

Unclear Consequences For Lenders Asking Language Choice

By Laurence Platt and Tori Shinohara

Law360, New York (July 24, 2017, 1:45 PM EDT) --

When, if at all, should a mortgage lender or servicer be required to conduct business in a foreign language simply because the consumer has expressed a preference to communicate in a different language? Where does one draw the line in terms of both the number of languages and the scope of the tasks in which a lender should be prepared to conduct business at the request of the consumer? And lastly, does the consumer's expressed language preference follow ownership of the loan or the mortgage servicing rights such that a subsequent purchaser is bound by the originator's or prior servicer's previous election to conduct some of its origination or servicing activities in a foreign language, even if neither the loan documents nor applicable consumer credit law explicitly requires such a course of conduct?

These questions are "top of mind" for residential mortgage lenders, servicers and loan-holders who have read the Federal Housing Finance Agency's (FHFA) "Improving Language Access in Mortgage Lending and Servicing Request for Input" dated May 25, 2017 (the request).[1] Approximately a year earlier, FHFA did not finalize a draft plan to amend the master form Uniform Residential Loan Application (URLA) to require lenders or brokers taking loan applications to ask the applicant his or her language preference. Leading up to the proposed draft were concerns raised by consumers, civil rights organizations and other organizations about the availability of mortgage services to support borrowers with limited English proficiency (LEP). Industry opposition to the proposal based on concerns about the operational and legal consequences of collecting information on language preferences contributed to FHFA's decision to table the proposal in order to examine the question more broadly.[2]

FHFA earlier this year signaled its intent to revisit the language preference issue in its 2017 scorecard for Fannie Mae, Freddie Mac and Common Securitization Solutions,[3] which requires the two government-sponsored enterprises (the enterprises) to identify major obstacles for LEP borrowers in accessing mortgage credit, to analyze potential solutions and to develop a multiyear plan appropriate for the enterprises to support improved access. FHFA's 17-page request now seeks input on actions the enterprises could take, appropriate to their role as secondary market participants, to promote access to mortgage credit for mortgage-ready LEP borrowers and to ensure that LEP borrowers have access to information necessary to understand the mortgage process. LEP borrowers, according to the request, consist of individuals who have a limited ability, or no ability, to read, speak, write or understand



Laurence Platt



Tori Shinohara

English. Individuals who are able to read, speak, write and understand English, but prefer to communicate in a language other than English, are referred to by the request as “preferred language” (PL) borrowers. The enterprises and FHFA believe that addressing issues related to LEP borrowers will typically benefit PL borrowers as well.

In seeking input on potential ways to enhance credit access for LEP and PL borrowers, the request cites the 2014 U.S. census, which, before the most recent presidential election, predicted a 46 percent increase in the number of foreign-born residents in the United States over the next 25 years. Referencing the U.S. Department of Housing and Urban Development’s 2016 "Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency" (the guidance) claiming a nexus between national origin and LEP, the request asserts that LEP borrowers will increase materially over the coming decades.[4]

A principal inquiry in the request is collecting data on borrower language preferences using a standard industry form that is designed by the enterprises, such as the URLA, an addendum to the URLA, and/or the Uniform Borrower Assistance Form. The request acknowledges the previously articulated industry concerns about going down this path. These concerns include originator and servicer uncertainty about the potential for increased costs, legal risk and regulatory consequences if they provide services or resources in languages other than English, issues that may be exacerbated by the many languages and language dialects spoken in the United States.

FHFA commits itself and the enterprises in the request to design any question on language preference with the objective that it not discourage borrowers; not create new obligations or liabilities for the originator, servicer or other parties; not create new rights for borrowers; and not create borrower expectations that the transaction will occur in a language other than English. In this regard, the request asks:

If a language preference question were to be asked on a standardized form, would the version below address relevant concerns? If not, why? What else might you suggest as an alternative or improvement?

Please mark the language you would prefer for communications about your loan (if available):

- English Chinese Korean
- Spanish Tagalog Vietnamese
- Other: _____

By law, your answer will NOT affect your mortgage application. Your answer does not commit the Lender or Other Loan Participants to communicate or provide documents in your preferred language. However, it may let them assist you or direct you to persons who can assist you.

Recognizing the continuing legal concerns, the request asks for input on a series of legal questions:

- Are there legal or regulatory obligations FHFA should be aware of as it considers recommendations on enhancing processes for the borrower’s preferred language?
- Are there any gaps in the current legal or regulatory structures that, if addressed by the appropriate federal or state agency, could facilitate originators and servicers working with LEP

borrowers?

- Would implementation of any of these specific actions trigger additional requirements or potential liability under state or federal laws? Please explain how with specific reference to the laws at issue.
- Are there ways that FHFA or the enterprises could mitigate these legal risks?

In considering these questions, note that, in September 2016, HUD's Office of General Counsel issued the guidance,[5] which asserted that discriminating on the basis of LEP, either intentionally or through a disparate impact analysis, may be a proxy[6] for national origin discrimination, which is prohibited under the Fair Housing Act.[7] In addition, the Consumer Financial Protection Bureau and the U.S. Department of Justice have brought three enforcement actions[8] in the past few years involving LEP consumers and alleging violations of the Fair Housing Act, the Equal Credit Opportunity Act, and/or federal prohibitions against unfair, deceptive or abusive acts and practices, including an action involving marketing in Spanish but providing documents in English. The request specifically cites the HUD guidance, so we must assume that FHFA is well aware of the legal and regulatory issues surrounding the addition of the language preference question on the URLA.

So, we are left with a number of obvious questions. What is a lender supposed to do with the language preference information that it may be required to collect by FHFA, and what is FHFA's ultimate purpose for requiring the collection of language preference information if there is no corresponding requirement to communicate in the preferred language? Would a disclaimer of any obligation to act on the answer be sufficient to preclude any such obligations on the part of the lender, servicer or subsequent holder? Or, once a lender knows of a borrower's language preference, is it obligated to act on that information? And is a lender or its assignees obligated to continue in the preferred language once it commences communicating in that language? Even if FHFA in good faith seeks to design the question with the objective that it will not subject lenders, servicers and holders to legal risk, FHFA cannot control how other governmental entities, courts or private plaintiffs will interpret the language and the potential resulting obligations.

Language preference is as much a business issue as a legal one, particularly for small businesses that may be unable to afford doing business in multiple languages and any size business that has to worry about the quality of the translations in both its written and oral communications with borrowers.[9] Moreover, from a business perspective, the industry presumably wants a way to provide enhanced credit access to a potentially and exponentially growing group of actual and potential borrowers, but the lender, servicer or holder needs some legal clarity to ensure that its good-faith efforts to communicate with LEP or PL borrowers will not be used against it in legal actions.

Perhaps the federal agencies should consider an "interagency statement" providing legal and regulatory clarity on communicating with LEP and PL mortgagors; if the agencies really want to encourage the policy of originators and servicers communicating in a language other than English and investors purchasing the loans, providing a legal safe harbor certainly would help. Asking language-preference questions without clearly knowing the legal consequences of either the "ask" itself or acting on the "ask" might be premature.

Comments on the proposal are due on July 31, 2017.

Laurence E. Platt is a partner and Tori K. Shinohara is an associate at Mayer Brown LLP in Washington, D.C.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] https://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/Language_Access_RFI.pdf.

[2] [https://www.mba.org/Documents/8-1-16 response to MBA Trade Associations re URLA.pdf](https://www.mba.org/Documents/8-1-16%20response%20to%20MBA%20Trade%20Associations%20re%20URLA.pdf).

[3] <https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/2017-Scorecard-for-Fannie-Mae-Freddie-Mac-and-CSS.pdf>.

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

[5] *Ibid.*

[6] LEP status is not a prohibited basis under the Fair Housing Act.

[7] The HUD guidance does not assert that the failure to communicate with borrowers in their language of preference in the mortgage context would be a violation of the Fair Housing Act. Although the HUD guidance largely focuses on the rental context, it provides some examples of concerns regarding the treatment of LEP borrowers in the mortgage context, including: (1) refusing to allow an LEP borrower to have mortgage documents translated or refusing to provide an LEP borrower with translated documents that the lender or mortgage broker has “readily available”; (2) restricting the borrower’s use of an interpreter; and (3) requiring that an English speaker cosign a mortgage.

[8] See Complaint, *United States v. Home Loan Auditors LLC et al.*, No. 1: 16-cv-04839, available at <https://www.justice.gov/opa/file/887201/download>. (The defendants allegedly “exploited their clients’ limited English proficiency. In contrast to their marketing materials, which were all in Spanish, the defendants required their clients to sign English-language contracts that were often not translated for them.”) In a CFPB action in December 2013, the bureau alleged deceptive acts or practices in connection with the telemarketing of a credit card add-on product to Spanish-speaking customers in Puerto Rico. Even though most consumers enrolled during calls conducted in Spanish, the CFPB alleged that there was no uniform Spanish language script for enrollment and all written materials were provided to consumers in English. In another CFPB action in June 2014, a bank allegedly excluded borrowers who (1) indicated they preferred to communicate in Spanish or (2) had a mailing address in Puerto Rico from a credit card debt-repayment program it offered. See also <https://www.justice.gov/archive/opa/pr/2001/January/007cr.htm>. (Consumers who applied for credit cards on Spanish-language application forms were allegedly subject to stricter underwriting standards and less favorable credit terms/conditions than those who applied in English.)

[9] For example, a mortgage servicer may have hundreds of form letters and other borrower correspondence that it sends at various stages of a mortgage-servicing life cycle. The translation of all borrower-facing documents would likely be an onerous task for mortgage servicers of any size.

All Content © 2003-2017, Portfolio Media, Inc.