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National Association of Federally-Insured Credit Unions

July 28, 2017

Federal Housing Finance Agency
Office of Housing and Regulatory Policy
400 7th St., SW, 9th Floor
Washington, D.C. 20219

RE: Improving Language Access in Mortgage Lending and Servicing Request for Input

Dear Sir/Madam:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), the only national trade association focusing exclusively on federal issues affecting the nation's federally-insured credit unions, I am writing to you in regard to the Request for Input (RFI) on Improving Language Access in Mortgage Lending and Servicing. Although NAFCU and its member credit unions support increasing access to mortgage credit for creditworthy borrowers, some of the ideas and various questions posed in this RFI are deeply concerning because, if implemented, they have the potential to impose a significant cost burden, heightened regulatory risk and potentially conflicting legal liabilities on mortgage lenders and servicers.

NAFCU implores the FHFA to ensure that any measures taken to assist limited English proficiency (LEP) borrowers do not create additional obligations or increase mortgage origination or servicing costs for credit unions. NAFCU encourages the FHFA to work with the government-sponsored enterprises (GSEs) and other federal agencies, such as the Department of Housing and Urban Development, to craft solutions to help LEP borrowers achieve greater access to and better understand of the housing market. To support this effort, the FHFA should develop a centralized system of publicly available translated mortgage materials as well as provide new resources and information about multi-lingual housing counseling services.

General Comments

Since the FHFA was created in 2008 to supervise, regulate, and provide oversight of Fannie Mae, Freddie Mac, and the Federal Home Loan Bank System, the agency's statutory mandate has required it to support access to credit across different market segments to provide creditworthy borrowers with homeownership opportunities. The agency's 2017 Scorecard requires the GSEs to identify major obstacles for LEP borrowers, find potential solutions, and craft a multi-year plan

for the GSEs to support improved access for such borrowers. Currently, over 25 million people in the United States do not communicate proficiently in English. Moreover, the U.S. Census Bureau's 2014 projections suggest that by 2060 the share of the American population that is foreign born will increase to 19 percent from today's 13 percent. Therefore, it is expected that, in the decades to come, the amount of LEP borrowers nationwide will continue to increase. With the number of people seeking homeownership who speak and read a language other than English steadily increasing, the FHFA is working to ensure meaningful access to the mortgage market for LEP borrowers. The GSEs currently offer various resources, such as translated origination documents, primarily in Spanish. Such documents include the Uniform Residential Loan Application (URLA), uniform security instruments, for example mortgages and deeds of trust, as well as notes and other origination-related documents. The GSEs also offer Spanish translations of servicing documents such as the Uniform Borrower Assistance Form. Although the GSEs and FHFA considered including a question about borrower language preference in the 2016 URLA, concerns from the mortgage industry regarding the operational and legal implications of such a question ultimately dissuaded FHFA from including the question at that time.

NAFCU and its member credit unions strongly support the GSEs' efforts to provide translated resources to assist LEP borrowers in the housing finance market, however, the onus to provide such materials and services should remain with the GSEs and the FHFA and not be shifted onto mortgage lenders and servicers. NAFCU is apprehensive that the approach explained in this RFI would mandate credit unions to do business in countless languages other than English. Such a result would create substantial regulatory risks and impose significant compliance costs on the industry. Credit unions do not have the depth and breadth of resources necessary to amend their processes and reprogram their systems to accommodate additional languages without incurring significant costs. Therefore, in pursuing activities to provide assistance to LEP borrowers throughout the mortgage life cycle, the FHFA must very carefully consider the potential effect on credit unions' bottom line.

Moreover, in order for the FHFA to truly ensure increased language access without increasing credit unions' already heightened regulatory risk, the Consumer Financial Protection Bureau (CFPB) should first provide clear, tailored, and reasonable rules for fair lending laws and its Unfair, Deceptive, or Abusive Acts and Practices (UDAAP) authority. NAFCU also questions whether the FHFA's 2017 Scorecard mandate to increase language access should be revisited in light of the Trump Administration's call to eliminate unnecessary regulatory burden. Given that this aspect of the Scorecard was not statutorily required by the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank Act), NAFCU requests the FHFA carefully review the burden that any language access requirements would have on the entire housing finance industry.

Potential New Obligations and Increased Costs

Every day, credit unions struggle to comply with a variety of new requirements in an ever-increasing regulatory environment. Although this RFI contains little detail about the potential changes to Fannie Mae and Freddie Mac's Selling and Servicing Guides (hereinafter collectively referred to as the "GSEs' Guides"), NAFCU and its member credit unions are worried that the ideas outlined in this RFI may force mortgage lenders who want to sell to the GSEs and mortgage servicers who want to service loans owned by the GSEs to do business in languages other than English. Requiring mortgage lenders and servicers to conduct business in languages other than English would undoubtedly impose tremendous compliance and operational burdens on credit unions.

Credit unions already devote an enormous amount of financial and operational resources to compliance. To implement the new language preference collection and disclosure ideas discussed in the RFI, NAFCU's member credit unions anticipate having to incur initial and ongoing costs to update their systems and amend their written and oral disclosures. Some credit unions may not have the financial or operational bandwidth to incur either the initial or ongoing costs. These credit unions may have no choice but to cease doing business with the GSEs, thereby exiting the secondary market and hindering their ability to offer new mortgage loans and related credit to consumers, many of whom have been denied access to homeownership by other lenders.

To avoid these unintended consequences, the FHFA must craft measures to assist LEP borrowers that do not impose new obligations on credit unions. Any changes to the GSEs' Guides should not include burdensome disclosure requirements that would inevitably force credit unions to reallocate already limited resources to comply with such new requirements. Changes to the GSEs' Guides should also not create duties that would impose significant costs on credit unions. As not-for-profit, member-owned cooperative financial institutions, credit unions manage to do a lot for their members with very little in terms of resources. Additionally, as member-owned institutions, credit unions are not the bad actors in the market seeking to take advantage of consumers' oversights or their LEP status; but are rather looking to provide fair and competitive products and services to suit their members' financial needs and goals.

The FHFA must also be careful not to create new, unrealistic expectations for borrowers. For instance, as a result of adding a question about language preference on the URLA, borrowers may actually be more confused because they will wonder why the question was even included if they will not also be receiving translation services and materials. The answer is not to require credit unions and other financial institutions to provide those translated services and materials; but rather to not include such a question in the first place. There are other means of gathering

data regarding borrower language preference, such as voluntary reporting through the FHFA or GSEs' websites. In fact, this alternative is preferable because it would include the population of prospective borrowers and not just those who have already filled out the URLA. The U.S. Census Bureau and the National Survey of Mortgage Originations also already provide broad datasets of borrower and prospective borrower demographics. Thus, another alternative would be to expand one or both of these existing datasets to include borrower language preference.

Potential Legal Liabilities

NAFCU has outlined the following areas of potential legal liability under federal law that the FHFA should evaluate in detail before pursuing any measures to assist LEP borrowers in the housing finance market: the *Fair Housing Act*; the *Equal Credit Opportunity Act* (ECOA); the CFPB's UDAAP authority; and the *Electronic Funds Transfer Act* (EFTA). This list is not exhaustive and there are other potential complications that may exist with federal laws relating to LEP borrowers. The FHFA should engage in a detailed analysis of how any changes to the GSEs' Guides may interact with these laws and the additional compliance burden these changes may ultimately impose on credit unions. NAFCU encourages the FHFA to only pursue language access initiatives that do not pose regulatory risks to credit unions.

Fair Housing Act and Equal Credit Opportunity Act

Last fall, HUD issued LEP guidance informing lenders of how the *Fair Housing Act* would apply to claims of housing discrimination.¹ The guidance mentions lenders on more than one occasion and, in the context of discriminatory effects liability, warns that "refusing to allow an LEP borrower to have mortgage documents translated, or refusing to provide the borrower with translated documents that the lender or mortgage broker has readily available, is likely not necessary to achieve a substantial, legitimate, nondiscriminatory interest." By failing to provide language assistance services to LEP persons under federal, state or local law, or by contract, the guidance explains, a "housing provider" may be discriminating based on national origin.

Although this guidance does not mean a lender would be subject to a *Fair Housing Act* violation or that a lender may face increased complaints and investigations, it certainly clarifies HUD's position on discrimination against LEP borrowers and calls attention to a lender's responsibilities under the Act. This guidance also serves as an example of a federal agency trying to use language as a proxy for national origin, when, in fact, language is not always conclusive of an individual's national origin. Attempting to use a proxy to enforce fair lending laws has the

¹ U.S. Department of Housing and Urban Development, *Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency*, 2016, <https://portal.hud.gov/hudportal/documents/huddoc?id=lepmemo091516.pdf>.

potential to not only cause inaccurate findings, but also expose credit unions to unnecessary legal and reputational risk. The FHFA should work closely with HUD before proposing changes to the GSEs' Guides to focus on aligning any proposed changes related to LEP borrowers with the requirements of the *Fair Housing Act*.

Similarly, the ECOA does not explicitly prohibit discrimination based on language, but its mandate to "promote the availability of credit to all creditworthy applicants" raises issues related to mortgage offerings to LEP borrowers. ECOA's implementing regulation, Regulation B, makes it unlawful for any creditor to discriminate against consumers based on their status as part of a protected class, including national origin. Regulation B allows consumer disclosures to be provided in languages other than English, but those disclosures must also be available in English upon request. Additionally, a lender must ensure that non-English disclosures offer the same services as those offered in the English language disclosure or risk violating ECOA's disparate treatment prohibition. The FHFA must ensure that any proposed disclosure requirements do not conflict with or complicate compliance with ECOA.

Unfair, Deceptive, or Abusive Acts and Practices

In recent years, the CFPB has been very active in pursuing enforcement actions and litigation, particularly based on their UDAAP authority under the Dodd-Frank Act. NAFCU is concerned that merely asking a question about a borrower's language preference may open the floodgates to liability under the "abusive" standard. As a result, a borrower may argue that a credit union knew of the borrower's language preference and took advantage of their lack of understanding and inability to protect their own interests in the negotiation of the mortgage terms.

The CFPB has yet to provide any additional definitive guidance on the "abusive" standard and is instead using its enforcement actions and civil suits as a way to generally define UDAAP practices. This ambiguity drastically amplifies the threat of liability and has forced credit unions to devote endless amounts of time and money to compliance efforts. If the FHFA were to add more compliance burdens for credit unions related to assisting LEP borrowers, NAFCU requests that the FHFA provide very detailed compliance guidance to assist credit unions as much as possible and to help them avoid costly liability under the CFPB's UDAAP authority. NAFCU also requests that the FHFA work with the CFPB to help provide better guidance on UDAAP and specific requirements related to mortgage origination and servicing of loans for LEP borrowers.

EFTA and Additional Considerations

Another federal law that provides protection to LEP borrowers is the *Electronic Funds Transfer Act*. The EFTA covers, in relevant part, automated clearinghouse systems, telephone bill

payment plans and personal computer banking programs. If a borrower has set up electronic mortgage payments from an outside financial institution, that outside institution would be required to provide certain disclosures to the borrower. Furthermore, the credit union receiving the mortgage payment would be responsible for following certain error resolution procedures with regard to, for example, additional or incorrect payments. Much like ECOA, the EFTA provides that disclosures may be made available in a language other than English so long as they are also available in English. The EFTA also provides that if a financial institution chooses to advertise in a foreign language, it must provide disclosures in both English and the foreign language. If the FHFA pursues changes to the GSEs' Guides to assist LEP borrowers in the mortgage process, it must consider the interplay with EFTA's disclosure requirements so as to not mandate duplicative requirements or measures that will only confuse borrowers instead of helping to clarify the mortgage process.

Another important consideration is how various state requirements may interact with federal regulations and any new rulemaking pertaining to LEP borrowers. For example, states such as California and Oregon require lenders to follow certain practices when offering mortgage loans and services to LEP borrowers, such as providing mortgage documents in the borrower's preferred language if the negotiations for a mortgage are conducted in that language. The FHFA must carefully consider the interplay between these requirements, other relevant state laws, and any new rulemaking in terms of potential legal liability for credit unions providing products and services to LEP borrowers.

Providing New Translated Materials and Services

Rather than creating new obligations and liabilities on mortgage lenders and services, the FHFA, as part of a short and long-term approach to improving language access, should work with the GSEs and other federal agencies to provide educational opportunities and resources for LEP borrowers. The first step should be to provide more public education measures to inform borrowers and the industry of existing services and materials and where to find them and what new resources may become available. The FHFA may also want to consider increasing awareness through public education programs of multi-lingual housing counseling services.

The FHFA should also provide translations of more origination and servicing documents into languages commonly spoken by LEP borrowers and instruct the GSEs to provide updates to their Guides to accommodate these language needs. Requiring lenders to assist LEP borrowers with their own translation services without accompanying translated GSE materials simply does not work. NAFCU encourages the FHFA to collaborate with the CFPB, HUD, and the Department of Veterans Affairs to provide additional materials and services instead of placing the responsibility on credit unions to spend valuable time and money on translation services.

NAFCU also supports the creation of a centralized clearinghouse of resources to serve LEP borrowers. Having all available resources in one place would make navigating the home-buying process much simpler for LEP borrowers. NAFCU does not, however, support efforts that would establish originator or servicer best practices or any other initiatives that would require credit unions to devote a considerable amount of time and resources from their day-to-day mission in helping their members achieve financial success.

Conclusion

NAFCU appreciates the opportunity to provide our comments regarding the FHFA's Request for Input on Improving Language Access in Mortgage Lending and Servicing. If you have any questions or concerns, please do not hesitate to contact me at (703) 842-2212 or akossachev@nafcu.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Ann Kossachev". The signature is fluid and cursive, with the first name "Ann" and last name "Kossachev" clearly distinguishable.

Ann Kossachev
Regulatory Affairs Counsel