Podcast: *The Consumer Finance Podcast*
Episode: Immigration Status in Credit Underwriting: What Recent Federal Guidance Really Means for Lenders
Host: Chris Willis
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Chris Willis (00:05):
Welcome to *The Consumer Finance Podcast*. I'm Chris Willis, the co-leader of Troutman Pepper Locke's Consumer Financial Services Regulatory Practice, and today I'm going to be talking about a series of recent pieces of guidance released by federal regulators about the role of immigration status in credit underwriting. But before I jump into that discussion, let me remind you to visit and subscribe to our blogs, troutmanfinancialservices.com and consumerfinancialserviceslawmonitor.com. And don't forget about all of our other great podcasts: the *FCRA Focus*, *Payments Pros*, the *Crypto Exchange*, and *Moving the Metal*. All of those are available on all popular podcast platforms, so give them a subscribe. And speaking of those platforms, if you like this podcast, let us know. Leave us a comment on your podcast platform of choice and tell us how we're doing.

(00:52):
Now, as I said, today I'm going to be talking by myself about some recent pieces of guidance issued by several federal regulators dealing with the issue of immigration status in financial services. I want to recap the statements that have come out and the action so far on this issue and then talk about the practical consequences, particularly on the consumer lending side.

(01:12):
So you may remember going back probably something like 10 years that the issue of immigration status in credit underwriting became an issue in private litigation. There was a series of cases filed primarily in California under the California Unruh Act, as well as 42 U.S.C. § 1981, alleging that creditors who restricted the availability of loan products to U.S. citizens and permanent residents, were violating those laws by discriminating against people who had an immigration status that allowed them to be in the United States and earn income but were excluded by the blanket policies of you have to be a US citizen or permanent resident.

(01:53):
There was a series of those cases that went on. Some of them resulted in very large class action settlements. Some of them were dismissed for lack of standing. But nevertheless, there was a wave of those cases going on in California. And in the wake of that, we had two other states amend their state fair lending laws to add immigration status and citizenship as protected characteristics, those being Washington State and

New York State. Then as we got into the Biden administration, finally we had some regulatory action on this issue.

(02:24):
So in 2022, the Department of Justice and the CFPB put out a joint statement warning creditors not to engage in the overbroad use of immigration status in credit underwriting. Despite the fact that Regulation B has said forever that a creditor can take immigration status into account in determining its rights and remedies in terms of payment, the federal regulators warned that the, quote, "overbroad use" of immigration status might lead to denials that would be a violation of the Equal Credit Opportunity Act if they weren't narrowly tailored to immigration statuses that would preclude someone from repaying a loan, working legally, being in the United States legally.

(03:03):
And there was a settlement with the Massachusetts Attorney General that picked up on this same theme in the summer of 2024, and that completed the regulatory action up until that point in time. Then, of course, we had the change to the current Trump administration at the beginning of 2025. And there have been several events relating to this issue that have occurred since then. The first event was that the joint DOJ-CFPB statement that had been issued in 2022 was withdrawn. So it's no longer out there. Both agencies have sort of disavowed it by withdrawing it.

(03:35):
But then beginning earlier in 2026, you had three different federal agencies put statements out, all in the vein of informal guidance. There was no notice-and-comment rulemaking on any of this. But first, earlier this year, you had statements released the same day by FinCEN, that is the Financial Crimes Enforcement Network that's responsible for anti-money laundering and OFAC compliance, and the CFPB. And the FinCEN one I'll just describe briefly, postulated that depository banks might be aware of suspicious patterns of deposit account use by employers who are secretly employing illegal aliens and that this might be evidenced by unusual transaction activity in the depository account for a business entity where you would expect them to have lots of employees, but they're really only paying taxes on a few of them. And FinCEN encouraged depository institutions to file suspicious activity reports if they encountered something like that.

(04:34):
And although the FinCEN guidance does talk a bit about lending, almost all of the concrete scenarios that it talks about are really more geared towards deposit accounts. The CFPB statement that was released the same day, however, is all about consumer lending. And in it, the CFPB reminded the world that Reg B has forever said that creditors can take immigration status into account in determining whether they're going to be repaid or not. And the CFPB went on to say that because there are many people who are in the country illegally and not able to remain in the country and earn money in

the country, because of their either undocumented status or they're in an immigration status that doesn't allow them to do that, that those people may create a higher credit risk and that financial institutions may take that into account in deciding whether to lend to them.

(05:23):
And the CFPB was specific in saying that someone who doesn't have a Social Security number but just has an ITIN may bear a greater chance of being in that category. The CFPB then went on in that same piece of guidance to remind us that there are two credit products for which there are federal ability to repay standards in place. Those, of course, being mortgages and the CARD Act for credit cards, both of which require an assessment of the consumer's ability to repay a loan before it is made, whether it's a credit card or a mortgage loan. And the CFPB said for those products, it was necessary for creditors to take into account potentially immigration status to meet the statutory and regulatory requirement of an ability to repay analysis.

(06:11):
So those two came out a few months ago. And then much more recently, we had a set of combined guidance from the OCC, the FDIC, and the National Credit Union Administration, which was a joint statement that picked up where the CFPB's statement left off and essentially cited the CFPB statement and said taking immigration status into account is perfectly permissible and may be required for certain products, but also may be required from a safety and soundness standpoint because it may not be a safe and sound banking practice to lend money to someone who's not legally able to be in the United States, to remain here, and to earn an income here.

(06:49):
So the federal banking regulators cautioned their respective supervised institutions about that issue and further said that there might even be certain geographic areas or employers or industries that might be a greater risk of disruption based on immigration enforcement efforts of having a large number of borrowers affected and unable to repay their loans. And so the federal regulators stated that there might be excessive concentration risk in certain geographies or industries or with even certain specific employers.

(07:23):
That brings us up to date to where we are now. That was the most recent statement by any of the federal regulators. But you can see over the course of the current presidential administration, we now have four different regulatory communications about this issue of immigration status in credit underwriting. And so it's very clear that the federal regulators and the administration in general are trying to encourage financial institutions to be applying greater scrutiny to individuals' immigration status when they apply for a loan.

(07:54):
Now, what do we do about it? Practically, what does this mean for us as consumer lenders, whether we're an insured depository institution or a non-bank lender? So the thing is, remember that there was a lot of movement on this issue in the industry to open up slightly the categories of people who were eligible for consumer loans beyond the traditional US citizen and permanent resident in light of the litigation risk that was created by the California litigation that I mentioned earlier in the podcast. And in fact, that danger still exists today because even just relatively recently, as of the time we're recording this, one of these lawsuits has been filed in, of all places, in Oklahoma.

(08:37):
So there's one pending in Oklahoma now that's essentially identical to the series of those that had occurred in California starting many years ago. And the fact that we have state fair lending laws like New York and Washington State in addition to California that deal with this issue and the potential claims under § 1981, that is the Civil Rights Act of 1877, if I recall, shows that the risk decision that the industry made to adjust practices in light of that litigation remains a valid consideration today because, again, we have a brand new lawsuit that was just filed within the past month or so on this issue. And there's also the possibility of state regulatory action on this issue, as we saw from Massachusetts in the summer of 2024.

(09:21):
And so there's plenty of risk still associated with going back to the old formulation of it's only US citizens or permanent residents. And so against that risk, we have to weigh the possibility of enforcement or other more forceful activity other than just releasing public guidance that we might see from the federal either banking regulators or the CFPB on this issue. So far, we have not seen any indication of that occurring. We've seen this guidance. The guidance itself is not terribly specific or prescriptive. It just says this is something you may need to take into account, or this is a risk you should study. But I think that it's likely that any credit risk, which would be relevant both to the ability to repay point that the CFPB made, as well as the safety and soundness point that the federal banking regulators made, would already likely have been taken into account by the credit risk departments of whatever institution you might be talking about.

(10:19):
In other words, if they found a category of people that posed an unacceptably high credit risk, you would expect that there would be efforts to make sure they didn't pass the underwriting standards and therefore we didn't make loans to them, because financial institutions aren't in the business of making loans to people who don't repay.

(10:34):
And so it seems unlikely to me that there is widespread lending to people who are in undocumented or illegal immigration statuses and who therefore pose a safety and soundness or ability to repay risk to whoever is doing the lending that now need to be

excluded from eligibility for loan products. Because my guess is they either are repaying perfectly fine and the data shows them to be doing so, or they're not repaying and therefore they're not getting approved. Because remember, in order to get approved for a loan, you have to have usually a credit file of a certain size and duration in order to have a credit score and pass all the other underwriting criteria that financial institutions have put into place.

(11:19):
So in general, I do think that these pieces of guidance are public statements that don't appear to me likely to have much practical impact on the real world of credit underwriting. But I think that leaves us with the question of is there anything that we should do? And I think financial institutions can consider whether or not they want to do anything in particular on this issue. It might be a good idea to do a look at your underwriting data and your policies and procedures and who's eligible and who's not to see if you think you have any gaps in this area that might be seized upon by a motivated regulator on this point, particularly if those gaps coincide with poor repayment performance, which would make either the ability to repay argument or the safety and soundness argument easier to make against you.

(12:04):
But failing that, another possibility would be just to make a simple inquiry on the application, essentially saying, "Are you legally able to earn an income in the United States? Yes or no." This would be very similar to the way credit card issuers assess ability to repay under the CARD Act. We've known for years that it's okay to gather someone's income in connection with a credit card application by just asking them and taking self-reported income and using that as the benchmark for ability to repay. And so why shouldn't we be able to do the exact same thing with a question on this issue? And financial institutions can decide if they think that a question like that might risk discouraging applicants either from a business standpoint or from an ECOA standpoint in the future, or whether or not they think they can put that on there and it won't make any difference to the application flow because they think almost everybody who gets approved today would answer yes to that question.

(12:56):
But my general feeling on it is I don't feel that this recent series of announcements by FinCEN, the CFPB, and the federal banking regulators are likely to require any significant operational changes for lenders because, as I said, I don't think there's lots of illegal, undocumented, or non-work-authorized borrowers who have thick enough credit files to qualify for a loan but nevertheless would be excluded by an immigration status-related eligibility rule. I think the numbers of those people must be very small, if they exist at all.

(13:27):
So I wanted to just share my thoughts that I think there's a lot of public discourse about

this, but that I think the operational impact on the consumer lending industry is likely to be very muted, if at all. And that was really what I wanted to share with y'all today. So send me an email if you'd like to discuss it further, but otherwise, please don't forget to visit and subscribe to our podcasts, troutmanfinancialservices.com and consumerfinancialserviceslawmonitor.com. And I'd also love it if you would visit us on the web at troutman.com and add yourself to our consumer financial services email list. That's the one that we use to send out periodic alerts and advisories, as well as invitations to our occasional industry-only webinars. And again, thank you all for listening to today's episode.
