GOBIERNO DE PUERTO RICO
CORPORACIÓN PÚBLICA PARA LA SUPERVISIÓN Y SEGURO DE COOPERATIVAS DE PUERTO RICO
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CARTA INFORMATIVA NÚM. 2023-22

A LAS COOPERATIVAS DE AHORRO Y CREDITO

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COMUNICACIÓN CONJUNTA DEL DEPARTAMENTO DE JUSTICIA FEDERAL Y LA OFICINA DE PROTECCIÓN FINANCIERA DEL CONSUMIDOR SOBRE LAS DISPOSIONES DE ECOA Y EL ESTATUS MIGRATORIO

El Artículo 11(a)(3) de la Ley Núm. 114-2001, según enmendada, *Ley de la Corporación Pública para la Supervisión y Seguro de Cooperativas de Puerto Rico* dispone que es deber y obligación de toda cooperativa cumplir con la reglamentación local y federal aplicable a sus negocios, servicios y operaciones.

Por su parte, el Artículo 2.01 (d) de la Ley Núm. 255-2002, según enmendada, *Ley de Sociedades Cooperativas de Ahorro y Crédito de 2002*, establece que las cooperativas de ahorro y crédito, para el logro de sus fines y propósitos, habrán de ofrecer servicios financieros a las personas, sean o no socios de la cooperativa, bajo los términos y condiciones más favorables dentro de las condiciones del mercado. Dentro de los servicios financieros ofrecidos por las cooperativas se encuentra la concesión de financiamiento de todo tipo[1] a socios y no socios.

Recientemente el Departamento de Justica Federal y la Oficina de Protección Financiera del Consumidor (Consumer Financial Protection Bureau, CFPB por sus siglas en inglés) emitieron una comunicación conjunta sobre *Oportunidades Justas de Préstamos y Crédito para Prestatarios No Ciudadanos bajo la Ley de Igualdad de Oportunidades de Crédito.*[2] En esta repasaron las disposiciones

[1] Artículo 2.02 (b) (1)-(10) y 2.03 de la Ley Núm. 255-2002
[2] Joint Statement on Fair Lending and Credit Opportunities for Noncitizen Borrowers under the Equal Credit Opportunity Act.

de la Ley de Igualdad de Oportunidades de Crédito (ECOA por sus siglas en inglés), al considerar el estatus migratorio en la toma de decisiones relacionadas a la extensión de crédito.

En breve síntesis, los reguladores federales reconocen que el estatus migratorio puede ser un elemento a considerar al tomar una determinación sobre extensión de crédito. Sin embargo, usar el estatus migratorio como subterfugio para discriminar contra posibles prestatarios no está permitido y discute parámetros de evaluación para evitar que el acreedor, en este caso la cooperativa, incurra en violaciones a la ley por discriminar sobre bases prohibidas. Asimismo, provee ejemplos de políticas abarcadoras que pueden dar paso a prácticas discriminatorias.

Las cooperativas de ahorro y crédito supervisadas por la Corporación tienen el deber de cumplir con las disposiciones de ECOA y su reglamentación. Por ello, emitimos esta carta informativa con el propósito de mantenerles informados, exhortarles a que lean la expresión conjunta de referencia y revisen sus políticas para evitar prácticas discriminatorias sobre bases prohibidas en la decisión de extensión de crédito.

Adjunto copia de la comunicación.

Joint Statement on Fair Lending and Credit Opportunities for Noncitizen Borrowers under the Equal Credit Opportunity Act

The Consumer Financial Protection Bureau and Department of Justice (collectively, the agencies) jointly issue this statement[1] to assist creditors and borrowers in understanding the potential civil rights implications of a creditor's consideration of an individual's immigration status under the Equal Credit Opportunity Act (ECOA). ECOA does not expressly prohibit consideration of immigration status, and, as explained further below, a creditor may consider an applicant's immigration status when necessary to ascertain the creditor's rights regarding repayment. However, creditors should be aware that unnecessary or overbroad reliance on immigration status in the credit decisioning process, including when that reliance is based on bias, may run afoul of ECOA's antidiscrimination provisions and could also violate other laws.

I. ECOA and Regulation B

The agencies are charged with enforcing the antidiscrimination provisions of ECOA, requirements that are essential for ensuring fair, competitive and nondiscriminatory lending markets.[2] ECOA prohibits discrimination by a creditor in any aspect of a credit transaction, on the basis of race, color, religion, national origin, sex (including sexual orientation and gender identity), marital status, age, an applicant's receipt of public assistance, or the good faith exercise of an applicant's rights under the Consumer Credit Protection Act. 15 U.S.C. § 1691. Discouraging applications for credit on a prohibited basis is also prohibited.

ECOA is implemented by regulations found at 12 C.F.R. part 1002, commonly known as "Regulation B." ECOA and Regulation B apply to all types of credit, including both personal credit and business credit. Among other things, Regulation B sets forth "[r]ules concerning evaluation of applications" for credit. 12 C.F.R. §1002.6. Under Regulation B, creditors shall not consider race, color, religion, national origin, or sex in any aspect of a credit transaction. 12 C.F.R. §

[1] This document is for informational purposes only. It does not impose any legal requirements, nor does it restrict the agencies' exercise of their authorities or confer rights of any kind, and it is not enforceable.

[2] The Consumer Financial Protection Bureau enforces ECOA with respect to any person subject to ECOA's coverage, with limited exclusions under the Consumer Financial Protection Act. 15 U.S.C. § 1691c(a)(9). The Department of Justice enforces ECOA where there is evidence of a "pattern or practice" of discrimination. 15 U.S.C. § 1691e(h).

1002.6(b)(9).[3] Subject to that restriction, "a creditor may consider any information obtained, so long as the information is not used to discriminate against an applicant on a prohibited basis." 12 C.F.R. 1002.6(a).

Thus, while ECOA and Regulation B do not expressly prohibit consideration of immigration status, they do prohibit creditors from using immigration status to discriminate on the basis of national origin, race, or any other protected characteristic.[4] Regulation B notably provides that a "creditor may consider [an] 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." 12 C.F.R. § 1002.6(b)(7). Regulation B does not, however, provide a safe harbor for all consideration of immigration status.

II. Issues Related to ECOA, Regulation B and Noncitizen Borrowers

While Regulation B describes certain conditions under which creditors may consider immigration status, creditors should remain cognizant that ECOA and Regulation B expressly forbid discrimination on the basis of certain protected characteristics, including race and national origin. Immigration status may broadly overlap with or, in certain circumstances, serve as a proxy for these protected characteristics. Creditors should therefore be aware that if their consideration of immigration status is not "necessary to ascertain the creditor's rights and remedies regarding repayment" and it results in discrimination on a prohibited basis, it violates ECOA and Regulation B.

Accordingly, creditors must ensure that they do not run afoul of ECOA's nondiscrimination provisions when considering immigration status. As a general matter, creditors should evaluate whether their reliance on immigration status, citizenship status, or "alienage" (i.e., an individual's status as a non-citizen) is necessary or unnecessary to ascertain their rights or remedies regarding repayment. To the extent that a creditor is relying on immigration status for a reason other than determining its rights or remedies for repayment, and the creditor cannot show that such reliance is necessary to meet other binding legal obligations, such as restrictions on dealings with citizens of particular countries, 12 C.F.R. pt. 1002, Supp I. ¶ 2(z)-2, the creditor may risk engaging in unlawful discrimination, including on the basis of race or national origin, in violation of ECOA and Regulation B.

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[3] The list of prohibited bases in 12 C.F.R. § 1002.6(b)(9) does not include all characteristics protected under ECOA. The limited circumstances for considering certain other prohibited bases, such as age and marital status, are discussed elsewhere in 12 C.F.R. § 1002.6(b).

[4] *See Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 92, 94 (1973) (noting that Title VII, which prohibits employment discrimination, "prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin"). Courts have generally interpreted prohibitions under Title VII and ECOA consistently. *See, e.g., Garcia v. Johanns*, 444 F.3d 625, 632 (D.C. Cir. 2006); *Mays v. Buckeye Rural Elec. Coop., Inc.*, 277 F.3d 873, 876 (6th Cir. 2002).

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.

In addition, the overbroad consideration of certain criteria – such as how long a consumer has had a Social Security Number – may implicate or serve as a proxy for citizenship or immigration status, which in turn, may implicate a protected characteristic under ECOA like national origin or race. Such overbroad policies may harm applicants with these protected characteristics without being necessary to ascertain the creditor's rights and remedies for repayment or to meet other binding legal obligations. 12 C.F.R. § 1002.6(b)(7); 12 C.F.R. pt. 1002, Supp I. ¶ 2(z)-2. Any claims that such policies are necessary to preserve the creditor's rights and remedies regarding repayment or to meet other binding legal obligations should be supported by evidence and cannot be a pretext for discrimination.

Similarly, if a creditor requires documentation, identification, or in-person applications only from certain groups of noncitizens, and this requirement is not necessary for assessing the creditor's ability to obtain repayment or fulfilling the creditors' legal obligations, that policy may violate ECOA and Regulation B by harming applicants on the basis of national origin or race.

In addition to potential violations of ECOA and Regulation B, creditors should be mindful of their obligations under 42 U.S.C. § 1981 (Section 1981).[5] Section 1981 provides, in relevant part, that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens[,]" 42 U.S.C. § 1981(a), and has long been construed to prohibit discrimination based on alienage.[6] To the extent that a creditor's consideration of immigration status would violate Section 1981, courts have made clear that the limited consideration of immigration status that is permissible under ECOA and Regulation B does not conflict with Section 1981, creditors must therefore comply with both statutes.[7] Indeed, far from conflicting, courts have observed that ECOA's prohibition of national

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[5] Neither the Consumer Financial Protection Bureau nor the Department of Justice has enforcement or regulatory authority with regards to Section 1981, and therefore discussion of this statute is limited to discussing its interaction with ECOA and relevant court decisions.

[6] *See, e.g.*, *Anderson v. Conboy*, 156 F.3d 167, 173 (2d Cir. 1998) (explaining that "use of 'persons' rather than 'citizens' was deliberate" as Congress changed a previous version of the statute that mentioned "all citizens" to "all persons" in order to "alleviate the plight of Chinese immigrants . . . burdened by state laws" in addition to African Americans); *Duane v. GEICO*, 37 F.3d 1036, 1043 (4th Cir. 1994) ("under the plain language of the provision, 'all persons,' blacks and aliens, receive the same protection against discrimination"); *Sagana v. Tenorio*, 384 F.3d 731, 739 (9th Cir. 2004), *as amended* (Oct. 18, 2004) ("§ 1981 prohibits alienage discrimination"); *but see Resendiz v. Exxon Mobil Corp.*, 72 F.4th 623, 627 (4th Cir. 2023) (explaining that, although the Supreme Court has not said that Section 1981 protects against alienage-based discrimination, "the Fourth Circuit has squarely done so" in *Duane*).

[7] *See, e.g.*, *Perez v. Wells Fargo & Co.*, No. 17-CV-00454-MMC, 2017 WL 3314797, at *3 (N.D. Cal. Aug. 3, 2017) (denying motion to dismiss for Section 1981 claim and rejecting contention that ECOA superseded Section 1981,

origin discrimination and Section 1981's prohibitions complement one another[8] and that discrimination that arises from overbroad restrictions on lending to noncitizens may violate either or both statutes.[9]

III. Conclusion

ECOA and other laws protect consumers and help ensure fair lending and credit opportunities for qualified borrowers. Creditors should be mindful of those obligations as they relate to noncitizen borrowers and ensure that credit decisions are based on non-discriminatory criteria.

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noting that, although ECOA was a more specific statute, ECOA did not conflict with the Section 1981 claims because "[a] creditor can comply with § 1981 and the ECOA by not discriminating on the basis of any of the categories listed in the two statutes"); *Juarez v. Soc. Fin., Inc.*, No. 20-CV-03386-HSG, 2021 WL 1375868, at *7 (N.D. Cal. Apr. 12, 2021) (same) (also explaining that Regulation B "does not empower a creditor to decline credit *solely* on the basis of immigration status"); *Garcia v. Harborstone Credit Union*, No. C21-5148 BHS, 2021 WL 3491745, at *3 (W.D. Wash. Aug. 9, 2021) (ECOA does not preclude Section 1981 claim for alienage discrimination); *Maystrenko v. Wells Fargo, N.A.*, No. 21-CV-00133-JD, 2021 WL 5232221, at *4 (N.D. Cal. Nov. 10, 2021) (same); *Camacho v. Alliant Credit Union*, No. 22-CV-01690-BLF, 2023 WL 149999, at *3 (N.D. Cal. Jan. 10, 2023) (same).

[8] *See, e.g.*, *Juarez*, 2021 WL 1375868, at *7 (ECOA was "not intended to limit any of the broad protections afforded by § 1981[,]" but rather to "expand protections against credit discrimination.") (citing *Perez*, 2017 WL 3314797, at *2-4); *Maystrenko*, at *4 (noting that ECOA prohibits discrimination in lending on the basis of race, color, religion, national origin, and other grounds, 15 U.S.C. § 1691(a), and Section 1981 prohibits alienage discrimination).

[9] Supreme Court precedent makes clear that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (explaining that unless there is an "'irreconcilable conflict' in the sense that there is a positive repugnancy between [statutes]" both are regarded as effective).