



December 1, 2020

The Honorable Kathleen L. Kraninger
Director
Consumer Financial Protection Bureau (CFPB)
1700 G Street, NW
Washington, DC 20552

RE: Docket No. CFPB-2020-0026; Request for Information on the Equal Credit Opportunity Act and Regulation B

Director Kraninger:

The Housing Policy Council¹ appreciates the opportunity to respond to the Consumer Financial Protection Bureau's (CFPB, Bureau) Request for Information (RFI) on the Equal Credit Opportunity Act (ECOA). In this comment letter, we focus solely on the element of the RFI that addresses Limited English Proficiency (LEP). We do believe that additional regulatory clarity on the fair lending issues associated with LEP would benefit the industry and consumers alike. However, in our opinion, that regulatory guidance should extend beyond fair lending alone, and also address questions such as Unfair, Deceptive and Abusive Acts and Practices (UDAAP) that have also caused lenders concern. While we recognize that the Bureau's RFI is focused on ECOA and Regulation B, in our view, the fair lending and UDAAP issues can occasionally intertwine, such that it is impossible to properly consider one without simultaneously considering the other.²

HPC members, as leading companies in housing finance, have been working diligently to establish appropriate protocols and practices to reach the LEP population, but have also been keenly aware of the regulatory and compliance challenges associated with serving LEP customers. As noted in the RFI and the Bureau's own 2016 *Supervisory Highlights on Fair*

¹ The Housing Policy Council is a trade association comprised of the leading national mortgage lenders and servicers, mortgage and title insurers, and technology and data companies. HPC advocates for the mortgage and housing marketplace interests of its members in legislative, regulatory, and judicial forums. Our interest is in the safety and soundness of the housing finance system, the equitable and consistent regulatory treatment of all market participants, and the promotion of lending practices that create sustainable homeownership opportunities in support of vibrant communities and long-term wealth-building for families.

² Indeed, ideally, we would propose an approach that extends not only beyond a single statute, but beyond the Bureau itself. Other regulators, such as the FTC, HUD, and state attorneys general, have periodically weighed in on LEP issues through enforcement actions, guidance statements and other means. While those various precedents are appreciated, they can also be unclear, and occasionally, inconsistent. After the Bureau develops its own guidance on these issues, we encourage a collaborative effort with an eye toward a clear, uniform position.

Lending, many institutions limit their services to LEP customers due to the regulatory uncertainties and perceived fair lending risks. No institution is capable of providing all of its mortgage-related services in all non-English languages, and the decision regarding which languages to prioritize, which services to offer, and what form of LEP assistance to provide are decisions that carry significant uncertainty and risk under both UDAAP and fair lending principles. In this letter, we reiterate comments previously shared verbally with the Bureau, including our thoughts on the challenges of serving LEP customers, as requested by the RFI, and suggest possible regulatory guidance that could address some of these challenges. Our letter has three sections that address the following topics:

- *Challenges* - Serving LEP customers is complicated by numerous factors, such as, but by no means limited to: the variety of languages spoken in the United States; the technical nature of mortgage lending; the inexact science of foreign language translation; the division of mortgage activities across multiple counterparties/financial institutions, from lending to servicing to securitization; the operational complexity of translating and disseminating documents and data through technology platforms designed to rely on standard English characters; and the need for in-house or contracted non-English speakers to support the full spectrum of both operational and compliance activities within any single company.
- *Recommended Regulatory Framework* - HPC members would prefer a nationally recognized and uniformly applied regulatory framework that not only provides protections for LEP consumers, but also sets clear “rules of engagement” for institutions. The regulatory framework should recognize that any given institution will have unique capabilities and distinct business considerations that will limit the types of assistance, the products and services, and the languages in which it can offer support and serve LEP customers. The framework should allow for these limitations and variations, without threat of legal action. The goal of HPC would be for this framework to be interpreted, applied, and enforced consistently by state and federal regulatory bodies.
- *Proposed Regulatory Guidance* – While HPC members would advocate for explicit regulatory requirements that establish unambiguous responsibilities for financial institutions, we recognize that rulemaking takes a considerable amount of time and that this topic is complicated by the distinct LEP approaches that the multitude of companies deploy. There is a high degree of variability of languages, services, and available assistance across institutions, which makes this type of rulemaking more difficult. And, most importantly, the delay associated with a rulemaking effort would perpetuate the current lack of services offered to LEP consumers until the rulemaking could be finalized. Therefore, HPC instead recommends that CFPB consider publication of regulatory

guidance that describes, with examples, the practices that institutions should, and/or may, perform to serve LEP customers, consistent with a regulatory framework that can be uniformly applied to drive a consistent interpretation of the various state and federal regulations. As a model, we suggest the FTC’s Dot Com Disclosures guidance, issued in March 2013.³ The FTC guidance is a highly practical guide to how industry can adhere to UDAP (Regulation AA) restrictions in their conduct, and a similar style of practical, specific CFPB guidance would be extremely beneficial in encouraging financial institutions to offer mortgage services in non-English languages.

Challenges Associated with Serving LEP Customers

There are more than 350 languages spoken in the U.S., making it entirely unrealistic for any single company, particularly those that offer mortgage services nationwide, to fulfill the business needs of all customers in all languages in all communities. Therefore, each company must prioritize some languages and some services. How a company determines what languages, business services, and form of LEP assistance is not explicitly addressed in regulation, which leaves companies vulnerable to legal challenge. Previous CFPB guidance acknowledges that a company may determine what languages are most prevalent within its lending “footprint,” but other factors may come into play, such as the in-house staff language capabilities or the capacity of the technology platform to accommodate other languages or even the costs to transform existing infrastructure to provide language support. Additionally, financial services continue to become increasingly nationalized, whether through lenders who maintain branches across a number of states, or something as increasingly common as originating loans through a mobile application. As that trend continues, the array of languages lenders encounter will steadily increase as well.⁴ As stated above, regulation offers no explicit requirements regarding what factors are acceptable to make determinations regarding the languages or business products and services that can be offered.

Further, companies must choose not only the services and languages, but the types of LEP support, and those decisions also leave a company vulnerable. For example, for companies that choose to use translated documents, there are substantial legal liability concerns associated with which translated documents to adopt, the accuracy of those translations, and the rationale for why those particular forms or disclosures are selected. The same types of questions apply for oral interpretation services and how a company determines which are most suitable and compliant. If a company chooses to use a third-party vendor, how can it

³ <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>

⁴ Even today, some HPC members already rely on vendor-based interpretation services to help them assist borrowers in well over 100 languages. For such lenders, an overly prescriptive approach (for example, one that required that development of translated documents and disclosures for each language spoken in the lender’s “footprint”) would be present immense costs and operational challenges.

determine which vendor is most qualified? If a company determines not to use a vendor, is it legally “safe” to limit oral interpretation to family, friends, or services selected by the customer? For smaller companies, the costs associated with these business decisions may be significant, but even for national lenders with more substantial resources to apply, the legal vulnerability, coupled with the implementation and compliance management costs may outweigh the benefits, without additional regulatory guidance.

Addressing the needs of LEP borrowers through requirements to provide translated documents, the most frequently proposed solution, exacerbates LEP execution difficulties. The translation process is costly and time consuming, and not an exact science. Documents, especially those with complex financial and regulatory lingo, do not always translate (or translate back) with a precise and ideal result for the LEP reader. Translations must be reviewed and approved, ideally by multilingual staff, preferably who are well-versed in mortgage processes as well as the applicable laws and regulatory requirements. The use of translated documents can also increase technology and operational challenges, particularly if translated forms are expected to include customer-specific details (*e.g.*, interest rate, payment amount) or special characters that English-based systems cannot accommodate. For this reason, translations are rarely used for the loss mitigation activities of mortgage servicing work, where open-ended data fields are necessary, to capture information on a borrower’s unique financial circumstances. Even simple origination forms must be maintained and managed over time, with updated versions fed into technology systems on an ongoing basis as changes are made to the English editions. For these reasons, HPC believes that translated documents are not the primary path forward to providing greater access to LEP consumers. Rather, telephone support is a far more fruitful avenue to bring immediate improvements in services in non-English languages.

Finally, home lending activities and services, from initial application through loan pay-off, are likely to be performed by multiple institutions, with varying LEP capabilities. It is improbable that an LEP customer, identified at the time of initial application (or prequalification), can be supported with translation and interpretation services over the full life-of-loan cycle. There is operational and legal complexity associated with managing the loan “handoff” across companies and/or distinct lines of business that originate to those that service the loans, including a distinction between performing loan servicing and loss mitigation activities. Should LEP customers be transferred and/or assigned only to servicing firms or lines of business that can meet the borrower’s unique language needs? How are these companies identified? How are customer needs identified? Further, does the need for LEP services for a particular borrower affect the value of the loan or servicing right, if it makes it more challenging to transfer? If so, that could affect the secondary market’s appetite for, and pricing of, mortgages and servicing rights involving loans made to LEP customers. Rules must permit the transfer of loans and servicing rights for LEP customers unimpeded by an unrealistic

expectation that any company that accepts transfer of the loan will have the capacity to provide translation and interpretation services in the LEP customer's language.

Given these significant challenges in the face of the critical need to serve the LEP population, a regulatory framework must explicitly recognize the distinct roles and responsibilities of various institutions and lines of business in the lending process as well as the language capabilities of those firms and business lines.⁵

Regulatory Request

For HPC members, the core objective of an LEP regulatory framework should be to establish a legal and business environment in which any financial institution can optimize and maximize the flow of information to LEP customers, while staying within explicit safeguards that allow companies to operate confidently within the confines of their LEP capabilities. An ideal regulatory approach would address LEP communications barriers by promoting broad outreach to LEP consumers, early disclosure of the institutions' level of language support and the limitations thereof, and the communications channels through which LEP consumers can obtain information and ask any questions.

HPC recommends that the core elements of an LEP regulatory framework embrace the following principles and concepts:

- **Recognize and promote verbal assistance / oral interpretation as the primary vehicle for LEP customer communications.** Many institutions already employ multilingual staff to support certain languages spoken by LEP borrowers. Some provide phone-based interpreters at no cost, and those that do not (often smaller institutions with fewer resources) may instead commit to working with customer-provided interpreters. This form of LEP assistance offers the greatest level of flexibility as well as the broadest reach across languages and services to meet a customer's needs, answer questions, explain products and features. And, unlike translated documents, telephone-based assistance can be provided at all stages of the product life cycle and can be delivered exactly when the customer has a question or problem.
- **Permit – do not mandate, nor prohibit – the use of translated documents.** Recognizing the challenges posed by the creation, management, and dissemination of translated documents, a regulatory framework that permits the use of translated written

⁵ This same consideration applies equally to non-mortgage lending. Some non-mortgage products can change hands through various servicers over time (such as student loans), and even credit card accounts can be sold between issuers, placed with debt collection firms, or sold to debt buyers. Thus, providing guidance clarifying that there is no requirement to service in a particular language after a transfer would also be applicable to these non-mortgage products.

materials, but does not require it, would allow financial institutions to determine the most efficient and cost-effective means to gradually and incrementally expand their operations and capabilities, without fear of legal risk. The regulatory framework should make it not only possible, but also safe for any company to decide when and how to adopt and expand the use of translated documents over a period of time, without the threat of disparate treatment or fair lending claims that today serve as a constraint on many companies' use of translated documents. Conditioning outreach to LEP consumers on the provision of translated documents establishes an expensive, complicated barrier for institutions.⁶

- **Require financial institutions to disclose to customers the types and level of LEP support available early in the relationship.** The LEP customer benefits from entering the business relationship with a full understanding of the products and services that can be accessed with LEP language assistance and what form that assistance will take. A regulatory framework that directly mandates that this type of information be made available to consumers, through disclosures, website materials, and other forms of communications would ensure that LEP consumers receive key information early in the relationship. The extent of language support offered (particularly the availability of translated documents or interpreter assistance) may be material to some LEP consumers, so a regulatory framework should require disclosures on these points early in the process. The consumer should know before committing to a product or service whether translation of related documents and disclosures and/or what form of oral interpretation services are available. This requirement is, of course, also consistent with the Bureau's guidance in the 2016 *Supervisory Highlights* that addressed this issue, but HPC believes that additional specificity around the timing, location and prominence of these disclosures would be helpful to both consumers and industry.
- **Provide flexibility to engage in outreach to all LEP populations, regardless of size.** A financial institution will determine which LEP customers to serve on the basis of a variety of factors, including the geographical footprint of the company and the size of the population that it could reach. However, that will be only one consideration and there may very well be a good reason for a company to target a smaller set of LEP customers, perhaps to take advantage of existing institutional capacity or to build out broader LEP capabilities or to reach a specific underserved group. HPC recommends

⁶ We recognize that there may be instances where one might reasonably conclude the benefit of requiring translated documents outweighs any burdens imposed on the lender or servicer. For example, through rulemaking, the Bureau has previously required translated disclosures in connection with remittance transfer services (12 CFR 1005.31(g)), prepaid accounts (12 CFR 1005.18(b)(9)), and advertisements for dwelling secured loans (12 CFR 1026.24(i)(7)). Should the Bureau believe that translated documentation or disclosures should be required in other circumstances, this could be addressed through similar rulemakings. Addressing such a requirement through a formal rulemaking approach would not only result in clarity and consistency, but would also follow a more measured approach that permits careful consideration of any operational burden, costs or potential unintended consequence.

that a framework allow institutions to serve these smaller groups of customers, without fear of liability.

- **Preserve legal liability for unfair, deceptive, discriminatory, or otherwise prohibited behavior, of course.** HPC recommends consideration of a more expansive regulatory framework, with clearly delineated safeguards for financial institutions, solely to establish a legal foundation from which institutions can reach and support LEP populations. In an ideal scenario, provided an institution fulfills certain minimum requirements and practices, marketing or assisting a specified set of LEP customers in other languages, should not be considered unfair, deceptive, abusive, or discriminatory. However, it goes without saying that any regulatory framework should not protect problematic practices, such as affirmatively misrepresenting terms or conditions, discriminating against LEP individuals in loan processing, or targeting LEP communities for unfair or exploitive products – regardless of the language in which such practices occur.
- **Support and promote the use of a Language Access Plan by each financial institution.** A Language Access Plan can serve as a vehicle for a company to identify and describe the products and services offered to LEP customers, the non-English languages supported across the particular products and services, and the primary forms of LEP assistance provided. A plan might also include the rationale for these LEP business decisions, including operational and legal constraints that affect the provision of language services.

Proposed Regulatory Guidance

HPC members request that the CFPB consider developing a guidance booklet similar to the [Federal Trade Commission's Dot Com Disclosures guidance](#), expressly intended to help financial institutions navigate key decisions regarding how best to assist LEP customers, within the confines of their unique sets of LEP capabilities. Such a guidebook could cover the core elements of a regulatory framework, as described above.

This guidance should be designed and intended to give financial institutions the confidence necessary to establish and execute policies and procedures to reach and serve LEP customers without threat of legal action. It should highlight the variable nature of LEP support across financial institutions, and recognize that companies must make determinations regarding the scope of products and services to be supported in non-English languages on the basis of not only the population served, but also the company's own capabilities. We would recommend that the guidance affirm the objective for companies to provide LEP assistance, yet also explicitly acknowledge the reality that companies cannot offer all products and services in the 350+ languages spoken in the United States and therefore, companies must be able to

determine how best to meet the needs of LEP customers without legal risk associated with a fair lending claim.

The guidance booklet could describe methods deemed appropriate by CFPB for institutions to make decisions and the acceptable factors they should consider when providing LEP support across their business operations, with actual examples to illustrate compliant and noncompliant acts and practices. The document could be divided into sections for the segments of business:

- marketing and outreach
- loan origination, from prequalification through loan closing
- servicing, including loss mitigation and foreclosure processes
- servicing transfers (if including non-mortgage products, CFPB could cover the placement or sale of debts with debt collectors or debt buyers) and securitization
- general information for and interactions with consumers

For each of these core segments of the business as well as general communications with LEP customers, the document could cover some of the relevant issues that an institution might include in the company's language access plan, consumer disclosures, or compliance management system. HPC would recommend that for each of the business segments listed above, CFPB could offer clear guidance on how the company may determine what languages and what forms of assistance will be made available, under both the company's interpreter access policy and the document translation policy. For each of the lending life-cycle activities, an institution needs to understand what policies and practices are legally permissible, and how to document and justify each business decision associated with the provision of LEP assistance. Such guidance would provide lenders with a safe environment to perform some, but not all, business using non-English language support. Among the areas that CFPB could and, frankly should, address are how to:

- Market, originate, or service mortgage products or services in *some* languages but not others and what factors may be used to make that decision
- Market, originate, or service products or services in a language other than English, if the lender does not also provide documents and/or disclosures for such products or services in that language, and how to document the rationale and justify that decision

- Provide customer service and assistance in a language other than English in response to consumer inquiries, applications, or requests, but not also provide documents and/or disclosures for such products or services in that language
- Contact consumers in a non-English language (via phone, correspondence, or other means), if the institution has knowledge, due to a current or prior customer relationship, that the consumer prefers to communicate in such language and how to record the rationale for and any legal requirements for that practice

Our request for this type of guidebook is a valuable alternative to actual rule-making and a complement to the existing regulatory provisions, which do permit some level of flexibility that is helpful, yet also leave financial institutions feeling vulnerable. Varying interpretations of current rule text could lead to legal action for serving only some LEP customers or offering some types of products with LEP support, a threat that contradicts the efforts of a company working hard to build out additional capacity. This type of legal action could (and does) have a chilling effect on financial institutions' LEP activities.

We appreciate the opportunity to comment on the LEP section of the CFPB's ECOA RFI and would welcome additional discussion with the Bureau on this topic. The fair lending leadership at CFPB is well-positioned to work with a broad set of stakeholders to develop and issue the type of guidance that we have described in this letter and we offer to you the time and attention of HPC staff and HPC members to help with such an exercise. Should you have any questions or need additional information, please do not hesitate to call Meg Burns, EVP for the Housing Policy Council, at 202-589-1926.

Yours truly,

A handwritten signature in black ink that reads "Edward J. DeMarco". The signature is written in a cursive style with a large initial "E".

Edward J. DeMarco
President
Housing Policy Council