freddie Mac, and then the Federal Housing Administration for FHA insured loans. Now, while Fannie and Freddie buy or securitize a lot of mortgages, their guidelines are often followed for loans that are not sold to them simply because if you follow those guidelines and you ever get challenged in your underwriting, you have a pretty good sense of protection as I'm using very well established industry norm underwriting guidelines. So they're used.

When it comes to immigration status, Fannie or Freddie will allow loans to lawful, permanent, or non-permanent residents of the United States. So you don't have to be a lawful permanent resident. You can be a lawful, non-permanent resident. FHA flip-flopped. On the last day of the Trump administration 1.0, they reversed their policy in not making loans to people without lawful status, basically to allow loans to DACA, people with DACA status.

Very last day of their first Trump administration, they reversed that policy. Trump 2.0 gets in and went back to the old policy. To qualify for an FHA loan, you have to have lawful permanent resident status, not non-permanent. It has to be lawful permanent resident status to qualify for an FHA loan. So FHA being more restrictive, but the Fannie Freddie guidelines are a high percentage of loans are originated under those guidelines. So lawful permanent or non-permanent resident status is fine.

Alan Kaplinsky:
Right. Right. So John, do you think that the guidance will impact creditors with programs to make loans to individuals without a social security number, but who have an individual taxpayer ID number?

John Culhane, Jr.:
Well, I think it's intended to have that impact. I think it's intended, as Rich said, to scare creditors from relying on ITINs to make loans. I think this is probably an area where there's maybe more mortgage loan. There are more mortgage loan products than other products, but there are small unsecured loan programs and there even have been automobile finance programs. The ITIN doesn't necessarily mean someone is here illegally. It just means they don't yet have a social security number or perhaps they're not qualified to get a social security number. But I think it's intended to scare the creditors that offer those programs. I haven't, at least in the non-mortgage space, I haven't seen reports of creditors backing away from these programs on any kind of massive basis, but it's certainly something we're watching. Rich, do you want to comment on mortgage loans?

Richard Andreano, Jr.:
Yeah. Not all lenders offer them, but there are a lot of lenders that have ITIN programs and they publicize them. And I think this is where you get into the nuance where you can't put all ITIN holders into one basket. What if you have a married couple applying for a loan? One is not a US citizen has an ITIN and the other's a US citizen. I don't see a heck of a lot of risk there, frankly, with that type. But this is where it comes down to individualized assessments. So I think people will look at their programs, but they have to get into the nuance and the details of, they're in different categories. Just because you have an ITIN doesn't mean the red flags are up, even though the government did suggest that. But this is where a careful assessment is important. And I would not paint with a broad brush just because someone has an ITIN.

Alan Kaplinsky:
Right. After this guidance came down, a client called me and said, "Well, I'm going to take a conservative approach." He said, "Give me your reaction to this. And I'm going to be conservative and make loans only to US citizens and permanent residents from now on. It has to be a simple process in our underwriting. We can't get involved in all these nuances that we've described today." Does that work? John, let me go to you and then ask Rich.

John Culhane, Jr.:
I think the short answer is no. It doesn't work. As Dustin indicated, and as Rich indicated, there are other fair lending laws that call in question a program like this. In particular, section 1981 of the Civil Rights Act, which provides that individuals within the jurisdiction of the United States, all persons within the jurisdiction of the United States have the same right to make an enforced contracts as white citizens. Now, I think the Trump administration has tried to argue, but I don't think successfully, that that should be read to mean all persons lawfully subject to jurisdiction of the United States. I think that's quite a leg, quite a, I guess, weak limb, not a leg, weak limb to rely on. But there are also state laws that very clearly prohibit discrimination on the basis of US citizenship or immigration status. There's long been one in California in the Civil Rights Act, and both Washington State and New York State have amended their credit discrimination laws to make citizenship or to prohibit discrimination on the basis of citizenship or immigration status in the last several years.

Washington did it in 2020. And I think New York did it at the end of 2022 or the beginning of 2023. So you're just trading, if you adopt this approach, you're trading maybe the risk of having to deal with the CFPB or the Department of Justice for the risk of having to deal with lawsuits brought by organizations like the Mexican

American Legal Defense and Education Fund, which has been very active in bringing cases involving discrimination against DACA students or state attorneys general, particularly in blue states.

Alan Kaplinsky:
Yeah. John, if I'm hearing you correctly, are you implying that having that kind of a policy doesn't violate ECOA and reg B, but it violates this other statute?

John Culhane, Jr.:
Well, it might not violate ECOA and regulation B. There's some commentary about being able to consider immigration status. And in fact, that's something that the CFPB and Department of Justice relied upon in their guidance. But I think even if you're able to finesse an ECOA and Regulation B claim, you've got this risk under other federal laws and certainly under state laws.

Alan Kaplinsky:
Yeah. Rich, you have anything you'd like to add?

Richard Andreano, Jr.:
Yeah. The trouble with broad brush approaches is in private, they tend to produce a class action litigation because they're just too broad brush and not nuanced enough. And the other problem I have is, as we mentioned before, the Biden administration took the opposite approach suggesting that considering immigration status, although expressly permitted by Reg B, could run afoul of ECOA. Now we will, well, we're pretty sure we'll have a new administration in 2029. We'll have to see what happens there. And if that administration is more aligned with the Biden administration's view of the world, that could be risky because ECOA has a five-year statute of limitations. So whatever conduct is occurring today can be reached by the next administration under ECOA. So I think people need to be careful here. I've heard, and that's trouble with the guidance. Sometimes says, "Well, I'll just be conservative and I won't lend to someone who doesn't have permanent lawful status." And our advice is that's not advisable. You need to be more nuanced here.

Alan Kaplinsky:
Yeah. I got it. So have the federal banking... We've been talking about the CFPB's guidance, but have the federal banking agencies, the Prudential regulators, the Fed, the FDIC comptroller issued any similar guidance about the consideration of immigration status in connection with extensions of credit? Rich, start with you.

Richard Andreano, Jr.:
Yeah. In fact, they have. They issued guidance in inter-agency guidance, the Fed, the FDIC and the Comptroller OCC, addressing lending to individuals who are not legally authorized to work in the United States. Now, it was based on the Trump administration May 2026 executive order, which was entitled Restoring Integrity to America's Financial System, which addresses the risk to the financial system poses by extensions of credit or financial services to people who may not be lawfully in the United States. And it's really taking the position that the US financial system is only meant for US citizens or lawful permanent residents. Kind of an extraordinary view of the US financial system that it's not meant to help other people. And there are main topics it addresses. The credit risk and underwriting considerations where they really spend a lot of their time. Source of repayment, obviously, can income continue.

Collateral considerations, particularly collateral that's movable. An automobile could be moved out of the country very, very easily. Documentation and verification requirements. Portfolio and concentration risk. Are you lending in an area where the high immigrant population that may not have lawful status, therefore presenting a risk to your loan portfolio in general in that area? And then they finally get to consumer compliance risk, which as you might expect, heavily focuses on the CFPB guidance in this area. Now, the thing was with the banking guidance, it's just not credit cards and mortgage loans. It's all credit, consumer credit that they're applying to, or even small business credit if you have someone who may not, an owner who may not be lawfully in the US. So they're using their safety and soundness hook to really spread the blanket here as to what might be covered by the guidance. Yeah.

John Culhane, Jr.:
Yeah. It's kind of an odd use. It's sort of an odd use of the safety and soundness guidance because they were very critical of the prior administration's use of safety and soundness to go against practices they didn't like because of the perceived reputational risk to the institution, which would then somehow threaten... it's literally threatened its existence. Here you have kind of the same overbroad argument that the elevation of credit issues is so significant that there's going to be a weakness regardless of current delinquency potentially affecting the existence of the institution. And then Rich mentioned the fact that you can have other issues here as well. And maybe since we don't have disparate impact under the Equal Credit Opportunity Act and Regulation B anymore, maybe that's not as much of a concern, but suggesting that you can draw a line around certain neighborhoods based on the number of immigrants in that neighborhood or the percentage of immigrants in that neighborhood certainly sounds a lot like redlining.

And it's hard to think that isn't going to be an invitation to litigation, either private litigation or attorney general action. They made a similar comment about immigrants working in certain industries, seemingly suggesting that you could draw a circle around certain types of employment and exclude individuals in those types of employment like construction, for example. But it seems to me to be just the same, subjecting an institution of the same kinds of arguments about discrimination. And maybe even rising to the level of being a disparate treatment claim on its face.

Alan Kaplinsky:
John, you would refer to some state laws a short while ago. And so I'm wondering, are there state laws that creditors need to factor in to this consideration of immigration status?

John Culhane, Jr.:
Yeah, absolutely. There are, as I mentioned, specific prohibitions on discrimination on the basis of citizenship or immigration status in California, New York and Washington. And I think that's an area that creditors would be well advised to track in case other states adopt similar restrictions in the future.

Alan Kaplinsky:
And I would guess they would purport to apply extra-territorially so that even though the creditor is located outside.

John Culhane, Jr.:
Yes. To anyone lending in the state. I mean, New York made clear that they viewed their prohibition on discrimination as applying to any institutions lending to New York residents.

Alan Kaplinsky:
Right. So Rich, I want to go back to you for a moment. Do you view the guidance as being consistent with the CFPB's stated policy of avoiding the issuance of guidance except where necessary and where compliance burdens would be reduced rather than increased?

Richard Andreano, Jr.:
Not at all. I think it's quite inconsistent with that in that, as we noted before, the guidance raises the risks under the ability to pay requirements of extending either credit card accounts or residential mortgage loans to persons without lawful permanent residence status in the US, but doesn't tell you how to do it and doesn't tell you how to balance the risks under ECOA and other civil rights laws. And it's very problematic in that regard. And I think what we've seen is that policy is applied when the policies are disfavored. Don't issue guidance that we don't like. But if it's guidance that we like, the fact it may raise compliance burdens, they tend to ignore that then. So I think it's very inconsistent with the Bureau's policy, but I think we'll probably continue to see them go down that path where it's either immigrants or other things they do not like. We will see guidance that probably raises rather than reduces compliance burdens.

Alan Kaplinsky:
Here's another potential inconsistency. And I'd like to see, John, what you think about this. What about the Trump administration's policy on debanking, which has been a major policy initiative of the Trump administration?

John Culhane, Jr.:
Yeah, it certainly seems inconsistent with that policy approach. It's like Rich said, it's okay to debank people we don't like. As long as you don't debank people we like.

Alan Kaplinsky:
Right, right, right. So here's a final question and then we're going to wrap it up for today. And I'm going to go to you, John, and then Rich, and then finally Dustin. And that is, what should Creditors be thinking about in view of the guidance?

John Culhane, Jr.:
I think they should be looking very carefully at their policies for underwriting, particularly in the credit card and mortgage space, and assessing whether there are opportunities to reduce the risk created by this guidance statement, which specifically says it does not have the force of law, basically looking to thread the needle. I think it's a very nuanced and difficult challenge for institutions, but if you're going to, in the words of the safety and soundness, look at certain occupations that are at risk for continued repayment, and you're going to do that, then maybe you have to broaden the view and consider job occupations that may be at risk now because of AI, and assess whether people in those jobs are going to be able to repay their long-term obligations.

Richard Andreano, Jr.:
Yeah. I think the way a lot of this will probably practically be applied is in the supervisory context. So I think they're saying, did you do anything and saying, I didn't do anything. That's probably not a good answer to an examiner. I think it's yes, we did engage in an assessment and came up with maybe a risk matrix of where we might pull back on lending and where we thought it was still safe to lend. But I think in the end, getting the temperature of your examiners is going to be a big factor, particularly for banks who have ongoing relationships with their examiners, particularly the examiner in charge. It might not be a bad idea to sort of check with them and seeing what are their expectations when they come walking in during the examination as to what the bank should have done in view of this guidance. And then consider that in whatever processes. But saying you didn't do anything, I don't think is going to be a good answer.

Alan Kaplinsky:

Right. But do you think, Rich, that it's necessary for there to be some written policy that creditors need to adopt here? And probably it ought to be reviewed by council, I would think.

Richard Andreano, Jr.:
I think so. Yeah. The backbone of any compliance management system is written policies and procedures that are adopted after careful assessment of risks involved. And so I think there needs to be the assessment, the documentation that the assessment occurred, and then the written policies and procedures that resulted, and then monitoring compliance with those policies and procedures, and assessing their results and whether the results are presenting either safety or soundness or fair lending concerns, depending on who's getting credit and who's not getting credit under that. I think that will be very important going forward.

Alan Kaplinsky:
Right. Well, Dustin, I'm going to give you the final say here today.

Dustin O'Quinn:
Thanks, Alan. I think I'll echo your last point, Alan, and the points that Rich and John just made. I would encourage creditors and their institutions to involve both compliance expertise and immigration expertise when developing or reviewing these underwriting policies. Maybe it's the optimist in me, but I'm not sure that it's as time-consuming or insurmountable as it initially seems. But if we work with Compliance and Immigration Council, we can help lenders to train their personnel on how immigration status should and shouldn't be considered. And that way we make sure the decisions are based on objective and documented factors rather than painting with that broad brush.

Alan Kaplinsky:
Right. Well, thank you. So we've covered a great deal of ground today, and I want to thank Dustin and Rich, and John for sharing their insights. And I also want to thank, of course, all of our listeners who listened to our program today. And with that, I hope everybody enjoys the rest of their day.