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Victoria Prussen Spears

**MORTGAGE LENDING TO NONTRADITIONAL BORROWERS: THE OPPORTUNITIES AND COMPLIANCE POINTS OF MORTGAGE LENDING TO DACA RECIPIENTS, RECENT IMMIGRANTS, AND LIMITED-ENGLISH PROFICIENCY BORROWERS**

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**DISPOSITION OF DOCUMENTS DISHONORED IN UCP600 – PART III**

Wang Jingen



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# Mortgage Lending to Nontraditional Borrowers: The Opportunities and Compliance Points of Mortgage Lending to DACA Recipients, Recent Immigrants, and Limited-English Proficiency Borrowers

*Andrew C. Glass, Gregory N. Blase, and Daniel S. Cohen\**

*Nontraditional borrowers, particularly in immigrant communities, are a growing market for mortgage lenders, but serving these consumers may involve unique compliance points. The authors describe some of these compliance points with respect to DACA recipients, recent immigrants, and consumers with limited English proficiency, and outline actions lenders may want to consider taking.*

Nontraditional borrowers, including recent immigrants, are a growing and potentially significant segment of the mortgage lending market. In particular, there are many creditworthy potential customers who also are beneficiaries of the Deferred Action for Childhood Arrivals (“DACA”) program, recent immigrants, or consumers with limited-English proficiency (“LEP”). More than half of DACA recipients, for example, are employed, and of those, nearly 70 percent are seeing their average hourly wage grow year-over-year.<sup>1</sup> One third of all DACA recipients are studying for a bachelor’s degree, and one third who are 25 years or older already have such a degree.<sup>2</sup> By some estimates, nearly 10 million prime borrowers have immigrated to the United States in the last 10 years, and foreign-born residents constitute nearly 13 percent of the population.<sup>3</sup> At the same time, foreign-born residents tend to own homes at a much lower

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<sup>1</sup> Tom K. Wong, et al., *DACA Recipients’ Economic and Educational Gains Continue to Grow*, Center for American Progress (Aug. 28, 2017), <https://www.americanprogress.org/issues/immigration/news/2017/08/28/437956/daca-recipients-economic-educational-gains-continue-grow/>.

<sup>2</sup> *Id.*

<sup>3</sup> See *infra* note 39.

rate than the national average.<sup>4</sup> Homeownership rates are even lower for immigrants who have lived in the United States for five years or less.<sup>5</sup>

This article considers some of the unique compliance points that attend to lending to DACA recipients, recent immigrants, and LEP consumers. Lenders may want to consider the following issues when offering mortgage loans to these groups of customers:

- The legal uncertainty surrounding the future of the DACA program has raised a variety of unanswered questions. Are mortgages to DACA recipients eligible for Federal Housing Administration (“FHA”) insurance? How should lenders determine DACA consumers’ ability to repay under Regulation Z or their continuity of income? Can lenders consider the uncertainty of DACA recipients’ legal status when reviewing whether and on what terms to extend credit?
- How should lenders market their products and services to meet LEP consumers’ needs for the purposes of complying with the Equal Credit Opportunity Act (“ECOA”) and Regulation B?
- Are there ways for lenders to evaluate the creditworthiness of recent immigrants who may lack a robust history of credit activity in the United States? For instance, are there efficient and lawful means to assess customers’ financial activity conducted abroad?
- Can lenders use alternative data in pricing credit to consumers from these groups in compliance with the ECOA, the Fair Housing Act, and the Fair Credit Reporting Act (“FCRA”)?

## DEFERRED ACTION FOR CHILDHOOD ARRIVALS

### Background

In 2012, President Barack Obama established the DACA program to allow undocumented individuals who were brought to the United States as children to defer removal action and obtain work authorization for two years, with the possibility of renewal.<sup>6</sup> To qualify, an applicant must meet certain criteria, including that they:

- 1) were 31 years old or younger as of June 15, 2012;

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *DHS DACA FAQs*, United States Citizenship and Immigration Services, Department of Homeland Security, <https://www.uscis.gov/archive/frequently-asked-questions> (last accessed Nov. 4, 2018).

- 2) arrived in the United States prior to their 16<sup>th</sup> birthday;
- 3) have lived continuously in the United States since June 15, 2007;
- 4) have not had lawful status to reside in the country as of June 15, 2012;
- 5) are currently studying in or have graduated from high school, have earned a GED or certificate of completion of high school, or have received an honorable discharge from the military; and
- 6) have not been convicted of a felony.<sup>7</sup>

Between approximately 700,000 and 800,000 people (known as DREAMers) have been granted the protections afforded under DACA.<sup>8</sup>

In September 2017, nearly five years after the program was created, former Acting Secretary of Homeland Security Elaine Duke (“former Acting Secretary”) rescinded DACA, announcing that it would expire in March 2018.<sup>9</sup> Several lawsuits followed that announcement, leading several judges to issue orders reinstating DACA on a nationwide basis.<sup>10</sup> Then, in November 2018, a three-judge panel for the U.S. Court of Appeals for the Ninth Circuit affirmed the U.S. District Court for the Northern District of California’s grant of a preliminary injunction maintaining DACA on a nationwide basis.<sup>11</sup> The Ninth Circuit held that the Trump Administration’s decision to rescind DACA, based on the record before the court, was arbitrary, capricious, and not otherwise in

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<sup>7</sup> *Id.*

<sup>8</sup> Francesc Ortega, *If ‘Dreamers’ are protected, would the economy benefit?*, PBS (Feb. 9, 2018), <https://www.pbs.org/newshour/economy/making-sense/if-dreamers-are-protected-would-the-economy-benefit>. See also Elizabeth Chmurak, *The economic impact of losing DACA workers*, NBC NEWS (Mar. 6, 2018), <https://www.nbcnews.com/business/velshi-ruhle/economic-impact-losing-daca-workers-n852751>.

<sup>9</sup> Attorney General Sessions Delivers Remarks on DACA, Speech, Department of Justice (Sept. 5, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca>.

<sup>10</sup> *The Regents of the Univ. of Cal. v. Dept. of Homeland Sec.*, No. 3:17-cv-05211, Jan. 9, 2018, Order Denying Fed. R. Civ. P. 12(b)(1) Dismissal and Granting Provisional Relief (N.D. Cal. Jan. 9, 2018), <https://assets.documentcloud.org/documents/4345906/1-9-18-DACA-Opinion.pdf>; *Vidal v. Nielsen*, No. 1:16-cv-04756, Feb. 13, 2018, Amended Memorandum and Order and Preliminary Injunction (E.D.N.Y. Feb. 13, 2018), <https://www.nilc.org/wp-content/uploads/2018/02/Batalla-Vidal-v-Nielsen-updated-pi-order-2018-02-13.pdf>; and *N.A.A.C.P. v. Trump*, No. 17-1907, Memorandum Opinion (D.D.C. Aug. 3, 2018), [https://ecf.dcd.uscourts.gov/cgi-bin/show\\_public\\_doc?2017cv1907-27](https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2017cv1907-27); and *CASA de Maryland, et al. v. Dept. of Homeland Security*, et al., 8:17-cv-02942 (D. Md. Oct. 5, 2017).

<sup>11</sup> *The Regents of Univ. of Cal. v. Dept. of Homeland Sec.*, 18-15068, (N.D. Cal. Nov. 8, 2018), <http://cdn.ca9.uscourts.gov/datastore/general/2018/11/08/18-15068%20Opinion.pdf>.



accordance with law. Specifically, the Ninth Circuit ruled that the former Acting Secretary's basis for rescinding DACA was flawed. According to the court, the former Acting Secretary rescinded DACA because she was advised by the Department of Justice ("DOJ") that DACA was unconstitutional.<sup>12</sup> The DOJ argued DACA was unconstitutional because the program had "the same legal and constitutional defects" as "Deferred Action for Parents of Americans" ("DAPA").<sup>13</sup> The Ninth Circuit, however, ruled that the DOJ's determination was incorrect: DACA, unlike DAPA, is a "permissible exercise of executive discretion" so the former Acting Secretary's justification was arbitrary and capricious.<sup>14</sup> Further, the court held that the district court did not abuse its discretion by issuing a nationwide injunction because, among other reasons, "such relief is commonplace in [Administrative Procedure Act] cases."<sup>15</sup> The DOJ filed a petition for *certiorari* with the U.S. Supreme Court to review the district court's decision before the Ninth Circuit issued its decision.<sup>16</sup> The Supreme Court is anticipated to grant the DOJ's petition and in early 2019. As matters stand, current and former DACA beneficiaries are eligible for DACA, but individuals who were not DACA beneficiaries prior to these rulings are not eligible for the program. The future of DACA, and, therefore, the legal status of nearly 800,000 people, remains uncertain.

### Compliance Points and Considerations

The uncertainty surrounding DACA has significant implications for mortgage lenders as they consider whether and on what terms to extend financing to DACA beneficiaries. These include: (1) determining DACA recipients' ability to repay, (2) determining whether DACA recipients are eligible for government-insured mortgages, or whether mortgages made to recipients are eligible for purchase by Fannie Mae and Freddie Mac (collectively, the "GSEs"), and (3) assessing compliance with the Civil Rights Act of 1866 (the "Civil Rights Act") and the ECOA.

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<sup>12</sup> *Id.* at 11.

<sup>13</sup> *Id.* at 10. The U.S. Court of Appeals for the Fifth Circuit held that DAPA was unconstitutional in *Texas v. United States*, No. 15-40238 (Nov. 9, 2015). Divided 4-4, the Supreme Court issued a per curiam decision affirming the Fifth Circuit's decision. See *United States v. Texas*, 579 U.S. \_\_\_ (2016).

<sup>14</sup> *Id.* at 11.

<sup>15</sup> *Id.*

<sup>16</sup> Amy Howe, *After federal government filing 9th Circuit rules in DACA dispute*, Scotus Blog (Nov. 8, 2018), <http://www.scotusblog.com/2018/11/after-federal-government-filing-9th-circuit-rules-in-daca-dispute/>.

***Ability to Repay***

The uncertainty around the legal status of the DACA program may present a challenge in determining DACA recipients' ability to repay pursuant to Regulation Z.<sup>17</sup> In accordance with Regulation Z, mortgage lenders must make a reasonable, good faith-determination prior to or upon execution of a mortgage that the consumer can repay the loan.<sup>18</sup> To meet this standard, lenders must consider the following eight criteria:<sup>19</sup>

- 1) Current or reasonably expected income or assets (other than the value of property securing the loan), which the consumers will rely on to repay the loan;
- 2) Current employment status (if the lender relies upon employment income when assessing a consumer's ability to repay the loan);
- 3) Monthly mortgage payment for the covered mortgage loan;
- 4) Monthly payments on simultaneous loans the creditor knows or has reason to know will be made;
- 5) Monthly payments for mortgage-related obligations;
- 6) Debts, alimony, and child support obligations;
- 7) Monthly debt-to-income ratio or residual income; and
- 8) Credit history.

The first two criteria are perhaps the most difficult for lenders to assess when considering loans for DACA recipients. On the one hand, DACA recipients are currently authorized to work for a period of two years, and they are eligible to renew that authorization. Accordingly, a lender could determine that DACA recipients' reasonably expected future income will be the same or similar to current income and that their employment status will not change. If those factors indicate that the consumers could repay the loan, the lender could meet Regulation Z's ability to repay requirement. But if the various circuit courts or the Supreme Court were to rule that the Trump Administration rescinded DACA lawfully, DACA recipients' reasonably expected income and employment status would change. The official commentary of the Consumer Financial Protection Bureau ("CFPB") regarding Regulation Z states that lenders must take into account whether a consumer's ability to repay will change after the consummation of the loan if the records which the lender considers indicate

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<sup>17</sup> 12 C.F.R. § 1026.

<sup>18</sup> 12 C.F.R. § 1026.43(c).

<sup>19</sup> 12 C.F.R. § 1026.43(c)(2)(i)–(viii).

this possibility.<sup>20</sup> Lenders should consider whether this requirement compels them to take into account any legal uncertainty surrounding the DACA program. Failure to comply with Regulations Z's requirements could expose a lender to claims for actual damages, statutory damages, attorneys' fees, and civil money penalties, among other implications.<sup>21</sup>

DACA's uncertain future also complicates lenders' obligation to the GSEs to determine a consumer's continuity of income in connection with the required representations and warranties to the GSEs for any mortgage the GSEs may purchase.<sup>22</sup> To make this determination, lenders must consider, among other things, the "probability of continued consistent receipt of the income used to qualify" for the mortgage.<sup>23</sup> Lenders may conclude, at least for Fannie Mae requirement purposes, the consumers' income is "stable, predictable, and likely to continue" if "the income does not have a defined expiration date," "the applicable history of receipt of the income is documented," and the lender does not have "knowledge to the contrary."<sup>24</sup> DACA recipients may fall into this category, depending on the specific (that is, non-DACA related) details of their income streams. More broadly, however, whether a DACA recipient's income is likely to continue is dependent upon whether the courts uphold the Trump Administration's rescission of the program.

To comply with Regulation Z, lenders may want to consider, prior to or at the time of executing a loan, whether losing DACA status would impact the consumer's ability to repay the loan. Lenders likely do not need to (and may not) make their lending decision solely on this basis because there are six other criteria they must consider. But the final determination of whether DACA has been rescinded will likely have a material effect on DACA recipients' ability to repay a loan.

### ***Government Financing***

There is also uncertainty as to whether DACA beneficiaries are eligible for insured financing through the FHA, and whether their loans are eligible to be purchased by the GSEs, because it is unclear whether DACA recipients are lawful non-permanent resident aliens.

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<sup>20</sup> Comment 43(c)(1-2), Consumer Financial Protection Bureau, <https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1026/43/#c-1>.

<sup>21</sup> 12 U.S.C. § 1640.

<sup>22</sup> Fannie Mae Selling Guide § B3-3.1-01; Freddie Mac Selling Guide § 5301(d).

<sup>23</sup> Freddie Mac Selling Guide § 5301(d).

<sup>24</sup> Fannie Mae Selling Guide § B3-3.1-01.

According to the Department of Housing and Urban (“HUD”) Development Handbook, a non-permanent resident alien is only eligible for FHA-insured financing if the following conditions are met:<sup>25</sup>

- 1) The property will be the borrower’s principal residence;
- 2) The borrower has a valid Social Security Number, unless employed by the World Bank, a foreign embassy, or equivalent employer;
- 3) The borrower is eligible to work in the United States, as evidenced by the Employment Authorization Document (“EAD”) issued by the United States Citizenship and Immigration Services (“USCIS”); and
- 4) The borrower satisfies the same requirements, terms, and conditions as those for U.S. citizens.

The key issue is whether a DACA recipient’s EAD is acceptable under this provision. Some HUD and FHA staffers have reportedly advised lenders informally that DACA recipients are not eligible for FHA-insured financing because their EAD is not acceptable under 8 C.F.R. Part 274A.12(c)<sup>26</sup> which specifies the “classes of aliens authorized to accept employment.” Subsection “c” lists the classes of “aliens who must apply for employment authorization.” DACA recipients receive their EAD under category “C-33,” which is provision 33 of 8 C.F.R. Part 274A.12(c). Section 33, however, is currently reserved. Thus, some lenders have been informally advised by HUD that an EAD issued under category C-33 is not acceptable under the HUD handbook. This trend appears to have begun under the Trump Administration but has not been formalized by HUD.<sup>27</sup> HUD has not issued a formal interpretation of the provision with respect to this issue, and, as written, Section 4000.1 of the HUD Handbook does not specify that an EAD issued under category C-33 is ineligible for FHA-insured financing. Lenders, therefore, might consider seeking legal counsel when evaluating whether or not a DACA recipient is eligible.

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<sup>25</sup> Department of Housing and Urban Development Handbook § 4000.1(II)(A)(1)(b)(ii)(A)(9)(b).

<sup>26</sup> Rob Chrisman, *UW and API products; FHA/VA/Ginnie Updates; DACA Policy*, Mortgage News Daily (July 12, 2018), <http://www.mortgagenewsdaily.com/channels/pipelinepress/07122018-fha-daca-loans.aspx>. See also Tammy Butler, *DACA status has mortgage lenders in a catch-22*, Fair Lending Diversity (June 21, 2018), <https://fairlendingdiversity.com/daca-status-has-mortgage-lenders-in-a-catch-22/>.

<sup>27</sup> Nidhi Prakash, *The Trump Administration is Quietly Denying Federal Housing Loans to DACA Recipients*, BUZZFEED NEWS (Dec. 14, 2018), <https://www.buzzfeednews.com/article/nidhiprakash/daca-trump-denied-federal-housing-loans>. A loan officer in Chicago informed BuzzFeed News that he originated 42 FHA-backed loans in the years prior to 2018. See *Id.*

The GSEs also require lenders to represent and warrant that a non-permanent resident alien to whom a mortgage is extended resides in the United States lawfully.<sup>28</sup> Fannie Mae does not specify the documents on which a lender must make this determination.<sup>29</sup> According to its Selling Guide, “[t]he lender must make a determination of the non-U.S. citizen’s status based on the circumstances of the individual case, using documentation it deems appropriate.”<sup>30</sup> Such a determination is difficult, however, in light of the ongoing uncertainty over the DACA program and the advice of some HUD staff members. To date, the GSEs have not issued a formal stance on the issue. Even if a DACA recipient’s EAD is valid for purposes of FHA-insured loans, the question remains whether lenders can extend such loans to DACA recipients who have applied for renewal.<sup>31</sup> Whether renewals will be granted remains to be seen, and the USCIS has not provided much information as to this point.<sup>32</sup>

Compliance is challenging in light of such uncertainty. Lenders should consider seeking written clarification from HUD, the FHA, and the GSEs as to whether: (1) DACA recipients constitute lawful non-permanent resident aliens; (2) whether the EADs issued to DACA recipients are acceptable under the relevant sections of the HUD Handbook and the GSEs’ selling guidebooks; and (3) whether DACA recipients who have applied for a renewal of their status meet the relevant criteria. Lenders should also consider (with assistance of counsel where appropriate) determining whether DACA recipients are lawful non-permanent resident aliens and how to implement an underwriting practice consistent with that determination. As part of this process, lenders should consider developing a list of documents necessary to substantiate their determination.

### ***Civil Rights Act of 1866 and Equal Credit Opportunity Act***

In addition to the compliance challenges of lending to DACA recipients, lenders must be cognizant of the potential consequences of not lending to DACA recipients or extending credit to them on different terms than to U.S. citizens. The Civil Rights Act mandates that “[a]ll persons within the

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<sup>28</sup> Fannie Mae Selling Guide § B2-2-02; Freddie Mac § 5103.2.

<sup>29</sup> Fannie Mae Selling Guide § B2-2-02.

<sup>30</sup> *Id.*

<sup>31</sup> Letter to Brian Montgomery, FHA Commissioner and Assistant Secretary for Housing, dated July 19, 2018, from the Mortgage Bankers Association, at 5, <https://www.mba.org/mba-newslinks/2018/july/mba-newslink-friday-7-20-18/mba-asks-fha-for-additional-clarity-guidance-on-fha-handbook>.

<sup>32</sup> *Id.*

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.”<sup>33</sup> The ECOA and its implementing regulation—Regulation B<sup>34</sup>—prohibit any creditor from discriminating against “any applicant with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, or age.”<sup>35</sup> Although the Civil Rights Act has a much broader scope than the ECOA, the two laws overlap by prohibiting lenders from discriminating against a borrower who is not a white citizen.

The ECOA and Regulation B provide parameters for lenders in determining whether and on what terms to extend credit to non-U.S. citizens. Pursuant to Regulation B, a “creditor may inquire about the permanent residency and immigration status of an applicant or any other person in connection with a credit transaction.”<sup>36</sup> And “[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.”<sup>37</sup> According to the CFPB’s official interpretation:

[t]he 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. 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.<sup>38</sup>

Notwithstanding these parameters, lenders’ ability to consider immigration status and how they consider that status is not necessarily settled. In 2017, several DACA recipients brought a class action lawsuit alleging that consideration of immigration status in the lending process violates the Civil Rights Act. In a preliminary finding, the court found that the Civil Rights Act claim could proceed even though the ECOA permits consideration of immigration status in

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<sup>33</sup> 42 U.S.C. § 1981(a).

<sup>34</sup> 12 U.S.C. § 1691(a).

<sup>35</sup> 12 CFR § 1002 *et seq.*

<sup>36</sup> 12 CFR § 1002.5.

<sup>37</sup> 12 CFR § 1002.6(7).

<sup>38</sup> Official Interpretation of Paragraph 6(b)(7), Consumer Financial Protection Bureau, <https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1002/6/#b-6-iii>.

the lending process.<sup>39</sup> The court reasoned that (1) in enacting the ECOA, Congress did not withdraw protections afforded to aliens under the Civil Rights Act, and (2) although Regulation B allows creditors to inquire about and consider immigration status, it does not “state[] a creditor is free to decline credit to an applicant solely on the basis of alienage.”<sup>40</sup>

Thus, lenders likely (1) should not deny credit or alter the terms of an extension of credit solely on the basis of the consumer’s immigration status, (2) when considering applications by DACA recipients in particular, should consider consumers’ status solely in the context of the ability to repay and only as one of several factors, and (3) should evaluate DACA beneficiaries’ applications consistently with respect to their status.

## RECENT IMMIGRANTS

### Background

DACA recipients represent just a small portion of the United States’ large and growing immigrant population. Today, there are more than 43 million foreign-born residents living in the United States.<sup>41</sup> Homeownership among this group, and particularly among individuals who have lived in the United States for fewer than five years, is low in relation to the population at large.<sup>42</sup> Less than 20 percent of all foreign-born residents who have lived in the United States for fewer than five years own a home.<sup>43</sup> In certain states, the numbers are even lower. In California, for example, only 13 percent of such foreign-born residents own a home.<sup>44</sup> In New Mexico, the rate is only 19 percent; in Colorado, only 18 percent; in Iowa, only 15 percent; and in Oregon and Nebraska, only 10 percent or less.<sup>45</sup>

Part of the reason homeownership is so low among recent immigrants is that their credit history is thin, or the relevant documents are difficult to obtain or

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Michael D. Nicholson, *The Facts on Immigration Today: 2017 Edition*, Center for American Progress, <https://www.americanprogress.org/issues/immigration/reports/2017/04/20/430736/facts-immigration-today-2017-edition/>.

<sup>42</sup> Brad Finkelstein, *A mortgage for immigrants with money but no credit history*, National Mortgage News (May 23, 2017), <https://www.nationalmortgagenews.com/news/a-mortgage-for-immigrants-with-money-but-no-credit-history>.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

are not in English. Accordingly, it is difficult and expensive for lenders to determine these consumers' creditworthiness. Some financial technology ("FinTech") companies are compiling recent immigrants' financial information so that lenders can review relevant documents in making lending determinations. One such company estimates that over the last decade, nearly 10 million prime or super prime borrowers have immigrated to the United States.<sup>46</sup> Some companies are relying on alternative data to help lenders more accurately assess immigrants' creditworthiness. Companies may use proof of payment of utility and telecom bills to generate a credit file and score for immigrants.<sup>47</sup> Companies are also using financial technologies to better connect lenders and recent immigrants, creating new opportunities for both groups.

### **Compliance Points and Considerations**

Lenders must bear in mind compliance with the FCRA, the ECOA, and the Fair Housing Act. Under the FCRA, lenders must provide an "adverse action" notice when, among other things, consumer credit is "denied or the charge for such credit is increased either wholly or partly because of information obtained from a person other than a consumer reporting agency bearing upon the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living."<sup>48</sup> Lenders must, upon written request by a consumer, disclose any data used that was provided by a non-Credit Reporting Agency third-party.<sup>49</sup>

This may be complicated when lenders use alternative data provided by third parties. Sometimes, third-party vendors may not know the source of the information. Alternatively, if lenders use third-party vendors to calculate the creditworthiness of a borrower, the vendors may be unwilling to share the details of their models, thereby leaving lenders with insufficient information to disclose to the consumer upon request.<sup>50</sup> Another issue to consider is the complexity of models that use alternative data and the corresponding difficulty in explaining credit decisions. When using alternative data, the increased

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<sup>46</sup> *Id.*

<sup>47</sup> For example, eCredable uses alternative data to build consumers' credit reports. *See How it Works*, eCredable, <https://www.ecredable.com/how-it-works/overview>.

<sup>48</sup> 15 U.S.C. § 1681m(b)(1).

<sup>49</sup> 15 U.S.C. § 1681m.

<sup>50</sup> Letter to the CFPB, American Bankers Association (May 17, 2017), <https://www.aba.com/Advocacy/commentletters/Documents/5-17-17ABACommentLetterreAlternativeDataandModelingTechniques.pdf>.



number of factors used to make a credit determination may make it difficult for lenders to explain decisions in the adverse action notice to the consumer.<sup>51</sup>

As previously discussed, the ECOA prohibits discrimination on the basis of race, color, religion, national origin, sex, marital status, or age. Similarly, the Fair Housing Act makes it illegal to, among other things, “refuse to sell, rent, negotiate, make unavailable or deny a dwelling or to discriminate in making available a real estate-related transaction or the terms of one due to a protected characteristic.”<sup>52</sup> Lenders are liable under these laws not just for intentional discrimination (“disparate treatment”) but also for practices that disproportionately and adversely affect consumers based on covered characteristics (“disparate impact”).

There are a variety of challenges that accompany using alternative data which may complicate compliance with the ECOA and the Fair Housing Act. For instance, verifying that alternative data is not the cause of any disparate impact on such borrowers may be expensive.<sup>53</sup> If lenders rely on data from third-parties or modelling by third-parties, the cost of verifying the data may be even more expensive than if the lenders used their own data. Additionally, some data are not easily disaggregated, so that determining whether specific data indicate a disparate impact may be difficult.<sup>54</sup> Further, lenders should take into consideration the risk a plaintiff may argue that traditional modeling or the use of more traditional variables constitute a less discriminatory practice which may remove lenders’ legitimate business reasons for using alternative data.<sup>55</sup> FinTech and alternative data may enable lenders to assist a large and currently underserved market, but lenders must be cognizant of the parameters imposed by the FCRA, the ECOA, and the Fair Housing Act.

## LIMITED-ENGLISH PROFICIENCY BORROWERS

### Background

Like DACA beneficiaries and recent immigrants, LEP consumers seek mortgage loans. In October 2016, the CFPB released its Fall Supervisory Highlights, which, among other things, discussed various ways in which financial institutions were serving and engaging with LEP consumers. Of these

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<sup>51</sup> The CFPB has expressed this concern. 82 Fed. Reg. 11183, 11187 (Feb. 21, 2017).

<sup>52</sup> 42 USC § 3604.

<sup>53</sup> The ABA has raised this issue. See Letter to CFPB, *supra* note 50.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

practices, the CFPB highlighted several that it believes did not violate the ECOA. For instance, providing translated documents, such as monthly payment statements, and using bilingual customer service agents complied with the ECOA.<sup>56</sup> So too did the provision of clear and timely disclosures to prospective consumers describing the extent and limits of any language services provided throughout a product's lifecycle.<sup>57</sup> Notifying non-English speaking customers of products advertised in English was also considered appropriate under the ECOA.<sup>58</sup> The CFPB stated that certain marketing practices and servicing of loans in languages other than English could comply with the ECOA and Regulation B.<sup>59</sup>

The report also highlighted various practices that the CFPB indicated violate the ECOA. For example, failure to market all available credit card products made available to English speaking customers to Spanish-speaking customers, absent good cause, would run afoul of the ECOA.<sup>60</sup> Institutions that advertise some products to English-speaking consumers but not to LEP consumers, and that do not have documentation demonstrating why they have made such a distinction, may also violate the ECOA.<sup>61</sup>

In November 2017, the CFPB released the "Spotlight on Serving Limited English Proficient Consumers," a report specifically examining the challenges LEP consumers face in obtaining adequate financial services.<sup>62</sup> For instance, the CFPB commented that LEP consumers often have difficulty completing key financial documents and resolving issues with financial products.<sup>63</sup> The CFPB noted that disclosures are written at a challenging reading level for LEP consumers and pointed to a study by the Government Accountability Office that found that the average disclosures for alternative mortgages is at an 11<sup>th</sup>-grade English reading level.<sup>64</sup> The report also cited a study by Fannie Mae

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<sup>56</sup> *Supervisory Highlights*, Issue 13, Fall 2016, Consumer Financial Protection Bureau, at 21, [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/Supervisory\\_Highlights\\_Issue\\_13\\_Final\\_10.31.16.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/Supervisory_Highlights_Issue_13_Final_10.31.16.pdf).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 22.

<sup>61</sup> *Id.*

<sup>62</sup> *Spotlight on serving limited English proficient consumers*, Consumer Financial Protection Bureau (Nov. 20, 2017), [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb\\_spotlight-serving-lep-consumers\\_112017.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_spotlight-serving-lep-consumers_112017.pdf).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 15.

and Freddie Mac that revealed that Spanish- and Vietnamese-speaking LEP consumers often do not understand mortgage documents that are written in English.<sup>65</sup>

The CFPB report also discussed the various practices that industry participants have implemented to serve LEP consumers effectively. Some financial institutions have assessed customers' language needs based on Census bureau data or customer-provided elections, and hired personnel or contracted with vendors to meet those needs.<sup>66</sup> Others have appointed a centralized point of contact for internal technical assistance.<sup>67</sup> The points of contact were empowered to review processes for using other languages, to establish translation and interpretation policies, and to implement procedures to maintain quality control of language services.<sup>68</sup> Additionally, some institutions have developed a translation and interpretation system, hired and trained individuals to speak other languages (at least for quality control when using translation services), and allowed consumers to set their language preferences on the institution's website.<sup>69</sup>

### Compliance Points and Considerations

The CFPB has stated that encouraging lenders to provide assistance to LEP consumers is "consistent with [its] mandate" under the Dodd-Frank Act to "ensure the fair, equitable, and nondiscriminatory access to credit."<sup>70</sup> Complying with the ECOA and serving LEP consumers can present issues, given certain restrictions under Regulation B. For instance, Regulation B prohibits lenders from making an oral or written statement that discourages a reasonable person from pursuing an application.<sup>71</sup> Advertising some products in a foreign language but other products in English, according to the CFPB, could discourage a reasonable person who is an immigrant from pursuing an application.<sup>72</sup> This may be true even if the product is not geared toward that consumer's needs. Lenders who want to serve LEP consumers, therefore, need to be mindful how their communications implicate Regulation B.

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<sup>65</sup> *Id.* at 15–16.

<sup>66</sup> *Id.* at 7.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 8.

<sup>70</sup> Supervisory Highlights, *supra* note 56, at 20.

<sup>71</sup> 12 CFR § 1002.4.

<sup>72</sup> Supervisory Highlights, *supra* note 56, at 22.

To comply with the ECOA and Regulation B, lenders should consider a variety of measures. First, they should consider expanding their language services infrastructure to effectively communicate with LEP consumers. Alternatively, they should consider contracting with reputable third-party vendors to provide these services. Second, lenders should consider the practices the CFPB identified in its 2017 spotlight report. Although the CFPB did not state that such practices are necessarily best industry practices or explicitly endorse them, the practices seemed to be viewed favorably by the Bureau. Third, lenders should avoid marketing some products in one language but not others. If a lender does decide to market certain products in English only or in another language only, it should have an appropriate and well-documented rationale for doing so. Finally, lenders should notify non-English speakers of other products marketed in English and notify them of the extent and limits of language services throughout the lifecycle of the product.<sup>73</sup>

## CONCLUSION

Nontraditional borrowers, such as DACA recipients, recent immigrants, and LEP consumers, are a growing and potentially significant segment of the mortgage lending market. When serving these consumers, mortgage lenders must bear in mind the numerous compliance parameters involved. In particular, lenders should design and implement their policies and procedures to ensure that they are complying with Regulation Z, the ECOA and Regulation B, the Fair Housing Act, and the FCRA, as well as the requirements for FHA-insured financing and GSE-purchase eligibility, among other laws, regulations, and GSE guidelines. Consultation with internal and external legal counsel on key issues will help lenders identify risk areas and solutions to the challenges presented.

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<sup>73</sup> *Id.* at 22.