

EXPERT ANALYSIS

Lost in Translation: Financial Services for Consumers With Limited English Proficiency

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A 2013 Rutgers University study indicates that the rate of homeownership among minority and immigrant borrowers is trending up, but it still lags the rate among whites. However, this may be changing. According to the “2013 State of Hispanic Homeownership Report” of the National Association of Hispanic Real Estate Professionals, by 2020, an estimated 50 percent of all new homebuyers will be Hispanic.

As the foreign-born population increases, so does the language barrier. The number of people with limited English proficiency increased 81 percent between 1990 and 2011, and more than 25 million LEP individuals were living in the United States in 2011.¹ The Consumer Financial Protection Bureau has noted that 75 percent of Hispanics who are 5 years of age or older speak Spanish at home and one-third of these individuals speak English “less than very well.” Therefore, to reach underserved markets, maintain market share and ensure long-term viability, lenders must address the language barrier.

A federal interagency website, www.LEP.gov, defines a person with limited English proficiency as one whose primary spoken language is not English and who has a limited ability to read, speak or understand English. Although meaningful access to *federally funded* programs and activities for LEP individuals is required by an executive order issued in 2000 by President Bill Clinton, the LEP community’s right to access is less clear for *privately funded* programs and activities. What is crystal clear, however, is that as the number of LEP borrowers increases, loan origination and servicing practices must be adapted to ensure the fair and consistent treatment of customers.

Although sparse legal guidance makes the task complicated, this lack of guidance may not be inadvertent — over-regulation could stifle lending or put roadblocks in the path of a recovering economy.

The CFPB and other federal agencies have struggled to find a balance between ensuring that LEP borrowers have meaningful access to credit while refraining from overburdening creditors.

FEDERAL AGENCY REQUIREMENTS

The CFPB has been quiet about its expectations for LEP access. There are no mandatory requirements for disclosures to LEP consumers, but *voluntary* disclosures in languages other than English are permitted under the Truth in Lending Act, 15 U.S.C. § 1601; Regulation Z; the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601; Regulation X; the Equal Credit Opportunity Act, 15 U.S.C. § 1691; and Regulation B.

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However, the CFPB Supervision and Examination Manual suggests that mortgage servicers should have policies and procedures for servicing the loans of LEP borrowers. Specifically, CFPB examiners will consider whether servicers take the following actions:

- Flagging files that require non-English assistance.
- Providing customer service call options for languages other than English.
- Making available dedicated customer service personnel who speak languages other than English.
- Training customer service personnel who assist in languages other than English in the same manner as those working in English.
- Providing translations of English-language documents to LEP borrowers.²

The difficulties experienced by the LEP community in connection with homeownership are real. For example, LEP borrowers encounter language-related barriers to benefits associated with the Home Affordable Modification Program, including mortgage modification opportunities, according to a February 2014 Government Accountability Office report. As a result, in the report, the GAO recommended that the Treasury issue guidance for mortgage servicers working with LEP borrowers and monitor compliance with that guidance.

Recognizing the difficulties faced by the LEP community, Executive Order 13166 requires federal agencies and recipients of federal financial assistance to take reasonable steps to ensure that meaningful access to their programs, products and services is available to these individuals.³ Justice Department guidance on the executive order explains that the determination of “meaningful” access is a fact-dependent and flexible inquiry balancing four factors:

- The number or portion of LEP persons eligible to be served or likely to be encountered by the program or grantee.
- The frequency with which LEP individuals come into contact with the program.
- The nature and importance of the program, activity or provided service to people’s lives.
- The resources available to the grantee/recipient and the costs.

Varying approaches to LEP assistance have been endorsed by federal agencies, including the Department of Housing and Urban Development.⁴ According to HUD, depending on the results of the four-factor analysis, providing access to LEP persons could include any or all of the following:

- Oral interpretation services.
- Bilingual staff.
- Telephone service lines with interpreters.
- Written translation services.
- Notices to staff and recipients of the availability of LEP services.
- Referrals to community liaisons proficient in the language of LEP persons.

LEP access may involve written translations of “vital” documents, according to HUD. Not all vital documents must be translated, and the need for translation will depend on the size of the LEP population being served. HUD’s guidance on the translation of vital documents also balances the cost of translations with their benefits to the LEP community.

Recently, the CFPB announced a commitment to providing LEP consumers with meaningful access to its programs and services and disclosed its language-access plan.⁵ Meaningful access under the plan encompasses “translating critical consumer-facing documents into select foreign languages” and handling consumer complaints in more than 180 languages. The plan may signal increased CFPB scrutiny of LEP access to consumer financial products and services. Also, in furtherance of the plan, the CFPB and the Federal Trade Commission recently held a joint seminar on the effect of debt-collection practices on the Latino community, especially those communities with LEP persons.

STATE LAWS

Some state laws require lenders to provide written disclosures in foreign languages. For instance, California lenders negotiating loans in Spanish, Korean, Chinese, Tagalog or Vietnamese must provide certain disclosures in those languages.⁶

Some states and local communities have laws indicating that English is the “official language,” but these do not supersede federal non-discrimination laws such as the Equal Credit Opportunity Act and Regulation B. Thus, these local or state laws are not a legal defense for “English-only” business practices that are deemed to be discriminatory on the basis of national origin or another protected class.

Although state laws generally focus on loan origination, lenders should not assume that their foreign-language obligations end at the loan closing. Even without specific foreign-language obligations in connection with loan servicing, an LEP borrower can raise concerns about unfair and deceptive acts and practices under state laws when he or she is suddenly confronted with English-only documents and exclusively English-speaking customer-service personnel. This risk arguably increases with loans in default when the borrower faces loss-mitigation processes and requirements that are all in English.

UNFAIR AND DECEPTIVE ACTS AND PRACTICES

Entities under CFPB supervisory authority should consider how their advertising affects LEP consumers. The CFPB’s Supervision and Examination Manual identifies advertising targeted to LEP consumers (or its absence) as a factor that may increase unfair, deceptive or abusive acts or practices, or UDAAPs. An agency consent order with Synchrony Bank (formerly known as GE Capital Retail Bank) underscores this concern.⁷

The CFPB alleged that Synchrony engaged in a pattern or practice of discrimination in violation of the Equal Credit Opportunity Act and Regulation B when it excluded, from two offers for financial products, those consumers with “Spanish-preferred” indicators on their accounts or whose mailing addresses were in Puerto Rico. These individuals were allegedly excluded even though they met the offers’ eligibility requirements.

Other than advising on the risk arising from advertising targeted to LEP consumers, the CFPB has not singled out other UDAAP issues. Rather, the bureau advises that entities review its enforcement activity and published guidance on the UDAAP concept. This task is “easier said than done,” but a handful of enforcement actions shed some light.

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For example, CFPB actions suggest that the bureau may view rushing consumers into accepting loans (particularly those with high interest rates) without a clear explanation of the terms as an “unfair” practice.⁸ Similarly, the bureau may view marketing in a foreign language and providing vital documents only in English as “deceptive” if the consumer does not receive the terms promised by the marketing materials.⁹ Despite the lack of LEP regulatory mandates, the UDAAAP enforcement risk still exists.

CONCLUSION

Recognizing the multicultural U.S. population, the Obama administration has highlighted a Clinton-era public policy to ensure that LEP consumers have reasonable access to services, benefits, information and legal rights. This access is mandated only for federally funded programs and activities, but the reasonable-access concept seems to be spreading to private activities and services. Where private services are concerned, access to credit ranks high on the list of what most consumers, regardless of language, want and need.

To date, various government agencies have taken an incremental approach to identifying improvements to LEP consumers’ access to credit. These improvements include translation, avoidance of incompatible marketing and product terms when multiple languages are involved and not pressuring borrowers to obtain products they may not fully understand.

For lenders committed to access to programs for LEP consumers, translating may be the first step, but it is not likely to be the last, because lending to these borrowers and servicing their debts involves a host of responsibilities. Conflicts can arise when one language is used in marketing and another is used for loan documentation or conversations about collection. The risks of misunderstanding are magnified when loan-servicing loss mitigation and collection communications occur in a language other than the one used to solicit the loan. Additional dilemmas involve choosing which languages to translate — does the selection of one or two languages (European and/or Asian languages, for example) suggest the rejection of others (African or Middle Eastern languages)?

Notwithstanding the fact that access to credit for LEP consumers is an emerging area, lenders seeking to minimize claims of discrimination, deception, abusiveness or unconscionability should anticipate that calls for access to credit for LEP consumers will increase and should develop systems and procedures to promote access. Lenders should also monitor complaints involving non-access and study the pronouncements and enforcement actions of relevant government agencies for an indication of conduct deemed to be inconsistent with the promotion of such access to credit.

NOTES

¹ Monica Whatley & Jeanne Batalova, *Limited English Proficient Population of the United States*, MIGRATION INFO. SOURCE, (July 25, 2013), available at <http://www.migrationpolicy.org/article/limited-english-proficient-population-united-states/>.

² CFPB Examination Procedures, ECOA Risks Related to Mortgage Servicing (July 2013), available at http://files.consumerfinance.gov/f/201307_cfpb_ecoa_baseline-review-module-fair-lending.pdf; CFPB Examination Procedures — Mortgage Servicing (January 2014), available at http://files.consumerfinance.gov/f/201401_cfpb_mortgage-servicing-exam-procedures.pdf

³ Exec. Order 13166, Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50121 (Aug. 16, 2000).

⁴ U.S. Dep’t of Hous. & Urban Dev., Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 72 Fed. Reg. 2732 (Jan. 22, 2007).

⁵ Proposed Language Access Plan for the Consumer Financial Protection Bureau, 79 Fed. Reg. 60840 (Oct. 8, 2014).

⁶ Cal. Civ. Code §§ 1632.5.

⁷ *In the Matter of Synchrony Bank, f/k/a GE Capital Retail Bank*, File No. 2014-CFPB-0007, consent order issued (C.F.P.B. June 19, 2014), available at http://files.consumerfinance.gov/f/201406_cfpb_consent-order_synchrony-bank.pdf.

⁸ See e.g. *Consumer Fin. Prot. Bureau v. ITT Educ. Servs.*, No. 1:14-cv-00292, 2015 WL 1013508, at * 26-29 (S. D. Ind. Mar. 6, 2015) (CFPB alleged facts sufficient to state a claim that a private education loan company's practice of rushing students through the process of signing up for loans without giving them an opportunity to understand what they were signing was an unfair practice).

⁹ See e.g., *In the Matter of Dealers' Fin. Servs. LLC, Lexington, Ky.*, File No. 2013-CFPB-0004 (C.F.P.B. June 26, 2013) (marketing of vehicle service contracts claiming that the contracts would add just a few dollars to the customer's monthly payment although they actually added an average of \$43 per month was viewed as deceptive; marketing materials suggested that all repairs would be covered by the contract, although many repairs were not covered), available at http://files.consumerfinance.gov/f/201306_cfpb_consent-order-004.pdf.



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