

July 31, 2017

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

cc: Office of Housing and Regulatory Policy

RE: Improving Language Access in Mortgage Lending and Servicing

Dear Director Watt:

The American Bankers Association (ABA), the Consumer Bankers Association (CBA), the Housing Policy Council of the Financial Services Roundtable (HPC), and the Mortgage Bankers Association (MBA), which together represent the banking and real estate finance industries, thank the Federal Housing Finance Agency (FHFA) for the opportunity to respond to the May 2017 Request for Input (RFI) on issues faced by qualified borrowers with Limited English Proficiency (LEP) throughout the mortgage life cycle, including mortgage lending and servicing.¹

Our members strongly support efforts to better understand the unique challenges relevant to LEP borrowers and to better serve the LEP population with safe, sustainable, and affordable mortgage credit. To further these objectives, we believe the best course of action for FHFA, other government agencies, Fannie Mae and Freddie Mac (the Enterprises), lenders, servicers, and other interested stakeholders is the pursuit of a holistic strategy that identifies LEP-specific barriers to homeownership, allocates resources to reduce these barriers in a cost-effective and practical manner, and minimizes confusion among all parties, including LEP borrowers. We understand this RFI to represent the beginning of this process, and we look forward to identifying ways to improve the mortgage finance system infrastructure to better accommodate LEP borrowers.

Considering our belief that a holistic approach to these important issues is essential, we are extremely concerned about the possibility of FHFA and the Enterprises prematurely including a question regarding the language preferences of potential borrowers on the Uniform Residential Loan Application (URLA) at this time. While we appreciate FHFA's stated position that the inclusion of such a question "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

¹ FHFA, "Improving Language Access in Mortgage Lending and Servicing Request for Input," May 25, 2017. Available at: https://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/Language_Access_RFI.pdf.

than English,”² we believe that its inclusion prior to resolution of the concerns enumerated below will mislead borrowers, increase costs for consumers, and open lenders, servicers, and secondary market investors to possible legal liability. It is more appropriate, and more beneficial for potential LEP borrowers, that future efforts determine where additional resources should be deployed and where regulatory gaps may exist. Far more guidance and clarification—not the inclusion of a question on the URLA—will meaningfully address the needs of LEP borrowers.

Therefore, we respectfully request that FHFA and the Enterprises not include a question regarding borrower language preference on the URLA at this time, and instead work expeditiously with our members and the relevant government agencies to develop a comprehensive action plan to efficiently and effectively provide LEP borrowers with greater access to sustainable mortgage credit.

I. Introduction

In August 2016, FHFA decided not to include a question regarding borrower language preference on the URLA after consideration of a variety of means by which to improve access to credit for LEP borrowers. Instead, FHFA announced a series of steps to begin addressing some of the unresolved issues related to this topic. These steps included additional surveying of borrowers through FHFA’s existing and ongoing surveys, issuance of an RFI, and collaboration with stakeholders at other government agencies and with industry and consumer representatives.³

Our associations appreciated this decision, as we believed—and continue to believe—that further progress must be made on numerous practical and legal concerns before it is appropriate to consider amending application materials such as the URLA. In particular, the use of surveys by FHFA or the Enterprises, in conjunction with the Consumer Financial Protection Bureau (CFPB), to obtain more information specific to potential LEP mortgage borrowers represented a positive development.

In December 2016, FHFA issued its 2017 Scorecard for Fannie Mae, Freddie Mac, and Common Securitization Solutions (Scorecard), which included a requirement that the Enterprises “Support access to credit for borrowers with limited English proficiency by assessing the impact of language barriers throughout the mortgage life cycle and developing a plan to improve access to credit that is appropriate for the Enterprises.”⁴

To further these objectives, FHFA released its RFI in May 2017 to gather additional public views on issues faced by qualified LEP borrowers.

² Id., page 12.

³ FHFA, “Letter to Trade Associations Dated August 1, 2016.” Available at: <http://consumerbankers.com/sites/default/files/8-1-16%20response%20to%20MBA%20Trade%20Associations%20re%20URLA.PDF>.

⁴ FHFA, “2017 Scorecard for Fannie Mae, Freddie Mac, and Common Securitization Solutions,” December 15, 2016, page 3. Available at: <https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/2017-Scorecard-for-Fannie-Mae-Freddie-Mac-and-CSS.pdf>.

As will be discussed in greater detail below, there is significant data and information available with respect to the diversity of languages spoken in the United States, including granular data on language proficiency that is supplemented with data across many other demographic indicators. There is also a wide range of existing efforts being undertaken by lenders and servicers to better serve LEP borrowers.

Critically, however, it is the lack of guidance and clarity from regulators that remains the greatest impediment to continued progress. Lenders and servicers remain unclear as to their responsibilities with respect to oral or written translation services, counseling, referrals, or other elements of their interactions with potential borrowers. This lack of guidance and clarity includes outstanding legal and compliance questions that potentially expose lenders, servicers, and investors to additional risks while leaving borrowers without a sufficient understanding of their rights and available resources.

The regulators charged with enforcing the applicable laws must determine what is required of various parties—government agencies, the Enterprises, lenders, servicers, investors, borrowers, and others—and what rules and resources to provide. Any approach that involves an amended URLA prior to the development of guidance, rules, or resources has the potential to confuse or mislead LEP applicants and borrowers and create uncertainty around possible liability for the industry stakeholders seeking to serve them.

II. Ample Data is Already Available on LEP Borrowers

Data collection has been asserted as a potential justification for amending the URLA to include a question regarding borrower language preference. Detailed data regarding the language preferences of those living in the United States has many beneficial public policy purposes. Our associations do not dispute the usefulness of such data. However, we believe that existing data sets provide ample information, and further, if new or more detailed data is needed, there are better collection platforms than the URLA.

For example, the U.S. Census Bureau, through its American Community Survey, publishes data on the size and share of the population that speak various languages other than English, with other data overlays including nativity, citizenship, age, educational attainment, and poverty status.⁵ Other ad hoc studies, working papers, data sets, and maps published by the U.S. Census Bureau provide further information on the language preferences and proficiency of those living in the United States.⁶

Other federal agencies, such as the Department of Education and the Department of Health and Human Services, provide demographic data that includes LEP-specific

⁵ U.S. Census Bureau, “American Fact Finder – Language.” Available at: <https://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t#acsST>.

⁶ U.S. Census Bureau, “Language Use.” Available at: <https://census.gov/topics/population/language-use.html>.

information.⁷ Further, a federal interagency working group on LEP maintains a website with an overview of publicly-available data.⁸

Non-government resources include the Migration Policy Institute, which publishes research reports detailing the size of the U.S. LEP population, as well as other characteristics of this population, including languages spoken, nativity, age, race, ethnicity, educational attainment, employment status, poverty status, and geographic distribution.⁹

Finally, for information specific to the mortgage process, the National Mortgage Database, a joint project of FHFA and the CFPB, provides data via two surveys—the National Survey of Mortgage Originations (NSMO) and the American Survey of Mortgage Borrowers (ASMB).¹⁰ The NSMO collects voluntary feedback directly from borrowers about their mortgage experiences, and includes questions on languages other than English spoken by borrowers, whether or not borrowers received documents or translations in their primary language, and the importance to borrowers of receiving documents or translations in their primary language.¹¹ The ASMB also collects voluntary feedback directly from borrowers about their mortgage experiences, with further details regarding experiences with maintaining a mortgage under financial stress. The ASMB includes questions on borrowers' English proficiency, languages other than English spoken by borrowers, whether or not servicers provided staff who could speak borrowers' primary languages, whether or not servicers provided explanations or translated documents in borrowers' primary languages, and whether or not counseling was provided in a language other than English.¹²

If FHFA or other government agencies determine that more data is needed, there are more appropriate platforms for collecting such data than the URLA. New data collection efforts should not be linked to individual borrower applications, as potential borrowers may become concerned that their answers could affect the lending institution's credit decision. Surveys or other platforms that are separate from the loan application would

⁷ For example, see U.S. Department of Education, "Civil Rights Data Collection." Available at: <http://ocrdata.ed.gov/>. For example, see U.S. Department of Health and Human Services, "Resource for Entities Covered by Section 1557 of the Affordable Care Act – Estimates of at Least the Top 15 Languages Spoken by Individuals with Limited English Proficiency for the 50 States, the District of Columbia, and the U.S. Territories." Available at: <https://www.hhs.gov/sites/default/files/resources-for-covered-entities-top-15-languages-list.pdf>.

⁸ Federal Interagency Working Group on Limited English Proficiency, "Demographic Data." Available at: https://www.lep.gov/demog_data/demog_data.html.

⁹ For example, see Batalova and Zong, "Language Diversity and English Proficiency in the United States," November 11, 2016. Available at: <http://www.migrationpolicy.org/article/language-diversity-and-english-proficiency-united-states>.

¹⁰ FHFA, "National Mortgage Database." Available at: <https://www.fhfa.gov/PolicyProgramsResearch/Programs/Pages/National-Mortgage-Database.aspx>.

¹¹ FHFA, "National Survey of Mortgage Originations." Available at: <https://www.fhfa.gov/PolicyProgramsResearch/Programs/Pages/National-Survey-of-Mortgage-Originations.aspx>.

¹² FHFA, "American Survey of Mortgage Borrowers." Available at: <https://www.fhfa.gov/PolicyProgramsResearch/Programs/Pages/American-Survey-of-Mortgage-Borrowers.aspx>.

be less likely to concern potential borrowers or elicit fears of discrimination. For instance, FHFA could direct the Enterprises to conduct a comprehensive study of LEP borrowers without utilizing the URLA. Such a survey would likely accumulate data quickly and in greater depth than would reliance on a question on the URLA, with the clear benefit that doing so would not confuse or mislead borrowers.

III. There Exist a Wide Range of Efforts by Lenders and Servicers to Serve LEP Borrowers

The RFI presents a number of questions related to existing processes and tools that lenders and servicers use to assist potential LEP borrowers. Our members employ a wide variety of strategies to do so. While experimentation and innovation can be valuable on this front, it is worth noting that some of the heterogeneity in approaches can be explained by the lack of clear standards or best practices with respect to serving LEP borrowers.

Many firms have reported that they offer borrowers the opportunity to meet with multilingual loan officers or, if communicating via telephone, to speak with multilingual customer service representatives. Others offer telephonic translation services or written materials in languages other than English. In some cases, firms have utilized technological solutions to develop communications that focus on explaining mortgage-related concepts rather than creating word-for-word translations. If firms do not have in-house resources in a borrower's primary language, many will refer the borrower to housing counseling services that may be better equipped to work with that particular borrower.

We continue to work with our members to better understand the approaches they take to assist LEP borrowers. While the response period associated with the RFI did not allow enough time to develop and conduct surveys of our members more comprehensive than those already shared with FHFA, we remain committed to gathering additional information that can provide further insight.

IV. Government and Enterprise Resources are Available for LEP Borrowers, But They Should be Centralized and Standardized

In addition to the efforts made by industry stakeholders, and as noted in the RFI, government agencies and the Enterprises have also made resources available to assist LEP borrowers in navigating the mortgage process. These resources include translated origination and servicing documents, multilingual staff, and information on counseling services. While these resources hold the potential to help mitigate some of the challenges faced by LEP borrowers, there is much more that can be done.

An important consideration for future efforts should not only be improvement of government and Enterprise resources, but also increased accessibility of these resources. The April 2017 report conducted for the Enterprises by the Kleimann Communication Group (Kleimann Report) reached a similar conclusion, stating, "The

issue for LEP populations is **NOT a lack of resources; the issue IS a lack of awareness of these resources.**¹³ In particular, the Kleimann Report emphasized that LEP participants surveyed were often unaware that government and Enterprise resources exist, and they were unable to consistently identify where such resources could be found.¹⁴

To help address this problem, we support the Kleimann Report recommendations that a clearinghouse for government and Enterprise resources be developed and thoroughly marketed to intermediaries such as real estate agents and brokers, as well as to LEP borrowers directly.¹⁵ Such a clearinghouse could include translated documents, regulator-approved glossaries of key terms, lists of approved translation services or housing counseling agencies, and general information on the mortgage process.

As the clearinghouse is developed, it is critical that government agencies and the Enterprises work to better standardize both the terminology and the translations used in these resources. For example, concepts that do not have direct translations or do not align with the cultural context underlying a given language or dialect should be described and translated in a similar manner across documents. Too much variation among resources located in the clearinghouse would likely confuse LEP borrowers, thereby negating the benefits of a central repository of information.

We also support the Kleimann Report recommendation that, at least initially, the clearinghouse exclusively be a source of government- and Enterprise-provided information. While it may eventually become desirable to add industry resources to the clearinghouse, initial efforts should focus on consolidating and standardizing disparate government and Enterprise resources. These resources can serve as a template or guide among lenders and servicers. For example, the translation and description of terms such as “escrow” or “points” in clearinghouse documents could then be used by lenders in their own materials or communications with LEP borrowers.

Because a clearinghouse has the potential to improve the utility of government and Enterprise resources already in existence, we believe its development should be a high priority for FHFA and other government agencies.

V. Although Lenders Want to Further Serve LEP Borrowers, There Exist Numerous Concerns

Although data on language needs is widely available, clarity on the specific legal responsibilities of mortgage lenders, servicers, and investors concerning LEP borrowers is lacking. Several fundamental legal questions are presented, a few of which include:

¹³ Kleimann Communication Group, “Language Access for Limited English Proficiency Borrowers: Final Report,” April 2017, page 49. Available at: <https://www.fhfa.gov/PolicyProgramsResearch/Policy/Documents/Borrower-Language-Access-Final-Report-June-2017.pdf>.

¹⁴ Id., page 50.

¹⁵ Id., page 53.

1. Under what circumstances is a mortgage lender or servicer required to conduct business in a foreign language? How do regulators understand a lender's or servicer's obligations when a consumer expresses a preference to communicate in a different language? Must it also be determined that he or she is not proficient in English?
2. If a lender or servicer does offer more than English services, can it limit the number of languages and the options available for LEP borrowers? Or is a lender required to conduct business in whatever language the consumer requests?
3. What are the Fair Housing Act implications of these choices?
4. Does the consumer's expressed language preference follow ownership of the loan or the mortgage servicing rights so that a subsequent purchaser or investor is bound by the originator's or prior servicer's previous election to conduct its activities in a foreign language, even if neither the loan documents nor applicable consumer credit law explicitly require such a course of conduct?
5. What are the unfair, deceptive, or abusive acts or practices (UDAAP) implications if a borrower contacts a loan officer or broker that speaks in the borrower's language but the lender does not or cannot provide documents, disclosures, or other services in that language?
6. Can a lender charge the borrower for translation or interpretive services? What are the Fair Housing Act and UDAAP implications of such a choice?
7. What are the possible Equal Credit Opportunity Act (ECOA) implications of requesting data on applicants' language preferences?

Because the undersigned have profound concerns about these and other issues potentially leading to litigation and enforcement as a result of the proposed URLA question, we have sought counsel from the law firm of Covington & Burling. Appendix A provides a memorandum from the aforementioned counsel, setting forth the conclusion that these legal risks are indeed significant. While the memorandum does not go into specific detail regarding these risks, the undersigned request an opportunity to meet with FHFA staff at their earliest convenience to discuss them in greater detail. Of particular importance, the memorandum states:

"The Mortgage Bankers Association ("MBA"), the American Bankers Association ("ABA"), the Consumer Bankers Association ("CBA"), and the Housing Policy Council of the Financial Services Roundtable have asked for a memorandum analyzing whether significant legal concerns would arise from the inclusion of the language preference question in the URLA. In short, we believe there are substantial risks that plaintiffs' attorneys or regulators could seek to use the mere request for language preference information, or the information obtained through this question, as a basis for alleging violations of law by lenders and/or their assignees, including

secondary market investors. Such efforts might cite the Fair Housing Act (the “FHA”), the Equal Credit Opportunity Act (“ECOA”), Regulation B, the Dodd-Frank Wall Street Reform and Consumer Protection Act’s (the “Dodd-Frank Act’s”) prohibition against unfair, deceptive, or abusive acts or practices (“UDAAPs”), or other federal or state laws.

This is a prediction about the likelihood of litigation, not liability. Mortgage industry participants would have strong arguments against these potential claims. Nevertheless, the potential for lawsuits reflecting these issues, including class actions, could lead to substantial legal costs, especially for highly fact intensive discrimination claims under the FHA and ECOA. As importantly, the reputational harm of such allegations—even if later dismissed—can be substantial as well. This fact can itself encourage litigation, as plaintiffs know that even frivolous or speculative cases may be settled to avoid negative publicity. Thus, the availability of additional data and legal theories relating to LEP status—absent additional action by appropriate regulation—should be expected to generate additional litigation. Moreover, although government plaintiffs may exercise more caution in bringing cases based upon the LEP data generated by the URLA language preference question, the financial and reputational risks from enforcement actions are even greater than the risks posed by private plaintiffs.”

Several practical concerns also make serving LEP borrowers in any language other than English difficult:

1. As indicated, a clearinghouse of available resources is needed but has not yet been established.
2. Explanations of the loan process and glossaries of terms in English and other languages would help LEP (and non-LEP) borrowers, but such explanations and glossaries are generally not yet available.
3. There are no clear standards for translation service providers and little guidance on how lenders should choose and employ such services.
4. The extent to which the current housing counseling infrastructure exists to serve LEP borrowers is also unclear.
5. Court documents and proceedings are generally in English. A clearinghouse could also provide resources to help LEP borrowers navigate such proceedings in states that do not offer these resources.

In addition to these practical concerns, there are concerns about the comparative costs and benefits of various options for serving LEP borrowers. The undersigned believe the appropriate government agencies should prioritize the use of resources for developing guides, glossaries, translations, and other utilities and services.

VI. Regulators Charged with Applicable Laws Should, with Stakeholder Input, Develop Rules and Guidance

As noted in counsel's memorandum (Appendix A), FHFA is not a consumer regulator and does not have jurisdiction over any of the laws that could be implicated if the proposed question is to be included on the URLA. Accordingly, the undersigned believe the agencies that do have responsibility for these laws, including the U.S. Department of Housing and Urban Development (HUD), the U.S. Department of Justice (DOJ), the CFPB, and state regulators should be consulted and provide the industry with clear and authoritative guidance on the issues highlighted by counsel before the proposed question is added.

Such consultation could resolve legal concerns and ultimately provide guidance on steps lenders, servicers, and others should take to address the needs of LEP borrowers. Such an approach will necessarily take time to develop, but will better serve consumers than an approach that would ask the language proficiency or preference questions before market participants are able to provide comprehensive support or develop the ability to meet borrowers' expectations that would naturally follow such a question.

VII. FHFA Should Not Require a Question on the URLA Regarding Language Preference before the Numerous Concerns are Resolved

FHFA first raised the possibility of installing a question regarding borrower language preference on the URLA in 2016.

The RFI 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."

As we indicated in June 2016, a question on borrower language preference on the URLA would raise many concerns, which are outlined in that letter. We have attached the June 2016 letter as Appendix B, as many of those concerns are still unaddressed.

After meeting with numerous trade associations, including the undersigned, FHFA withdrew plans to include a borrower language preference question on the URLA, recognizing these concerns. Further efforts by FHFA and other regulators since that point have failed to address the issues raised and have not been adequate to mitigate the concerns that a question on borrower language preference would be:

1. Requiring Lenders to Ask Borrowers Sensitive Questions before the Interactions and Implications of Other Rules are Understood and Addressed.
2. Creating Expectations Among Consumers that Cannot Be Met.
3. Providing an Inferior Means of Obtaining and Analyzing Data.
4. Detracting from Other More Promising Avenues.
5. Potentially Exposing Lenders to Liability.
6. Increasing Origination Costs and Uncertainty.
7. Opening Servicers to New Obligations and Increasing Borrowers' Servicing Costs.
8. Requiring Translation Services without Accompanying Government or Enterprise Materials.

At this time, the inclusion of the proposed URLA question would only create confusion, uncertainty, and an increased likelihood of liability. Given the implications across federal government agencies, we urge FHFA to abandon this proposal or, at the very least, seek broader interagency and stakeholder input to resolve these legitimate concerns before proceeding further with this addition to the URLA.

The RFI also asks for input on a series of legal questions:

1. Are there legal or regulatory obligations FHFA should be aware of as it considers recommendations on enhancing processes for the borrower's preferred language?
 - A. Yes. While we appreciate that "the FHFA commits itself and the Enterprises in the RFI 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," we do not believe that is possible.

The Fair Housing Act, ECOA, and UDAAP implications of both the originator and any servicer receiving the information in the question and either acting on it or ignoring it must be resolved. The implications of such action on private parties is real and must be considered.

2. 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?
 - A. As explained above, there are large gaps in the legal structure as to how LEP borrowers are to be served. Similarly, there are gaps in the materials and guidance to address practical concerns.
3. 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.
 - A. The attached memorandum (Appendix A) from counsel at Covington & Burling makes clear that the inclusion of the question would likely trigger litigation and additional costs.
4. Are there ways that FHFA or the Enterprises could mitigate these legal risks?
 - A. The only way to mitigate these legal risks, at least at the federal level, is to work with each of the other relevant regulators to develop rules that include a safe harbor.

A number of other questions arise if the proposed URLA question is added: What should a lender or servicer do with the language preference information that it may be required to collect by FHFA, and what is FHFA's ultimate purpose of 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 or servicer 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? To what extent is an investor liable for actions or inactions regarding LEP borrowers' language preferences?

VIII. Conclusion: The Many Concerns Raised Should be Addressed before a New URLA Question is Added

The undersigned strongly urge FHFA to adhere to the following principles as it moves forward. These principles represent the best path to actualize the goal of the Scorecard and "assess the impact of language barriers on borrowers with limited English proficiency throughout the mortgage life cycle and develop a plan to improve access to credit that is appropriate for the Enterprises."¹⁶

¹⁶ FHFA, "2017 Scorecard for Fannie Mae, Freddie Mac, and Common Securitization Solutions," December 15, 2016, page 3. Available at: <https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/2017-Scorecard-for-Fannie-Mae-Freddie-Mac-and-CSS.pdf>.

The principles are as follows:

1. Work within the existing legal and regulatory structure. Because FHFA does not have rulemaking authority over lenders and servicers under most of the laws that are applicable, it must act in concert with other agencies within the existing legal and regulatory structure. As indicated, ECOA, the Fair Housing Act, UDAP under the Dodd-Frank Act, and unfair or deceptive acts or practices (UDAP) under the Federal Trade Commission Act are relevant in this regard.
2. Use an evidence-based approach to develop materials that support the most prevalent languages spoken by LEP borrowers. This issue presents a unique set of challenges, as the most prevalent languages will vary over time and across geographies and markets, and are not national or uniform.
3. Identify and support actions that address the most critical needs of LEP borrowers. We agree that any policy guidelines must start with a determination of materiality. No matter their efforts, lenders and servicers cannot provide marketing, origination, servicing, and loss mitigation services for all products in all markets in every possible language. Any expectations must assume reasonable limits. There should be clarity regarding the material documents and communications that need to be in a foreign language.
4. Ensure proposed solutions do not create unrealistic borrower expectations for services or documents. Our comments above on the proposed URLA question address this issue in greater detail.
5. Coordinate actions with relevant stakeholders (including lenders, servicers, technology providers, vendors, consumer advocates, and counselors) and government agencies to avoid or mitigate any market disruption. As indicated, several agencies and organizations have a legitimate interest in expanding access to credit and ensuring that language barriers do not result in discrimination or unfair treatment of consumers. It is important that FHFA work closely with all of them to ensure that any guidelines or policy positions are uniform throughout the federal government. FHFA's jurisdiction extends to the Enterprises, but many mortgage loans made to LEP individuals may never be intended for sale to the Enterprises. Uniformity and standardization are critical, and many lenders will fall under the supervision of multiple agencies, leading to a significant challenge if different actions are expected or required.
6. Consider the impact to secondary market issuers and investors. Addressing the legal and operational issues for the originating lender is paramount to

ensuring no adverse impact to the secondary market and its ability to provide liquidity to support the primary market.

Finally, as indicated, we respectfully request a meeting with FHFA as soon as possible to further discuss our concerns. To facilitate this meeting, please contact Ken Markison, MBA Vice President and Regulatory Counsel, at (202) 557-2930 or kmarkison@mba.org.

Thank you for your consideration of our comments.

Sincerely,

**American Bankers Association
Consumer Bankers Association
Housing Policy Council of the Financial Services Roundtable
Mortgage Bankers Association**

Appendix A:
Potential Liability Concerns with LEP Data Collection

July 31, 2017

Memorandum

To: Mortgage Bankers Association, American Bankers Association, Consumer Bankers Association, and the Housing Policy Council of the Financial Services Roundtable

From: Eric Mogilnicki, Andrew Smith, and Lucy Bartholomew

Re: Potential Liability Concerns with LEP Data Collection

On May 25, 2017, the Federal Housing Finance Agency (“FHFA”) released a Request for Input (“RFI”) inquiring about how Fannie Mae and Freddie Mac (the “Enterprises”) could collect data on the language preferences of limited English proficiency (“LEP”) borrowers using standardized forms, including the Uniform Residential Loan Application (“URLA”).¹ Specifically, the RFI asks for input on the inclusion of the following language:

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.

Last year, the FHFA and the Enterprises considered including a similar question about language preference on the URLA. Then, on August 1, 2016, the FHFA sent a letter to nearly a dozen trade associations stating that it would not amend the URLA to include such a question after considering “a number of unresolved concerns.”²

The Mortgage Bankers Association (“MBA”), the American Bankers Association (“ABA”), the Consumer Bankers Association (“CBA”), and the Housing Policy Council of the Financial Services Roundtable have asked for a memorandum analyzing whether significant legal

¹ See FHFA, *Improving Language Access in Mortgage Lending and Servicing Request for Input* (May 25, 2017), available at https://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/Language_Access_RFI.pdf.

² See FHFA Letter to Trade Associations (Aug. 1, 2016), available at <http://consumerbankers.com/sites/default/files/8-1-16%20response%20to%20MBA%20Trade%20Associations%20re%20URLA.PDF>.

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concerns would arise from the inclusion of the language preference question in the URLA. In short, we believe there are substantial risks that plaintiffs' attorneys or regulators could seek to use the mere request for language preference information, or the information obtained through this question, as a basis for alleging violations of law by lenders and/or their assignees, including secondary market investors. Such efforts might cite the Fair Housing Act (the "FHA"), the Equal Credit Opportunity Act ("ECOA"), Regulation B, the Dodd-Frank Wall Street Reform and Consumer Protection Act's (the "Dodd-Frank Act's") prohibition against unfair, deceptive, or abusive acts or practices ("UDAAPs"), or other federal or state laws.

This is a prediction about the likelihood of litigation, not liability. Mortgage industry participants would have strong arguments against these potential claims. Nevertheless, the potential for lawsuits reflecting these issues, including class actions, could lead to substantial legal costs, especially for highly fact intensive discrimination claims under the FHA and ECOA. As importantly, the reputational harm of such allegations—even if later dismissed—can be substantial as well. This fact can itself encourage litigation, as plaintiffs know that even frivolous or speculative cases may be settled to avoid negative publicity. Thus, the availability of additional data and legal theories relating to LEP status—absent additional action by appropriate regulation—should be expected to generate additional litigation. Moreover, although government plaintiffs may exercise more caution in bringing cases based upon the LEP data generated by the URLA language preference question, the financial and reputational risks from enforcement actions are even greater than the risks posed by private plaintiffs.

In addition, it is worth noting that the FHFA is not a consumer regulator and does not have jurisdiction over any of the laws discussed above. Thus, although any FHFA disclaimer to the proposed language preference question might influence the allegations plaintiffs could assert against mortgage industry participants, the disclaimer may not bind plaintiffs, nor other agencies, including the United States Department of Housing and Urban Development ("HUD"), the Department of Justice ("DOJ"), the Consumer Financial Protection Bureau ("CFPB"), and state regulators.

We recommend that the MBA, ABA, CBA, and the Housing Policy Council of the Financial Services Roundtable seek a meeting with FHFA staff to discuss in further detail the risks and costs of such litigation.

**Appendix B:
June 2016 Letter to FHFA**

June 8, 2016

The Honorable Mel Watt
Director
Federal Housing Finance Agency

Dear Director Watt:

Very recently the undersigned trade associations learned that the Federal Housing Finance Agency (FHFA) as well as Fannie Mae and Freddie Mac are considering a last minute addition to the new Uniform Residential Loan Application (URLA), in the form of a question that will ask borrowers to indicate their language preference. While we support a range of efforts to ensure that borrowers are well informed during the mortgage process, the inclusion of such a question on the redesigned form raises several serious compliance and legal concerns that strongly weigh against including it on the form or, at the very least, warrant a full vetting through a notice and comment process before its inclusion.

A question on language preference on the URLA would:

- 1. Require Lenders to Ask Borrowers Sensitive Questions Before the Interactions and Implications of Other Rules are Understood and Addressed.** Inclusion of a language preference question raises numerous compliance questions under the Dodd-Frank mortgage rules including Know Before You Owe, the Truth in Lending Act, Equal Credit Opportunity Act and the Fair Housing Act. These laws are outside the purview of the Federal Housing Finance Agency and within the purview of the Consumer Financial Protection Bureau (CFPB), the Department of Housing and Urban Development (HUD), the Department of Justice (DOJ) and other agencies. The questions include, to name a few: What is the extent of lender and consumer responsibility where a consumer prefers a particular language? What constitutes sufficient translation? How should costs be incurred, disclosed and defrayed? What if any cost or other limits should apply?
- 2. Create Expectations Among Consumers that Can't Be Met.** The consumer who provides language preference information at the lender's request will reasonably expect that they will receive communication in such language. Otherwise, why was the question asked? There are, however, an estimated 350 languages spoken in the United States and, at this point, no rules that guide lenders on what they should do in light of a borrower's response
- 3. Provide an Inferior Means of Obtaining and Analyzing Data.** Census, American Housing Survey or the National Survey of Mortgage Borrowers and Home Mortgage Disclosure Act (HMDA) data offer much broader-based datasets on homebuyers and prospective homebuyers for public policy analysis. If data is to be gathered, it should reside in one of these datasets and it should be collected and reported in accordance with their requirements.
- 4. Detract from Other More Promising Avenues.** More promising approaches would involve the FHFA working with the CFPB, HUD and other agencies to determine a government-wide approach to limited English proficiency (LEP) consumers in the mortgage process and in the marketplace generally.
- 5. Potentially Expose Lenders to Liability.** If the borrower indicates a non-English preference and the lender does not proceed in that language, the lender may expose itself to Unfair, Deceptive and Abusive Acts and Practices (UDAAP) liability. Merely asking the question also may open the

lender to the charge that it has used language preference as a proxy to learn more about the ethnicity of the borrower than the other government monitoring information may allow.

- 6. Open Both Lenders and Borrowers to Considerable Origination Costs.** If the lender believes it is expected to obtain translation services and no rules apply, there are no limits on the obligation and such costs. Notably, there have been no cost/benefit analyses of the costs of including this question considering that the costs of providing translation services potentially in all languages.
- 7. Open Servicers to New Obligations and Increase Borrowers' Servicing Costs.** Considering the question is on the loan application, the borrower may also rightfully expect that all communications on the mortgage including the loan's servicing may be in the preferred language. This will increase the cost of servicing and necessitate adjustments to those rules as well.
- 8. Require Translation Services Without Accompanying Government or GSE Materials.** While the Loan Estimate and the Closing Disclosure are available only in English and Spanish, we know of no plans to expand the language offerings for these documents or to translate the accompanying Homebuyers Toolkit into other languages. We also know of no effort by the GSEs to translate their note, deed of trust or other materials into numerous languages.

At this point, the inclusion of the subject question would only create confusion, uncertainty and potential liability. Given the implications across federal agencies, we urge the FHFA to abandon this proposal or, at the very least, seek broader interagency and stakeholder input before proceeding further with this addition to the URLA.

We greatly appreciate your consideration of our views on this important issue. We would also greatly appreciate an opportunity to meet with you concerning it at your earliest convenience.

Thank you.

Sincerely,

American Bankers Association
Consumer Bankers Association
Consumer Mortgage Coalition
Credit Union National Association
Housing Policy Council
Independent Community Bankers of America
Mortgage Bankers Association
National Association of Federal Credit Unions

cc:

Timothy Mayopoulos
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