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Language Preference on URLA — Rebuilding the Tower of Babel*

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There is some thought that the Federal Housing Finance Agency (FHFA), Fannie Mae and Freddie Mac may unilaterally, without notice and comment, require the Uniform Residential Loan Application used by Fannie Mae and Freddie Mac lenders to list a declaration by the borrower of the language in which the borrower prefers to have mortgage communications take place. There are serious implications that flow from such a requirement that warrants broader publication and discussion before it is finalized.

The Uniform Residential Loan Application

Fannie Mae and Freddie Mac require certain documents to be filed if a lender wants them to guarantee a loan. One of those documents is called the Uniform Residential Loan Application, or "URLA." They and the regulator of those entities, the FHFA, are now considering a change to the form that will require the language preference of the borrower to be stated on the form. Should that happen, it would come with substantial consequences, and they may well turn out to be unintended consequences for not only lenders but borrowers themselves.

Potential Implications

Stating that a particular language is preferred by the borrower may be interpreted to mean that such language is the only language that the borrower can comprehend, or that the borrower cannot comprehend English. It also may be interpreted to mean that the stated language should be used in all communications with the borrower for all purposes. If that is so, then it could be argued that these consequences are expected to follow from that:

- All relevant documents in the mortgage process must be in that language;

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- All oral communications at any time between the borrower and the lender or counselor or any third party in the process must be in that language;
- All marketing materials must be in that language;
- Any foreign language may be selected as the preferred language;[1]
- There must be accuracy of translations and consistency between lenders and counselors and other third parties engaged;[2]
- Regulators must have the capacity to engage in these languages flawlessly; that includes the capacity at the examination stage as well as those at the supervisory and enforcement stage;
- Regulatory guidance and information bulletins or other means of communications should likewise be in those languages; and
- To be consistent, the dispute resolution system must be prepared to decide mortgage related disputes that are in foreign languages. That includes mediators and arbitrators. What that means for judges and jurors is unclear, but if all discussions have been in Mongolian Khalkha throughout the process, it is possible that there would be a logical basis for saying that any court proceedings should also be in that language.[3]

This is a lengthy list and there may be responses to it that say — "This is not what we meant. We just meant to gather data." There are many less controversial ways to gather data, however; all could agree on that. A relatively inexpensive survey could accomplish that within a reasonable range of accuracy, and could do so quickly.

A consumer stating that he or she prefers Arabic or another language, however, must have some consequence beyond being a sterile data point to the person reading the form and trying to decide whether to approve the application. That would be true whether or not FHFA mandated a disclaimer that said the answer to this question will only be used for research purposes. FHFA does not have the ability to bind other agencies or private parties, in the first instance, and any disclaimer could be eliminated in a subsequent review by a new Director.

The logical conclusion of a question that asks the borrower to state a language preference would be that the person prefers that the communication be in that language. It also could be argued that it identifies the national origin of the borrower.[4]

[1]There are as many as 400 foreign languages and dialects spoken in the U.S. Even though there has been some suggestion that the number of languages should be limited to the 7 or 8 most spoken in the U.S., there is no logical reason behind such limitations if viewed from the perspective of an individual consumer.

[2]These must ensure consistency both between each language and English and among all of the languages.

[3]It could get complicated if a plaintiff speaks one language (say Mandarin or one of the hundreds of other Chinese languages) and the defendant speaks another (say one of the 114 languages spoken in Sudan).

[4]The hole down which this leads might be less deep if the requirement be limited to only the "most popular" of the foreign languages used in the U.S. But logically, there is very little reason to distinguish between consumers who speak Spanish and those who speak only Khmer (or pick any of the other 400 or so languages). Whatever argument exists to say that Spanish speaking LEPs should have the benefit of Spanish communication should also apply to the Cambodian who speaks Khmer, so limiting the translations and other communications to only those "most popular" foreign languages would be picking winners and losers based on (to use the language of those promoting the idea) a proxy for national origin.

Legal Implications

There are risks lurking around every corner if transactions must be translated and communications interpreted in dozens or hundreds of foreign languages.[5]

Lying at the root of one of the arguments is an assumption that language preference is a proxy for national origin — i.e., if you prefer to speak Finnish, then you are presumed to be Finnish.[6] If that is accepted, then the question raised is whether anyone who speaks and understands only a non-English language (in this case, Finnish) can receive fair and equal treatment when applying for a mortgage if communications are only in English.

ECOA prohibits discrimination based on national origin. One could argue that if a particular language is preferred that is a proxy for national origin, and if communications are not in that language, then the consumer would be unable to make a reasoned choice among the various products and services that might be available. Others who could speak English would be able to make those choices, and therefore, the LEP person would be discriminated against. That would be true in originations as well as in all aspects of servicing. One could also make similar arguments under the Fair Housing Act or the Civil Rights Act of 1964.

After all, once the language preference is stated, the lender is on notice that the consumer would prefer communication in that language, and if it is not in that language, the lender assumes the risk that any preference revealed by a statistical analysis for non-Finnish speaking persons over Finnish would be illegal.

In addition, if communications are not in the preferred language, the consumer could argue that he or she will not receive full information about the largest single purchase the consumer will ever make. Beyond that, the lender has been notified that would be the case when the language preference is declared on the URLA.

While not basing the argument on national origin or protected groups, the Dodd-Frank Act requires CFPB to ensure that features of a product or service offered to a consumer are fully and accurately disclosed to the consumer, and the argument could be made that disclosure in any but the language preferred is not such disclosure. Similarly, that Act creates a UDAAP liability that prohibits acts or practices that interferes with the ability of a consumer to understand a term or condition of a financial product, or takes advantage of a consumer's lack of understanding; knowledge of the language is crucial to those considerations.

There is a further question whether there even is a contract if the person does not understand English and, in particular, if the lender receives notice of that by the borrower stating in the URLA that he or she prefers Basque.[7] A contract at its core is an agreement between two parties. If one party does not understand the language in which the contract is written, then the written contract itself may not represent agreement and the parties may not have a contract.

[5]See memorandum by Americans for Financial Reform, ***AFR Issue Brief: Fair Treatment of Homeowners with Limited English Proficiency***.

[6]Lau v. Nichols, 414 U.S. 563 (1974).

[7]One could even argue that a later disclosure by the borrower that he or she understood English might not protect the lender since the borrower could argue that he or she understood Basque better than English and in such an important transaction, to fully understand the terms and conditions (ala UDAAP reasoning) the communication would have to be in Basque.

Does the lender have that responsibility of doing anything with this notice — i.e., must he provide communication in that language? The lender could argue that English is the language of the courts and the laws and therefore is the language in which communication about legal rights and responsibilities should take place. He could show how complicated and confusing providing communications in many languages would be. He could test whether the consumer really doesn't understand English, or could argue that the onus should be on the consumer to hire a translator if English is not an understandable language. He could argue that the preference itself does not create a responsibility to provide communication in that language because it doesn't direct the lender to do so and the assumption is that English should be the language of communication. He could argue that the borrower assumed any risk generated by the use of English in the documents. He could challenge the basic assumption that language represents national origin.

Whether those arguments, or other similar arguments, would prevail would have to be determined.

What does seem clear, however, is that once the preference is stated on the URLA, FHFA cannot limit possible legal ramifications simply by stating in the guidance or an accompanying commentary that what is intended is only a collection of data for research purposes. It may be that FHFA could limit itself, but it cannot limit what CFPB or other federal or state agencies or private parties are able to do to utilize that statement for purposes that go beyond simply data gathering for research purposes. They have independent bases for enforcing the laws and regulations of the country, and if a form used to get a mortgage says the borrower would prefer that communication should be in Hindi, then protestations by FHFA or the GSEs that only data gathering was intended are not dispositive.

Broader implications

Once a lender discovers in the mortgage process that a borrower speaks only Portuguese, should the lender thereafter communicate with that borrower only in Portuguese even if the product offered or sought is not a mortgage product? Assume that person wants to finance a car or truck and had earlier on the URLA expressed his preference in communicating in Portuguese. Should the lender now be obliged to communicate only in Portuguese with that borrower in that transaction since the borrower had earlier stated that Portuguese is the language in which he or she prefers communication to occur?

It is doubtful that many believe that the scenarios sketched out above would result in a desirable policy for the GSEs to follow. Setting aside expense (and that is a massive set-aside, of course — the expense would chase many lenders out of the field), the mortgage world would be a cacophony of competing languages the totality of which would be that no consumer could be at all confident that he or she was receiving comparable treatment from originators, servicers, the dispute resolution system, the government or anyone else, nor could any of the others in the field be certain they were treating everyone fairly. Who could tell if an Albanian translation provided the same information that a Rumanian translation provided, or even worse, whether someone answering a question in Czech provided the same information that another translator in another company provided to a similar inquiry in Urdu?

Specialties couldn't develop to service just a few languages (say just English, or just Tagalog) because any consumer would have the right to apply for a loan with any originator and state the

language in which the communications would have to take place. Denying anyone because of a desire to specialize in a different language might well violate the law by denying service based on national origin.

Overriding these considerations, of course, is the impetus this would give to dividing the country into language-based metrics rather than uniting them as one group of citizens operating under the same set of laws, principles and communication. It would make communication among our citizens more difficult rather than less difficult.

Ironically, this would take place as the rest of the world recognizes the importance of understanding English and being able to communicate globally with persons from many countries using one language, namely English. English has become globally prevalent in the fields of business, academics, science, computing, education, transportation, politics and entertainment, and is spoken as a first or second language in so many countries that the estimate now is that there are three or four more non-native speakers of English than native speakers. Soon as many as one-third of the population of the world will be studying English.[8][9]

Summary

Requiring the URLA to state the language preference of the consumer is not an innocuous mandate, nor are its consequences necessarily beneficial to the society at large or to the parties involved in the transaction. There are most likely better ways to assist LEP consumers to participate in the commercial activity of the country than this, since all parties have a desire to be sure that the consumers understand the transactions into which they are entering. For example, there could be greater assistance and encouragement to LEP consumers to learn English. Consumers who wish to make a purchase as significant as a home could be encouraged to utilize counselors or other translation providers to ensure that they understand the agreement. There are many other ways to address the issue. And if data collection is the goal, there are very reliable ways to collect the essential data without the consequences that accompany the mandate to state a language preference.

The important point is to consider the issue thoroughly and not impose the mandate apparently being considered without a full consideration both of its implications and of possible alternatives that could reach a beneficial result. That is best done with notice to the public of any proposed change and a full opportunity for the public to comment.

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[8] "***Across Cultures, English is the Word***," NY Times, April 9, 2007 Seth Mydans
[9] "***English as a Global Language***," The History of English