

July 29, 2016

The Honorable Mel Watt
Director
Federal Housing Finance Agency
400 7th Street SW
Washington, DC 20219

Dear Director Watt:

We write to follow up on our discussion last week about including preferred language data fields in the redesigned Uniform Residential Loan Application (URLA). We recognize that this redesign has been a long and complex process. Advocates have actively participated in that process, including by proposing the inclusion of a language preference item since at least October 2014. This proposal has been subject to significant discussion throughout. For example, in June 2015, advocates sent FHFA a letter responding to specific arguments industry trade groups made against this proposal. We appreciate the opportunity to continue to press the case for why preferred language data fields should be included in the URLA.

Including language preference in the URLA redesign is the best opportunity to systematically record this information in connection with a specific loan and ensure it is available to the lender and to mortgage servicers regardless of how often the loan or servicing rights are sold. This will permit the industry to more efficiently meet the language needs of their customers.

We do not find the arguments that have been raised against including this item persuasive. First, we understand that some have suggested employing alternatives to the URLA for capturing borrowers' preferred languages. We strongly believe that none of the alternatives would fulfill the goal of ensuring that preferred language is captured and included as part of the mortgage file of a specific borrower for the life of the loan.

One alternative that has been raised is collecting preferred language data through surveys. The primary objective of collecting preferred language information from borrowers, however, is to enable lenders and servicers to meet their customers' language needs by ensuring that they know when a borrower prefers to communicate in a language other than English. No survey could fulfill this objective because a survey is not linked to a particular loan. While such surveys might be useful, as would inclusion of language preference in HMDA, it is not a replacement for loan-specific information.

Furthermore, the National Survey of Mortgage Originations (Survey),¹ as currently conducted, does not provide adequate data on the experiences of LEP homeowners. As an initial matter, the Survey is conducted only in English and Spanish,² thereby excluding the 36 percent of LEP residents who do not speak Spanish.³ We continue to urge the survey be provided in additional languages.⁴ Even if that

¹ Formerly known as the National Survey of Mortgage Borrowers.

² [National Survey of Mortgage Originations](#).

³ U.S. Census Bureau, 2010–2014 American Community Survey 5-Year Estimates, American Community Survey (Washington, DC: U.S. Census Bureau) Table B16001.

⁴ The implementation of this recommendation would be much easier if the National Mortgage Database (NMDB) included the homeowner's language, which would be possible if the information were requested by the URLA. The

problem were resolved, there would not be a sufficient number of survey responses from LEP borrowers to accurately assess their experiences. Typically, the Survey is sent to 6,000 homeowners per quarter.⁵ Approximately one-third of the Surveys are returned and usable.⁶ Even assuming that LEP borrowers were represented in the Survey population and returned the Survey at the same rate as others, fewer than 120 surveys per quarter would be returned by Spanish-speaking LEP homeowners and fewer than 70 surveys per quarter would be returned by other LEP homeowners. That would not be sufficient to generate reliable results for the LEP population as a whole, let alone individual assessments of commonly spoken languages like Chinese, Vietnamese, and Korean, or examination of differences by income, age, or region.

The Uniform Borrower Assistance Form (UBAF) has also been raised as a possible alternative to collecting language preference information from borrowers. While we support the idea of including language preference in the UBAF, it is not sufficient as an alternative to collecting the information in the URLA. First, collecting language preference information in the UBAF would dramatically limit the universe of borrowers for whom language preference information is known. Nearly all borrowers will complete the URLA, but only those seeking modification assistance will complete the UBAF, making it a poor substitute when the goal is to collect preferred language information for as many borrowers as possible. UBAF is also inadequate because the servicer not knowing the borrower's language preference makes it less likely that a UBAF will be completed in the first place. Moreover, the URLA can be used to provide assistance before the loan is closed. The goal of recording language preference information on the URLA is to collect language preference information as early as possible and to ensure it travels with the mortgage file for the life of the loan. Along with its much more limited scope, this makes UBAF, which may not be completed for years after origination, an inadequate mechanism for capturing preferred language information early in the process.

Others have suggested that language preference should be gathered earlier in the process. We believe that most lenders would in fact be aware of language preference information – along with other borrower information – before the URLA was completed. There is no barrier to originators doing so now or in the future. But without a uniform process to systematically record this information at a single point in the process, the advantages to recording this information may be less readily available throughout the lifecycle of the loan and less uniformly implemented.

FHFA has also suggested that it may do a more formal rulemaking or convene a multi-agency task force to more comprehensively approach the issue of language access. We very much support efforts to comprehensively address language access, but this possibility is not a reason for failing to move now to collect individualized information on the URLA. In fact, it only demonstrates the need for doing so; both developing and acting on future policies will be easier when originators have systematically recorded the homeowner's preferred language. There is simply no better place to collect this information than

NMDB does not include information about the borrower's language made available from Experian, because the agencies consider the data unreliable. [FHFA Update About the National Mortgage Database](#) (Aug. 1, 2014).

⁵ National Survey of Mortgage Borrowers, [Technical Report 15-02](#) (Aug. 27, 2015), Section 5.0.

⁶ National Survey of Mortgage Borrowers, [Technical Report 15-02](#) (Aug. 27, 2015), Table 3.

the URLA, and this redesign process is the ideal opportunity to incorporate it in this standard form. Failing to capture preferred language through this form would forfeit the best opportunity we will have in a generation to begin to improve language access in the mortgage market for LEP homeowners.

We also would like to address industry concerns that including the borrower's preferred language on the mortgage application would trigger new legal liabilities, specifically under the state laws of California, Massachusetts, New York, and Texas. We have reviewed the relevant laws in these states and do not agree that asking a borrower's preferred language on the mortgage application would expose lenders to new forms of liability.

The California statutes that are relevant to the issue of language access in a mortgage transaction are California Civil Code Sections 1632 and 1632.5.⁷ These statutes are triggered when an underlying transaction is primarily negotiated in one of five languages other than English. If the negotiation is primarily in one of the five specified non-English languages, the statutes apply; if it is not, the statutes do not apply. A lender's knowledge of a borrower's preferred language is simply irrelevant to these requirements. If, for example, a borrower indicated on the mortgage application a preference for communicating in a language other than English, but the negotiation was nonetheless done primarily in English, the statute would not apply.

There are two provisions of the Massachusetts UDAP regulations that apply to LEP consumers. The first relates to door-to-door sales and home improvement transactions.⁸ This regulation does not apply to mortgage loans. The second Massachusetts regulation that relates to LEP consumers defines as an unfair and deceptive act or practice the failure of a mortgage broker or lender to "take reasonable steps to communicate the material facts of the transactions in a language that is understood by the borrower."⁹ This regulation, as written and as it has been interpreted, imposes an affirmative obligation on the lender to ensure the borrower understands, but obtaining information about a borrower's preferred language would not add anything new to this obligation. As one court viewed it, the responsibility is part of the inflexible duty of the lender, the fulfillment of which is a case-by-case determination that depends on each borrower's capacity to understand the transaction.¹⁰ As a practical matter, one would expect a prudent lender who is subject to this regulation to affirmatively seek to know if a borrower had a need to have his or her language needs accommodated and including a preferred language data field in the mortgage application would simply help to facilitate lenders' compliance with section 8.05(3).

Under New York law, there are two statutory provisions that impose obligations on parties to real property transactions where one party speaks limited English. The first applies in cases of foreclosure and requires "[e]very covered contract and notice of cancellation attached thereto ... [to] be written ... in both English and Spanish if Spanish is the primary language" of the homeowner.¹¹ As with the

⁷ Loans secured by real property are covered under both 1632 and 1632.5 if they are negotiated through a licensed real estate broker. Where a real estate broker is not involved, a loan secured by real property is covered only under 1632.5. "Supervised financial organization[s]" are deemed compliant with § 1632 if they adhere to § 1632.5. Cal. Civ. Code § 1632(b)(4) (2016); Cal. Civ. Code § 1632.5(a), (c)(1) (2016).

⁸ 940 Mass. Code Regs. § 3.09 (2016).

⁹ 940 Mass. Code Regs. § 8.05 (2016).

¹⁰ See *Ossers v. Litton Loan Servicing*, No. 09-01208-BLP, 2012 WL 4928874, at *1-3, 6 (Mass. Super. Ct. Oct. 5, 2012).

¹¹ N.Y. Real Prop. Law § 265-a(3) (McKinney).

Massachusetts regulation that was discussed previously, this statute provides a defense to foreclosure to a Spanish-speaking borrower even if the mortgagor does not know the borrower's language. Therefore, including preferred language data fields on the mortgage application will have no bearing on the mortgagor's obligations under this statute; in fact, including preferred language data fields on the mortgage application would assist in complying with preexisting obligations under this statute.

The second relevant New York provision requires that notice of foreclosure be delivered in the borrower's native language if that language is one of the six most commonly-spoken foreign languages (according to census data) and the borrower is "known to have limited English proficiency."¹² First, in nearly all cases, the borrower will already be able to point to a basis for the borrower's LEP status to be known, which would make noncompliance with the New York notice requirement a defense to foreclosure. Second, compliance with this statute is a de minimis burden – it is a single, statutory notice in only six languages. In fact, compliance with New York law would be facilitated by capturing language preference on the URLA.

Texas laws affecting the rights of LEP consumers in real property transactions are limited to rent-to-own agreements, which are distinct from credit transactions, and cancellation rights in sales of real property.¹³ The provision that covers cancellation rights applies only to sales contracts involving real property, not to mortgage financing, and therefore does not apply to lenders. Furthermore, this provision is triggered by a sales pitch being given in a language other than English, not the seller's knowledge of the buyer's preferred language.

In any case, there is no persuasive argument that inclusion of the language item on the URLA would trigger new legal obligations. Lenders currently have reason to know when a borrower is not fluent in English. Systematically recording that information would only serve to facilitate meeting any already existing legal obligation. In addition, the URLA could include disclaimer language that the request for a borrower's language preference does not itself constitute a commitment for the originator or servicer to communicate in that language.

* * *

With nearly one-in-ten U.S. residents having limited English proficiency, it is critical that industry, regulators, and advocates work together to address language access issues. Ensuring that lenders and servicers have the basic information they need to be able to serve their LEP customers—knowledge of the borrower's preferred language—is a necessary element of meeting customers' language needs and expanding fair and equitable access to the mortgage market. There is not a better alternative to collecting this information than the URLA, and FHFA and other regulators have had ample time to vet the proposal.

¹² N.Y. Real Prop. Acts. § 1304(5) (2016).

¹³ Tex. Bus. & Com. Code Ann. §§ 92.051, 601.002(b)(4), 601.052(b)(1) (West 2016).

Thank you for the opportunity to continue to engage on this question and please let us know if you have any other concerns that it may be helpful for advocates to address.

Sincerely,

Americans for Financial Reform

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

National Fair Housing Alliance

National Housing Resource Center