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Federal Housing Finance Agency
Office of Housing and Regulatory Policy
400 7th Street, S.W., 9th floor,
Washington, D.C., 20219

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

Dear Director Watt:

The Housing Policy Council (HPC) of the Financial Services Roundtable¹ appreciates the opportunity to respond to FHFA's Request for Input (RFI) on Improving Language Access in Mortgage Lending and Servicing. Ensuring consumers have access to mortgage credit and understand the terms of that credit is a top priority for HPC. HPC wants to emphasize that our members are keenly aware of the very serious nature and significance of this FHFA request and stand ready to work with FHFA and other regulators, federal agencies, consumer advocates, and the mortgage industry to ensure that any steps taken to expand access for borrowers with Limited English Proficiency (LEP) are thoughtful, productive, and mitigate the risks to all parties involved.

HPC agrees with FHFA's intent to carefully consider the role of Fannie Mae and Freddie Mac (the GSEs) in establishing new LEP standards or guidelines, given the broad array of other mortgage-related lending regulations that interplay with GSE guidance. HPC supports FHFA's decision to exclude the language preference question from the 2016 redesign of the Uniform Residential Loan Application (URLA) as well as the alternative method FHFA proposed to collect relevant information through the National Survey of Mortgage Originations and the American Survey of Mortgage Borrowers. This alternative solution is a practical and efficient way to gather useful information on LEP borrowers.

In response to the RFI itself, our comments articulate HPC's concerns with:

- a. Implementing a language preference requirement in the URLA that would trigger numerous and unclear regulatory obligations, increased operational and legal

¹ The Housing Policy Council (HPC) is a division of the Financial Services Roundtable. Our members are 32 of the leading national mortgage lenders, servicers, mortgage insurers, and title and data companies. HPC advocates for the mortgage and housing marketplace interests of its members in legislative, regulatory, and judicial forums. For additional information, visit: <http://www.fsroundtable.org/category/hpc/>



- risk, and costs without demonstrably contributing to increasing LEP borrowers' access to credit;
- b. the operational challenges for an industry that has no pre-existing infrastructure to establish the extensive translation services suggested by this RFI;
 - c. the potential negative impact on smaller lending institutions, some of which have a competitive advantage today, specializing in serving particular LEP communities, but who, for the most part, cannot afford the expense of building out extensive processes and practices to offer full-cycle lending in multiple languages; and
 - d. the need for interagency regulatory coordination to ensure policies are clear and do not present compliance or operational risks that will decrease the availability or cost of mortgage credit

Legal and Liability Challenges

The RFI raises a range of legal and liability issues for originators and servicers. Once the language preference is stated, lenders and servicers are on notice that the consumer prefers communications in that language, and under current law, it is unclear whether the lender/servicer has legal liability if it then fails to communicate in that language. For example, the Dodd Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) requires that product or service features be fully and accurately disclosed to the consumer.² Disclosure in any but the preferred language may expose the lender or servicer to legal and regulatory actions, particularly under the Dodd-Frank prohibitions of unfair, deceptive or abusive acts or practices (UDAAP),³ the Federal Trade Commission Act's prohibition of unfair or deceptive acts or practices (UDAP),⁴ or similar state-level prohibitions.

Both UDAAP and UDAP have been broadly interpreted by the Consumer Financial Protection Bureau (CFPB) and enforced in a variety of lawsuits. Unfair acts are those likely to cause injury, not reasonably avoidable, and not outweighed by countervailing benefits. Deceptive acts are those that mislead in a material way. Specific to UDAAP, abusive acts are those that interfere with the ability of a consumer to understand a term or condition, or take unreasonable advantage of a consumer's lack of understanding, inability to protect his or her interests, or reasonable reliance on a person to act in his or her best interests. If a consumer cannot understand English, yet

² 12 U.S.C. § 5532(a) (authorizing the CFPB to prescribe regulations to ensure that the features of any consumer financial product or service are fully, accurately, and effectively disclosed to consumers).

³ 12 U.S.C. § 5531.

⁴ 15 U.S.C. § 45(a).



all communications are in English, the risk to the creditor under either UDAP or UDAAP could be substantial.

Similarly, the Equal Credit Opportunity Act (ECOA) prohibits discrimination in credit transactions based on the consumer's national origin,⁵ and there is some case support for the argument that language is a proxy for national origin, including Fair Housing Act guidance issued by HUD in 2016.⁶ HUD stated that LEP borrowers are not a protected class under the Fair Housing Act, but any inequitable treatment of an LEP consumer could be viewed as a pretext for discrimination of a protected class. As a result, practices that appear to discriminate based on the prospective borrower's language, or even merely result in disparate impact, may potentially be considered an ECOA or Fair Housing violation. Any approach taken on LEP related issues must therefore be flexible enough to allow lenders and servicers to serve all customers equally, regardless of the language they happen to speak.

The situation is exacerbated for lenders who market in a particular "non-English" language to a known LEP population. Ultimately, the ideal policy would allow lenders flexibility to market in *any* language, in their market area, to allow increased outreach to LEP borrowers. Tying burdensome compliance obligations to this type of marketing would likely discourage community outreach, rather than encourage it.

For companies that offer a broader set of consumer lending products, a change in mortgage policy for LEP borrowers could be misconstrued by a consumer to extend to other forms of financial products. Policy-makers should understand these implications and establish policy guardrails to prevent or parameters to address the exposure a lender could sustain if they offer mortgage documents and/or accommodation in a non-English language for mortgages, but car loan documents/accommodations only in English to the same consumer.

The legal issues, arising from unclear regulatory obligations, could create secondary market impacts, including: 1) the risk of potentially impairing the liquidity of mortgages or the related servicing rights when a loan application indicates language preference, 2) the potential need for additional disclosure obligations to mortgage investors or successor servicers arising from a language preference indication in the mortgage file, 3) increased operational complexity, compliance and legal risk increasing servicing costs, and 4) purchaser or assignee liability risks.

⁵ 15 U.S.C. § 1691.

⁶ HUD Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency, Sept. 15, 2016, <https://portal.hud.gov/hudportal/documents/huddoc?id=lepmemo091516.pdf>.



While FHFA proposed adding a question to the Uniform Residential Loan Agreement, along with a statement that the borrower providing a language preference does not obligate the lender to provide documents in that language, it's questionable whether that approach offers full protection from the UDAAP, UDAP, Fair Lending, or other risks mentioned above. It does not bind other federal or state agencies, nor does it bind private litigants or even a subsequent FHFA Director. Even to the extent legal liability is avoided, it certainly does not limit the potential for reputation endangering stories or reports.

These liability challenges must be fully considered by FHFA as well as other regulators before any action is taken. We urge FHFA to hold discussions on these issues with other regulators, both federal and state, as well as interested parties, including mortgage originators, servicers and community organizations. Without full consideration, understanding, and mitigation of these risks, lenders and servicers would be faced with a significant potential for litigation and reputational harm.

Operational Challenges

The housing finance industry of today does not have appropriate infrastructure – personnel, systems, and basic business practices – to manage full life-cycle mortgage operations in multiple languages. While some companies have staff and documents designed to serve specific non-English speaking populations, these arrangements are not typical. Further, companies that offer these services generally specialize in reaching customers who speak only one or two of the more dominant languages (e.g., Spanish or Chinese). Even these companies, which have a first-hand appreciation for the various parts of the lending process that may need to be adapted, would have tremendous difficulty setting up a full-scale service in a multitude of languages.

To illustrate the immense challenge of complying with such a change, consider the fact that the number of documents, per file, which are required to facilitate an origination alone can range anywhere from 50 to 100 and the number of pages those documents contain can often exceed 500.⁷ These documents would need to be tailored in lender systems to each version of each product and then to each language, and to make matters more complex, variations of each language. In short, requiring that documents be translated into multiple languages means potentially tens of thousands of pages of legal documents which would need to be translated (and supported by customer service) for originating and servicing in languages other than English.

Existing industry platforms would need substantial modification to be able to support the breadth of lending activities affected by such a change - from loan application through servicing. To do this well, the lending community would need to

⁷ Figures based on unscientific survey of HPC members



dedicate a tremendous amount of resources and research to ensure the efficacy of any new practices. Further, the third-party vendors and business partners involved in mortgage lending would be required to make significant upgrades to technology, processes, and documents as well. As we saw with the roll-out of the new TILA/RESPA Integrated Disclosure Forms, the broad-based adoption of a policy change of this magnitude is resource-intensive, costly, and affects a multitude of organizations.

The research required to enable the mortgage industry to dramatically expand its capabilities to serve customers in multiple languages must include an assessment of existing models from other industries, like health care or legal services. A good first step may be to compile information on other models, answering the following types of questions: What other industries have adopted a multi-lingual approach to customer service (voluntarily or by law)? Do other industries have the type of document-intensive processes that mortgage origination and servicing require? Do they rely on external, independent translation services? How do they assess the quality of those services? Are there reliable credentials and standards that could be used to identify companies or individuals that provide high-quality services? Do these types of services warrant their work? Do companies that are required to assist non-English speaking consumers collaborate to procure translators, perhaps through shared service providers or call centers? Are there any effective technologies being used for these types of services? What lessons have been learned in these other industries that could be applied in the mortgage industry?

Impact on Smaller Lenders

HPC recommends that FHFA consider the impact of new GSE guidance on smaller institutions, which have fewer resources available to execute against any LEP service mandate. Although HPC members are larger institutions, virtually all HPC companies engage in commerce with small- to mid-sized lenders – from acquiring or servicing loans originated by these companies, to offering settlement services or various forms of technological support, to providing mortgage insurance or other forms of credit enhancement. These business relationships are critically important to HPC members and HPC wants to preserve and protect the role of these partners in reaching traditionally underserved borrowers and communities.

In fact, it is highly likely that many of these small and mid-sized lenders have the greatest reach into the LEP population that the FHFA is suggesting could be better served. Yet, these companies have fewer resources that could be devoted to a broad-based mandate, by virtue of their size - with a lower volume of loans, fewer staff, and less capital available for this type of investment.

While there is broad agreement that the overall health and resilience of the marketplace depends on the continued contribution of lenders of all sizes, many small



and mid-sized lenders have struggled under the regulatory burden imposed since the financial crisis. A vibrant marketplace should include a diverse array of lending institutions, including these smaller, community-based institutions and local credit unions. In spite of the excellent intentions of a requirement to serve LEP borrowers in a specific way, FHFA should heed the lessons learned from the unintended consequences of expanded regulatory mandates on smaller companies that are not equipped to absorb the additional costs and resource burdens.

Therefore, HPC recommends that any policy proposals carefully evaluate and consider the implications of a new broad set of requirements on the very companies who are best-positioned and best-suited to serving the LEP community. HPC would like to work collaboratively with FHFA and other agencies and regulators to enhance service for LEP borrowers, while also protecting and supporting institutions that lack the capacity to perform services in multiple languages.

Need for Interagency Regulatory Coordination

The GSEs have played a significant role in setting standards for the housing finance system as a whole, a role that many view as similar to that of a regulator. However, it is critically important to recognize that this is not the primary role of the GSEs. Guidance issued by the GSEs is intended to set risk management parameters that protect the GSEs from excessive losses. As such, GSE guidance must align with and operate within the actual federal and state regulatory framework.

HPC recommends that FHFA ensure that any new LEP-related guidance is developed with full engagement of the regulators who supervise the lending activities of financial institutions involved in the mortgage market. We believe that active participation from the following regulators and government entities, at a minimum, is critical:

- a) Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), the Federal Reserve Board (FRB), and the National Credit Union Administration (NCUA), which examine for violations of ECOA for institutions with assets of \$10 billion or less.
- b) The Consumer Financial Protection Bureau (CFPB), which issues regulations affecting all institutions and examines institutions with assets of more than \$10 billion for violations of ECOA.
- c) The Department of Housing and Urban Development (HUD), which enforces the provisions of the Fair Housing Act, and the Department of Justice (DOJ), which litigates these and other laws in which national origin might be relevant.
- d) State regulators with specialized and distinct rules regarding the administration of lending products in non-English languages, such as the



California Department of Financial Institutions, responsible for state banking regulation.

FHFA's exploration of LEP, per this RFI, represents an issue of major systemic significance, not simply an additional question on the URLA. We feel strongly that the subject must be evaluated for systemic consideration by the various relevant regulators, through a collaborative and consultative process.

Conclusion

HPC agrees with FHFA that it is important to review how to most effectively serve consumers with limited English proficiency and appreciates the opportunity to respond to the RFI. However, HPC members strongly recommend that FHFA, working with the housing finance industry, consumer advocates, and other regulators dedicate time and resources to gather and digest critical information and insight necessary to determine how any new policies fit within the existing regulatory framework and how best to set any new standards and create the appropriate infrastructure to meet the needs of the LEP population.

HPC wants to assist in an on-going productive dialogue on this important issue. To help support the effort, the Housing Policy Council would be happy to host a forum with FHFA and other stakeholders to discuss the best methods to advance progress in serving LEP customers in the most effective manner possible. If you have any questions or would like to discuss our comments, please contact Meg Burns, SVP for Mortgage Policy, at 202-589-1926.

Yours truly,

Edward J. DeMarco
President
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