REGULATORY FOCUS ON LIMITED ENGLISH PROFICIENCY SET TO INCREASE INTO 2018

FEATURE ARTICLE BY
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As the mortgage industry continues to settle into the new regulatory landscape, the market for mortgage credit has tightened as lenders have become more conservative and risk adverse. Historically, when credit markets tighten, it signals a shift in the regulators' focus from consumer's access to credit, which always brings attention to fair lending issues. The trend becomes apparent upon review of the Department of Justice's (DOJ) annual Equal Credit and Opportunity Act (ECOA) reports where the DOJ discloses the number of pending investigations:

AT THE END OF 2013 — 11 OPEN INVESTIGATIONS
AT THE END OF 2014 — 25 OPEN INVESTIGATIONS
AT THE END OF 2015 — 35 OPEN INVESTIGATIONS

And as for 2016? We will soon see but as of the printing of this article, the report has yet to be released. Within the mortgage space it is becoming clear that focus on Limited English Proficiency (LEP) borrowers may drive the next round of fair lending violations. LEP borrowers are defined as individuals who have a limited ability to read, write, speak or understand English. From a regulatory standpoint this population of potential borrowers creates a double edged sword. If you originate a loan or are servicing a loan to a LEP population and use your best efforts to communicate, are you creating regulatory exposure through a UDAAP violation by not providing full or complete access to your products and services in their language of choice (for example not translating all notices and disclosures) or are you creating regulatory exposure through a fair lending violation if you exclude this population because you believe you cannot offer full or complete access to your products and services in their language of choice?

On September 15 2016 HUD issued Guidance No.16-135 which states that "individuals who are LEP are not a protected class under the Act". However, the Guidance further stated that " Nearly all LEP persons are LEP because either they or their family members are from non-English speaking countries. The link between national origin and LEP is fairly intuitive but is also supported by statistics. In the United States, 34% of Asians and 32% of Hispanics are LEP as compared with 6% of whites and 2% of non-Hispanic whites.

Focusing on place of birth, in the United States 61% of persons born in Latin America and 46% of persons born in Asia are LEP as compared with 2% of persons born in the United States. Thus, housing decisions that are based on LEP generally relate to race or national origin." "Selective application of a language-related policy, or use of LEP as a pretext for unequal treatment of individuals based on race, national origin, or other protected characteristics, violates the Act." The HUD Guidance also addresses issues raised by state regulations. Certain states have previously addressed LEP issues. For example, some states have requirements that if a mortgage is negotiated in a non-English language, certain disclosures and documents must also be provided in the same language in which the negotiations took place. Some lenders attempt to avoid compliance with these state regulations by having a policy that all transactions must be negotiated in English. HUD takes the position that mandating the use of English in a mortgage transaction is not a valid means to circumvent state regulations, stating " Avoiding compliance with a state consumer protection law would not be considered a substantial, legitimate, nondiscriminatory interest that would justify refusing to serve LEP borrowers." What HUD failed to do in the guidance, however, is to provide clear direction as to how to remain compliant and avoid creatingfair lending issues under the FHA that may arise with LEP borrowers. For that the industry is turning to the Consumer Financial Protection Bureau (CFPB).

> "WITH NO OFFICIAL GUIDANCE TO DRAW UPON, IT IS SURPRISING TO SEE LEP ADDRESSED WITHIN THE CFPB'S EXAM MANUALS.

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The CFPB has addressed LEP issues in multiple lines of business through enforcement actions, rule promulgation, exam procedures and supervisory highlights. The CFPB has yet to issue formal guidance. Within the CFPB's Fall 2016 Supervisory Highlights the Bureau roughly outlined acceptable metrics which institutions have used when determining if services in languages other than English should be provided:

A. Census Bureau data on the demographics or prevalence of non-English languages within the financial institution's footprint. (Although this failed to address if the data should be looked at on a national or a regional scale)

B. Communications and activities that most significantly impact consumers (e.g., loss mitigation and/or default servicing). Meaning more focus on what if any documentation should be translated should occur when the borrower is in danger of losing their home.

C. Compliance with Federal, state, and other regulatory provisions that address obligations pertaining to languages other than English.

In the same 2016 Supervisory Highlight the Bureau also stated that in its course of conducting exams it observed "one or more financial institutions providing services in languages other than English, including to consumers with limited English proficiency, in a manner that did not result in any adverse supervisory or enforcement action under the facts and circumstances of the reviews. Specifically, examiners observed":

A. Marketing and servicing of loans in languages other than English.

B. Collection of customer language information to facilitate communication with LEP consumers in a language other than English.

C. Translation of certain financial institution documents sent to borrowers, including monthly statements and payment assistance forms, into languages other than English.

D. Use of bilingual and/or multilingual customer service agents, including single points of contact, and other forms of oral customer assistance in languages other than English.

E. Quality assurance testing and monitoring of customer assistance provided in languages other than English.

When it comes to violations the same Supervisory Highlights issue stated that examiners observed the following practices and viewed them as fair lending violations:

A. Lenders marketing only some of their available credit card products to Spanish speaking consumers, while marketing several additional credit card products to English speaking consumers.

B. Lenders who lacked documentation describing how they decided to exclude those products from Spanish language marketing, raising questions about the adequacy of their compliance management systems related to fair lending.

The CFPB has taken two enforcement actions addressing the language abilities of borrowers. While these actions were outside of the mortgage line of business, the business practices addressed by the CFPB remain applicable to mortgage lending and servicing. First in 2013, the CFPB took action against American Express alleging UDAAP violations due to certain telemarketing of a credit card add-on product to Spanish-speaking customers. The vast majority of these consumers enrolled in this product did so through these Spanish language telemarking calls. American Express did not provide a uniform Spanish language script for these calls, and all written materials provided to the consumers were in English. As a result, the CFPB determined that American Express did not adequately alert consumers about the steps necessary to receive and access the full product benefits and found that a UDAAP violation had occurred.

In 2014 the CFPB took action against Synchrony Bank in which the Bureau alleged ECOA violations based on the exclusion of consumers from two promotions if the consumer preferred to communicate in Spanish. The bank failed to provide the offers to these consumers in Spanish or English even if the consumer otherwise met the promotion's qualifications. The CFPB deemed this a violation of ECOA. The CFPB is now placing LEP regulations into rules theBureau is attempting to promulgate. For example, in the Bureau's efforts to overhaul the regulation of debt collection, it recently issued what is known as a SBREFA outline in which the Bureau indicates it is considering (i) requiring subsequent collectors to obtain (and prior collectors to transfer) the language preference of the consumer and (ii) what languages to translate disclosures such as validation notices and statements of rights.

With no official guidance to draw upon, it is surprising to see LEP addressed within the CFPB's Exam manuals. Already the CFPB Mortgage Servicing Examination Procedures direct examiners to assess servicing policies and procedures for loans held by LEP borrowers. Among other things, the examiner is to assess whether the institution:

A. Identifies borrowers that may require non-English language assistance;

B. Provides an option for customer service calls in a language other than English;

C. Has customer service personnel available to provide assistance in languages other than English and, if so:
- whether they are dedicated service personnel, and
- whether they receive the same training, and have the same authority, as other customer service personnel;

D. Provides translations of English language documents to LEP borrowers.

The Bureau also instructs examiners of the ECOA module for examination of mortgage servicing to describe the institution's policies and procedures for servicing loans held by LEP borrowers including inquiries of the following servicing policies:

A. Does the institution flag files that require non-English language assistance? If so, how is this flagged?

B. Do calls for customer service have an option for languages other than English? If so, how are those calls processed?

C. Does the institution have customer service personnel available to provide assistance in languages other than English?

D. If customer service personnel are available to provide assistance in languages other than English, are they dedicated customer service personnel (as opposed to an as-needed basis)?

E. Do customer service personnel who are available to provide assistance in languages other than English receive the same training, and have the same authority, as other customer service personnel?

F. Are translations of English language documents provided?

Review of HUD and CFPB activity relating to LEP borrowers makes it clear that the issue is being brought to the forefront and poised to drive fair lending issues in the near future. Those of us focused on the issue and awaiting regulation and official guidance are searching for the answers to multiple questions; for example:

1. What languages will be necessary to translate?

2. What disclosures will be necessary to translate?

3. As loans board from origination to servicing or from servicer to servicer what language preferences will be required to be noted within the loan file?

4. In which languages will Loan Officers be allowed to communicate?

5. If a lender complies with a state regulation that only governs translation of one portion of the mortgage life cycle will the lender or servicer be required to translate documents and provide language assistance for the remainder of the mortgage's life?

Hopefully we will see official guidance or a federal rule governing LEP practices in the mortgage space very soon, but in the meantime it would be wise to examine your policies and procedures and determine what exposure may be created by customer language preferences and abilities.

READ IT TO BELIEVE IT:
VIRGINIA FORECLOSURES MAY HAVE JUST GOTTEN EASIER

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Effective July 1, 2017, the Virginia General Assembly amended and reenacted Virginia Code §55-225.10, which addresses when a notice to terminate a lease is required to be sent to a tenant who occupies foreclosed real property. The amendment addresses two issues that exist with the pre-July 1, 2017 version of the statute. First, successor owners after foreclosure are provided with clarification of when and how a tenant lease is terminated. Second, successor owners are provided clarification as to how they may proceed to obtain possession from the tenant in possession of a lease with the prior owner.

First, the amended statute removes reference to the Protecting Tenants at Foreclosure Act of 2009 (PTFA) which "sunset", or ceased to be federal law, on December 31, 2014. Many tenants believed that the PTFA was still in effect in Virginia since the pre-July 1, 2017 version of the statute continued to make reference to the PTFA. Prior to the amendment, the status of a tenant lease after foreclosure was unclear at best. Some jurisdictions would require notice to be sent to terminate the lease prior to pursuing possession; while other jurisdictions would treat the lease as being terminated upon recordation of a trustee deed. The inconsistencies between the courts made the amendment necessary.

Successor owners attempting to take actual possession of real property after a foreclosure ran into obstacles when a tenant with a lease with the prior owner occupied the property. In some instances, the tenants would try to convince a judge that they could not be evicted due to the existence of a purported valid lease with the prior owner. Tenants would stress that they have been trying to pay rent but did not know who to pay or they would state that they had continued to pay the prior owner. Successor owners were also unsure of their obligations when a tenant presented what appeared to be valid lease. The reference to the PTFA created a gray area in the law which forced some fairly simple eviction actions into a hotly contested litigated eviction.

Successor owners had guidance when the PTFA was in place. They were required to honor the lease under certain conditions. Many successor owners continued to honor prior owner leases after the PTFA due to a lack of direction by the court and legislators. This amendment makes the termination of the lease clear.

The amended code section clarifies that the foreclosure itself terminates any lease in effect at the time of the foreclosure. Additionally, possession by the tenant changes automatically to a month-to-month term so long as the remaining terms, or payment of rent, on the prior lease are maintained. The amendment will also provide the courts with clear direction that nothing additional needs to happen to terminate a lease.

Second, the amended statute provides for a process for the tenant and successor owner 1) to allow possession to remain with the tenant by providing notice to the tenant of who to pay or 2) for the termination of the month to month lease and a clear path to possession of the property.

Should the successor owner wish to allow the tenant to continue to occupy the property, the amended version of the statute clarifies that the possession by the tenant shall continue until the successor owner sends written notice to terminate the lease or notice of where to send the monthly rent payment.

The successor owner needs only to send written notice as to how they wish to proceed with the property; either pay the monthly rent or terminate the lease. The tenant is automatically required to continue with the remaining terms of the lease, including paying rent, once notified in writing where to send the payment. The time frame for termination is no longer tied to the terms of the prior lease. A simple notice to terminate the lease is all that is required in order to take the next step to obtaining physical possession.

The amended version of the statute clarifies that the prior owner lease is no longer in effect and imposes a statutory lease until such time as the parties either agree to maintain the month to month version of the prior lease, terminate the statutory month to month lease or enter into a new lease contract executed by the successor owner and tenant. Hopefully, the confusion regarding tenant occupied property in Virginia post-foreclosure will cease.

4 NEW THINGS TO WATCH FOR IN MARYLAND FORECLOSURES

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An active Maryland legislature has once again amended the foreclosure process. Practitioners in this State are always vigilant in watching for these changes so as to always be compliant with continuously evolving law.

FIRST

Effective October 1, 2018, a new registration process has been established. Pursuant to this newly required process, substituted trustees must provide a notice of foreclosure to the Department of Labor, Licensing and Regulation (DLLR) within seven days of filing an action to foreclosure residential property. The notice must include certain specified information about the property and about the substituted trustees. The Department will specify the form and contents of this notice, which has yet to be promulgated. It is hoped and expected that the notice will be adopted in advance of the effective date.

SECOND

Additional foreclosure notices are now required. This legislation is effective October 1, 2017. This requirement specifies that a notice of a proposed foreclosure sale must also be sent to a condominium or homeowner's association that has recorded a statement of lien at least 30 days prior to a foreclosure sales date. This change however, does not impose any additional burden on counsel as the law has always provided a mechanism for sending this type of notice. This legislation, however, requires a new procedure regarding sale cancellations. Within 14 days of sale postponement/cancellation, a newly required notice must be sent to the record owner and to any condominium/homeowners association that was previously sent a notice of the proposed sale date.

THIRD

New legislation has created a new procedure for handling vacant and abandoned properties. It is effective October 1, 2017. Vacant and abandoned properties have been a focus of advocates and this legislation is similar to a Bill passed in Ohio. It seeks to create a system of fast tracking the foreclosure process on these types of properties in order to reduce crime, maintain community property values and reduce blight. To date, however, the mechanics have not been effective as the process and procedures required cannot be said to be fast. The new expedited legislation, authorizes a secured party to petition the court to immediately commence a foreclosure, provided the property meets the following criteria:

- The loan has been in default for 120 days or more.
- No mortgagor has filed a challenge to the foreclosure "setting forth a defense or objection that, if proven would preclude the entry of a final judgment and decree of foreclosure".
- No mortgagor has filed a statement with the court that the property is not vacant and abandoned; and,
- At least three out of a list of eleven specific circumstances regarding the property exist; e.g. status of utilities, condition of windows and doors, vandalism, criminal conduct, junk and hazardous materials, citations, condemnation, vacancy, written statement of intent to abandon, and a catch-all for other "reasonable indicia of abandonment".

The procedure required by this legislation and the limitations imposed, may still remain too onerous to create a viable path to remedy the problem of vacant and abandoned properties in Maryland.

FOURTH

And finally, Montgomery County, has passed a Bill, "Housing and Building Maintenance Standard – Foreclosed Property Registration Penalty", which become effective July 24, 2017. This Bill requires a foreclosure purchaser to submit a registration to the Foreclosed Property Registry. The penalty for failing to do so, is $1,000 for an initial or repeat offense.