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Federal Housing Finance Agency
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Comments on the Federal Housing Finance Agency's Request for Input on Improving Language Access in Mortgage Origination and Servicing Submitted by Americans for Financial Reform's Language Access Task Force

Introduction

Americans for Financial Reform (AFR)'s Language Access Task Force submits the following comments in response to the Federal Housing Finance Agency (FHFA)'s Request for Input (RFI) on Improving Language Access in Mortgage Lending and Servicing issued May 25, 2017. AFR is a nonpartisan and nonprofit coalition of more than 200 civil rights, consumer, labor, business, investor, faith-based, and civic and community groups. AFR's Language Access Task Force was convened to advocate for improved language access for borrowers with limited English proficiency (LEP borrowers) as they navigate the financial marketplace. For the past two years, our task force has been focused specifically on improving language access in mortgage lending and servicing, the very subject of this RFI. We thank FHFA for the opportunity to provide input on this very important issue.

Other organizations that collaborated on these comments include the Connecticut Fair Housing Center, Consumer Action, Empire Justice Center, Mobilization for Justice, Inc., National CAPACD, National Consumer Law Center (on behalf of its low-income clients), National Fair Housing Alliance, and National Housing Resource Center.¹

As the demographics of the United States evolve, the number of U.S. residents for whom English is not a first language and who speak English with limited proficiency has become quite substantial. In 2015, approximately 25.4 million individuals, nearly 9 percent of the U.S. population, were considered LEP. Approximately five-sixths (83.3%) of all LEP residents speak one of eight languages: Spanish, Chinese, Vietnamese, Korean, Tagalog, Russian, Arabic, and Haitian Creole. About 64.2% of the LEP population speaks Spanish, followed by Chinese,

¹ More information about AFR and each contributing organization is provided in Appendix A.

spoken by 6.8% of the LEP population.² The remaining 12.4% represents 3.1 million people who speak the other 6 languages listed above.

Because the mortgage market is aimed primarily at English language speakers, people with limited English proficiency may be confused about the products and services marketed to them. They often encounter barriers to making well-informed decisions and are vulnerable to abusive practices. It is imperative that we protect borrowers for whom English is not a primary language. Just as racially discriminatory housing practices prevent minorities from fully realizing the American dream of homeownership, refusing to provide language assistance to non-English speakers as they attempt to navigate the murky waters of the mortgage market similarly prevents entire communities from enjoying the same opportunities for economic growth and social mobility as their English-speaking counterparts.

Full access to the mortgage market remains a formidable challenge for LEP borrowers. Many industry players conduct market research to tailor their sales pitches to members of the LEP community, including advertising financial products to LEP borrowers in their own languages. However, once LEP borrowers are sold the product, too often they receive complicated financial information regarding all of the important terms in English. They may have to rely on children to understand legal terms and other highly-specialized terminology.³

The burden of interpreting financial services jargon and communicating with lenders and servicers should not rest solely on borrowers. Many times it is the process of borrowers translating or interpreting for themselves that obscures key details about the loan and puts them at risk of receiving a loan they can't afford. Even if a family is able to get help reading English-only form letters or other documents, they are often still hampered in talking with employees who only speak English.⁴

Expanding access to language services throughout the mortgage process would begin to equalize a system that currently undermines the ability of LEP borrowers to understand the complexities of their future homeownership prospects and to protect their home after purchasing it. Failure to

² U.S. Census Bureau, *2011–2015 American Community Survey 5-Year Estimates*, American Community Survey (Washington, DC: U.S. Census Bureau) Table B16001D (accessed July 27, 2016). Note this survey is performed in-language for many LEP individuals.

³ Americans for Financial Reform, *Issue Brief: The CFPB and Other Federal Agencies Should Adopt Strong Language Access Protections for Homeowners and Other Consumers* (May 2016) http://ourfinancialsecurity.org/wp-content/uploads/2016/05/AFR_LEP_Issue_Brief_05.26.2016.pdf.

⁴ See, e.g., *Barriers to Language Access in the Housing Market: Stories from the Field* (May 2016), available at http://ourfinancialsecurity.org/wp-content/uploads/2016/05/AFR_LEP_Narratives_05.26.2016.pdf.

provide adequate language access to LEP borrowers results in an insidious form of disenfranchisement.

In neighborhoods across the country, networks of community-based organizations help thousands of LEP families who have been targeted for sales and services but abandoned when they run into trouble. LEP borrowers need in-language access to the financial system and need to know their rights before, during and after the transaction. While lenders seek business from these emerging markets, it is essential that they provide the customer support needed to grow a healthy market sector that also benefits communities. They must adjust and improve their business practices to meet their customers' diverse needs at all stages of the process.

Full access for limited English proficient people is particularly important in the mortgage market because of the importance of homeownership in creating wealth and contributing to family and community stability. Studies have shown that purchasing a home is often accompanied by a renewed engagement in community life; the long-term stability that a home provides allows homeowners to participate more fully in public life. Homeownership has long been associated with the acquisition of capital, status, class, influence, and stability in American life. An affordable mortgage allows homeowners to concentrate on building up other forms of social and economic capital; being saddled with an unaffordable loan due to a lack of understanding of the terms destabilizes the progress LEP borrowers are currently striving to make. Failure to provide the language access necessary for LEP borrowers to fully participate in the mortgage market infringes on their ability to obtain a responsible financial product and understand the terms of their contract.

Twenty years ago, banks provided limited in-language services to LEP communities, but they saw it as a burden and not a market opportunity. That dynamic has changed dramatically as the demographics of the future pool of new first-time homebuyers have changed. Bank executives are very aware of those changing demographics. Now, when advocates raise the value of serving LEP populations at meetings, bankers do not need to be convinced to serve this market, but want to talk to advocates about the details of how to create efficient systems to reach these populations. Banks – ranging from the largest, to mid-sized regional banks, to small local banks – already know that this is a vital demographic that they need to reach as part of their business strategy. This is true even in communities that don't have the significant concentrations of immigrants that exist in some of the larger cities. This appreciation extends from senior management to those closer to the customers, actively delivering the mortgage products. FHFA can play a critical role in supporting lenders in making this jump and ensuring that LEP communities are served effectively and with clear communication.

We recommend that FHFA and the Enterprises take the following steps for improving language access in the mortgage market:

- Require lenders and servicers to ask about language preference and track language preference throughout the life of the loan;
- Provide and mandate use of translated disclosures;
- Require and support oral interpretation, by connecting housing counseling agencies with lenders and servicers and providing training and resources to bilingual staff and third-party oral interpreters;
- Facilitate acceptance of non-English or translated documents, in addition to English versions;
- Create and promote resources, including through a clearinghouse;
- Develop policies with stakeholders through a working group.

Each of these recommendations is discussed in greater detail throughout these comments as we address each section of the RFI.

A. Existing Processes and Tools

1. Loan Originators and Servicers are Using a Number of Processes and Tools to Promote Language Access, but Their Use is Uneven.

FHFA begins the RFI by asking for information about what processes and tools are already in use today by mortgage originators and servicers to facilitate the origination and servicing of mortgages for LEP borrowers. Surveys and anecdotal evidence from housing counselors, legal aid lawyers, and other advocates show that the current use of processes and tools by mortgage lenders and servicers to promote language access for LEP borrowers is uneven. Some lenders and servicers are employing helpful strategies that could serve as a model for the industry. Others are doing nothing to attempt to meet the language needs of borrowers with limited English proficiency, or are making inadequate efforts in this regard.

Reports from housing counselors and attorneys representing LEP consumers suggest that consumers sometimes have difficulty obtaining translated documents and oral interpretation (or access to bilingual loan officers and processors) in the mortgage origination process. However, advocates also report that some originators are using strategies like employing bilingual loan officers, using a language line to serve applicants who speak less common languages, and providing translations of the key loan documents into the borrower's preferred language. We have heard from regional banks, mid-sized lenders, and small lenders who are seeking to employ more bilingual loan officers, for example, to reach more LEP consumers.

In the servicing arena, the industry track record is also mixed. NHRC has conducted a number of surveys asking housing counselors and other advocates how well mortgage servicers are

meeting the needs of borrowers with limited English proficiency. In a 2015 survey⁵ of housing counselors, with 169 respondents, counselors were asked to rate eleven different servicers on how well each one provided written communications in borrowers' preferred languages. On a scale of 1 (poor compliance) to 5 (strong compliance), the average servicer rating was a 2. Counselors rated servicers even more poorly with respect to their ability to speak with borrowers in the borrower's preferred language, with the average rating being just 1.5 out of 5.

In a separate survey of counselors, with 163 respondents,⁶ 48% of respondents reported that servicers "rarely" or "never" provide written communications in the LEP borrower's preferred language, and 44% reported that LEP borrowers were "rarely" or "never" assigned a point of contact at the servicer who was fluent in the borrower's preferred language. In a recent national survey of counselors and attorneys conducted by NCLC, over half of respondents stated that they were seeing borrowers with limited English proficiency who were struggling to get clear information related to servicing or loss mitigation because of a lack of access to translated notices or oral interpretation.⁷

Some servicers are providing bilingual point of contact staff who have no specific knowledge of the borrower's case and who are, therefore, not able to adequately answer the borrower's questions. For example, one counselor reported in a survey⁸ that "All communications are in English with a note at the end, 'This document is important, call us to translate.' However, when the client follows through with a phone call, he receives general information in relation to the letter, but the servicer representative is unable to provide him any targeted information about his specific loan." It is crucial that servicers ensure that bilingual staff have access to account information and the ability to answer borrowers' questions.

A number of lenders and servicers have begun to provide translations of key documents and disclosures, such as the Loan Estimate (at the origination stage) or the periodic mortgage statement (at the servicing stage). However, too many market participants still refuse to provide

⁵ National Housing Resource Center, *Servicer Compliance with CFPB Servicing Regulations* (survey conducted October, 2015; 169 respondents).

⁶ National Council of La Raza and National Housing Resource Center, *Are Mortgage Servicers Following the New Rules?: A Snapshot of Compliance with CFPB Servicing Standards* (survey conducted June-Aug. 2014; 163 respondents).

⁷ National Consumer Law Center, National Survey of Consumer Advocates (June 2017), Appendix A to NCLC's Comments to the CFPB regarding its RESPA Mortgage Servicing Assessment, available at: www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/comments-to-cfpb-servicing-assessment-respa.pdf. The survey pulled responses from 233 consumer advocates, including 171 housing counselors, 49 attorneys, and 13 employees of other nonprofits.

⁸ National Council of La Raza and National Housing Resource Center, *Are Mortgage Servicers Following the New Rules?: A Snapshot of Compliance with CFPB Servicing Standards* (survey conducted June-Aug. 2014; 163 respondents).

readily available translations or to accept documents in languages other than English, even when the documents are official federal forms that are available in other languages. In the previously referenced survey,⁹ 23% of respondents said that mortgage servicers “always” or “often” refuse to accept official U.S. government documents that are approved for use in languages other than English, such as the IRS’s form to request a transcript of a tax return (Form 4806-T) and the now-retired HAMP Request for Mortgage Assistance. This refusal to accept documents in languages other than English puts the burden on the borrower to seek out translation services and may result in a borrower foregoing the opportunity to apply for credit or for much-needed loss mitigation.

In the experience of many advocates, lenders are very adept at marketing mortgage products to borrowers with limited English proficiency in languages other than English. However, when the time comes to process a loan application or communicate with the borrower after the transaction is closed, problems too often arise with lenders and servicers failing to meet the language needs of their LEP customers. The uneven experience of LEP consumers across the marketplaces shows that providing language access is possible, but that more must be done, especially by the Enterprises, to make access for LEP borrowers more routine.

2. Other Mortgage Industry Participants, Such as Counselors, are Using Processes and Tools in Ways that Could be a Model and a Resource for Lenders and Servicers.

FHFA has also requested information on the processes and tools that are currently in use by other market participants, such as housing counselors and other advocates. Many HUD-approved housing counseling agencies do an excellent job of providing counseling services in the languages that are commonly spoken in their communities. In a recent survey with responses from 264 counselors,¹⁰ 97% of respondents said their agency provides counseling services in Spanish. A large number of languages that are commonly spoken in particular areas are also represented by HUD-approved counseling agencies. For example, nine percent of agencies reported providing counseling services in Vietnamese and eight percent reported providing counseling in Chinese.

In addition to providing counseling in languages that are commonly spoken in their communities, counselors often play the role of interpreter for their LEP clients in their interactions with mortgage lenders and servicers. Counselors are even more effective interpreters than interpreters from language lines, because they understand the mortgage origination and loss mitigation processes. Housing counselors report that language line interpreters sometimes lack the expertise necessary to interpret in the specific context of mortgage origination and loss

⁹ *Id.*

¹⁰ Unpublished survey conducted by National Housing Resource Center (survey conducted Dec. 2016 through Feb. 2017; 264 respondents).

mitigation. Additionally, counselors who provide counseling in languages other than English reported that they regularly translate documents for their LEP clients because, as previously discussed, servicers often refuse to accept documents in languages other than English, and often do not provide documents to LEP borrowers in their preferred language.

Where counseling agencies are unable to provide counseling in their client's preferred language, counselors typically rely on language lines. Language lines are relatively inexpensive and accessible services that provide oral interpretation in a large number of languages. These services are imperfect, but nonetheless provide counseling agencies the ability to meet the basic language needs of their LEP clients when the agency does not have the capacity to do so in-house.

Legal services organizations also employ bilingual staff, language lines, and translation of documents to serve their LEP clients who are facing challenges in the mortgage application or loss mitigation process. The experiences of attorneys mirror those of housing counselors; that although language line employees sometimes are unfamiliar with particular terms of art, they can still assist consumers in obtaining information. If the use of their services by the mortgage industry increases over time, language line companies may develop resources and devote additional training to help their staff with the translation of terms common in mortgage lending and servicing. However, the Enterprises can accelerate this process and ensure a minimum level of subject matter competence across all language line companies by establishing standards for interpreters used by their originators and servicers and requiring originators and servicers to make language interpretation services available to their LEP clients.

3. Originators and Servicers Do Not Have a Uniform Means of Learning About a Borrower's LEP Status, and Borrowers Go Without Language Access as a Result.

FHFA also asks how and when originators, servicers, and other mortgage industry participants typically learn that a borrower is LEP. In our experience, originators and servicers generally do not have any formal process for learning whether a borrower has limited English proficiency or what a borrower's preferred language is. Even when an originator does come to learn this information, many lenders do not have any mechanism by which this information can be recorded in the loan file and subsequently shared with the mortgage servicer. As subsequent sections will discuss in greater detail, we believe it is critical to ask questions about whether the borrower has a preferred language other than English and if so, it is necessary for this information to travel with the loan file throughout the life of the loan. Asking about language preference at the outset will enable the initial servicer and subsequent transferees to provide language access where they have the capacity to do so.

B. Current Barriers to Addressing Language Access

1. FHFA Should Acknowledge that There is No Meaningful Distinction Between Borrowers Whose Preferred Language is Other than English and LEP Borrowers, and Should Require Lenders and Servicers to Allow Consumers to Self-Identify.

FHFA has asked in its RFI whether the same barriers that apply to LEP borrowers also apply to so-called “preferred language” (or PL) borrowers. All of the barriers LEP borrowers encounter in the mortgage market are equally applicable to borrowers whose preferred language is other than English. The distinction between PL and LEP borrowers is not meaningful in practice. The RFI defines PL borrowers as those who are “able to read, speak, write and understand English but prefer to communicate in a language other than English.”¹¹ However, whether or not a borrower speaks some English, expressing a preference for communicating in another language is an indication that, at least for mortgage market transactions, the borrower’s command of the English language is limited, and thus the borrower is LEP. Borrowers may know sufficient English to handle everyday matters, yet lack the proficiency in English to be confident of their ability to fully comprehend the details of a mortgage transaction conducted solely in English. For example, borrowers relatively proficient in English in other contexts often still prefer in-language documents in a mortgage transaction, because they want to make sure they understand everything they are signing.¹²

Our recommendations for improving language access in mortgage lending and servicing are based on an applicant or borrower’s language preference, rather than based on a supposed measure of actual proficiency. We urge FHFA and the Enterprises to focus on the language preference of borrowers when mandating services and offering resources. Assessment of language proficiency is both unworkable and may inadvertently promote potentially discriminatory behaviors. The borrower is in the best position to assess whether or not she is comfortable entering a major financial transaction entirely in English or with assistance in her preferred language. Therefore, the PL/LEP distinction should be eliminated entirely in FHFA’s assessment of how to improve language access in the mortgage market. Borrowers should be the ones to make the identification that they prefer to conduct mortgage-related transactions in another language and on that basis, receive available services in-language.

¹¹ Federal Housing Finance Agency, *Improving Language in Mortgage Lending and Servicing Request for Input* (May 25, 2017), p. 2.

¹² Kleimann Communication Group for Freddie Mac and Fannie Mae, *Language Access for Limited English Proficiency Borrowers: Final Report* (April 2017, finalized June 2017), Available at: <https://www.fhfa.gov/PolicyProgramsResearch/Policy/Documents/Borrower-Language-Access-Final-Report-June-2017.pdf>.

2. Barriers Exist in Mortgage Lending for LEP Borrowers throughout the Mortgage Cycle.

LEP borrowers face significant barriers throughout the entire lending process. These barriers begin even before origination, as LEP consumers shop for different loan products. In general, LEP borrowers encounter several barriers at origination that continue throughout the life of the mortgage loan.

Because navigating the mortgage market requires an understanding of the lending process and its complex terminology, it is often an overwhelming experience for consumers. This challenge is only compounded for LEP borrowers by their limited grasp of the English language. LEP borrowers often have difficulty understanding the pre-approval process or how to compare different mortgage loan options. Additionally, many desirable mortgage products are only advertised in English, and therefore LEP communities may not be aware of their availability. Some lenders target LEP communities with specific marketing, but do not provide the support needed for LEP borrowers to fully comprehend the marketed product or the related documents presented to them.

At origination, LEP borrowers often enter into mortgage loans without understanding the terms of the contract due to the lender's failure to communicate with them in a language they can understand. All of the pertinent documents, including all of the important terms, are often only in English, and there may be no interpreters available to convey this information to them. Instead, many LEP homeowners are forced to rely on their children or other family members to translate technical, legal or financial information, which further compromises their ability to make well-informed decisions regarding the mortgage process. Even if their children are native English speakers, they are usually unfamiliar with mortgage loans and the highly specialized terminology involved in these transactions, which limits their ability to fully interpret the complicated information necessary to understand the implications of their mortgage loan. Placing the burden of interpreting financial and legal jargon on LEP borrowers and their families serves as a steep barrier to entry for LEP consumers.

Because lending documents are usually available only in English, and loan officers often only speak English, LEP borrowers are particularly vulnerable to fraud and abuse. For example, a Spanish-speaking couple from Long Island, New York, was tricked into signing an interest-only adjustable-rate loan by a deceitful interpreter with monetary ties to the loan officer, title company, and closing attorney. Because they did not read English, they relied on the interpreter's representation that they were obtaining a fully amortizing, fixed-rate loan. The letter they later received informing them that their monthly payment was to nearly double due to the interest rate reset and containing the information that they had not paid off any of their principal balance was also only in English. They would have been entirely left in the dark about

their loan had it not been for the services of a bilingual housing counselor, who is now helping them refinance their mortgage. Not all LEP borrowers have been so fortunate to reach this kind of assistance in time.

After origination, LEP borrowers often are unable to ask questions or get information about their loans because all of the subsequent documents, such as mortgage statements and escrow account information, are also only in English. Many servicers do not have interpreters available. Even if interpretation services are available, homeowners report longer wait times if they request an interpreter over the phone, especially if the homeowner is requesting interpretation for a language other than Spanish. Even if a servicer provides some service in-language, homeowners and advocates have also observed that a servicer's over-the-phone language capability may vary by department. Customer service departments usually have Spanish-speaking representatives, but this is not the case for some loss mitigation departments for the very same servicers.

For example, two homeowners from Connecticut repeatedly requested that their servicers assign Spanish-speaking Single Points of Contact (SPOCs) to their accounts. When they called their servicer they would initially reach a Spanish speaker, but once they inquired about the loan modification process, they were transferred to a representative in the loss mitigation department who spoke only English. When pressed for the reasoning behind this, both servicers indicated that they did not have bilingual representatives in their loss mitigation departments.

An LEP homeowner who encounters a hardship that makes it difficult to keep up with mortgage payments may face even greater hurdles in communicating with their mortgage servicer. At the onset, a homeowner may have difficulty even reaching a representative by phone to discuss the hardship. Although most servicers provide homeowners with the option of "Spanish" or "English" upon reaching their 800 number, the same is not available for any other language. Therefore, an LEP borrower whose native language is not Spanish would be forced to communicate the need for an interpreter to an English-speaking representative who may not even be familiar with the very basics of the borrower's language. Spanish is the only consistent language spoken by servicers; other languages are transferred to a third-party translation line.¹³ Even if interpretation services are available, the longer wait times to even speak to the servicer act as a deterrent that prevents LEP homeowners from engaging in the loss mitigation process. Alarming, these barriers may completely shut out LEP borrowers, preventing them from getting the assistance needed to preserve homeownership, even if they would otherwise be able to save their homes.

LEP borrowers also struggle with filling out English-only forms and understanding requests for documents during the loss mitigation process. This can cause extensive delays in the servicer's

¹³ *Id.*

review of their application, all while their arrearage continues to increase. Servicers often do not accept supporting documents in other languages for loss mitigation applications, even if they are official documents, such as bank statements or Social Security award letters. Moreover, even if the servicer offers language services, often borrowers are unaware that these services are available.

Even an LEP borrower who is able to submit a complete loss mitigation application and get approved for a trial modification or other program may still face barriers in finalizing the workout. For example, a LEP borrower in Connecticut was offered a modification that reduced his principal by over 80%. Because the servicer provided the modification documents only in English, the borrower did not know that his signature had to be notarized. Instead of having a Spanish-speaker explain the defect to the borrower, the servicer rejected the modification document because it was not notarized and sent him a temporary, interest-only modification. The payment amount for the modifications was similar, so the borrower believed the documents were the same and signed the second modification. The servicer processed the interest-only modification instead of the principal reduction one. The servicer's failure to communicate with him properly cost the borrower \$180,000 in principal reduction, which could have put him back on track toward rebuilding equity in his home.

The lack of in-language loss mitigation help has left LEP homeowners particularly vulnerable to companies promising to provide costly "loan modification assistance" or "forensic account audits" as ways to save homes. These scammers quite often target LEP borrowers in their native languages. Borrowers turn to these services largely due to their difficulties in communicating with their servicers in-language.

For example, three Spanish-speaking New York City homeowners paid thousands of dollars to a scam company that promised to obtain affordable modifications for them. This company targeted Spanish-speaking communities by placing ads in Spanish language newspapers claiming it had expertise in loan modifications and special contacts in the banking industry. It enticed Spanish-speaking homeowners to make thousands of dollars in upfront payments and recurring monthly payments for its assistance. The company had no such expertise and did absolutely no work on the homeowners' behalf, causing them to fall further behind on their mortgage and come closer to foreclosure. Because they did not speak much English, these homeowners were unable to communicate directly with their servicer to find out what was actually happening with their situation. They trusted the scam company and the in-language information the scam company provided them. The only reason these homeowners did not ultimately lose their homes is because they met a legal services attorney who intervened in time. Nonetheless, they ended up having to pay thousands of dollars in legal fees for a case that could have been entirely avoided if they had never come into contact with the scammer. If these borrowers had had access to

Spanish documents and an interpreter, they could have negotiated their own loan modifications directly with their servicer.

3. The Enterprises, Lenders, and Servicers Should Increase their Outreach to LEP Communities.

It is essential that the Enterprises reach out themselves, and require lenders and servicers to reach out, directly and proactively, to LEP communities affected by a financial information vacuum. Expanded outreach to these communities can protect them from scam companies and provide them with information they need to make informed decisions about their mortgages. LEP communities would benefit enormously from direct outreach by lenders, servicers, and the Enterprises, with reliable information about mortgages and the kinds of services that are available in-language.

Salespeople, marketers and scam artists—often from within the LEP population—take full advantage of the information vacuum among new immigrants or non-English speakers. Sometimes there is little unbiased, factual financial information available to financially and linguistically isolated individuals. In some cases LEP borrowers have no idea where to find reputable resources for information about qualifying for a mortgage or credit card, sending a remittance, or understanding a credit report. In other cases these vulnerable consumers do not know how to distinguish valuable information from mere sales pitches or scams, setting them up as easy prey for fraud and predatory lending. The information vacuum is too often filled by in-language solicitations that may appear to be an official governmental announcement to someone not experienced or comfortable with the English language and culture. When there are legitimate in-language services available, LEP borrowers are often unaware of their existence.

Borrowers with limited English proficiency can best be reached through in-language media and community outreach. It is incumbent on the Enterprises, lenders, and servicers to follow the lead of non-profits to forge relationships with ethnic community leaders and reach out to ethnic media outlets with key financial information, tips, and warnings that can alert LEP borrowers to the latest scams and breaking news. For instance, many LEP borrowers learned the details of the recent Wells Fargo fake bank accounts scandal, in a timely manner, through in-language media.

Many immigrant professionals who may know English but not much about American culture may still prefer to seek out information from in-language media. Multi-channel educational efforts will vary depending on the community. Sometimes LEP borrowers find it culturally more comfortable to access financial information from ethnic radio programs, especially for underserved communities. Call-in programs allow for greater understanding of topics and are quite popular, in particular, in certain Asian communities. Low literacy rates among some Hmong, Laotian, and Cambodian communities, and a lack of in-language newspapers, make

radio the ideal medium for these groups. In other Asian communities, such as Korean and Vietnamese, reliance on ethnic radio, church newspapers, and in-language TV shows are effective for outreach. Ethnic media paired with non-profit financial educators, community based organizations, and housing counselors can help provide the financial and language expertise and bridge the cultural gap when it comes to understanding differences in wording between Mexican and Argentinian Spanish speakers, for instance.

Housing counselors have already taken the lead in reaching LEP communities through their outreach strategies. Bilingual housing counseling agencies in National CAPACD's Housing Counseling Network utilize innovative techniques to reach out to LEP groups regarding in-language housing counseling services. One community-based group, Philadelphia Chinatown Development Corporation, provides bilingual outreach to potential clients about their services through a broad variety of media including ads in Chinese language newspapers, contacting community organization coordinators, flyering, postcards, phone banking, print and digital monthly newsletters, and social media.

In Queens, New York, Chhaya CDC takes a different approach and hosts an annual home buyer fair at a local elementary school. The Jackson Heights neighborhood, where it is located, has a diverse mix of LEP residents, including immigrants from India, Bangladesh, Pakistan, Nepal, Tibet, Bhutan, Sri Lanka, Jamaica, Korea, and China. This all-day event brings in 600 individuals and families in the community who are interested in becoming homeowners. The goal is to arrange for them to speak to a number of different financial institutions about available resources. There are usually five or six lenders and bankers in attendance, providing information to participants on the variety of products they offer. Lenders also give out information about the first-time homebuyer workshops they provide. State mortgage providers also attend, and participate in a panel discussion about homeownership with other nonprofits, lenders and government agencies. A registration and outreach table at the front of the event has translated flyers (English, Bengali, Spanish, and Nepali) that reflect the primary languages in which they offer services. Housing counselors have found it most effective to go directly to these communities in their languages to reach them. FHFA and the Enterprises should work with lenders and servicers to do the same.

C. Potential Actions to Improve Language Access - Short Term

We applaud FHFA for actively seeking recommendations for significant legal, operational and systemic changes that can be made expeditiously. The agency's welcoming of such input recognizes the detrimental impact that lack of market access has on LEP borrowers. We support all of the improvement measures identified as potential approaches and discuss them below, along with additional recommendations and responses to other questions asked in this section. We note that while we are not ranking all of our recommendations, the primary goal should be to

increase provision of information and access directly to borrowers, especially by directly increasing the ability of LEP borrowers to receive and submit documents and to interact orally directly with industry participants in-language. We support measures aimed at creating more supportive resources, but these all should be in the service of promoting direct access as the primary goal. Our comments focus on the role of lenders and servicers, including both routine servicing tasks and default servicing and loss mitigation. While other market participants interface with borrowers, the lenders and servicers have the most direct role in affecting a borrower's loan experience.

The best way forward would be for FHFA and the Enterprises to establish binding requirements, such as enhancing seller-servicer guide requirements and amending other relevant contracts to promote LEP market access. By requiring such changes, the Enterprises would create transparent rules and more significant progress than would flow from optional best practice guidelines. Where requirements are not (or not yet) possible, best practice guidelines are a way to move the ball forward, although we view them as an interim measure. Guidance or best practices also could be used to further describe standards relating to established requirements, such as oral interpretation. As described later in these comments, mandating certain procedures does not create untenable liability risks, but rather reasonably incentivizes compliance with the rules. By establishing standards for the industry, FHFA and the Enterprises would be leaders in helping the mortgage market move to the next level on LEP access. Providing resources to support market transformation also is essential, but plays a supporting role to supplement clear requirements that facilitate direct market access.

The following is a discussion of the specific policies raised in the RFI, as well as our additional recommendations. We note that the commissioned report¹⁴ for the Enterprises does a remarkable job of conveying the challenges and concerns of LEP borrowers and recommends some of the same measures, including work to enhance the quality of translated documents, a clearinghouse of in-house resources, development of guidance on LEP practices, and ongoing work with stakeholders.

1. FHFA and the Enterprises Should Promote Direct LEP Access.

(a) Require Collection, Recordation, and Transfer of Language Preference.

As discussed in greater detail in Section D, language preference should be included as a question in the Uniform Residential Loan Application (URLA) as well as the Uniform Borrower Assistance Form (UBAF) (and any successors to these forms). Moreover, any file where a borrower has self-identified a language preference by communicating or seeking to communicate

¹⁴ *Id.*

with the servicer or lender in a language other than English should be flagged in the file with a notation that includes the borrower's preferred language. Lenders and servicers also should be required to notify all borrowers in writing about language services and how to access them. This information can be included in marketing materials, forms provided along with the Loan Estimate and Closing Disclosure, regular monthly statements and other correspondence. FHFA should direct the Enterprises to identify specific circumstances and ways in which lenders and servicers can and should ask an applicant or borrower about language preference.

Language preference information that has been collected should be recorded in the borrower's file for customer service and other personnel to access and should be transferred to the transferee servicer when there is a transfer of servicing. The recordation and transfer of language preference is a key tool for ensuring continuity of language access across the life of the loan and across the range of activities the lender or servicer may have with the LEP borrower. A homeowner who expressed a language preference as part of the origination process should not have to begin this communications challenge again from square one when she calls her servicer with a question. While we discuss in sections D and E various concerns raised by some in the lending industry related to the collection, maintenance or transfer of language preference information, we include this discussion here to highlight the importance of short term action on this issue.

(b) Provide and Mandate the Use of Translated Disclosures and Forms.

FHFA and the Enterprises should require loan originators and servicers to provide translated disclosures and forms for LEP borrowers where such documents have been made available by FHFA, the Enterprises, the CFPB, or another federal government agency, including the federal bank regulators. Once such documents are available, the advantages to providing them to LEP borrowers are significant, while the cost and risk of using them are modest because they are both easily accessible and recognized as acceptable by the federal regulators.

FHFA and the Enterprises should create and approve official translated documents whenever feasible to ensure accuracy and to standardize the translations for lenders and servicers. The Enterprises should work with the regulators to ensure that any Enterprise-translated documents are acceptable to the regulators. Translated disclosures enable borrowers to be better informed about the terms of their transactions, and the written nature of the material allows a borrower to share the information and obtain counsel from a trusted advisor. Translated forms, as discussed further below, allow an applicant or borrower to provide information in the preferred language.

Translated disclosures (and translations of the note and security instrument) would be for informational purposes only and would not constitute the legal contract. Borrowers should be

informed that the translated disclosures are only being provided for explanatory purposes and that the official recorded transaction documents are in English.

As FHFA's report¹⁵ demonstrates, LEP borrowers rely on translated disclosures when they are made available. All of the LEP borrowers in the study made use of the translated documents. Some relied solely on the translated documents to understand the terms of the transaction, while others used the translated documents in conjunction with the English documents. When asked if translated documents are helpful, LEP borrowers answered that they would have greatly benefited from translated documents because they felt they could not fully grasp the English documents without the help of family members. Even with the assistance of family members, borrowers were not sure they understood all of the terms. Having translated documents was the only way LEP borrowers felt they could fully comprehend the mortgage transaction. Moreover, having translated documents protects LEP borrowers from incomplete explanations and misrepresentations about their loans.

FHFA and the Enterprises should begin by requiring originators and servicers to use existing translated documents created by FHFA, the Enterprises and the CFPB.¹⁶ We also urge the translation of documents that already are available in Spanish into additional languages. In the context of origination, the Enterprises and the CFPB should provide translations of the note, security instrument, URLA, Loan Estimate, and Closing Disclosure in the eight languages most commonly spoken by LEP consumers. Once available, lenders should provide these key documents to borrowers/applicants who express a preference to communicate in one of these top eight languages. Translation of the URLA (and UBAF) is a distinct issue from asking language preference on these forms. The translation of core origination documents into the top languages, and requirement for lenders to use them, should be responsive to future immigration trends. Moreover, FHFA should examine ways to address situations where a company has a strong presence in a region and a substantial portion of LEP borrowers speak a language other than the top eight nationwide.

Over time, as official translations put out by the CFPB and the Enterprises become available in a given language, lenders also should be required to provide key servicing documents in-language based on a borrower's language preference. Servicers should be required to provide translated versions of the UBAF, periodic statement, the loss mitigation application, denial notices, and

¹⁵ *Id.*

¹⁶ A number of key origination and servicing documents have already been translated by the CFPB and the Enterprises. *See, e.g.,* <https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/tila-respa-disclosure-rule/>; <https://www.fanniemae.com/singlefamily/spanish-resources-for-lenders/>; <https://www.fanniemae.com/singlefamily/spanish-resources-for-servicers/>; <http://www.freddiemac.com/uniform/spanish.html>; http://www.freddiemac.com/singlefamily/purchasemarket/spanish_materials.html.

loss mitigation offers or arrangements, including but not limited to the trial period plan and any permanent modification contract. As with origination documents, FHFA and the Enterprises should translate these documents into the eight languages most commonly spoken by LEP consumers and explore how to address particular instances of regional concentrations of LEP borrowers who speak languages not in the top eight nationwide. Once a document has been translated by FHFA, the Enterprises, or a federal agency, servicers should be required to provide it, along with the English version, to LEP borrowers.

(c) Require and Support Oral Interpretation.

FHFA asks about the use of “language translation services” as a resource for assisting LEP borrowers through the mortgage origination and/or servicing process. In our experience, the term “translation” refers to written documents, and the term “oral interpretation” is used to describe the provision of language assistance in oral communications. We use those terms in these comments.

It is critical that LEP borrowers who are seeking a mortgage have access to a bank employee or interpreter (in person or over the phone from a service) who speak their language and can explain the details of the mortgage process and the particular mortgage product. Without this, borrowers may end up with loans they do not understand and cannot afford, as illustrated by some of the responses to an AFR survey¹⁷ of housing counselors conducted in 2016. For example, one Spanish-speaking couple on Long Island, whose lender did not have any Spanish-speaking staff and apparently did not use third party interpreters, thought they were getting a 30-year fixed-rate mortgage but actually ended up with an interest-only loan. When their loan reset, their payments nearly doubled, making the loan unaffordable and putting them at risk of foreclosure.

It is equally critical for oral interpretation services to be available to borrowers who have routine servicing questions for customer service or who encounter difficulties making their mortgage payments and need help getting a loan modification or other loss mitigation options. Borrowers with questions about their accounts or seeking to correct errors must be able to access assistance in-language. LEP borrowers facing hardship must understand the options available, the qualifications for each, what information and documents they are required to submit and by when, and the terms of their loan modification, short sale, or other loss mitigation option. In the survey of housing counselors cited above, counselors reported instances where borrowers were unable to take advantage of loss mitigation options for which they qualified because all of the communications from the servicer were in a language (English) they did not understand and as a result they did not know what was required of them or what deadlines they had to meet. This resulted in foreclosures that would have been entirely avoidable if the needed interpretation

¹⁷ http://ourfinancialsecurity.org/wp-content/uploads/2016/05/AFR_LEP_Narratives_05.26.2016.pdf.

services had been available. For example, one Spanish-speaking borrower in New York was offered a loan modification, but because the instructions about signing the documents and returning them by a specified date were only in English, he did not understand them and missed the deadline. This resulted in his being denied the modification and having to start the process all over again.

Many lenders and servicers who lack internal capacity to provide assistance to borrowers in a particular language rely on oral interpretation services available by phone. These services are relatively inexpensive and offer access to interpreters who speak a wide range of languages. For example, LanguageLine Solutions advertises that it can provide interpretation services in more than 240 languages, ranging from Acholi to Zyphe. Similarly, ALTA advertises that it provides over-the-phone interpretation services in more than 200 languages.

The large number of languages in which oral interpretation is available over the phone might seem to suggest that over-the-phone interpretation could be a useful strategy for enabling effective communication between lenders and servicers and their LEP borrowers. Interpretation is available in most of the languages that might be needed, and the fact that service is provided over the phone eliminates the need for the interpreter to be in the same location as the borrower and the lender or servicer.

Nevertheless, when lenders or servicers use third party interpretation services they may not have the subject matter expertise to provide effective interpretations.. As discussed in Section A, feedback that we have received from HUD-approved housing counselors highlights the importance of having interpreters who are competent not only in the language spoken by the LEP borrower, but also in “mortgage” – that is, the terminology and concepts associated with mortgage origination and servicing. To the extent that particular terms used in English, such as “escrow” or “closing,” have direct translations in the target language (or dialect of that language), the interpreter must be familiar with those terms. However, in some cases, there is no direct translation for a particular term, and in those cases the interpreter must be able to describe the concept accurately in the target language. Just as with medical terms, legal terms, or other technical terms, without the proper training, interpreters whose competency in a particular language may enable them to do an adequate job of interpreting more common types of transactions or interactions may not be able to do an adequate job of facilitating communication for a mortgage-related conversation. These challenges highlight why, as discussed above, it is inappropriate at best to have a borrower rely on a family friend, or in some circumstances a child, to provide oral interpretation in connection with a mortgage-related transaction.

FHFA and the Enterprises should incorporate into their seller-servicer guides a requirement for lenders and servicers to develop and implement a reasonable plan for using oral interpretation as part of the origination and servicing processes. Language access should be available for

speaking to front-line staff as well as for escalations and appeals. Companies could fulfill this need in part through hiring bilingual staff. Ideally, such staff would be dedicated language access staff or at least perform this role as part of their routine duties in the department rather than being pulled from a different department (and therefore having less expertise in the subject matter). Additionally, customer service personnel providing oral interpretation should have the same access to subject matter training as other colleagues working in the same department.

With regard to third-party language services, we recommend two actions to address the problems of quality and availability. First, is to develop the system needed to enable lenders and servicers to tap into the capacity available through HUD-approved housing counseling agencies that have staff with both strong knowledge of mortgage lending and servicing, and oral interpretation skills in various languages. Currently, many counseling agencies provide assistance to LEP borrowers in a significant number of languages most prevalent among the nation's LEP residents. However, lenders and servicers' ability to take advantage of this extensive language capacity is limited by the lack of an easy process to determine which languages are available (by phone or in person) through which counseling agency per service area. While HUD collects this information, its housing counseling locator website does not support the kind of search that servicers would need to conduct to locate an agency that could serve their LEP clients. In addition to helping lenders and servicers better serve their clients, LEP borrowers would benefit from being connected to housing counseling services to help them navigate the mortgage origination and servicing processes. HUD should upgrade its housing counseling locator website by adding a search feature for language capacity.

Second is to provide training in the mortgage lending process and the terminology for oral interpreters working for commercial language interpretation services. (This training also would be useful for in-house bilingual staff.) FHFA should require that lenders selling loans to, or servicing loans for, the GSEs must use interpreters who have received such training and have achieved the subject matter expertise to provide effective interpretation services. Glossaries, as discussed below in the Resources section, are a helpful tool for enhancing the quality of oral interpretation, but they are only one aspect of a broader training need.

In terms of logistics and costs, lenders and servicers who have reason to believe a borrower may prefer or need oral interpretation (either because language preference has been asked on a form or the borrower self-identifies), should offer the option of oral interpretation. A borrower who does not need oral interpretation can respond as such, but a borrower who needs it often may not feel comfortable asking. The cost of oral interpretation should be covered by the company with whom the LEP borrower is interacting—the lender or servicer (who can pass the cost on to the owner of the loan). Providing services to LEP borrowers has some similarities to ensuring accommodations under the Americans with Disabilities Act, under which providing access is considered a cost of doing business. All patrons may or may not use the wider bathroom stall at

a restaurant or other public accommodation, but the cost of providing it is borne by the facility and not specifically passed on to customers who need to use it. Similarly, industry participants covering the cost of LEP access should not pass these costs on to LEP borrowers. The modest costs for such services are a limited percentage of overall business and could be spread out over the entire portfolio. Moreover, providing oral interpretation opens the door for more LEP borrowers to enter the market, which will likely increase profits for the lenders and servicers doing business with them.

(d) Facilitate Acceptance of Non-English or Translated Documents.

LEP borrowers may be able to provide certain documents only in their preferred language, such as gift letters or credit report inquiry explanations for a loan application, or a hardship affidavit for a loan modification. In some cases, they may have received documents in another language from the government, such as Social Security income documentation, or from a foreign bank, such as an account statement. LEP borrowers also may receive forms from the lender or servicer in a non-English language and need to fill them out in-language.

Documents received from a bank or government entity in a language other than English should not have to be translated by the borrower or applicant. Official letters from the Social Security Administration, public benefits award letters, bank statements, and IRS forms should be automatically accepted as is.

FHFA and the Enterprises should also examine avenues to enable borrowers to submit non-English documents in the top eight languages spoken by LEP borrowers. Solutions should be sought to address situations where a lender/servicer has a strong presence in a region and there is a significant population of LEP borrowers who speak a language other than the top eight nationwide.

Borrowers receiving origination or servicing forms in their preferred language, when available in translation, should be permitted to fill them out and submit them in-language. At origination, all major forms, including the URLA, should be available not only in English but also in the top eight languages spoken by LEP consumers. This is a distinct issue from asking language preference on a loan application, which should be done on all applications regardless of the language of the application. Similarly, servicers should have all major loss mitigation forms available in-language, including the UBAF, and LEP borrowers should be able to submit them in-language. While the contractual documents – the note and security instrument – would be in English, with the non-English version for information only, other forms should also be accepted in a non-English language by the borrower or applicant, with the lender then obtaining a certified translation (or utilizing a form that obviates the need for translation).

Systems should be developed to address these situations while acknowledging the inherently individualized nature of accepting non-English documents. Some borrowers will be working with a counselor or attorney who can assist them in providing submissions in English. Many borrowers, however, do not work with a third-party who can assist them. Market participants should be encouraged to work more closely with counseling agencies who could provide such services. Lenders and servicers also could contract with organizations similar to those providing oral interpretation services to obtain certified translations of written documents.

Moreover, the Enterprises could modify their standard forms (particularly the URLA and UBAF) to minimize narrative responses and instead utilize checkboxes and multiple choice answers, so that once the form has been translated, there would be no need to translate the filled-in version. While a borrower's narrative response provides more individualized details, check boxes, a certification and a signature still promote clarity and veracity. Similarly, a standardized explanation of credit inquiries could likely be reduced to a limited universe of possible answers.

Any working group established by FHFA or other agencies should study what is already being done to address this matter in the industry and work with stakeholder groups, including homeowner advocates, to establish mechanisms and guidelines that facilitate the translation and submission of non-English documents. Courts, public housing authorities, and medical providers, could supply helpful examples of effective translation of forms.

2. FHFA and the Enterprises Should Create and Promote Resources.

FHFA and the Enterprises should work with other regulators, and consult with industry and consumer representatives, to create a centralized clearinghouse of resources to enhance services and access for LEP borrowers. The clearinghouse should not be a substitute for direct counterparty requirements, but should support those requirements, lay the groundwork for supplementing established rules, and provide a mechanism for building better delivery systems. The clearinghouse resources could also support enhanced marketing to the LEP community. While many of the resources would be used directly by originators and servicers, resources also should be made available directly to borrowers, where appropriate. The clearinghouse should include translated disclosures and informational consumer-facing materials, as well as guidance for industry parties on working with LEP borrowers. Glossaries on mortgage and financial terms should be included, and can be used for training oral interpreters as well as for educating consumers directly. Many resources already exist and can provide the basis for the clearinghouse. Translated disclosures and forms, glossaries and other materials already available in Spanish should be translated into additional languages. Materials should be available online to maximize availability, although hard copies of appropriate documents should be made

available upon request.¹⁸ FHFA should fund and maintain the clearinghouse. Public and industry education should be carried out to maximize use of the available resources.

3. FHFA and the Enterprises Should Develop Policies with Stakeholders.

FHFA and the Enterprises should develop an interagency working group that actively consults with a wide range of stakeholders, including consumer advocates, to address and provide guidance on how industry participants should work with LEP borrowers. The working group should not be a means for postponing short-term measures to enhance LEP borrower access, but rather a means to support that work and expand it. A key priority of the group should be implementing a plan for collecting, reporting, tracking, and transferring language preference information.

D. Potential Actions to Improve Language Access – Long Term

1. It is Crucial to Ask About and Track Language Preference from Origination throughout the Life of the Loan.

In order to ensure that borrowers who are not proficient in English get the assistance they need to fully understand the transaction into which they are entering and address any problems that may occur post-closing, it is important both to collect the borrower's language preference early on in the process, and for that language preference information to become a permanent part of the loan file, available to the originating lender and any subsequent servicer. The best vehicle for collecting and tracking a borrower's preferred language would be to include a preferred language data field in the Uniform Residential Loan Application (URLA). This question also should be included in the UBAF. While we recommend adoption of such policies in the short-term goals, we include a longer discussion here as it relates to questions asked in the RFI.

The URLA already asks applicants for information on their race, ethnicity and sex, in order to facilitate compliance with the Equal Credit Opportunity Act (ECOA),¹⁹ Home Mortgage Disclosure Act (HMDA) and Fair Housing Act. This so-called “government monitoring box”

¹⁸ See, e.g., <https://www.fanniemae.com/singlefamily/spanish-resources-for-lenders>; <https://www.fanniemae.com/singlefamily/spanish-resources-for-servicers>; <http://www.freddiemac.com/uniform/spanish.html>; http://www.freddiemac.com/singlefamily/purchasemarket/spanish_materials.html.

¹⁹ See Regulation B, which implements the Equal Credit Opportunity Act, at 12 CFR Section 1002.1.3(a)(1), available at https://www.consumerfinance.gov/eregulations/1002-13/2013-22752_20140118#1002-13-a and Regulation C, which implements the Home Mortgage Disclosure Act, at 12 CFR Section 1003.4(a)(10), available at https://www.consumerfinance.gov/eregulations/1003-4/2015-26607_20170101#1003-4-a.

has been a standard part of the mortgage application form for many years. This section of the application form includes a statement explaining that the information is being requested in order to monitor compliance with these laws, that lenders may not discriminate either on the basis of the information provided or on whether or not the borrower chooses to provide the information, and notes that the borrower may choose not to provide the requested information.²⁰ Lenders have been asking borrowers for the government monitoring information for years, and doing so has not been detrimental to either the lender or the applicant, especially when lenders' staff receive training that equips them to explain why the information is being requested, how it will be used, that it is requested of all applicants, and that it will not play any role in the underwriting decision.

Incorporating a section into the URLA that allows the applicant to indicate language preference would be very comparable to the existing questions in the government monitoring box. Like the government monitoring information, this question on the form should be accompanied by an appropriate explanation about why the information is being requested, how it will be used, and that it will not factor into the decision about whether or not to make the loan. Lenders can explain to borrowers that having this information helps the lender to provide language-appropriate documents, oral interpretation and other services, to the extent that they may be available, and also helps them ascertain the potential need to make such services available in particular languages. The language preference section on the URLA could also include a clear statement alerting applicants that they may choose not to provide the information requested, and that the fact that the form asks for their language preference does not imply that the lender has the capacity to provide all services or conduct all interactions related to the mortgage in any language other than English.

Collecting a borrower's preferred language at the mortgage application stage will allow LEP borrowers to be connected with bilingual housing counselors who can help them navigate the loan origination and/or servicing process. Housing counselors have a thorough knowledge of mortgage lending and servicing and there is broad capacity within the counseling community to work with borrowers with limited English proficiency. In addition to helping LEP borrowers navigate the origination process, counselors can also help LEP borrowers understand how to make sure their language preference is noted by the lender and why this information is important for both the borrower and the lender and/or servicer going forward. In order for this information to be captured in a consistent and comprehensive fashion, there must be a system for collecting the information at the loan application stage, incorporating it into the loan file, and transmitting it to all relevant parties throughout the entire life of the loan.

²⁰ See page 4 of the Uniform Residential Loan Application, available at https://www.fanniemae.com/content/guide_form/1003rev.pdf.

Maintaining information on language preference over the entire life of the loan is critical because borrowers need to interact with their lenders and servicers at many different times over the life of a loan. Borrowers need to understand the terms of the loan products they are evaluating, the standards they must meet and the documents they must submit in order to qualify, the changes in their monthly payment after origination, and the loss mitigation options available if they encounter difficulties making their monthly payments. LEP borrowers currently encounter significant barriers to getting the information and assistance they need at each of these stages. In some cases, language-appropriate assistance is not available. In other cases, borrowers must jump through hoops to re-establish their language needs each time they need to contact their lender or servicer, causing considerable delays and frustration. This could be avoided if language preference were captured in the application (i.e., on the URLA), maintained in the loan file, and transferred to any subsequent servicer.

Research conducted by FHFA in conjunction with this RFI indicates that LEP borrowers prefer in-language documents and would ask for and use such documents if they knew they were available.²¹ Some such information currently exists, and we hope that the GSEs will expand the number and types of mortgage-related documents available in languages other than English. But such documents are only useful if they make it into the hands of borrowers, and lenders will only know to make them available to borrowers if they have information about borrowers' language preferences.

Tracking and transferring language preference information allows more seamless communication with the LEP borrower, which ultimately saves time for both the servicer and the borrower. After closing, the reality of the mortgage market is that throughout the life of a mortgage loan, both the actual servicers and the individuals handling the loans are likely to change multiple times. . It is counterproductive and burdensome for an LEP borrower to have to communicate repeatedly his preferred language at each one of these changes. It slows down the process for everyone.

For example, if a Vietnamese-speaking homeowner was already communicating with her servicer in Vietnamese about her pending loss mitigation application and this information traveled with her file, a transferee servicer would already know that she needs a Vietnamese interpreter. If the new servicer has multilingual staff available, having language preference already noted on the file allows the new servicer to assign loans to the appropriate multilingual staff person as soon as it receives the file so the borrower can continue receiving services in-language and ask any questions about the transition. If the new servicer does not have bilingual Vietnamese customer relations or loss mitigation staff, but does have access to language line

²¹ See Kleimann Communication Group for Fannie Mae and Freddie Mac, *Language Access for Limited English Proficiency Borrowers: Final Report* (April 2017, finalized June 2017).

services, the notation on the file could prompt the new servicer to offer the use of outside oral interpretation during the first phone call, and thereafter.

Having language preference noted in the file could be particularly helpful in cases where the borrower needs loss mitigation assistance. Language barriers have been a big obstacle to both borrowers seeking loan modifications or other loss mitigation options and their servicers, impeding the timely communication of information and documents. Borrowers must take precious time to locate servicer personnel or third party contractors who speak their language, sometimes on multiple occasions as they go through the stages of the loss mitigation process. If they are unable to get assistance in the appropriate language, they may not understand what documents or information they are required to submit, what deadlines they face, what loss mitigation options are available to them or ultimately offered to them, and what steps they must take to accept a loan modification or other offer, should they be eligible and choose to do so. These communications barriers and the accompanying delays are costly to the servicer and may ultimately lead to outcomes such as foreclosure that are detrimental to both the borrower and the servicer. This process can be conducted much more efficiently, and therefore less expensively, if the servicer has information about the borrower's language preference at the very beginning. Including language preference also in the UBAF would serve as a belt and suspenders. If the information was not properly recorded at origination or transferred, the servicer will have this information for the loss mitigation process.

Lenders and servicers may ask about language preference without incurring regulatory risk on that basis. The CFPB has specifically stated that asking about customers' language information is permissible to facilitate communication with LEP consumers.²²

Contrary to arguments made by some in the lending industry, including information about language preference in the servicing file that is transferred to a new servicer would not change that subsequent servicer's duties. As discussed in section E, servicers already have obligations under fair lending laws to take reasonable steps, commensurate with their resources, to provide language access. The extent of these obligations depends on a number of variables, including the servicer's size and the needs of the market segment it serves. This has been recognized by the CFPB in its discussions of fair lending compliance.²³

Reasonable steps for a small servicer might not include translation of all servicing and loss mitigation documents into a relatively obscure language, spoken by few LEP borrowers within its servicing footprint. However, even a small servicer likely can use a language line to provide oral interpretation beyond any limited list of most prevalent languages. Small services can also

²² Consumer Financial Protection Bureau, *Supervisory Highlights* (Fall 2016) (hereafter, "CFPB Supervisory Highlights") at 21.

²³*Id.* at 24.

easily use readily available form and disclosure translations provided by the GSEs, the CFPB, and other regulators. The cost of providing varying degrees of language access is a factor that federal regulators have indicated they will consider in assessing lenders' and servicers' compliance.²⁴

If servicers fail to conduct core servicing functions and loss mitigation efforts in a way that allows access to LEP individuals and is commensurate with their resources, they already face compliance risk. Avoiding information about borrowers' language needs is likely to increase rather than reduce that risk.

2. Standardizing the Question about Language Preference Minimizes Potential Discomfort.

Some have raised concerns that borrowers may be made uncomfortable by being asked to state their language preference on the URLA or elsewhere. To the contrary, we believe that borrowers who would benefit from receiving information in the language in which they are most comfortable communicating will welcome the opportunity to indicate their language preference. Nonetheless, any such concerns can be alleviated by incorporating the question into a standard form and asking it of all borrowers. This should help minimize any discomfort borrowers may have in responding to the question. Any potential discomfort can be minimized further by providing effective training to lender/servicer staff, so they are well equipped to explain why the question is being asked and how the information will be used. In addition, borrowers will always have the option of specifying English as their preferred language.

3. Language Preference Questions Need to Be Asked In-Language.

The goal of providing information and assistance to borrowers in a language they understand can best be met by ensuring that the greatest possible number of LEP borrowers indicate their language preference. To accomplish this, it will be important to ask the question about language preference in a number of languages. Otherwise, LEP borrowers may not realize what they are being asked and may fail to indicate their language preference, even though they would both appreciate and benefit from whatever in-language assistance may be available. We recommend that the question be translated into the eight most commonly spoken languages other than English spoken by LEP individuals. Similarly, translation should be provided for any disclaimer that may be included to ensure that borrowers understand that asking for their language preference does not mean that lenders and servicers will either be able to provide assistance in their particular language or required to conduct the entire transaction in their language. If the question about language preference and any related disclaimer are only included in English, a

²⁴ *Id.*; Dep't Housing and Urban Development, "Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency" (Sept. 15, 2016).

great many LEP borrowers may not understand the question, fail to provide the information, or have unrealistic expectations about the service their lenders will provide.

4. FHFA Should Require Certain Initial Steps by Lenders and Servicers to Promote Language Access, and Monitor the Need for Further Requirements.

While collecting the borrower's preferred language at the mortgage application stage and tracking language preference for the life of the loan is an important first step to meeting the language needs of borrowers with limited English proficiency, this alone will not be sufficient. The purpose of collecting and tracking preferred language information is to ensure that lenders and servicers have the information they need to then provide language-appropriate services to their LEP borrowers. The Enterprises should impose requirements for reasonable steps that participating sellers and servicers of conventional loans must take to assist LEP borrowers. We discuss these measures further in the section above on short-term recommendations. These requirements should include providing access to oral interpretation through a language line or (where available) bilingual staff, referring borrowers with limited English proficiency to a HUD-approved counseling agency that has capacity in the borrower's preferred language, providing translated disclosures and forms that have been made available by the GSEs or regulators and accepting such forms. FHFA should also develop a protocol of actions for originators and lenders to take, beyond the minimum required actions, when a borrower has indicated a preferred language other than English. Such actions may include assigning a point-of-contact who has capacity in the borrower's preferred language, providing additional translated documents, and accepting a broader array of in-language documents from borrowers or applicants.

In summary, FHFA and the Enterprises should take the following steps to promote meaningful access for LEP consumers to the mortgage marketplace and continue to monitor and develop protocols and requirements:

- Require lenders and servicers to track language preference throughout the life of the loan;
- Mandate the use of readily available documents translated by the GSEs or agencies;
- Require and support oral interpretation, by connecting housing counseling agencies with lenders and servicers and providing training and resources to bilingual staff and third-party oral interpreters;
- Facilitate acceptance of non-English or translated documents and forms, in addition to English versions;
- Create and promote resources, including through a clearinghouse; and
- Develop additional best practices with stakeholders through a working group.

In the section that follows, we discuss the legal and compliance issues surrounding the potential language access measures identified in the RFI and discussed in our comments, and explain why these actions would not expand lender and servicer liability.

E. Legal, Regulatory, and Other Impacts

FHFA has identified a number of concrete steps the Enterprises could take to increase access to the mortgage market for LEP consumers. As described above, taking these steps would make a real difference in the lives of LEP individuals who wish to buy a home or protect their existing home. These changes would also benefit lenders, who could expand their market reach, and servicers and investors, by helping to prevent avoidable foreclosures through better communication. At the same time, many in the lending industry have suggested that asking about language preference, providing translated documents, and offering oral interpretation could expose them to increased legal risk. Yet, to date, we have seen no detailed account of such potential liability. In the discussion that follows, we seek to address each area of law we have heard raised in connection with language access or that could be relevant to the kinds of steps identified in the RFI. Our analysis shows that the actions identified by FHFA in its RFI and discussed in our recommendations would not lead to a meaningful increase in legal liability for lenders, and in many ways, would actually mitigate lenders' risks.

1. Asking about language preference will not result in increased liability under state translation laws.

FHFA has inquired about requiring the Enterprises to update their standard forms, such as the URLA and the UBAF, to include a question about borrower language preference. LEP consumers face many barriers in accessing services during mortgage origination and servicing. Some of these barriers could be reduced or removed if lenders would ask consumers whether they prefer to communicate in a language other than English. Asking about language preference would allow consumers to indicate whether they have a preference to receive in-language services, where available, and enable the lender to notate the file so that future contacts with the consumer could take this preference into account.

A number of state statutes require lenders to provide translated documents or disclosures under certain circumstances. Mortgage lenders have voiced concerns that a requirement to ask about language preference or record such information would trigger these state translation requirements, exposing them to risk. However, as explained below, the proposed change would have virtually no effect on the applicability of these state laws. Furthermore, even if asking about language preference or taking other actions could trigger coverage of a translation law, these laws are not onerous. Mortgage lenders can easily comply with the translation laws and avoid liability.

(a) *Asking about language preference would not trigger most state translation requirements.*

Most states, including some of the most linguistically diverse, do not require translations of key documents in mortgage transactions. Only six states – California, Texas, Oregon, Illinois, New York, and Massachusetts – and the District of Columbia have translation requirements relevant to most mortgage lenders.²⁵ Generally, these statutes merely require mortgage lenders to provide a translated copy of a loan agreement or to provide translations of federally required disclosures. With the exception of New York, no state imposes a requirement on mortgage lenders to provide a translation after loan origination. In four of the six states, as well as in Washington, D.C., there is no obligation to provide translated documents unless the lender negotiates or communicates with the borrower in a listed language. In most cases, translated versions of the required documents are available from official sources.

California’s law is often identified as among the most demanding of state translation laws – a designation that is entirely inaccurate. California’s Civil Code has two statutory sections potentially imposing a translation requirement in the mortgage lending context. Section 1632, enacted in 1976, does not apply to mortgage originators unless the loan is a reverse mortgage or was originated through a mortgage broker. When it applies, §1632 imposes an obligation to provide a translated contract if the agreement was *primarily negotiated* in one of five languages: Spanish, Chinese, Tagalog, Vietnamese, or Korean.²⁶ Section 1632.5, which took effect in 2010, does apply to most mortgage lenders, but carries no private right of action and only a limited regulatory fine.²⁷ Section 1632.5 requires a mortgage lender to provide a translated disclosure (translation provided by the state regulator) for mortgage loans primarily negotiated in one of the five listed languages. “Primarily negotiated” is not defined in the statutes, but courts have found the requirement to apply when the price and other material terms are discussed in the listed foreign language.²⁸ A lender may comply with both § 1632 and § 1632.5 by providing a

²⁵ Other statutes require translation or disclosure of rights in certain types of consumer transactions. For example, in Arizona, for consumer loans of \$10,000 or less, lenders must disclose to all borrowers, near the signature line, in English and Spanish, that the borrower has the right to request Truth in Lending disclosures in Spanish prior to signing the documents. ARIZ. REV. STAT. ANN. §§ 6-601 (coverage); 6-631(B) (requirements) (1997). Some states also require translations for door-to-door solicitations. *See, e.g.,* Neb. Rev. Stat. § 69-1604; Wis. Admin. Code ATPC §§ 127.06(3), 127.34(2), 127.64(3).

²⁶ CAL. CIV. CODE § 1632(b)(1)-(7) (West 2015).

²⁷ CAL. CIV. CODE § 1632.5 (West 2015). Note that although the state licensing agency may enforce § 1632.5, it does not give rise to a private right of action by an injured consumer. *See* CAL. CIV. CODE § 1632.5(k) (“this section shall not be construed to create or enhance any claim, right of action, or civil liability that did not previously exist under state law, or limit any claim, right of action, or civil liability that otherwise exists under state law”). The law also does not apply to federally chartered institutions. § 1632.(j).

²⁸ *E.g., Lopez v. Asbury Fresno Imports, LLC*, 183 Cal.Rptr.3d 696, 700 (Cal. Ct. App. 2015) (finding that sale of a vehicle was not primarily negotiated in Spanish because “[t]here was little or no discussion of price or other terms” in Spanish).

consumer with a translation of the mortgage contract (which the GSEs have now posted in Spanish, and could provide in other languages) and an approved form that is translated and posted by the state regulator. Coverage of these statutes is triggered not by knowledge that the borrower has limited proficiency in English, or a stated preference to communicate in another language, but specifically when the lender and the borrower are using a foreign language during negotiations.²⁹ Moreover, these statutes do not apply if the borrower uses his or her own (non-minor) interpreter.³⁰ Contrary to some claims, lenders are still conducting mortgage negotiations with LEP borrowers in-language in California.³¹

Texas imposes a translation requirement for second mortgages, home equity loans, and land installment contracts. Prior to closing on such a loan, lenders must provide a summary of the terms of the loan in Spanish if the terms of the loan were negotiated in Spanish.³² The form to be provided is a Spanish-language copy of the disclosures required for closed-end loans under the Truth in Lending Act.³³

Under the Oregon statute, if a mortgage broker or lender advertises in a non-English language and offers to make, or makes, a loan wherein a “substantial portion of the communication with the borrower that is related to the transaction takes place in the language other than English,” then the broker or lender shall provide RESPA and TILA disclosures in that language.³⁴ In such cases, the broker or lender must also provide to the borrower, in that other language, “A statement notifying the borrower that loan documents associated with the transaction will be in English and advising the borrower to obtain appropriate assistance with any necessary translations.”³⁵

Under Illinois law, if a person conducts a retail transaction or conducts “negotiations related to a retail transaction resulting in a written contract” in a language other than English, the borrower and the outside interpreter, if one was used, must sign a certification in the borrower’s native

²⁹ *Id.* at 700; *Magdaleno v. Indymac Bancorp, Inc.*, 853 F.Supp. 2d 983, 995 (D. Cal. 2011).

³⁰ CAL. CIV. CODE § 1632.5(e)(1) (West 2015)

³¹ According to an informal poll of housing counselors conducted by National CAPACD, counselors working with LEP consumers in California are able to refer them to lenders with bilingual loan officers who will speak to the applicants in-language.

³² TEX. FIN. CODE ANN. § 341.502(a)-(a-1) (West 2011).

³³ *Id.*

³⁴ The Oregon statute requires the versions of these federal disclosure forms that were in effect in 2010. However, the state regulator provides translated forms for the top three non-English languages spoken in the state.

³⁵ OR. REV. STAT. ANN. § 86A.198(1)-(2) (West 2010).

language.³⁶ The borrower’s certification must state (as applicable) that the borrower used an outside interpreter or opted to use the retailer as an interpreter, that the obligations of the contract were explained in the borrower’s native language, and that the borrower understands the contract. Lenders are not required to translate documents under the statute, even those containing material facts.³⁷

In Washington, D.C., translations of a one-page disclosure form must be provided “in the language of the mortgage lender’s presentation to the borrower.”³⁸ Registered mortgage loan originators, however, are exempt from this requirement.³⁹

Only two states, Massachusetts and New York, have translation laws that could potentially be triggered by the specific act of asking a consumer about language preference. In Massachusetts, mortgage lenders must “take *reasonable steps* to communicate the material facts of the transactions in a language that is understood by the borrower.”⁴⁰ Reasonable steps compliant with this regulation “include but shall not be limited to” using adult interpreters and providing the borrower a translated copy of disclosure forms required by applicable federal or state law.⁴¹ Asking a borrower about language preference may actually protect lenders who are subject to this law, since it is surely a “reasonable step” to ensure communication in a language the borrower can understand.

In New York, one particular notice – a foreclosure notice – must be served in the borrower’s native language if the borrower is *known* to have limited English proficiency, “provided that the [native] language is one of the six most common non-English languages spoken by individuals with limited English proficiency in the state of New York, based on United States census data.”⁴² The New York State Department of Financial Services is required to post on its website a translation of the notice into these six most common languages for which compliance is required.

Thus, only New York and Massachusetts have translation laws that are arguably triggered by what the originator knew regarding the borrower’s language proficiency. In those two states, formally asking about language preference could trigger knowledge of a lack of proficiency, and therefore coverage of the statute. However, in most situations, the lender will already have

³⁶ 815 ILL. COMP. STAT. ANN. 505/2N(a)-(b) (West 2001).

³⁷ *Nevarez v. O’Connor Chevrolet, Inc.*, 426 F. Supp. 2d 806, 817 (D. Ill. 2006).

³⁸ D.C. CODE ANN. § 26-1113(8)(B) (West 2009).

³⁹ D.C. CODE ANN. § 26-1102(12) (West 2009).

⁴⁰ 940 MASS. CODE REGS. ADC 8.05(3) (1998) (emphasis added).

⁴¹ *Id.*

⁴² N.Y. REAL PROP. ACTS. LAW § 1304(5) (McKinney 2016).

information about the consumer's English proficiency through their interactions. Specifically asking the consumer about language preference and documenting the consumer's response is likely to help the lender or servicer demonstrate compliance with the law.

Even in New York and Massachusetts, a form asking about language preference is unlikely to be the only source of information the lender has regarding the consumer's English proficiency. The other state laws requiring translation in mortgage transactions all turn on whether a transaction is conducted or negotiated in a given non-English language. Thus, in states other than New York and Massachusetts, whether any translation requirement applies will turn not on whether language preference is indicated on a form, but on whether negotiations are conducted in one of the languages identified in the applicable statute – a decision lenders could make independently, even if they use a GSE form that asks about language preference.

(b) Even if steps identified by FHFA in the RFI triggered the coverage of certain state translation laws, mortgage lenders can easily comply with these laws and not face liability.

As discussed above, merely asking about language preference should not trigger the applicability of most translation laws. Other actions suggested in the RFI – such as providing oral interpretation or access to bilingual loan officers – might. In the event the GSEs adopt steps to increase language access that could trigger coverage of state translation laws, it would not be difficult for mortgage lenders to comply with these laws. The Massachusetts statute provides that “reasonable steps” necessary to comply with the law may include providing an adult interpreter and giving the borrower a translated copy of disclosure forms required by federal or state law.⁴³ New York requires translation only of foreclosure notices, significantly limiting the lender's obligation to translate to just one aspect of the mortgage lending process. Furthermore, New York mortgage servicers are only obligated to provide the in-language notice in the six top languages identified, all of which are translated and made available by the state banking regulator.⁴⁴ Both of these laws focus on only one part of the lending process and neither imposes a burden on mortgage lenders to provide translation throughout the mortgage life cycle. Because the requirements in these states are so limited in scope, it should not be difficult to comply with the laws if lenders believe coverage under state laws may be triggered.

A lender may comply with both California statutes, to the extent they apply, by providing a consumer with a translation of the contract and a form that is translated and posted by the state regulatory body. Oregon's regulatory body similarly posts a translation of the required disclosure forms in the top three non-English languages spoken in the state. The form required

⁴³ 940 MASS. CODE REGS. ADC 8.05(3)(a)-(b)(1998).

⁴⁴ N.Y. REAL PROP. ACTS. LAW § 1304(5) (McKinney 2016).

by Texas law is a Truth in Lending disclosure that has already been translated by the CFPB.⁴⁵ Illinois and D.C. do not appear to provide translations. However, the D.C. form is a simple one consisting of only one page (and is not required for registered mortgage loan originators), and Illinois lenders are not required to provide any translated disclosures, but merely a translated three-sentence certification.

To the extent the GSEs adopt practices outlined in the RFI, including providing LEP consumers with access to bilingual staff and interpreters, state translation laws that might be triggered do not have onerous requirements and could easily be followed without significant expense. This will be especially true if the Enterprises and federal and state regulators continue to translate the loan contract and required disclosures into additional languages.

Lenders seem most concerned about regulatory uncertainty. If the GSEs adopt a policy of requiring lenders to offer oral interpretation and translated documents where reasonably available, such as where language line services that meet certain standards are available or where translated disclosures have been provided by a federal regulator or the Enterprises, lenders would be able to avoid liability under state translation laws by simply assuming that the laws apply and complying with them. Compliance with these laws imposes minimal costs, as described above.

2. Lenders' and servicers' compliance with fair housing and fair lending laws would be enhanced by the steps identified by FHFA.

Mortgage lenders and servicers need to provide reasonable language access in order to comply with fair housing and fair lending laws. If the Enterprises adopted practices like providing model translations of key documents in common languages, creating glossaries of mortgage-related terms to facilitate high quality oral interpretation, and updating the seller-servicer guides to require language access measures where reasonably available, lenders would have the opportunity to reduce their fair housing and fair lending compliance risk.

Mortgage lenders are obligated to avoid discriminating on the basis of race or national origin under the Fair Housing Act, the Equal Credit Opportunity Act, and state anti-discrimination laws.⁴⁶ As the Supreme Court has held, language is closely tied to national origin, and practices that disfavor LEP individuals can have a disparate impact based on national origin.⁴⁷ In the

⁴⁵ The CFPB has translated the required Truth in Lending disclosures into Spanish, which is the only language for which Texas mortgage lenders need provide a translation under the state law.

⁴⁶ See 42 U.S.C. §§ 3601-19; 15 U.S.C. § 1691, *et seq.*; and, *e.g.*, O.C.G.A. § 8-3-200 *et seq.*

⁴⁷ *Lau v. Nichols*, 414 U.S. 563 (1974). *Accord, e.g.*, Dep't Housing and Urban Development, "Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency" (Sept. 15, 2016) ("HUD LEP Guidance"); Executive Order 13166: Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50123 (Aug. 16, 2000).

United States, 61% of persons born in Latin America and 46% of persons born in Asia are LEP, as compared with 2% of persons born in the United States.⁴⁸

HUD recently outlined its position regarding the close relationship between LEP status and national origin in a memorandum regarding compliance with the Fair Housing Act. The memorandum states that entities covered by the Fair Housing Act violate the statute by implementing a policy or practice that has an unjustified discriminatory effect on a protected class.⁴⁹ HUD has opined that it will be difficult for mortgage lenders and housing providers to identify interests that are considered substantial, legitimate, and nondiscriminatory, as many of the typical arguments raised in the employment context (such as a need to speak English in order to perform job requirements) will not apply in the housing context.⁵⁰ In reasoning through possible justifications for various practices, HUD explained that refusing to provide an LEP borrower with translated documents that are readily available to the lender would not likely be justified.⁵¹ HUD also stated that failing to take certain steps cannot be justified by a desire to avoid compliance with state consumer protection laws, such as the translation requirements discussed above.⁵² Even if a lender or servicer shows a legitimate business justification for a practice, it still must consider whether less discriminatory alternatives exist. Examples of less discriminatory alternatives cited by HUD in its LEP Guidance include obtaining written or oral translation services or making use of bilingual staff members.⁵³ Based on HUD's assessment of the Fair Housing Act's application in this area, lenders face significant risk by not providing translated documents and in-language oral communication where reasonably available.

The Equal Credit Opportunity Act (ECOA) similarly imposes liability on lenders who use practices that have an unjustified discriminatory effect.⁵⁴ For this reason, the CFPB in its Compliance Manual asks questions geared at assessing language access policies in origination and servicing, including:

- Does the entity target its products to particular populations?
- Consider whether any particular populations are missing or excluded from the entity's advertising.
- Does the entity offer and/or require fair lending training to employees and service providers that market its products to consumers?

⁴⁸ HUD LEP Guidance (citing U.S. census data).

⁴⁹ HUD LEP Guidance.

⁵⁰ HUD LEP Guidance.

⁵¹ HUD LEP Guidance.

⁵² HUD LEP Guidance.

⁵³ HUD LEP Guidance.

⁵⁴ 15 U.S.C. § 1691, *et seq.*

- Does the entity provide any fair lending-related monitoring of its servicing?
- Does the entity offer servicing options for borrowers with limited English proficiency (LEP)? Are such options offered through live customer service? Through translated documents?
- Does the entity capture and track borrowers' indicated preference to receive services in languages other than English?
- Does the entity contract with service providers to provide any LEP services on behalf of the entity?⁵⁵

The CFPB has provided lenders and servicers with helpful information about language access policies that should not lead to fair lending liability and other policies that likely would. In its Fall 2016 Supervisory Highlights, the CFPB emphasized that its examiners have observed one or more financial institutions providing services in languages other than English in manners that did *not* result in adverse supervisory or enforcement action.⁵⁶ These practices identified by the CFPB as not problematic from a fair lending enforcement standpoint included:

- Marketing and servicing of loans in languages other than English;
- Collection of customer language information to facilitate communication with LEP consumers in a language other than English;
- Translation of certain financial institution documents sent to borrowers, including monthly statements and payment assistance forms, into languages other than English;
- Use of bilingual and multilingual customer service agents, including single points of contact;
- Quality assurance testing and monitoring of customer assistance provided in languages other than English.⁵⁷

Conduct the CFPB observed that was problematic or did expose lenders to potential enforcement actions included marketing only some of their available products to Spanish-speaking consumers, without documentation describing how the institution decided to limit the products offered in Spanish-language marketing; excluding consumers who preferred to communicate in Spanish from certain debt-relief offers; and telemarketing credit card add-on products to Spanish-speaking customers without providing complete information in Spanish regarding the steps necessary to receive program benefits.⁵⁸

⁵⁵ Consumer Financial Protection Bureau Examination Procedures, ECOA Baseline Review Module 13, 20-21 (Oct. 2015), available at files.consumerfinance.gov/f/201510_cfpb_ecoa-baseline-review-modules.pdf.

⁵⁶ CFPB Supervisory Highlights at 21.

⁵⁷ *Id.*

⁵⁸ The CFPB noted that one or more lender mitigated the risk stemming from this practice by informing consumers in Spanish of the availability of other credit card products and making clear and timely disclosures of the extent and limits of language services. CFPB Supervisory Highlights at 22.

The CFPB recommends that lenders mitigate their fair lending and other risks by implementing a compliance management system to review treatment of LEP and non-English-speaking customers. Such a system would include having an up-to-date fair lending policy statement, regular fair lending trainings, review of lending policies for fair lending risk, controls on originator discretion, statistical analysis of loan-level data for potential disparities, and review of marketing practices for potential steering or exclusion of LEP consumers.⁵⁹

In light of this guidance from the CFPB and HUD, lenders and servicers can avoid fair lending and fair housing liability by making language services available in a logical manner, maintaining quality controls and oversight, and ensuring that individuals who are identified as LEP are not categorically excluded from certain products or steered into others. It is difficult to see how any lender or servicer could avoid fair lending risk if they do not have an LEP policy and do not make a reasonable attempt to assess their customers' needs for language access. Failing to consider, review, and attempt to address language barriers that impact consumers disproportionately based on their national origin exposes lenders and servicers to legal risk.

In considering what is a reasonable and justifiable business practice regarding language access, questions of cost, the relative size of the lender's book of business, and the percent of LEP individuals in its geographic footprint will certainly be relevant.⁶⁰ Taking actions that are relatively low-cost, like making available forms that have already been translated into a given language, would be necessary for most lenders and servicers to show that they are acting reasonably.⁶¹ Tracking language preference information serves an important purpose in ensuring that a lender's practices do not have a disparate impact of excluding individuals based on national origin. Moreover, if a lender does not know the language needs of its market population, or of the consumers contacting it for potential services, it would be unable to assess whether additional resources should be devoted to translating documents into a given language or hiring and training bilingual staff fluent in that language.

Collecting data on language preference does not change the question of whether lenders are liable for fair lending violations. Indeed, the CFPB has specifically stated that lenders may collect information about language preference in order to facilitate communication with LEP consumers.⁶² Lenders need only ensure that an indication of LEP status on a consumer's file does not result in products or services being limited. While not collecting such data may create barriers to identifying evidence of the discriminatory impact of certain practices, that is not a reasonable justification for not requiring the tracking of information. Similar arguments about

⁵⁹ CFPB Supervisory Highlights at 24.

⁶⁰ *Id.* at 24-25.

⁶¹ HUD LEP Guidance.

⁶² CFPB Supervisory Highlights at 21.

potential for legal risk or misinterpretation of data were made when the Home Mortgage Disclosure Act was first implemented; lenders argued that tracking information might make it easier for people to sue.⁶³ Then, as now, the existence of accurate data did not create the legal violation; it merely allowed regulators and consumers to identify violations that were in fact happening. FHFA and the Enterprises should not be sympathetic to arguments like these as a reason for not asking borrowers about language preference or tracking this information in the loan file so as to better serve LEP individuals.

3. Providing translated documents and oral interpretation will not increase the legal risk of unfair, deceptive, and abusive acts and practices claims, and may even mitigate these risks.

Some in the mortgage industry express concerns that expanding language access could impose additional liability under state and federal consumer protection statutes for translation inaccuracies or mistakes. As we explain below, these arguments are misplaced.

(a) UDAP liability explained

All fifty states and the District of Columbia have enacted at least one statute with broad applicability to most consumer transactions, aimed at preventing consumer deception and abuse in the marketplace.⁶⁴ Many of these statutes are patterned after the language in Section 5(a)(1) of the Federal Trade Commission (FTC) Act⁶⁵ that prohibits “unfair or deceptive acts or practices.” The term “UDAP” is an acronym for this prohibition. In addition, the CFPB has authority under the Dodd-Frank Act to write regulations and pursue enforcement actions to root out unfair, deceptive, and abusive practices (referred to as its “UDAAP” authority).⁶⁶ Under state laws following the FTC Act framework, an act is deemed unfair if it is (a) likely to cause substantial injury to consumers (b) which is not reasonably avoidable by consumers themselves and (c) not outweighed by countervailing benefits to consumers or to competition.⁶⁷ Many states also cite the general definition of deception used by the FTC as a material representation, omission, act, or practice that misleads or is likely to mislead a consumer whose

⁶³ Charles A. Lamb et al., “HMDA, Housing Segregation, and Racial Disparities in Mortgage Lending,” 12 *Stanford Journal of Civil Rights and Civil Liberties* 249 (June 2016).

⁶⁴ See National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (9th ed. 2016) § 1.1 and Appendix A, *updated at* www.nclc.org/library.

⁶⁵ 15 U.S.C. § 45(a)(1).

⁶⁶ 12 U.S.C. §5531.

⁶⁷ The Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312 § 9, *adding a new* 15 U.S.C. § 45(n) (Aug. 26, 1994).

interpretation is reasonable under the circumstances.⁶⁸ Conduct is deemed “abusive” under the CFPB’s UDAAP enforcement authority when it:

- (1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
- (2) takes unreasonable advantage of--
 - (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
 - (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
 - (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.⁶⁹

(b) Typical UDAP claims are based on abusive conduct combined with exploiting LEP status.

Although it is important for lenders and servicers to take reasonable steps to ensure accurate translations and high-quality oral interpretation, good faith translation errors are unlikely to lead to UDAP claims. The body of case law shows that UDAP claims typically follow from material and intentional misrepresentations of loan terms coupled with taking advantage of the borrower’s LEP status by providing the contractual documents only in English.

Most cases where courts have found lenders to have acted in an unfair or deceptive way, and hence imposed UDAP liability, involved situations where a loan officer or broker conducted negotiations in the consumer’s preferred language and made representations that were materially different from the terms spelled out in the loan documents, which were provided only in English. In most of these cases, the unfairness or deception arose from the fact that the lender or broker actively and intentionally misrepresented the terms of the transaction. The fact that the consumer could not read or speak English was not the key fact, but was a reason why the consumer could not adequately protect himself or herself from the unfair or deceptive conduct. In most cases, the deception regarding contract terms was also accompanied by unfair or abusive loan terms and, in at least one case, misrepresentation of the borrower’s income to make it appear that a loan was affordable.⁷⁰ Lenders already have to police their originators for

⁶⁸ *In re Cliffdale Assocs.*, 103 F.T.C. 110, at *45 (1984) (appendix to decision).

⁶⁹ 12 U.S.C. §5531(d).

⁷⁰ *See, e.g., Thelemaque v. Fremont Inv. & Loan*, No. 2011 WL 2734490 at *1 (Mass. Dist. Ct. Mar. 23, 2011) (loan officer and closing attorney misrepresented to borrower in his native Haitian Creole that they would be able to refinance in six months; lender also misstated the borrowers’ income despite borrowers providing proof of accurate income); *Gonzalez v. Ameriquest Mortg. Co.*, 2004 WL 2472249 (N.D. Cal. Mar. 1, 2004) (brokers made oral and written misrepresentations in Spanish that monthly payments would

fraudulent practices and employ quality controls to remove such bad actors when they are found. Bilingual staff, just like monolingual staff, may employ unlawful practices at times, and lenders have to guard against this with careful monitoring, but providing translations alone do not change or increase UDAP liability.

(c) Lack of assent stems from complete omission of a material term.

In a related line of cases, courts have at times refused to enforce an arbitration clause where one was included in the English contract but completely omitted from the in-language translation provided to the borrower.⁷¹ Such courts have found there was a lack of assent to the arbitration clause. Lenders can avoid this problem by using translated documents that include all material terms in the contract. The GSEs can promote this by continuing the work they have already begun by translating the uniform note and security instrument into additional languages.

After a diligent search, we have not found **any** reported decisions where a lender was found liable for a UDAP claim or was unable to enforce a contract based on a good faith translation error.

(d) Lenders are more likely to face UDAP claims for not providing translations.

Rather than incurring more liability by providing language access, lenders are likely to reduce their legal risk by providing translated copies of the contract and other key documents, such as the Loan Estimate and Closing disclosure. Providing these documents in-language should prevent consumers from being misled by oral communications that may be conflicting or confusing. Some states make it an unfair or deceptive practice to fail to communicate the material terms in a language the borrower can understand.⁷² Providing translated documents also mitigates any risk of liability under the state translation laws discussed above.

be no more than a certain amount and closing costs would be minimal; English contract required a much higher payment and significant closing costs).

⁷¹ See, e.g., *Ramos v. Westlake Serv.*, 195 Cal.Rptr.3d 34, 36 (Cal. Ct. App. 2015).

⁷² See 940 Code Mass. Regs. § 8.05(3) (making it an unfair or deceptive practice in Massachusetts for a mortgage lender or broker to fail to take “reasonable steps” to communicate the “material facts” of the transaction in a language the borrower understands); D.C. Code § 28-3904(r)(5) (barring unfair transactions where, among other factors, a person has “knowingly taken advantage of the inability of the consumer reasonably to protect his interests by reasons of... ignorance, illiteracy, or inability to understand the language of the agreement.”) Although this provision applies to “sales or leases,” it has been interpreted to apply to mortgage lending. See *DeBerry v. First Government Mortg. and Investors Corp.*, 743 A.2d 699, 701 (D.C. Ct. App. 1999); *Cooper v. First Gov’t Mortgage and Investors Corp.*, 206 F. Supp. 2d 33 (D.D.C. 2002).

Mortgage lenders are already attempting to reach consumers who prefer doing business in a language other than English. They are engaging this segment of the market by advertising in non-English languages, publishing marketing materials in these languages, and hiring loan officers who can speak to potential customers in these other languages. When lenders advertise, solicit business, and converse with borrowers in other languages, but present the key documents for the transaction (including the loan contract and all required disclosures) entirely in English, there is an elevated risk that a consumer will not understand the terms of the transaction, or that the terms explained to them orally in their native language will not match the terms spelled out in the documents. Lenders can mitigate this risk by providing translated disclosures. The legal risk that arises out of providing translated documents is very low, so long as lenders take reasonable steps to ensure adequate quality of translations, as discussed below. This risk would be further minimized if the Enterprises provide high-quality, vetted translations of the loan contracts and other documents in additional languages.

(e) Quality of translation: How to improve and control quality and mitigate risk.

Mortgage lenders and servicers are right to devote attention to ensuring that in-language translations and oral interpretation are accurate and high quality. Mortgage-related documents contain many legal and technical terms. Some of these terms do not have direct translations in other languages, requiring translators to give explanations. Translators may also need to take into account regional differences in the dialects of a given language.

However, lenders, servicers, and the outside translation companies they use have means of dealing with these challenges. Translators can employ a two-tiered approach, where one employee does the initial translation and a second person reviews it to ensure accuracy. Lenders and the GSEs can ask focus groups to review translated documents to ensure clarity and prevent confusion. Lenders can develop language assessment protocols to ensure that current and prospective bilingual employees are qualified. Lenders can develop and maintain partnerships with community organizations, such as housing counselors, that also serve the LEP population and can help to detect and report any inaccurate translations or language-related complaints. Periodic customer satisfaction surveys also can be used to assess whether high quality service is being provided in-language.⁷³

Broader use of translation and interpretation services by mortgage lenders will result in these businesses starting to expand their available services. Larger translation companies have

⁷³ Civil Rights Division, “U.S. Department of Justice, Common Language Access Questions, Technical Assistance, and Guidance for Federally Conducted and Federally Assisted Programs” (Aug. 2011), available at: https://www.lep.gov/resources/081511_Language_Access_CAO_TA_Guidance.pdf (addressing these and a range of other best practices related to language access).

developed niche areas of expertise.⁷⁴ Such companies could easily develop dedicated teams with specialized training in the vocabulary used in mortgage lending and servicing.

4. Lenders and servicers can provide translation and interpretation at some, but not all, steps of the process without triggering UDAP liability.

Some mortgage industry participants have expressed concern that if they begin to provide language services in some instances, state and federal consumer protection statutes may require complete access in every instance.

As discussed above, no state translation statute requires translation services anywhere near to an end-to-end obligation.⁷⁵ To address potential UDAP/UDAAP liability, the CFPB has already determined that “clear and timely disclosures to prospective consumers describing the extent and limits of any language services provided throughout the product lifecycle” are permissible and effective.⁷⁶ Such disclosures have already been developed by Fannie Mae and others.⁷⁷

Accordingly, a written and oral disclosure to the borrower can be provided at the time language services are first provided, in the borrower’s preferred language, explaining the extent to which language services will be provided and clarifying that other documents and interactions may be available only in English.

5. Compliance risks are exaggerated, and the market can respond to a reasonable, incremental increase in requirements related to serving LEP borrowers.

Much alarm has been raised over the potential regulatory and legal risk lenders and servicers may incur if the Enterprises mandate a basic level of language access by participating sellers and servicers. Lenders and servicers seem to be arguing, in part, that they cannot ask about language preference on a form because doing so will require them to have some level of in-language services behind the question. The reality is that fair lending laws already require lenders and servicers to provide some reasonable level of in-language services. An English-only lending or servicing policy is simply not justifiable under existing laws.⁷⁸ There is no evidence to support claims that the sale of loans or servicing rights would be impeded by any steps identified in the RFI. In response to previous regulatory changes, including the implementation of the CFPB’s

⁷⁴ See, e.g., <https://www.language.com/industries/healthcare-interpreting>.

⁷⁵ New York is presently the only state to require a translated notice after loan closing – and it requires only the statutory foreclosure notice to be in-language.

⁷⁶ CFPB Supervisory Highlights at 22.

⁷⁷ See, e.g., Fannie Mae, Frequently Asked Questions for Borrowers about Spanish and English Language Documents, available at: <https://www.fanniemae.com/singlefamily/spanish-resources-for-servicers#>.

⁷⁸ See generally CFPB Supervisory Highlights at 21-25; HUD LEP Guidance.

mortgage servicing rule, industry trade groups made similar arguments. Based on that recent experience, while pricing of mortgage servicing rights may be impacted in the short term, in the long term, the market will normalize as lenders and servicers adjust to a new standard way of doing business.

A simple Westlaw search shows that the state and federal laws requiring translation of documents under certain circumstances have not resulted in a flood of litigation. There are very few cases raising legal claims of any kind related to translations or the lack thereof. The willingness of some lenders and servicers to take a proactive approach to expanding their language access services shows that it is entirely possible to do so without undue risk. The vastly uneven experiences of LEP borrowers across the market shows that FHFA and the Enterprises have a crucial role to play in setting a baseline regarding language access, as the private sector has failed to do.

6. The Enterprises should incentivize and require lenders and servicers to take reasonable steps toward full language access.

The GSEs should translate documents and make them available to the lending industry, but that alone is not enough. Fannie and Freddie have already made available a host of documents in Spanish, but, according to reports, they are rarely being used by lenders.

There are a number of reasons why lenders are not using translations of key documents that are readily available. Lenders claim that one of these reasons is a concern that Fannie and Freddie might not buy the loans if the lender does certain things – including providing translated disclosures, using the bilingual URLA, or accepting documents from applicants in non-English languages. Fannie and Freddie need to go beyond making form translations available and should encourage, and even require, lenders and servicers to provide reasonable language access. Above all, Fannie and Freddie should assure lenders that the GSEs are comfortable with a certain range of practices and will purchase loans where these practices are used. Beyond contractual requirements, these other measures are essential for new practices to take hold.

On its bilingual URLA form, Fannie Mae states on the last page:

A lender that chooses to use this bilingual form in connection with a mortgage application must be able to make all of our standard representations and warranties By making this form available, we make no representation or warranty regarding its suitability for use in any jurisdiction. Before using this bilingual form, a lender should consult with its own legal and compliance advisers to ensure that its use is not prohibited or regulated. A lender should verify that the laws of any jurisdiction allow the use of this form in connection with a mortgage transaction and make sure that its use does not

impair any of the borrower's obligations or the lender's rights under the mortgage and applicable law.

In essence, this language tells lenders to use the form at their own risk. Certainly, the GSEs should expect lenders to comply with applicable state and federal laws. However, the Enterprises could also provide guidance to lenders about certain steps they can take, in connection with using the bilingual form, which would likely minimize compliance risks. The GSEs can also assure lenders that they are willing to purchase loans when lenders provide language access consistent with Enterprise guidelines and requirements. The Enterprises should go beyond making it clear that they allow the use of translated forms, to actually requiring lenders and servicers to use reasonably available translated documents created by the Enterprises or federal agencies, as well as requiring lenders and servicers to adopt other language access measures like oral interpretation. They also should assess the language needs of various geographic areas and provide information about how many additional borrowers could be reached with better language access, and continue to monitor the needs of the LEP community that are not being addressed.

Conclusion

We applaud FHFA for recognizing the necessity of improving language access in the mortgage market for LEP borrowers. LEP borrowers are an important and growing segment of the consumer marketplace, and FHFA should establish rules and procedures to make mortgage lending and servicing fully and fairly accessible to them. While this work will be an ongoing process, progress is urgently needed. AFR's Language Access Task Force looks forward to working with FHFA and the Enterprises to improve language access for LEP individuals in the mortgage market.

Appendix – Contributing Organizations

Americans for Financial Reform:

Americans for Financial Reform (AFR) is a coalition of more than 200 consumer, investor, labor, civil rights, business, faith-based, and community groups that works through policy analysis, education, advocacy, and outreach to lay the foundation for a strong, stable, and ethical financial system. AFR was formed to advocate for the passage of the legislation that became Dodd-Frank and continues to protect and advance the reforms in that legislation, including by advocating for the full implementation of the housing policy reforms. A list of AFR member organizations is available at <http://ourfinancialsecurity.org/about/our-coalition/>.

Connecticut Fair Housing Center:

The Connecticut Fair Housing Center is a statewide nonprofit organization that serves as a resource for borrowers, housing counselors, consumer attorneys, and policymakers on foreclosure prevention, responsible lending, homeownership rights, and mortgage lending discrimination. The Center also provides legal services to victims of housing discrimination and those at risk of foreclosure, and conducts education, training, and outreach on both fair housing and foreclosure laws. <http://www.ctfairhousing.org/>

Consumer Action:

Consumer Action has been a champion of underrepresented consumers since 1971. A national, nonprofit 501(c)(3) organization, Consumer Action focuses on financial education that empowers low to moderate income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers and regulators to advance consumer rights and promote industry-wide change, particularly in the fields of credit, banking, housing, privacy, insurance and utilities. By providing extensive financial education materials in multiple languages, a free national hotline, and its annual credit card survey, Consumer Action helps consumers assert their rights in the marketplace and make financially savvy choices. Nearly 8,000 community and grassroots organizations benefit annually from its free wide-ranging outreach programs, training materials, and support. <http://www.consumer-action.org/>

Empire Justice Center:

Empire Justice Center is a statewide, multi-issue, multi-strategy public interest law firm with offices in Albany, Rochester, White Plains, Yonkers and Central Islip (Long Island). Empire Justice focuses on changing the “systems” within which poor and low income families live. With a focus on poverty law, Empire Justice undertakes research and training, acts as an informational clearinghouse, and provides litigation backup to local legal services programs and community based organizations. As an advocacy organization, we engage in legislative and administrative advocacy on behalf of those impacted by poverty and discrimination. As a non-profit law firm, we provide legal assistance to those in need and undertake impact litigation in order to protect and defend the rights of disenfranchised New Yorkers. www.empirejustice.org

Mobilization for Justice, Inc.:

Since 1963, Mobilization for Justice, Inc. (formerly known as MFY Legal Services, Inc.) has been in the forefront of protecting the legal rights of New York City’s vulnerable and low-

income residents by providing free legal assistance. Mobilization for Justice, Inc. (MFJ) handles more than 10,000 cases annually benefitting more than 20,000 people, prioritizing services to at-risk and underserved populations, and engaging in law reform, impact litigation, and policy advocacy. MFJ envisions a society in which there is equal justice for all. MFJ's mission is to achieve social justice, prioritizing the needs of people who are low-income, disenfranchised or have disabilities. MFJ advances its mission through providing the highest quality direct civil legal assistance, providing community education, entering into partnerships, engaging in policy advocacy, and bringing impact litigation. <http://mobilizationforjustice.org/>

National Coalition for Asian Pacific American Community Development (CAPACD):

National CAPACD is the first national advocacy organization dedicated to addressing the housing, supportive service, community and economic development needs of diverse and growing Asian Americans and Pacific Islander (AAPI) communities. As the first and only AAPI-serving HUD housing counseling intermediary, our mission is to improve the quality of life for low-income AAPIs. We are a coalition of more than 100 community-based organizations spanning 21 states and the Pacific Islands. Collectively, the coalition improves the lives of over two million AAPIs who live in poverty by providing voice, tools, and shared knowledge to drive change. The coalition focuses on promoting economic vitality, civic and political participation, and racial equity through a broad range of strategies, from community organizing and financial services to the creation of affordable housing and community institutions.

<http://nationalcapacd.org/>

National Consumer Law Center (on behalf of its low-income clients):

The National Consumer Law Center, Inc. (NCLC) is a non-profit Massachusetts Corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of practice treatises on consumer credit laws and unfair and deceptive practices. NCLC attorneys regularly testify in Congress and provide comprehensive comments to the federal agencies on consumer regulations. NCLC's contribution to these comments was written by Alys Cohen and Sarah Bolling Mancini.

<https://www.nclc.org/>

National Fair Housing Alliance:

Founded in 1988, and headquartered in the District of Columbia, the National Fair Housing Alliance is a consortium of more than 220 private, non-profit fair housing organizations, state and local civil rights groups, and individuals from 37 states and the District of Columbia.

Through comprehensive education, advocacy and enforcement programs, NFHA seeks to provide equal access to housing for millions of people. <http://nationalfairhousing.org/>

National Housing Resource Center:

The National Housing Resource Center promotes the long-term interests of the housing counseling industry and the people served by the housing counseling agencies. The Center is created to accomplish things together that we are not able to do separately. The Center advances public policies, programs, and educational materials that will strengthen the housing counseling

industry and benefit housing consumers, especially communities of color, the elderly, low and moderate income people, and underserved populations. <http://www.hsgcenter.org/>